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Cláudia Sofia Melo Figueiras (ed.)

Contemporary Challenges in Administrative Law and Public Administration



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**Contemporary Challenges in
Administrative Law and Public
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Preface

Editors

Professor Rafał Szczepaniak, Adam Mickiewicz University, Poland

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This volume contains the scientific papers presented at the International Conference “Contemporary Challenges in Administrative Law and Public Administration” that was held on 27 April 2018 at Bucharest University of Economic Studies, Romania. The conference is organized by the Society of Juridical and Administrative Sciences together with the Department of Law at Bucharest University of Economic Studies. More information about the conference can be found on the official website: www.alpaconference.ro.

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

- *Contemporary Challenges in Administrative Law.* The papers in this chapter refer to the topicality and perspectives of the Romanian administrative law; the legal procedure applicable to administrative acts; the negative effects of legal instruments of appealing public procurement procedures - abuse of law; comparative examination between disciplinary liability of employees and disciplinary liability of civil servants; controversy on legal liability of the medical staff in the case of the presumptions of parental consent; the legal regime of the public policy documents; the administrative disputes law, between complementarity and incompatibility; Commission institution - 'guardian of the treaties' and deputy of the execution and administration functions in the European Union; public legal person vs. public authorities; short comparison between the Financial Supervision Authority of Romania (ASF) and the Security and Exchange Commission of U.S.A. (SEC).
- *Contemporary Challenges in Public Administration.* This chapter includes papers on: correlation good administration – good governance in the context of Romania’s integration in the European Union; regionalism in Spain; the role of nongovernmental organizations in the participatory budgeting; Common Administrative Space of the European Union; electronic administration: brief reflection on a new administration model; ensuring a good administration by granting the petition right; free access to information of public interest, a premise of good governance of public companies; the intellectual capital a vector of innovation in the public

sector; police requirements as a public service; legal news on penal protection of cultural patrimony: the experience of the Republic of Moldova.

This volume is aimed at practitioners, researchers, students and PhD candidates in juridical and administrative sciences, who are interested in recent developments and prospects for development in the field of administrative law and public administration at international and national level.

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

Table of Contents

CONTEMPORARY CHALLENGES IN ADMINISTRATIVE LAW..... 9

Elena Emilia ȘTEFAN

The Romanian administrative law. Topicality and perspectives 10

Diana-Mihaela MALINCHE

The legal procedure applicable to administrative acts..... 22

Emilian CIONGARU

Negative effects of legal instruments of appealing public procurement
procedures - abuse of law 32

Radu Ștefan PĂTRU

Comparative examination between disciplinary liability of employees and
disciplinary liability of civil servants 39

Camelia Daciana STOIAN

Controversy on legal liability of the medical staff in the case of the
presumptions of parental consent 46

Marieta SAFTA

The legal regime of the public policy documents..... 54

Ovidiu PODARU

The administrative disputes law, between complementarity and
incompatibility..... 69

Ioana-Nely MILITARU

Commission institution - 'guardian of the treaties' and deputy of the execution
and administration functions in the European Union 84

Mădălina VOICAN

Public legal person vs. public authorities. Delimitations. Legal framework.
Categories 91

Ileana VOICA

Short comparison between the Financial Supervision Authority of Romania
(ASF) and the Security and Exchange Commission of U.S.A. (SEC) 105

CONTEMPORARY CHALLENGES IN PUBLIC ADMINISTRATION.....	117
Florina Ramona PREDA (MUREȘAN) Correlation good administration – good governance in the context of Romania’s integration in the European Union	118
Ovidiu – Horia MAICAN Regionalism in Spain.....	136
Bogdan ȚONEA Participatory budgeting. The role of nongovernmental organizations in the participatory budgeting.....	145
Teofil LAZĂR Common Administrative Space of the European Union	157
Cláudia FIGUEIRAS, Bárbara Magalhães BRAVO Electronic administration: brief reflection on a new administration model	166
Cătălin – Radu PAVEL Ensuring a good administration by granting the petition right	178
Alina POPESCU Free access to information of public interest, a premise of good governance of public companies.....	188
Lidia-Gabriela HERCIU The intellectual capital a vector of innovation in the public sector	199
Ioan Laurențiu VEDINAȘ Police requirements as a public service	212
Aurel Octavian PASAT Legal news on penal protection of cultural patrimony: the experience of the Republic of Moldova.....	219

**CONTEMPORARY CHALLENGES IN
ADMINISTRATIVE LAW**

The Romanian administrative law. Topicality and perspectives

Lecturer Elena Emilia ȘTEFAN¹

Abstract

This article presents some aspects regarding the place and the role of the administrative law in the Romanian legislation system, in the year of the Great Union Centenary. The legislative changes in the past years in the administrative law domain but also the necessity of clarification of some of the conceptual terms, in the cases in which the doctrine is divergent or the legislation unclear or the surprise of the relevant jurisprudence dynamic of the High Court of Cassation and Justice or the Constitutional Court of Romania, determined us to analyze the stage where the administrative law finds itself today, mostly using the deductive method. Furthermore, by the complexity of the analysis that we are going to realize, moving back and forth between the public and private law, we are going to underline the conclusion by which the administrative law is a live discipline, perfectly adapted to the social life, but is deprived of a codification so necessary in its evolution, by comparison with penal or civil law.

Keywords: administrative law, Constitution, public acquisitions and concessions, Government Emergency Ordinance, judicial conflict of constitutional nature, revoking of administrative acts.

JEL Classification: K23

1. Introduction

At present, the Romanian administrative law goes through a multitude of transformations, on the one hand, because of the necessity of harmonization with the Community's acquis and on the other hand, as a follow up of the adaptation of the national legislation to the social changes². It is a reality, in all branches of law, not only in administrative law that, in time, law is left behind the society's evolution and, from time to time, in this aspect, it is important to bring updates or additions to the normative regulation. The doctrinaires have been and still are preoccupied to analyze in their works, the administrative law's stage or the development perspectives or its tendencies, like, next to mentioning this aspect in treaties, courses or monograph of the domain, but also developed in more detail, in special studies printed in magazines such as The Public Law Magazine, Law Magazine, The Judicial Courier and many more³.

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² See Cătălin-Silviu Săraru, *Administrative law science in Romania*, „Juridical Tribune – Tribuna Juridica”, Volume 8, Issue 1, March 2018, p. 314- 318.

³ For example, Antonie Iorgovan (in collective) *The administrative litigation law. Commentaries and jurisprudence*, Universul Juridic Publishing House, Bucharest, 2008; Gabriela Bogasiu, *The*

If criminal or civil law have a code, this is not the same for administrative law. Therefore, the administrative Code is just a normative act necessary for the stage of our society⁴. Thus, at present, we hope that the year 2018, the year of the Great Union Centenary, to be the year in which the administrative law enriches itself because the long awaited administrative Code will be adopted, normative act that is still in project at the date of the current paper and under discussion in the Romanian Parliament⁵.

In this paper, we will make a summary retrospective of over 25 years of administrative law, underlining reality by which the administrative law is a live discipline. The methods used are diverse and combined, both qualitative and quantitative methods, and logical method and especially deduction, comparison, informatics method, statistic etc. This paper documentation always had in sight the combining of three great lines: the legislation stage, the doctrine's points of view and the jurisprudence.

The originality of this paper and its added value consists in both the used methodology and the information presented by domains: public authorities, the administrative act, the administrative litigation, the administrative liability, the public domain and the public property and also in the underlining of the research's conclusions, fitting to the subject.

2. Paper content

The existing legislative modifications in administrative law have targeted, like we surprised and present them, nearly all the institutions of the administrative law, even if we refer to public authorities, to their administrative acts, to

administrative litigation law. Commented and annotated. 3rd Edition, reviewed and added, Universul Juridic Publishing House, Bucharest, 2015; Dana Apostol Tofan, *Administrative law*, volume I (4th edition – 2018) and II (4th edition – 2017), C.H. Beck Publishing House, Bucharest; Dana Apostol Tofan, *The discretionary power and the power excess of the public authorities*, All Beck Publishing House, Bucharest, 1999; Oliviu Puie, *The administrative contracts in the context of the New Civil Code and the new Civil procedure Code*, Universul Juridic Publishing House, Bucharest, 2014; Iuliana Rîciu, *The procedure of the administrative litigation*, Hamangiu Publishing House, Bucharest, 2009; Cătălin-Silviu Săraru, *Administrative law. Fundamental problems of public law*, C.H.Beck Publishing House, Bucharest, 2016; Cătălin-Silviu Săraru, *The administrative contracts. Regulation, doctrine, jurisprudence*, C.H.Beck Publishing House, Bucharest, 2009; Ioan Santai, *Administrative law and the administration science*, volume II, Alma Mater Publishing House, Sibiu, 2009; Verginia Vedinaș, *Administrative law*, 8th edition, Universul Juridic Publishing House, Bucharest, 2014; Verginia Vedinaș, *The 188/1999 law regarding the Statute of the public functionaries – commentaries, legislation, doctrine and jurisprudence*, 2nd edition reviewed and added, Universul Juridic Publishing House, Bucharest, 2016; Mircea Ursuța, *Misdemeanor procedure*, Universul Juridic Publishing House, Bucharest, 2009 etc.

⁴ See Cătălin-Silviu Săraru, *Considerations on the sources of Romanian administrative law. The need to codify the rules of Romanian administrative law*, „Juridical Tribune – Tribuna Juridica”, Volume 7, Issue 2, December 2017, p. 234-236.

⁵ The informations are public and available online at the web address: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=1&idp=21037, last time accessed 11.04.2018.

the public functionaries or to the administrative liability or to the public domain and public property. Therefore, in the next pages all the necessary information to prove the purpose and the objective of the paper will be presented selectively, since it is about 1990-2018 period.

2.1. Public authorities

About the central public authorities, keeping in mind that the executive in our country is double-headed, being formed by the Chief of State and the Government, we will show, in this order the relevant information.

Regarding the *Chief of State*: we notice that the presidency is now taken all the way no matter if it is 4 years and then, after the Constitution was revised in 2003, 5 years.

About the Chief of State's liability during the presidency, in Romania there were only cases of political liability, respectively a number of three attempts of suspension from the function and of activating article 95 from Constitution, with or without the organization of popular referendum. Thus, the Constitutional Court of Romania has given three consultative notices:

- Consultative notice number 1 from July 5, 1994 regarding the proposal of suspension from function of the President of Romania, mister Ion Iliescu;
- Consultative notice number 1 from April 5, 2007 regarding the proposal of suspension from function of the President of Romania, mister Traian Basescu;
- Consultative notice number 1 from July 6, 2012 regarding the proposal of suspension from function of the President of Romania, mister Traian Basescu.

About the Government we notice that, unlike the Chief of State, in their majority and especially in the last two years, it did not carry its 4 years mandate with which it was invested by the Parliament with the constitutional procedure from articles 85 and 103.

We can also notice that there is a high number of ministers, that have been members of the former Governments, but also the increased cases of criminal liability of ministers during their mandate or after it ceases.

As a last observation, its referring to the socio-judicial novelty situation when a government, as soon as it is being instated, has revoked its own administrative act at the pressure of the street, thus creating a dangerous precedent in the activity of the public authorities. We are obviously referring to the Government's Emergency Ordinance no. 13/2017 (...) which was revoked by the Government's Emergency Ordinance no. 14/2017 (...) ⁶.

⁶ The Government's Emergency Ordinance no. 13 from January 31, 2017 for the modification and completion of the Law no. 286/2009 regarding the criminal Code and of the Law no. 135/2010

2.2. The administrative act

The administrative act is dominated by the legality and formality principle, but, it is noticed, about the tax administrative act, the existence of a minister's order that establishes the viability of a restricted normative acts, respectively 27 such acts, emitted electronically, without being signed or stamped. Thus, according to the Order of the president of the National Tax Administration Agency no. 2949/2017⁷ for the modification of the Order of the president of the National Tax Administration Agency no. 11.555/2016 are established: "(...) *The categories of tax and procedural acts, emitted by the central tax organs and printed by the massive printing center, available without signatures of the empowered persons, of the tax organ, according to the law and the stamp of the emissary organ (...)*", such as: enforceable title, summon, garnishments from bank accounts etc.

The revoking of the administrative act knows a new challenge about the revoking of the title of doctor by the emissary authority because of the giving up of its beneficiary and the Constitutional court has spoken about this recently. The doctrine has noticed the law problem: the revoking of an administrative act, the title of doctor respectively, after it entered the civil judicial circuit and it produced judicial effects. The situation refers to the giving up of the beneficiary of the right offered by an administrative act after it was emitted, it has entered the judicial civil circuit and it has produced judicial effects, the giving up to the title of doctor in law respectively, revoking that cannot be made by the emissary authority but by action in administrative litigation, in the annulment of the act, in 1 year term, at the soliciting of the emissary authority.

"The holder of a scientific title can ask the Ministry of Education and Scientific Research about the withdrawal of the title in cause. In this case the Ministry of Education and Scientific Research takes notice of the giving up by a revoking order emitted with this purpose. The indication is about *the title of doctor* which according to the article 168, line 7:... is given by order of the minister of research, education, youth and sports after the doctor thesis validation by C.N.A.T.D.C.U.". The same author continues: "At present a methodology that can detail the procedure does not exist and the cited author, in the same context, surprises very well, in conclusion the multiple problems from practice about the

regarding the criminal procedure Code (published in Official Journal no. 92 from 01.02.2017) abrogated by the Government's Emergency Ordinance no. 14 from February 5, 2017 regarding the abrogation of the Government's Emergency Ordinance no. 13/2017 from January 31, 2017 for the modification and completion of the Law no. 286/2009 regarding the criminal Code and of the Law no. 135/2010 regarding the criminal procedure Code (published in Official Journal no.92 from 01.02.2017).

⁷ The Order of the president of the National Tax Administration Agency no. 2949/2017 for the modification of the Order of the president of the National Tax Administration Agency no. 11.555/2016, (published in Official Journal no. 830 from October 19, 2017).

doctor thesis and the title of doctor would have been obtained with the breach of the academic ethical rules⁸ “.

The Constitutional Court of Romania, by Decision no. 624 from October 26, 2016⁹, notices that “the voluntary giving up at the title of doctor leaves without object the legal dispositions that refer to the activity of the organs to analyze the suspicions regarding the breach of the procedures or of the quality standards or professional etiquette, because the unilateral manifestation of will in the case of the giving up of the title of doctor discontinues the investigative activity of the organs that can order the sanction of the withdrawal of the title. Thus, in the conditions in which the law sees the withdrawal of the title of doctor as a sanction for the breach of the standards taken for its elaboration, including plagiarism, in the case of voluntary giving up at the title of doctor, the new dispositions do nothing else than to encourage a dishonest behavior, illicit, in a domain that should be characterized by rigor, professionalism and ethical probity”.

We also notice something new about the administrative act, those being the modifications brought to the article 218 of the Law no. 215/2001 regarding the local public administration¹⁰ that expressly foresee *the investiture with executor formula of the act*, by being signed: “*the mayor, the president of the county council, the meeting president of the local council and of Bucharest and also the person empowered to do this function, by signing, invest with formula of authority the execution of the administrative acts emitted or adopted in exercising the attributions given by law*”. We consider the completion of the law maker useless because the value of authenticity of the administrative act, by being an execution title on its own, once emitted, it deduces from the traits of the administrative act, and that is that of being emitted by a public power.

Another modification underlines the judicial liability for the persons that sign the administrative acts approved or emitted without the completion of some administrative operations: “*the local public authorities acts approved or emitted without fundament, signature, countersignature or certified from the technical or legality point of view, produce full judicial effects and in case of such consequences the judicial liability is only for the signatories*”, or the administrative, civil or criminal liability for the signatories of some administrative operations:” *The drawing of reports foreseen by law, the countersignature or the approval for*

⁸ Dana Apostol Tofan, *Administrative law*, volume II, 4th edition, C.H. Beck Publishing House, Bucharest, 2017, p. 20.

⁹ The Constitutional Court of Romania, by Decision no. 624 from October 26, 2016, (published in Official Journal no. 937 from November 22, 2016).

¹⁰ The local public administration Law no. 215/2001, (republished in Official Journal no. 120 from February 20, 2007), with the last modification by Law no. 140/2017 for the modification of article 128 from the local public administration Law no. 215/2001 and of article 55 from Law no. 393/2004 regarding the Statute of the elected (published in Official Journal no. 461 from June 20, 2017).

legality and signing the fundamental notes ask for administrative, civil or criminal liability, of the signatories, in the case of law breach, in report with the specific attributions”.

2.3. The administrative liability

About the property administrative liability of the state for the prejudices caused by judicial errors. The recent jurisprudence tried an interesting motivation brought to maliciously and bad negligence in matter of judges liability. It is about a Sentence given by the Court of Appeal in Bucharest¹¹ that says in its motivation:

- “Judges are also human beings, as such their decisions may be wrong (...);
- Usually, the judge cannot be personally liable for wrong decisions, this not being allowed by the independence of the judge and the safety of the legal decisions;
- To be in the presence of bad-faith, it is not enough for the decision/act to be obviously wrong, it has to have other clues to show that the magistrate acted with the direct intention of breaking the law and being well aware of this. The distortion of the law must be obvious. No other judge, having the same cause and being in similar conditions, would have judged differently. The judicial reasoning of the magistrate is in contradiction with the law principles in the matter
- Under probative aspect, the elements can only be found in the decision’s motivation and only if there are clues that the motivation is foreign to the cause’s object
- There has to be other clues to argument the faith that the magistrate has distorted the law consciously, to demonstrate that the judge has applied the law wrongfully and knowingly (the connection with one of the parties)
- Everything that can be explained and can be accepted does not constitute a bad-faith case or maliciousness (...).”

About the elected local elected liability, through modifications brought to the local public administration Law no. 215/2001¹², we notice a shift of the liability towards the personnel that creates/fundaments an administrative act, article 128, line 1 from the local public administration Law, respectively: *„the local or county counselors, in some cases, vice-mayors, the general mayor of Bucharest and vice-mayors, mayors and vice-mayors of the territory administrative*

¹¹ For complete details, you can access public informations, available online at the web address: <http://www.avocatura.com/stire/16597/motivare-reaua-credinta-si-grava-neglijenta-in-materia-raspunderii-judecatorilor.html>, last time accessed in January 4, 2018, *apud* Elena Emilia Ștefan, *Administrative law. Part II. University Course*, Universul Juridic Publishing House, 2018, p. 160-161.

¹² The local public administration Law no. 215/2001, already cited.

subdivisions and the mayor's special apparatus, of the county council respectively, answer contraveniently, administrative, civil or criminal for the facts made during the attributions according to the law" and line 4: "the local public administration authorities acts, according to the law, attract the administrative, civil or criminal liability according to case of the functionaries and the personnel from the mayor's special apparatus, respectively of the president of the county council which, with the breakage of the law fundamentals technically and legally their emitting or approving or countersigns, approves for legality these acts".

About the administrative-disciplinary liability we notice the approval of many deontological codes in a diversity of domains but also doctrine disputes. Thus, like it was recently underlined, "after centuries of doctrine, in which it was founded, with solid arguments the fact that a public functionary is not another type of earner, that it represents a distinct, judicial institution that is tied to the public law in general and to the administrative law, in particular, it continues to show exclusive approaches by which to the public functionary the definite elements are disabled, being transformed or trying to be transformed into an earner, object of research in work law(...)"¹³.

About the contraventional-administrative liability, this has a new institution – the prevention procedure the prevention Law no. 270/2017¹⁴ which gave a series of instruments to ensure the prevention of committing contraventions. It came into force in January 17, 2018 and in a few months the Government's Decree no. 33/2018 regarding the contraventions that enter under the prevention Law no. 270/2017, and also the model plan of remediation¹⁵. Practically for a number of contraventions, the warning sanction is applied followed by a plan of measures of remediation in stage I, in stage II the agents will have to check the fulfillment of the measures plan, in other case the common law in contraventional matter is applied, respectively the Government's Ordinance no. 2/2001 regarding the judicial regime of contraventions¹⁶.

2.4. The administrative litigation vs. judicial conflict of constitutional nature

About the administrative litigation

¹³ Virginia Vedinaş, *Administrative law. Contemporary approach or about its forced privatization*, in "Public Law Magazine" no. 4/2017, p. 17. The author refers to Serban Beligradeanu's studies, like: *Considerations on the work judicial report of public functionary and regarding the typology of the work reports and a new vision on the work law*, in "Law Magazine" no. 8/2010, p. 87-112

¹⁴ The prevention Law no. 270/2017, (published in Official Journal no.1037 from December 28, 2017).

¹⁵ The Government's Decree no. 33/2018 regarding the contraventions that enter under the prevention Law no. 270/2017, and also the model plan of remediation, (published in Official Journal no.107 from February 5, 2018).

¹⁶ The Government's Ordinance no. 2/2001 regarding the judicial regime of contraventions, (published in Official Journal no.410 from July 25, 2001, with modifications and completions).

Maybe amongst the most important legislative modifications of the last years is also found in the procedure of the administrative litigation, *the appeal filter procedure of the High Court of Cassation and Justice*. Like we said before, with another occasion, “the filter procedure applicable to the administrative litigation appeals practically signifies an abolition of the double degree of jurisdiction (...)”¹⁷.

The appeal in administrative litigation matter was deeply analyzed in many special studies by the magistrates of the High court of Cassation and Justice¹⁸. The activity Report of the High Court of Cassation and Justice, in 2014, shows the dimension of the number of causes pending and also the volume of work/file¹⁹. In the Report, at page 149 is shown: “it is mentionable the fact that realization of the preparing activities and filtering the appeal files implies the ruling of every file at least 4 times and at most 6 times for the next procedural operations: the verification of the accomplishment of the request form, the verification of the accomplishment of the request lapses, the making of the report on the admittance of all the appeals, the participation in the council room to analyze the appeal under article 493, line 5 and 6 from the civil procedure Code from 2010, the participating at the fund judgment of the appeal, in public meeting²⁰”.

About the appeal ways in public acquisitions and concessions matter, the new pack of laws from 2016 comes with new elements in this matter regulating: remedies, appeal ways and their solving procedures on a administrative-jurisdictional or judiciary way in matter of attributing the public acquisition, of sector contracts and of concession contracts and also organizing and functioning of the National council of Resolution of appeal²¹.

Another mentionable element, recently underlined in the special doctrine refers to the nature of *qualification of some contracts of administrative or civil law* and the dispute public-private tied by it: “about concession, administration or free use of private property that represent modalities of valorization that, as judicial nature, have become < real rights applicable to the public property law >, mentioned in civil Code in article 854 and articles 858-875 after, evidently , have

¹⁷ Elena Emilia Ștefan, *Considerations on the appeal in administrative litigation matter*, in “Public Law Magazine” no. 1/2016, p. 79.

¹⁸ Eugenia Marin, *Specific aspects regarding solutions of the appeal by the High Court of Cassation and Justice in administrative litigation*, “The Public Law Magazine”, no. 4/2015.

¹⁹ The information is public and available on http://www.luju.ro/static/files/2015/aprilie_2015/05/raport_activitate_iccj.pdf last accessed on February 2, 2016, *apud* Elena Emilia Ștefan, *op. cit.*, p. 86.

²⁰ It is about a number of 234 files, as it is shown in the activity Report of the year 2014, *apud* Elena Emilia Ștefan, *op. cit.*, p. 87.

²¹ For this subject, to be seen, Emilia Lucia Catană, *The assimilated administrative litigation*, C.H. Beck Publishing House, Bucharest, 2017, p. 368-369 *apud* Elena Emilia Ștefan, *Administrative law, Part II, University Course*, Universul Juridic Publishing House, Bucharest, 2018, p. 190.

been eliminated from Law no. 213/1998. A concession has been made about the renting of the public property, this being kept in Law no. 213/1998”²².

Thus, we notice, by checking the internet page for the Constitutional Court of Romania²³, that the number of cases of judicial conflict of constitutional nature pending for this Court has grown²⁴.

2.5. About the public domain and the right to public property

Like it was recently shown in doctrine, “the partnership public-private gains more and more field under the influence of the privatization exerted by the European Union law”²⁵ and in Romania this is regulated, at present, by public-private partnership Law no. 233/2016²⁶. Like tendencies, we estimate that the two of its forms, respectively the contractual private-public partnership and the institutional private-public partnership, will materialize in many domains and under many forms, between the state and the private partners, because the state does not have the capacity to deal with work executions, public services etc. this conclusion is also drawn from the perspective of the legislation’s modifications of public acquisitions, because, at present *the new packet of laws regarding the public acquisitions and concessions* have abolished just one Ordinance and that is the Emergency Ordinance no. 34/2006²⁷, which means an interest of the state to harmonize the national legislation with the Union *acquis* but also to adapt to the needs of the actual society’s needs.

²² Verginia Verdinas, *Administrative law. Contemporary approach or about its forced privatization*, in “Public Law Magazine” no. 4/2017, p. 18-19.

²³ The information is public and available online at www.ccr.ro, last accessed April 12, 2018.

²⁴ For example, the Decision of the Constitutional Court of Romania no. 63 from February 8, 2017 regarding the demands of solving judicial conflicts of constitutional nature between the executive authority – the Govern of Romania, on the one hand and the legislative authority – The Parliament of Romania, on the other hand and also between the executive authority - the Govern of Romania, on the one hand and the judging authority – the Superior Magistrates Council, on the other hand, requests written by the President of the Superior Magistrates Council and the President of Romania, (published in Official Journal no. 415 from February 27, 2017) and the Constitutional Court of Romania decision nr. 68 from February 27, 2017 regarding an answer to the judicial conflict of constitutional nature between the Government of Romania and the Public Ministry – the State’s Attorney Office near the High Court of Cassation and Justice – the Anticorruption National Direction, request written by the President of Senate (published in Official Journal no. 181 from March 14, 2017) etc.

²⁵ Catalin-Silviu Săraru, *Administrative law. Fundamental problems of public law*, C.H. Beck Publishing House, Bucharest, 2016, p. 577.

²⁶ The public-private partnership Law no. 233/2016, published in Official Journal no. 954 from November 25, 2016, with the last modifications by the Government’s Emergency Ordinance no. 104/2017, (published in Official Journal no. 1037 from December 28, 2017).

²⁷ The Government’s Emergency Ordinance no. 34/2006 regarding the attribution of contracts of public acquisition, of contracts of concession of public works and of services contracts, (published in Official Journal no. 418 from May 15, 2006), at present it is abolished.

Thus, at present, we talk about: Law no. 98/2016 regarding the public acquisitions (published in Official Journal no. 390 from May 23, 2016), Law no. 99/2016 regarding the sector acquisitions (published in Official Journal no. 391 from May 23, 2016), Law no. 100/2016 regarding the work and services concessions (published in Official Journal no. 392 from May 23, 2016) and Law no. 101/2016 regarding the remedies and appeal ways in matter of attribution of contracts of public acquisition, of sector contracts and of concession contracts of work and services and also for the organization and functioning of the National Solution and Contest Council (published in Official Journal no. 393 from May 23, 2016)²⁸.

2.6. The European dimension of the administrative law

Institutions such as the European Ombudsman or the European Public Function Tribunal, through their activity in embellishing the activities of the public authorities, represent a potential influential factor of the national jurisprudence. The European jurisprudence is already a law source that influences the national jurisprudence and the national doctrine is embellished through courses of european administrative law²⁹ or administrative institutions³⁰.

3. Conclusions

Like we planned, the objectives of this study have been to demonstrate the extremely live character of the administrative law, a discipline always adapted to the social upheaval. The Constitutional Court of Romania creates law by its activity, its decisions are mandatory erga omnes, or the law imposes judicial values and directs all those comportments that are definite for the organization of the society³¹ and lately, the Court had a very rich activity. The administrative law

²⁸ Recently modified and completed this pack of laws through the Government's Emergency Ordinance no. 107 from December 20, 2017 for modification and completion of some normative acts with impact in the public acquisitions domain, (published in Official Journal no. 1022 from December 22, 2017) and the Government's Emergency Ordinance no. 98 from December 14, 2017 regarding the function of control ex ante of the attribution process of contracts/accords – frame of public acquisition, of accords-frame sector contracts and of concession contracts for works and services, (published in Official Journal no. 1004 from December 18, 2017).

²⁹ Ioan Alexandru, *European administrative law*, 2nd edition, Universul Juridic Publishing House, Bucharest 2010; Ioan Alexandru, Claudia Gilia, Vasile Ivanoff, *European administrative-political systems*, Hamangiu Publishing House, Bucharest, 2007.

³⁰ Dana Apostol Tofan, *European administrative institutions*, C.H. Beck Publishing House, Bucharest, 2006; Mădălina Elena Mihăilescu, *European administrative institutions. Course notes*, Hamangiu Publishing House, Bucharest, 2017.

³¹ Nicolae Popa (in collective), *Judicial sociology*, Bucharest University's Publishing House, Bucharest, 1997, p. 37.

is a discipline with european opportunities and in the next studies our objective is to study more of this problem that we mentioned in this paper.

The legislative modification surprised in this study, and also the evaluation of the activity of some of the authorities or the impact the legislation had over some judicial institutions, like the appeal in the administrative litigation of the High Court of Cassation and Justice or the public acquisitions or the concessions, demonstrate how much a Code in the administrative law is needed, at present.

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The legal procedure applicable to administrative acts

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Abstract

For collecting and interpreting the data necessary for the elaboration of this article, I have used the method of content analysis research, taking into account the theoretical concepts of administrative law at the national level as well as the legislative provisions adopted at European level for the use by the public administration institutions of standardized administrative acts. The act of administrative law is therefore the legal expression of the way of promoting the public power by the public administration bodies. Due to its complexity, the administrative act presents specific elements: the legality and the expediency of the administrative acts, the competence of the public administration authorities, the related competence and discretionary power of the public administration. In order to be valid, legal acts are issued in written form, providing a guarantee of compliance with legality. By strictly observing all the requirements of the law, the legal effects of administrative acts are threefold: the presumption of legality, the presumption of authenticity and the presumption of veracity. As expected, there are both cases of cancelling of administrative acts, as well as cases of suspension or revocation resulting from total or temporary cessation of legal effects by an administrative act. It is important to note that, at European level, administrative acts are enforced ex officio without going through a bureaucratic procedure.

Keywords: administrative law, administrative act, written form, presumption of legality, presumption of authenticity, presumption of veracity.

JEL Classification: K23

1. Grounding the topic

For collecting and interpreting the data necessary for the elaboration of this article, we used the method of content analysis research, taking into account the theoretical concepts of administrative law at national level as well as the legislative provisions adopted at European level for the use by the public administration institutions of standard forms of administrative acts.

According to Prof. Chelcea Septimiu, the content analysis is considered to be: "... a set of quantitative and qualitative research techniques, and verbal and nonverbal communication, for objective and systematic identification and de-

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scription of the content of the manifest and/or as latent, in order to draw conclusions about the individual and society to communicate itself, as a process of social intercourse"².

I consider that the structure and elements specific to the legal regime of the administrative act have not been adequately debated so that the presentation of these issues in the content of this paper is aimed at highlighting the importance of using a standardized form of administrative acts in public institutions at European level.

2. Introduction

Administrative act, the subject of this article is defined in the literature as "the unilateral legal act emanating from a public authority or from private persons authorized by them under public authority on the basis of and in order to enforce the law."³

Moreover, the administrative act is the basic legal form for public administration authorities.

Thus, being a complex subject, the administrative act presents an equally complex series of distinct features, as follows:

a) The administrative act is in its complexity an act of a legal nature with the purpose of producing legal effects;

b) The administrative act is a unilateral manifestation of legal will, which transmits a single legal will from a public authority;

c) The administrative act is issued and adopted by a public authority in order to satisfy a public interest purpose;

d) The manifestation of will takes place under and with the purpose of achieving public power;

e) The administrative act is issued in order to organize the execution of the law, having a hierarchical organization according to the legal importance.

On this background, it is necessary to delimit and clarify the theoretical legal regime of administrative acts. In the following, I will discuss the elements specific to the legal regime of administrative acts in order to highlight its importance in the functioning of an optimal circuit of administrative acts.

3. Contents

Against the background of the above- mentioned features, I think it is necessary to relate the particularity of the legal regime, in close connection with

² Chelcea, Septimiu, *Metodologia cercetării sociale*, Ed. Economică, Bucharest, 2007, p. 573.

³ Săraru, Cătălin-Silviu, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C.H. Beck, Bucharest, 2016, p. 66; Alexandru, Ioan, *Drept administrativ european*, Ed. Universul Juridic, Bucharest, 2008, p. 74.

the administrative act, as follows: "By legal regime we will understand a set of rules, of substance and form, which give particularity to administrative acts in the legal circuit."⁴

In other words, the legal regime prescribes the rules of validity of the administrative act, including the rules governing the effects produced by administrative acts.

4. Legality and timeliness of administrative acts

By the lawfulness of administrative acts we understand "the obligation to comply with the provisions of the Constitution and the laws adopted by the Parliament, as well as with the other normative and administrative acts with a legal force superior to the act adopted".⁵

For an administrative act to be legal, it must comply with the following conditions:

- To be issued in accordance with the provisions of the Constitution;
- To be issued in accordance with laws and ordinances, as appropriate;
- To be issued on the basis of the acts of the bodies representing the public administration superior to the administrative body issuing the administrative acts;
- Comply with the form prescribed by law.

Specialist studies reveal the importance of legality not only as a limitation factor, but also as the condition of an administrative - specific activity that primarily aims to support the interests of individuals in the state concerned.

5. Competence of public administration authorities

The administrative acts are adopted within the limits of competence established by the normative and administrative acts applicable to the issuing authorities.

Therefore, "the competence of the public authorities specifically expresses the content of the activity carried out by public officials, civil servants and contract staff by public bodies, with or without legal personality, from a material, territorial and temporal point of view.

Intermediary of dignitaries, civil servants and contract staff by public structures, with or without legal personality, from a material, territorial and temporal point of view. The competence of the public administration bodies is defined in the doctrine either by the law and the obligation stipulated by the law and the other normative acts to carry out certain activity, either as a whole of the

⁴ Iorgovan, Antonie, *Tratat de drept administrativ, Vol. I*, Ed. Nemira, Bucharest, 1966, p. 291.

⁵ Săraru, Cătălin-Silviu, *op. cit.*, 2016, p. 75.

attributions established by the Constitution or by law, conferring rights and obligations to carry out a certain activity in its own name and in the achievement of public power administrative."⁶

Of course, this competence can only be passed through the staff Employee of Public Authorities, competence having the following features:

- It must be determined by law only in the areas and areas indicated by it;
- Its main purpose is to efficiently satisfy the public interest, which is closely related to the position held and not to the person in charge of public office;
- Jurisdiction is binding, its limits being set by law.

Given its complex nature, competence is of various types:

1. The material competence of the public authority issuing the administrative act signifies the scope of its powers as provided by law;

2. Territorial competence is the sphere in which the public authority operates. It can be both international and local;

3. Personal competence which may refer to the scope of the duties corresponding to the position occupied by an individual or to the exceptional quality of a person to whom a public authority may act;

4. Temporal competence refers to the length of time a public authority can carry out its activity. In most cases, the temporal competence of public authorities is permanent.

By subtracting, it is necessary to specify that although the features presented above are complex and include a wide range of action, "the competence of the administrative bodies do not have to be confused with the administrative law capacity. Thus, administrative capacity designates the ability to participate as an independent subject with legal personality, in administrative law relations. Unlike capacity, competence designates all the duties established by law for the bodies of the administration whether they have legal personality or not. "⁷

6. Tied competence and discretionary power of public administration

The tied competence of the public administration is given by the situations in which the public administration is forced to act in full accordance to the provisions of the law, which does not have the possibility of adopting a margin of freedom.

An example of this is the way to issue a movement permit. The fulfillment of the age - related conditions and the validity of the documents required for the issuance of the movement permit are established by the issuing authority on the basis of the legal provisions.

⁶ *Ibidem*.

⁷ *Idem*, p. 79.

At the opposite end, the discretionary power is the above- mentioned margin of freedom, available to public authorities under the conditions established by law, which allows an appreciation of the way in which the interests of society are served.

Regarding the example given above, I add that the verification of other conditions such as the ability to drive a vehicle rests with the police, so that we can speak in this case about the exercise of discretionary power.

We observe, therefore, in the case of discretionary power, the discretion of the public authorities in certain situations, under the conditions regulated by law, lacking freedom in the exercise of the related competence discussed above.

In order to support the discretion of the public authorities in compliance with the legal limits, the discretionary power is given the notion of opportunity which will be exercised in compliance with certain conditions:

"- The conformity of the action of the administration with the spirit of the law (the will of the legislator);

- Compliance with the general principles of public administration;
- Using the most modern public management techniques in order to achieve efficiently and effectively the social requirements corresponding to the public interest. "⁸

Considering these issues, comes out the question whether "the opportunity should be seen as a distinct condition for the validity of the administrative act or the opportunity is an element of the condition of legality"⁹, this issue being approached distinctly by the School of Bucharest and that of Cluj, objective in this sense, the view that the opportunity is a dimension of the lawfulness of the exercise of the discretionary power, including by the courts.

7. Form of the administrative act

"The form of the legal act designates the way of exteriorizing the manifestation of wills made with the intention of creating, modifying or extinguishing a legal relationship."¹⁰

The written form of the issuance of legal acts is a guarantee of compliance with legality, for which administrative acts are adopted in written form in order to maintain its validity. Moreover, administrative acts are intended for publication, otherwise they are considered non- existent.

⁸ Săraru, Cătălin-Silviu, *Competence determined strictly by the law and the discretionary power of public administration*, „Juridical Tribune – Tribuna Juridica”, Volume 6, Issue 2, December 2016, p. 248, 249.

⁹ Săraru, Cătălin-Silviu, *Drept administrativ. Probleme fundamentale ale dreptului public*, op. cit., p. 85.

¹⁰ *Ibidem*.

The manner of publication is regulated as follows: "The acts of the central public administration authorities and institutions are published in the Official Gazette of Romania, Part I ... the decisions and ordinances adopted by the Government are published in the Official Gazette of Romania ... the decrees issued by the President Romania is published in the Official Gazette of Romania ... The normative administrative acts of the authorities and institutions of the central public administration deconcentrated in the territory and of the autonomous local authorities and institutions are published in the Official Gazette of the county and the municipality of Bucharest ..." ¹¹

As regards individual administrative acts, they are always communicated to the addressees in written form. Also, official acts of official character will be adopted in Romanian, being declared official language of Romania. As an exception, the territorial administrative units ensure the issuance of administrative acts in their mother language in cases where the community has a minority share of more than 20% of the total population.

The administrative normative act contains several constituent parts, according to the Law no. 24/2000: the title, the preamble, the introductory formula, the enacting part and the attestation of the authenticity of the act.

8. Procedure for the issuance / adoption of administrative acts

The specialized doctrine reveals that unipersonally administrative authorities issue administrative documents (the mayor, etc.) while collegiate authorities adopt administrative acts (local council, etc.). On this background, we identify three categories of procedural forms necessary for the issuance/ adoption of an administrative act, as follows: previous procedural, concomitant and post procedural forms.

The earlier procedural forms we commonly encounter are opinions and agreements.

Opinions "represent the opinions that a public administration body requires from another public administration body in a problem or any problem, in order to inform and decide on the case." ¹²

In view of this, the opinions may be optional, advisory or conforming to administrative operations carried out prior to the issuance or adoption of the administrative act.

At the opposite, the agreement "represents the acceptance, the consent that a public body gives to another public body for the issuance of an administrative act by the latter." ¹³

¹¹ Săraru, Cătălin-Silviu, *Drept administrativ. Probleme fundamentale ale dreptului public*, op. cit., p. 86.

¹² *Idem*, p. 89.

¹³ *Ibidem*.

Therefore, it can be considered that the agreement is a fundamental condition for the legality of an administrative act, its absence causing the invalidity of the act in question.

Concurrent procedural forms. For the issuance/adoption of administrative acts by collegiate bodies, legal quorum and majority regulations must be met and, last but not least, signed and motivated under the law.

By quorum we understand the number of members who must be present to give the deliberations validation, in relation to the total number of members of the administrative body concerned.

By majority, we deduct the number of votes in favor of the draft contained in the administrative act necessary for the act in question to be adopted.

The procedural forms after the issuance/ adoption of an administrative office are: communication, publication, approval and confirmation, the latter having various modes of common purpose application.

The communication is made by displaying at the home of the interested person or by direct handing over by the public authorities issuing the administrative act.

Publishing means the public notice of the individual interested by printing the administrative acts in the Official Gazette, official county monitors, the media, or on their own website by the issuing authority.

Approval "means the manifestation of the will of a superior administrative body by which it agrees with the act issued by a lower organ, an act which, without this manifestation of his posterior will, would not, according to the law, produce legal effects."¹⁴

9. The legal force of administrative acts

By strictly observing all the conditions laid down by law, the legal effects of administrative acts are threefold:

"a) Presumption of legality: the administrative act was issued in accordance with the provisions of the Constitution, laws and administrative acts adopted by higher hierarchical bodies;

b) Presumption of authenticity: the act was issued by the public authority by specific forms: header, stamp, signatures;

c) Presumption of veracity: the administrative act is presumed to correspond to the truth of the truth."¹⁵

A peculiarity of these presumptions lies in the fact that they can be overturned if the administrative act is challenged before the administrative litigation

¹⁴ Săraaru, Cătălin-Silviu, *Drept administrativ. Probleme fundamentale ale dreptului public*, op. cit., p. 99.

¹⁵ *Idem*.

courts. Moreover, these presumptions highlight the obligation to observe the regulations contained in the administrative act by any subject and the obligation to enforce its provisions.

Analyzing in detail, we note that the administrative act itself is an enforceable title, which is executed *ex officio*, through the peculiarity of its legal force.

By its legal nature, the administrative act is a manifestation of the will made with the purpose of producing legal effects and the realization of political power.

In the case of the issuing administrative body, the administrative act takes effect from the moment it is issued, while for the other legal subjects the effects will occur when they are published or communicated, as the case may be. In some cases, such as normative acts establishing and sanctioning contraventions, the effects occur within 30 days from the date of publication of the administrative act in the Official Gazette, which is stipulated in the content of the publication.

As is to be expected, there are also cases of suspension in the execution of administrative acts which are manifested by the temporary cessation of legal effects by an administrative act. Suspension cases arise from the existence of uncertainties as to the legality or timeliness of an administrative act.

Suspension may be made by the issuing body of the administrative act, its hierarchically superior body or the administrative contentious court under conditions regulated by Law no. 554/2004. Moreover, suspension of an administrative act may also take place lawfully, under the conditions laid down by law.

The legal effects of the suspension of the administrative act cease temporarily until the cessation of the causes that led to the suspension of the administrative act has ceased.

10. Revocation of administrative acts

Revocation "is the legal operation by which the issuing body or the hierarchical superior abolishes the administrative act in question, *ex officio* or at the request of the subjects of law concerned"¹⁶ and may be carried out if irregularities or inappropriate ties are found in the execution of an administrative act. If the issuing body revokes the administrative act, this procedure is called withdrawal.

As with the suspension procedures discussed above, the revocation may be performed by the issuing administrative body or its hierarchically superior administrative body.

As well as the effects of the revocation of an administrative act, it is necessary to recall the extinction of the legal relations arising from the administrative act subject to revocation.

¹⁶ *Idem*.

Like any administrative process, revocation has different features that I will discuss below.

Thus, if the revocation occurs as a result of the unlawfulness, it will produce retroactive effects from the date of issue of the act and it will be abolished.

In the event of inappropriateness, the revocation shall take effect from the date of discovery of the failure, the effects preceding that date remaining valid.

Of course, there are also some exceptions to this procedure:

- Administrative acts of a judicial nature;
- Administrative acts executed in a material way;
- Administrative acts aimed at sanctioning contravention may only be annulled through the courts;
- Administrative acts that have caused rights guaranteed by law;
- Administrative acts that followed the civilian circuit, thus causing legal effects.

11. Annulment of administrative acts

Cancelling an administrative act is made by the legal operation that orders the abolition administrative act if its illegality is found.

As in the above cases, the abolition of the act may be ordered by the court and the hierarchical superior to the issuing body. In practice, the most common form of cancellation is that done by the judiciary through a court order. I refer here both to the annulment of individual and normative acts.

The cancellation procedure has in this case retroactive effects until the act is administrative issued.

It is important to note here that "the revocation of the administrative act has the authority publishes the issue or the public authority hierarchically superior to the issuer, while the annulment of the act is ordered by the court."¹⁷

Rarely administrative authorities are confronted with the absence of administrative acts.

This situation occurs when violation of the validity conditions is so that he can not be given the status of legal act and can no longer be an executory title. Furthermore, in these situations, the administration is accountable for the damages and the non-existence of the administrative act is promulgated by constitutional provisions.

Equally rare are those cases where administrative acts have been destroyed or lost for various reasons by resorting to these cases in the reconstruction of the documents administrative.

¹⁷ Săraru, Cătălin-Silviu, *Drept administrativ. Probleme fundamentale ale dreptului public*, op. cit., p. 111.

12. Conclusions

As we have seen, the act of administrative law is an act that contributes in significant way to the achievement of state power.

I therefore consider that the administrative act is an act of deliberative will, constituted for the purpose of producing legal effects.

The administrative law act is, as we have seen in the content of this paper, the legal expression of how the public administration promotes public power.

It is worth mentioning that the issue is that administrative acts are directly enforced, most of the time *ex officio*, without going through an endless bureaucratic process.

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Negative effects of legal instruments of appealing public procurement procedures - abuse of law

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Abstract

In accordance with the provisions of Law no. 98/2016 of 19 May 2016 on public procurement, the principles underlying awarding public procurement contracts and organising solution contests are: non-discrimination; equal treatment; mutual recognition; transparency; proportionality and assuming responsibility. Any person who deems themselves to have had their interests injured may oppose the method by which such contracts were awarded. Consequently, this being the case, the procedure is not completed and it shall enter the convoluted system of procedural law courts, the cases possibly lasting quite a long period of time, causing delays which are often irreparable from the point of view of the parties involved, but especially of the contracting authority. Problems that occur in such situations must be resolved much quicker and should enter an emergency procedure aimed to minimise the negative effects of the delays which, many times, are fabricated. Could abuse of law or evasion of the law be invoked in this respect? It would be interesting to take into account such alternatives but strictly within the limits laid down by the letter and the spirit of the law.

Keywords: public procurement; the principles of awarding public contracts; the administrative-jurisdictional procedure; the abuse of law.

JEL Classification: K23, K41

1. Introduction

In order to transpose Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, published in the Official Journal of the European Union (JOUE), series L, no. 94 of 28 March 2014, into the internal legal order, the Romanian Parliament adopted Law No. 98/2016 of 19 May 2016 on public procurement, governing the way in which public procurement is accomplished, the procedures for awarding public contracts and organising solutions contests, the specific tools and techniques that can be used for awarding public procurement contracts, as well as certain specific aspects related to the execution of public procurement contracts. The provisions of the law themselves specify that it is aimed at ensuring the legal framework necessary to achieve the purchase of goods, services and work with social and economic efficiency.

In an absolutely necessary and normal way, on 26 May 2016, along with the repeal of G.E.O. no. 34/2006, Law 101/2016 on the remedies and means of

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appeal in awarding public procurement contracts, sectoral contracts and concessions of works and concessions of services, as well as for the organization and functioning of the National Council for the Settlement of Disputes, is adopted.

The provisions of this law shall apply to all appeals/requests/claims for which the procedural terms begin after the date of its entry into force. Therefore, both the appeals/requests/claims which were in the process of settlement by the Council/court of law, as well as those submitted, in accordance with the law, at the Post Office, before the date of entry into force of Law no.101/2016 shall be resolved under the conditions and in accordance with the procedure laid down in G.E.O. no. 34/2006. The new law will apply only to appeals/requests/claims made after the entry into force of the law.

2. Regulations specific to public procurement

Law 101/2016 which is also known as the Law on remedies mainly regulates the following aspects: the scope and the principles of the system of remedies; prior notification; the appeal made in front of the National Council for Solving Appeals; the appeal made by judicial means; the means of appeal against decisions of the Council and resolutions of the courts; the settlement of disputes regarding compensation and contracts concluded; the nullity of contracts; the organization and functioning of the Council; measures for the unification of the practice.

This new law also regulate the following aspects: the remedies, means of appeal and procedure for resolving them in an administrative-jurisdictional or judicial manner, in respect of the award of public contracts, the sectoral contracts and contracts of concession; requests having as object awarding compensation for repairing the damage caused in the awarding procedure, as well as those regarding the execution, cancellation, resolution, annulment or unilateral termination of contracts, and the principles governing the system of remedies in order to ensure compliance with the provisions of law concerning awarding contracts, are the following: the principle of effectiveness; the principle of celerity and the principle of efficiency.

A very important new provision is that any of the members of an association will be able to formulate any means of appeal provided by Law 101/2016.

Another element of novelty is also that the procedure of prior notification represents a mandatory stage in the whole procedure for the settlement of appeals, having as penalty the rejection of the appeal as inadmissible. In this context, in accordance with the procedure of prior notification, any party which deems to have had its interests injured may request the contracting authority to re-examine an act adopted by it, within the purpose of a possible revocation or amendment thereto, before addressing the National Council for Solving Appeals or the com-

petent court of law. However, remedial measures that are adopted by the contracting authority as a result of the receipt of a prior notification may be challenged without carrying out this procedure.

The law provides that under the sanction of the rejection of the appeal as inadmissible, which can also be invoked by default, before addressing the Council or the competent court of law, the person which considers itself the injured party has the obligation to notify the contracting authority with respect to the request for remedy, in whole or in part, of the alleged infringement of the legislation regarding public procurement or concessions, within the well-established terms provided in the text of the law.²

The new law also brings other elements of novelty in the procedure for resolving appeals, the most important being:

- *ensuring delivering the unitary solutions* in the sense that the appeals brought within the same awarding procedure shall be settled as follows:
 - (i) in the stage up to the date of opening the offers, they shall be settled by the same panel;
 - (ii) in the stage after the date of opening the offers, they shall be settled by the same panel, other than that of the first stage; also, at each stage, the appeals made within the same procedure shall be joined;³
- *requests for intervention* when it is explicitly stipulated that it is possible for economic operators to make a voluntary request for intervention in the dispute, with notice to the parties to the case awaiting judgement;
- *the point of view of the contracting authority* when the point of view of the contracting authority entails the termination of the right to propose evidence and to invoke exceptions, except those regarding public order;
- *new reasons for appeal* when the law lays down the specific practice of the Council according to which the presentation of new reasons for appeal and/or the formulation of new heads of claim by way of written or oral conclusions or specifications to the appeal, subsequent to the lawful term of formulating them, is deemed inadmissible.

According to law, the Council shall be competent to settle appeals concerning procedures for awarding contracts by specialized panels set up according to the rules of organization and functioning⁴, and any appeals which do not fall within the competence for settlement of the Council shall be declined by it, by decision, to the competent court of law or, where appropriate, to any other authority with competent jurisdictional activity.

The Council's decision to decline shall not be subject to any appeal, the file being sent immediately to the competent court of law, or, where appropriate, to another authority with competent jurisdictional activity.

² According to art. 6, paragraph (1) of Law no. 101/2016.

³ According to art. 7 of Law no. 101/2016.

⁴ Regulation approved according to art. 37 paragraph (2) of Law no. 101/2016.

In the exercise of its powers, the Council, through the panels for the settlement of appeals, shall adopt decisions and conclusions. The decisions of the Council may be appealed through complaint, and the decisions of the courts of law may be appealed by second appeal.

The law also provides that⁵, in the exercise of its duties and powers, the Council, through conclusions, may suspend the procedure for solving the appeal in the following situations:

- in the situation in which it depends in whole or in part to the existence or non-existence of a right which is the subject of another judgement;
- when the criminal proceedings for an offence committed in connection with the act appealed by the claimant were started.

The suspension of the procedure for solving the appeal is effective until the decision in the case which caused the suspension becomes final.

The Council may justifiably issue a new decision on the suspension⁶, if it is found that the party who asked for it does not have a diligent behaviour in the process which has led to the suspension, delaying its resolution, or if solving the criminal action which has led to the suspension lasts longer than one year from the date on which the suspension occurred, without reaching a solution for that case.

The adopted conclusion according to the above provisions can be appealed by complaint, to the competent authority provided in Article 32(1), separately, within 5 days of the notice.

The suspension of the procedure for solving the appeal shall interrupt the term for resolution provided in Article 24(1). A new term shall begin when resolution is resumed.

What is interesting to approach in this procedure is the effect which such a solution may have in the case of a contract which must be concluded within a well determined or at least determinable term in accordance with the contractual provisions or when the object of the contract would constitute an essential element for the existence of a certain company or even a community.

It should be mentioned that the law stipulates that in the case in which the person who deems to be the injured party formulates an appeal against the same act of the contracting authority both to the Council and to the court of law, it shall be presumed that it has waived the administrative jurisdictional path.⁷

As an example, it is assumed that procurement procedures were requested to be initiated in a company, with a view to acquire parts and sub-assemblies needed for the urgent repair of equipment necessary for carrying out intervention work in adverse weather conditions. The procedure is initiated, all the steps laid down by the specific legal regulations are followed, then, part which

⁵ According to art. 25, paragraph (1) of Law no. 101/2016.

⁶ According to art. 25, paragraph (3) of Law no. 101/2016.

⁷ According to art. 4, paragraph (6) of Law no. 101/2016.

deems itself injured starts the procedure for appealing, by: prior notification, appealing to the Council in the administrative jurisdictional procedure, attacking it in the court of law - where it follows the specific procedural rules - and then also initiates a criminal complaint which, according to law, suspends the procedure for resolving the appeal, all these actions lead to very long terms for hearings which in fact are likely to delay this urgent acquisition and when this procedure is completed, sometimes after at least one year, the activity of the company is blocked and the community or communities in question are affected, in most cases, irreversibly.

The legislator has provided for such situations and, for a speedy resolution of such appeals, it has provided that within 30 days of the date of entry into force of the law, by Government decision, to supplement the number of positions in courts of law, in order to employ a number of 48 judges and 16 registrars for courts of appeal and, respectively, 50 judges and 50 registrars for courts of law.⁸

In situations of undue appeals or not of procedures for awarding public procurement contracts may we speak of abuse of law?

For better clarification of the matter *abuse of law* must be defined, which is expressly governed by Article 15 of the Civil Code as follows: "No right may be exercised in order to injure or damage another, in an excessive and unreasonable manner, contrary to good faith".

Therefore, the exercise of a subjective law⁹ shall be considered abusive when the right is not used with a view to achieve its final purpose, but with the intention to harm another person or contrary to good faith.

The Code of civil procedure, through article 723, also sanctions the exercise of procedural rights in bad faith and contrary to the purpose for which they have been regulated and recognized by law, any party exercising these rights in an abusive manner having the obligation to be liable for the damages caused by these actions.¹⁰

In this context it may therefore be concluded that the elements constituting abuse of law would generally consist of a person guiltily and, in particular, without guilt, committing a harmful act towards another person's situation or the rule of law, as a result of the design or the exercise of the use of a legitimate right, in spite of the principles of good faith and in order to obtain a reward or by not noticing the dissatisfaction caused to a third party.

⁸ According to art. 71 of Law 101/2016.

⁹ M.Niemesch. *Teoria generala a dreptului*. Hamangiu Publishing House. Bucharest. 2014. p. 27.

¹⁰ M. Tabarca, Gh. Buta, *Codul de procedura civila: comentat si adnotat cu legislatie, jurisprudenta si doctrina*, second edition, reviewed and added, Universul Juridic Publishing House, Bucharest, 2008, p. 1708.

As it can be observed, the responsibility for the abuse of law¹¹ remains a specific form of manifestation of tort liability, in such a way that it may not be committed in the absence of guilt and injury caused to another person.

However, the provisions of Article 1353 of the Civil Code, which provides that "the one who causes injury by the exercise of its rights is not obliged to repair it, unless it is exercised abusively", must be taken into account. So, this time as well, not using the right in order to achieve its purpose, but intending to harm the other person or in breach of the principle of good faith, shall be considered abusive exercise.

In the practice of jurisprudence, establishing the limits up to which a person who, in the exercise of its legitimate right, may be considered to be in good faith, shall remain a controversial issue.¹²

As the New Civil Code does not establish the way in which abuse of law may be penalised, the person guilty of abuse of law shall be found liable by the court of law, pursuant to the general principles of civil liability, to repair any injury in the form which the court deems most suitable in relation to the concrete circumstances of this court case.

3. Conclusions

In conclusion, in accordance with the regulations relating to the abuse of law, the lack of penalties in the logical-legal structure of this legal rule leads to the hypothesis that this rule is an imperfect legal rule which has a hypothesis and provision and the coercion, which should be exercised by the state through adverse legal consequences for breach of the provisions of the provision does not exist or is exclusively the one ordered by the court of law.

In the case of procedures necessary for awarding a public procurement contract, the situations in which a right may be exercised abusively are numerous, and the court of law shall have the task to establish, in concrete terms, taking account the particularities of each case, if it has been diverted from its purpose, aspect which, in practice, may give rise to non-unitary jurisprudence resolutions, but, along with the thresholds provided for in law regarding the taxes for appealing such contracts in another way than the jurisdictional administrative one would be such as to discourage the actions of justice seekers to unnecessarily use the state's human and material resources, which are quite costly, but also by obliging the parties to repair the damages to the contracting authority. But, irrespective of the value of the damage, there are situations in which certain targets are missed, most of the times even irreversibly or impossible to be carried out for various

¹¹ Gh. Beleiu, *Drept civil roman. Introducere in dreptul civil. Subiectele dreptului civil*, House of Publishing and Press "Sansa" S.R.L., Bucharest, 1994, p. 81.

¹² M.Bojinca. *Drept civil roman. Teoria generala*. Academica Brancusi Publishing House. Tg.Jiu. 2012. p. 30.

reasons which may occur in this period of the resolution of an appeal, made legally, or more or less abusively.

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6. Law no. 98/2016 of 19 May 2016 on public procurement.
7. Law no. 101/2016 on the remedies and means of appeal in awarding public procurement contracts, sectoral contracts and concessions of works and concessions of services, as well as for the organization and functioning of the National Council for the Settlement of Disputes.

Comparative examination between disciplinary liability of employees and disciplinary liability of civil servants

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Abstract

Disciplinary liability is a category of responsibility specific to labor law and derives from the employer's prerogative to penalize the employee by virtue of the subordination relationship between the parties that characterize the labor relations. The legislator established in the Labor Code art. 251-252 a summary disciplinary investigation of the employee, that is carried out by a person empowered by the employer to investigate the employee. Employer under internal regulation or social partners under a collective labor contract may establish a discipline committee, which is in practice. Law no. 188/1999 on the status of civil servants, in art. 77 to 82 regulate the disciplinary liability of civil servants. Unlike the provisions of the Labor Code, Law no. 188/1999 provides a number of additional guaranties for civil servants, such as the enumeration by the legislator of the facts constituting disciplinary misconduct and the commission for the disciplinary investigation. Elements of differentiation between the two occupational categories can also be found in the rehabilitation after disciplinary sanctions. In the present study, the main aspects that characterize the disciplinary liability of employees and civil servants will be analyzed and, on the basis of the analysis, proposals de lege ferenda will be made.

Keywords: public servants, employees, disciplinary liability, cancellation of the disciplinary sanctions.

JEL Classification: K23, K31

1. Introduction

The reporting relationship between employer and employee gives the employer three prerogatives: the legislative prerogative, the prerogative of control and the disciplinary prerogative².

By virtue of the disciplinary prerogative, the employer may take a disciplinary measure against an employee if the latter commits deeds that disturb the work discipline called breaches of discipline³.

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² See I. T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, Universul Juridic Publishing House, Bucharest, 2017, 4th revised and extended edition, p. 248, Al. Țiclea, *Tratat de dreptul muncii*, 10th updated edition, Universul Juridic Publishing House, Bucharest, 2016, p. 352.

³ The breach of discipline has been defined in the Labour code in article 247(2) as the deed related to work and which consists in an action or inaction guiltily committed by the employee by which they breach the legal standards, the internal regulation, the employment contract or the collective labour agreement in force, the orders and legal provisions of their superiors.

In case of civil servants, they answer before the institution or the public authority for the way in which carry out their activity, including by means of liability to disciplinary action.

Employees' liability to disciplinary action is regulated by the legislator in the content of the Labour code, the applicable summary provisions being supplemented with the provisions of the internal regulation or, if necessary, with the provisions of the relevant employment contract.

Civil servants' liability to disciplinary action is regulated by the Law no. 188/1999 on the statute of civil servants⁴ in articles 77 – 82 and by H. G. no. 1344/2007 on the rules of organization and functioning of the disciplinary boards⁵.

2. Comparative elements relating to employees' liability to disciplinary action and civil servants' liability to disciplinary action

A. The legislator has instituted the obligation to carry out a prior disciplinary investigation before the employer may apply disciplinary sanctions.

To carry out the prior disciplinary investigation, the employee shall be summoned in writing by the person authorized by the employer to perform the investigation while mentioning the object, date, time and place of meeting (article 251(2) of the Labour code).

As for this person, the Labour code does not provide any details regarding whom the respective person might be, the education or the position held by them within the company.

As the law remains silent, any variant is possible, including the resort to specialists outside the unit, since the legislator does not expressly forbid that.

The applicable disciplinary measure is established in relation to the gravity of the breach of discipline committed by the employee while taking the following aspects into consideration (article 250 of the Labour code): a) the circumstance in which the deed was committed; b) employee's level of guilt; c) the consequences of the breach of discipline; d) employee's general conduct at work; e) the disciplinary measures enforced on them beforehand, if any.

After having completed the disciplinary investigation, the person authorized by the employer may propose the following measures: a) the written warning; b) demotion with a salary corresponding to the new lower position; c) the reduction of the base wages by 5-10% for a period of 1-3 months; d) the reduction of the base wages and/or the management bonus, as the case may be, by 5-10% for a period of 1-3 months; e) disciplinary termination of the employment contract.

⁴ Republished in the Official Journal no. 365 of May 29, 2007.

⁵ Published in the Official Journal, Part I, no. 768 of 13.11.2007 in force since January 13, 2008.

The disciplinary measures provided above represent the applicable general regulation, employers not having the right to apply other sanctions to the employees except the ones established in the labour code.

By way of exception, if other sanctioning regime is established by professionals statutes approved by special law, this shall be applied (article 248(2) of the labour code)⁶.

Mention must be made of the fact that the law does not stipulate the fining but withholdings are judiciously considered as indirect fines⁷.

The disciplinary measure may be applied within 30 calendar days since the date when the employer has become aware of the committing of the breach of discipline, but not later than 6 months since the deed was committed, pursuant to article 252(1) of the labour code.

The employer shall issue a sanction decision that shall contain the following elements: a) the description of the deed making the object of the breach of discipline; b) the specification of the provisions in the personnel statute, internal regulation, employment contract or the collective employment contract in force that were breached by the employee; c) the reasons for which the defences formulated by the employee during the prior disciplinary investigation were rejected or the reasons for which the investigation was not conducted; d) the legal grounds based on which the disciplinary measure is applied; e) the time period within which the disciplinary measure may be appealed; f) the competent court where the disciplinary measure may be appealed.

B. The Internal regulation must also contain, *inter alia*, provisions relating to work discipline, according to article 242(g) of the Labour code.

In this context, we may affirm that the main source of labour law is the internal regulation that must contain provisions regarding the work discipline.

Despite all that, in reality, social partners negotiate provisions regarding the disciplinary investigation through the collective agreement by establishing a disciplinary board that may investigate the breaches of discipline.

The attribution of the competence in this respect to a board represents a judicious aspect because a board made up of several members offers supplementary guaranties of impartiality, unlike the situation provided in the code where the competence is incumbent on a single person only.

The disciplinary board shall be made of an uneven number of members, at least 3 individuals, among whom we think there must be an employee from the legal department, an employee from the economic department and an employee from the department competent in relation to the breach of discipline committed by the employee, thus avoiding the situation of a conflict of interests.

⁶ By way of example, M. Ioan, *Răspunderea disciplinară a polițiștilor*, in the volume of the national conference Novelties and perspectives in labour legislation, Sibiu, October 30, 2015, Universul Juridic Publishing House, Bucharest, 2016, pp. 190 – 208.

⁷ I. T. Ștefănescu, *Tratat teoretic și practic de drept al muncii...op. cit.* p. 844.

The board may be set up permanently or it may summon ad hoc through employer's internal decision.

The working procedure of the board may be established by the social partners through the employment contract or by the employer through the internal regulation.

C. The cancellation of the disciplinary measures for employees shall intervene within 12 months since application if the employee is not given another disciplinary measure within this period, under article 248(3) of the labour code.

The cancellation of the disciplinary measures shall intervene *de jure*, the written decision issued by the employer having only a confirmation role.

We mention that the cancellation of the disciplinary measures shall apply to all disciplinary measures, including disciplinary dismissal, since the legislator does not make any distinction in terms of the application of this concept of the labour law⁸.

The 12-month deadline shall apply to all categories of sanctions provided in the labour code.

D. As for the relevant legal provisions applicable to civil servants, we may mention that the legislator has established much more precise and detailed rules as compared to the legal regime applicable to employees.

By way of example, in article 77(2) of the Law no. 188/1999, the legislator enumerated the breaches of discipline that may be committed by the civil servants as follows: a) systematic delay in carryout out their tasks; b) repeated negligence in carrying out their tasks; c) unmotivated absences from work; d) repeated failure to comply with the working hours; e) interventions or insistences on solving certain requests outside the legal framework; f) failure to observe the professional secrecy or confidentiality of the works having this nature; g) manifestations that bring prejudices to the prestige of the authority or public institution where they work; h) carrying out of some political activities during the working hours; i) the refusal to perform their duties; j) breach of the legal provisions relating to duties, incompatibilities, conflicts of interest and interdictions established under the law for civil servants; k) other deeds provided as breaches of discipline in the legislation related to the civil service and civil servants.

There is one advantage as compared to the regulation in the common law but mention must be made of the fact that an exhaustive enumeration of the breaches of discipline in the Labour code is a desideratum impossible to achieve if we take into account the complexity of work relations.

The employer by the internal regulation and social partners by the employment contract may establish the breaches of discipline in the unit with the

⁸ For the opinion according to which cancellation does not also apply to the case of disciplinary termination of the employment contract, see A. Țiclea, *Tratat de dreptul muncii...op. cit.* p. 909 – 910.

observation that the enumeration must contain all the breaches of discipline since, if the employee commits a deed that is not specified as a breach of discipline, they shall not be sanctioned.

The sanctions applicable to civil servants as established in article 77(3) from the Law no. 188/1999, which are quite similar to the sanctions applicable to employees, are as follows: a) written reprimand; b) the reduction of wages by 5-20% for a period of up to 3 months; c) suspension of the right of promotion in the wage grid or, as the case may be, of promotion in the public service for a period from 1 to 3 years; d) demotion in the wage grid or demotion in the public service for a period of up to one year; e) dismissal from the public service.

The only specific sanction is represented by the suspension of the right to get promoted in the wage grid or, as the case may be, of promotion in the public service.

Another important difference is that civil servants are investigated in terms of discipline by a disciplinary board and not by a single person.

Similarly to employees, the disciplinary investigation shall not occur for the application of the written reprimand.

The disciplinary board shall also contain a representative of the trade union at unit level.

The working procedure of the disciplinary board is regulated under the law, a fact that is a further argument for the just regulation in the field of liability to disciplinary action in case of civil servants.

As for civil servants, disciplinary measures shall apply within 1 year at the latest since the date when the disciplinary board has been notified about the committing of the breach of discipline but not later than 2 years since the date when the breach of discipline was committed, this aspect again being different from the provisions of the Labour code applicable to employees.

The cancellation of disciplinary measures is also possible for civil servants with the observation that the legislator has established different deadlines for sanction cancellation as follows: a) 6 months since application for the disciplinary measure specified in article 77(3)(a), namely written reprimand; b) within one year since the expiry of deadline for which disciplinary measures mentioned in article 77(3)(b-d) were applied – other sanctions except dismissal from the public service; c) within 7 years since application for the disciplinary measure mentioned in article 77(3)(e) – dismissal from the public service.

Taking into account the specificity of the public service, the persons who have been dismissed can no longer hold the position of a civil servant for a period of 7 years since their dismissal from service.

It is important to retain that for civil servants the legislator has instituted the administrative record containing all the disciplinary measures received by the civil servants that are not cancelled, therefore upon the expiry of the cancellation period, the sanction shall be erase from the administrative record, unlike the case

of employees who only have a personal file and the cancellation of the disciplinary sanction is difficult to apply⁹.

3. Conclusions

The Labour code regulates in a general manner employees' liability to disciplinary action.

The applicable common law regulation should be improved because this fundamental concept of the labour law must be explained more precisely by the legislator¹⁰.

In terms of civil servants, the Law no. 188/1999 offers more guarantees, in the sense that for more objectivity the disciplinary investigation must be conducted by a board.

This aspect derives from the rigors characterizing the public services, thus the individuals who exercise the state authority in their job need additional guarantees, especially when we speak about disciplinary measures.

Legislator's regulation regarding the broader deadlines within which the employee may be sanctioned also resides in the specificity of the public service.

As for cancellation, we may notice the correct regulation of this legal concept in the Law no. 188/1999 in relation to the provisions of the Labour code since cancellation deadlines are established objectively according to the disciplinary measure received.

This regulation leads us to *de lege ferenda* proposal in the sense of similarly regulating different deadlines for employees in the Labour code according to the nature of the disciplinary measures received by employees.

Last but not least, we think that the legal regulation applicable to civil servants is judicious in terms of administrative record, this aspect representing a model for the regulation in terms of employees as well, additionally to the provisions relating to the personal file.

As a conclusion about the applicable legal provisions:

- the disciplinary investigation of employees is performed by a person authorized by the employer, while for the civil servants it is conducted by a board;

⁹ Pursuant to article 81(3) from the Law no. 188/1999, the administrative record is necessary in the following cases:

- a) appointment of a civil servant as member in the board for the contest for the recruitment of civil servants;
- b) appointment of a civil servant as chairperson and member in the disciplinary board;
- c) appointment of a civil servant as member of the joint committee;
- d) holding a job in the public service corresponding to the category of high civil servants or management civil servants;
- e) in any other cases provided under the law.

¹⁰As for the fact that the legislator should adopt through legislation a framework model of internal regulation, see I. T. Ștefănescu, *Considerații practice cu privire la cercetarea disciplinară a salariaților*, in „Revista Română de Dreptul Muncii” issue 6/2017, p. 22 – 23.

- the legislator enumerates the disciplinary measures for civil servants;
- the disciplinary measures are quite similar for the two professional categories with certain particularities specific to the public service;
- the cancellation of disciplinary measures for employees takes place after the expiry of a 12-month period, while in case of civil servants it takes place within different deadlines according to the nature of sanction received;
- the legislator has regulated the administrative record for civil servants.

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Controversy on legal liability of the medical staff in the case of the presumptions of parental consent

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Abstract

"Consent presumed to be given" in the case of compulsory immunizations raises great questions both in terms of legal interpretation from the perspective of the possible consequences of the decision to assume responsibility, but especially when we call into question the actual procedure to be followed and the legal basis for each procedural step. The right of children to health and education is guaranteed to be unrestricted, and when this imperative breaks down and can place us relatively briefly face to face with undesirable postvaccinal side-effects or discrimination situations, we realize another possible consequence that adversely affects the "children's world", their higher interest, the right to equal protection against all discrimination, but especially against any challenge to such discrimination or impairment of the state of health. State protection measures must be in accordance with the principles of equality and non-discrimination with respect to all those involved, professionals, children or parents, and also prevent the imposition of even adverse consequences on the future of the individual, even when adopted on the basis of a motivation such as "preventing and limiting the spread of communicable diseases that can be prevented by vaccination". The article aims to draw attention to one of the many "legal phenomena" that do not find a place on all its lands regulated in the practice of Romanian law, without proper corroboration of all the normative acts in force at national level and not only.

Keywords: *presumed consent, mandatory vaccination, undesirable post-vaccine adverse effects, discrimination.*

JEL Classification: K23, K32

1. Regulations in force - consent of the parent or legal guardian: informed, written, prior and express or only informed and presumed

The rule is that medical personnel **are civilly liable for damages resulting from non-compliance with the patient's informed consent regulations**². In 2016, taking into account the need for effective and unitary

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² Extract of Law no. 95/2006 (r).

"Art. 662

(1) The attending physician, nurse / midwife is responsible when not obtaining the informed consent of the patient or his / her legal representative, unless the patient is unconscious and the nearest legal representative or close relative can not be contacted, due to the emergency situation.

(2) Where the legal representative or closest relative can not be contacted, the doctor, midwife / midwife may apply for authorization to perform the medical act to the guardianship authority or

application in an organized framework of the provisions of art. 660 of the Law no. 95/2006 (r)³, of the situations in practice, but especially of the essence given in the motivations of the court decisions appearing in the medical malpractice files, the Minister of Health issued the Order no. 1411 of 12 December 2016⁴ amending and supplementing the Order of the Minister of Public Health no. 482/2007 regarding the approval of the Methodological Norms for the application of the title XV "Civil liability of the medical personnel and the provider of medical, sanitary and pharmaceutical products and services"⁵ of Law no. 95/2006 on health reform.

The significance of the issuance of this normative act is invoked in this article, precisely because in APPENDIX no. 1, we identify for the first time a unitary framework model of the "Informed Patient Agreement Form", which lists the information *to be used including minors and undocumented adults. This information in connection with the medical act emphasizes the proof of the signing of the parents, legal representatives, of some aspects regarding: the identity and professional status of the staff, the nature and purpose of the proposed medical act, the benefits and consequences of the medical act insisting on the potential risks of the medical act. Also, the parents or the legal representatives must express their written consent for the actual accomplishment of the medical act, once it has been understood, including the possible adverse consequences. We therefore, starting from the above-mentioned provisions, in all situations of execution of medical records, the need for informed consent, prior and explicit, of an agreement written in writing by the parent / legal representative by signature.*

Continuing on the same line of interest, we identify somewhat identical provisions that imply unaccountably, *in the case of minor donors, an express written agreement written by the parent / legal representative of the minor in risk situations that are known to exist in the case of sampling of strain cells (stem) medullary or peripheral hematopoietic stems from the minor.* Thus, the Order of the Minister of Health no. 1170/2014⁶ on the approval of model forms for the application of the provisions of Title VI of Law no. 95/2006 on Health Reform, approves by including in Annex 2 a model-type DECLARATION, assumed by signature by both parents / legal representative. Moreover, if the minor donors are at least 10 years old, the form and the written consent of the president of the tribunal in whose territorial jurisdiction the headquarters of the medical center or of the tribunal in whose territorial jurisdiction the minor lives is required.

may act without its consent in an emergency, when the time until the consent would irretrievably endanger the health and life of the patient."

³ Republished in the Official Gazette no. 652 of 28 August 2015.

⁴ Published in the Official Gazette with the number 1027 of 21 December 2016.

⁵ Published in the Official Gazette no. 237 dated April 5, 2007 and amended and completed by the Order issued by the Minister of Health under no. 1411/2016.

⁶ Published in the Official Gazette No 765 dated October 22, 2014.

As a first conclusion of the treatment we have now, we can state that by existing regulations, *the medical staff have now ensured the protection of the existence of the agreement, the written proof of the parent's consent for each procedural step taken* and the superior interest of the child is appreciated as such protected by decisions of accountable parents, decision expressed, reiterated by informed consent, prior, express, and granted in writing.

The protection of the medical staff involved in the medical act of vaccination will no longer exist, because in the Senate-approved draft of the Law on the Vaccination of Persons in Romania, we meet the notion of "*consensus presumed to be given*", and *this is when the presumption, the parent or legal guardian must be present, his presence is recorded, but strangely, he does not have to sign, to ensure the written expression of the consent for the medical act that the medical staff is to undertake!*

Law no. 95/2006 provides for the protection of the current doctor or the medical assistant for failing to take care to obtain the informed consent of legal guardians only in cases of urgency, clearly defined and not interpretable. And vaccination does not fit here, does not meet the characteristics of an emergency situation.

Moreover, vaccination is defined in Article 3, paragraph 1, letter o) of the draft normative act as a "*medical act*" and *the frame of expression of the informed patient's consent, of the legal representatives of the minor*, refers to the "medical act" of any kind, without reference to certain acts medical. Also, within this form, we also include a space reserved for the right to express the refusal of the involved persons.

As a supporting rationale for our claims, we draw the attention of those directly involved in the management of medical records, the ECHR⁷ judgment of January 15, 2013, delivered in *Csoma v. Romania*⁸ (application 8759/05), where the Court found violation of art. 8 of the Convention by not obtaining the written consent of the patient, considering that medical malpractice (defined by Law 95/2006 as a "*professional misconduct*") *may also consist in the omission to obtain the written consent of the patient of the patient, an obligation expressly provided by Law no. 95/2006 and the non-fulfillment of which brings the responsibility of the medical staff.*

⁷ European Court of Human Rights.

⁸ *Malpraxis medical. Lack of written consent of the patient* and doctor's omission to adequately inform the patient about the risks of the medical procedure - violation of art. 8 of the Convention - the case of *Csoma v. Romania*.

2. The potential risks of vaccination and cases of potential fault warnings of health professionals

Following the medical act of administering a vaccine to children and adults, we can intervene as we outline and define the bill, "*undesirable post-vaccine adverse reactions - RAPI*" respectively adverse effects⁹. With the statement that an adverse reaction¹⁰ is not always an adverse effect, it is well-advised that both suppose undesirable side effects, secondary to the effect of vaccine administration by healthcare professionals.

However, the concern of healthcare professionals should be that once the normative act itself states that the undesirable postvaccinal adverse reaction can be determined by: *the components of the vaccine or the defects of the administration devices, the manner of interpretation by the medical the condition of the patient, the anamnesis, the particularities of the vaccinated, the medical conditions that temporarily or forever contraindicate the vaccination or the technique of carrying out the medical act itself*. Of the three criteria, two of which can undertake the responsibility of the medical framework, there is still a contrived one by *the existence of evidence of information and counseling of the parents / legal guardians about the postvaccinal side effects, a fact which is not proven to be interpreted and can be categorized as and act of malpractice*.

The jurisprudence of the ECHR demonstrates that whenever moral damages are granted, a subjective appreciation is made in terms of the patients' physical suffering and the consequences that have led them to do so. It is common ground that it is *always necessary to prove the existence of a causal relationship between the possible detentions of the medical staff listed above and their possible culpability in relation to the determination of the undesirable effect*. There is always a causal relationship, even if medical error, negligence, recklessness, insufficient medical knowledge, ignorance of medical protocols, or exceeding skill limits can interfere with good faith. And this is because, as always, the prisoners will want to know if their loved ones have a long-suffering or significant disability or disability, for objective or medical reasons, and this involves expertise, analyzes and specialized inquiries, disputes which affects the professional future of the medical setting and which are all the more difficult to support in the absence of the written consent of the petitioners. In the aforementioned case, *Csoma v. Romania* had just informed the patient of the possible risks and complications unsupported by the existence of a written

⁹ side effects - "side-effects to the effect desired by the medical act"; - draft law draft on the vaccination of persons in Romania - <https://www.senat.ro/Legis/PDF/2017/17L216FS.pdf>.

¹⁰ Undesirable postvaccinal adverse reaction - "any unwanted reaction resulting from vaccination due to the vaccine, medical act or particulars of the response of the vaccinated person" extracted draft Law on the vaccination of persons in Romania - <https://www.senat.ro/Legis/PDF/2017/17L216FS.pdf>.

consent that was missing from the medical record, was a cause considered to be due to medical negligence. Furthermore, *even the medical nurse, and thus the applicant's medical background, could not be a pertinent motivation for not defining information and merely suggesting the existence of consent.*

In this context, the implications of the retention of a causal link have consequences that can not only be of a civil liability but of an administrative nature by engaging the accountability of the legal person where the medical framework is employed or even of a criminal nature. The consequences of disciplinary liability for non-compliance with the laws and regulations of the medical professions, the Code of Medical Deontology and the rules of good professional practice, as well as for any acts committed in connection with the profession, which are liable to prejudice its honor and prestige, are not neglected

3. Considerations on medical tort liability

From the time of committing an illicit act in the exercise of the medical profession, civil liability for tort / delict can be traced even for the most negligent negligence if there is an injury, the causal relationship between the illicit act and the damage and the guilt component. In such cases, the damages are both predictable and unpredictable, since the amount of money made with the steps to be taken in most situations can not be assessed at the time of the offense, but depends on the consequences of the type of postvaccination.

According to the Civil Code, Article 1387, in cases of bodily injury or health damage, compensation may be required to include the equivalent of the work earned by minors who have been deprived of their rights to be mobilized to recover their health and to limit their adverse effects in due time, compensation for medical care expenses, the costs of increasing the life needs of the injured person, as well as any other material damages and even temporary compensation for urgent needs such as transport, medicines or accommodation. Also, Article 1391 of the Civil Code regulates the right to claim pecuniary compensation for non-pecuniary damage defined by the restriction of family and social life, categorically provided that the prejudice meets the following conditions: be certain with reference to existence; constitute a direct effect of the unlawful act and have not been repaired. And since civil liability does not remove the incurring of criminal liability if the act that caused the damage constitutes an offense. the interpretation of this article is clarified by reference to a criminal case involving an offense of bodily harm, *in the sense that only the victim of the injured party is entitled to obtain compensation for the consequences suffered on the psychological level by restricting the possibilities of family and social life*¹¹.

¹¹ Decision of the High Court of Cassation and Justice no. 12 of May 16, 2016, on a preliminary ruling on how to interpret and apply the provisions of Art. 1.391 par. (1) and art. 1.371 par. (1) of the Civil Code - published in the Official Gazette no. 498 of 4 July 2016.

Decision of the High Court of Cassation and Justice no. 12/2016 with regard to these provisions, interprets the fact that the perpetrator of the deed will be held liable only for the part of the damage he has suffered and provided that the victim of the damage also has guilty of causing or increasing the damage or did not avoid, in whole or in part, though he could do so, respond appropriately. Thus, a set of facts and moments will be presented, which will be subjected to analysis and specialized, judicial, extrajudicial, forensic expertise aimed at identifying and sorting the types of liability, the degree of guilt and the limits of the responsibility of each of those involved: vaccines or medical devices, ministry, medical or parent. The limits of switching from one liability to another are difficult to establish because always a reaction associated, for example, with a vaccine production defect is to have a post-vaccination impact in a period of up to at least 4 weeks, which is assumed by the parents expressing question marks in a first phase about the medical act. Subsequently, on time and on the basis of expertise, it is possible to reach the manufacturer, but all that time, additional costs are already to be covered.

Healthcare professionals should have the necessary evidence to go through all stages on the basis of the patient's consent, as they are not trained when dealing with insufficient endowment with appropriate treatment equipment or hidden vices sanitary materials, medical equipment and devices or drug substances such as vaccines.

I have noted from the wording of the draft law on vaccination that rules on the information side will be adopted, so we are going for this step and an appropriate form, especially as provided in Article 21 para. 4 of this project and a refusal form, *but the refusal to do so in case the doctor indicates the administration of the vaccine!* Nobody found it appropriate to identify the possible refusal of the vaccine type as possible, although we have reported such situations¹². However, this refusal should be found in the information form, knowing that the doctor's duty is also to make the patient / guardians of minors understand the medical conduct regarding the treatment, the risks involved in the medical procedure and to provide specialist information about vaccine. All practice shows that situations can also occur in which the doctor can not respond to the expectations of the parents, can not satisfy their desire for understanding, which also in the absence of a written consent can give rise to different interpretations. Moreover, the physician can not afford to guarantee what the parents will really want, namely the compatibility of the vaccine with the patient. Here, without going into the actual debate of the case, there is an immediate action invoking that the Ministry of Health has failed to investigate the

¹² „The applicant asks that the doctor without first having to inform her and have her agreement in writing on the choice of the material from which the works are to be carried out performed those works in a material for which the applicant did not give his written consent” - Court of First Instance Bucharest - Civil Sentence no. 4588 / 03.14.2016; object: claims of moral damages.

compatibility of a Danish vaccine and the risks of adverse effects for patients in Romania before it was placed on the domestic market¹³, and in respect of which the Board of Appeal found:

„Objectively uncontested by any of the parties, the minor suffered postvaccination reactions, consisting of the emergence of left axial lymph nodes whose removal required surgical intervention according to the documents submitted in probation.

The vaccine ... is a vaccine that was part of the mandatory national immunization program established by the Order of the Ministry of Health *which was responsible for authorizing the placing on the market and ensuring the administration of this vaccine*”.

And then, when there is an antecedent, we ask how the doctor can pass a vaccine without having the belief that he has responded legally to parents' questions if he does not have the written consent of both to understand all the information provided both for the risks and for the actual administration?

4. Conclusion

From the desire to move away from the reasoning that the most important causes of medical malpractice are legislative shortcomings or deficiencies in the system, we wanted in this article to formulate a plea in favor of ensuring the protection of professionals and, implicitly, all those with the discernment and responsibility involved in the act medical care of the vaccination, including parents who deserve and before that they are entitled to a response according to their desire and ability to understand, reflected in writing by the decision.

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1. Law no. 95/2006 on health reform, republished in the Official Gazette no. 652 of 28 August 2015, as amended.
2. Order of the Minister of Public Health no. 482/2007 regarding the approval of the Methodological Norms for the application of the title XV "Civil liability of the medical personnel and the provider of medical, sanitary and pharmaceutical products and services (published in the Official Gazette no. 237 dated April 5, 2007).
3. Order no. 1411 of 12 December 2016 amending and supplementing the Order of the Minister of Public Health no. 482/2007 regarding the approval of the Methodological Norms for the application of the title XV "Civil liability of the medical personnel and the provider of medical, sanitary and pharmaceutical products and services" (published in the Official Gazette with the number 1027 of 21 December 2016).

¹³ Satu Mare Tribunal – Case no. 530/2015.

4. Order of the Minister of Health no. 1170/2014¹⁴ on the approval of model forms for the application of the provisions of Title VI of Law no. 95/2006 on Health Reform (published in the Official Gazette No 765 dated October 22, 2014).
5. Decision of the High Court of Cassation and Justice no. 12 of May 16, 2016, on a preliminary ruling on how to interpret and apply the provisions of Art. 1.391 par. (1) and art. 1.371 par. (1) of the Civil Code - published in the Official Gazette no. 498 of 4 July 2016.

¹⁴ Published in the Official Gazette No 765 dated October 22, 2014.

The legal regime of the public policy documents

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Abstract

Public policy documents are decision-making tools that identify possible solutions to address public policy issues. The present study analyzes the incidental regulatory framework regarding the initiation, development and adoption of these documents. The study also analyzes the types of public policy documents, the place and the role in the decision-making process at the level of the public administration, the effectiveness of the measures they establish, in order to conclude on their importance, especially with regard to the legislative process and legal certainty.

Keywords: public policy documents, strategy, plan, memorandum, legal certainty

JEL Classification: K10, K23

1. Legal framework

The public policy system is the set of institutional tools, procedures and institutional architecture developed to improve the quality and efficiency of the decision-making process². The decision may concern a wide range of measures, including the adoption of normative acts. Also, in order to ensure a well-founded decision and to increase the coherency of the measures to be implemented, normative acts (of course with the exception of individual ones or those governing urgent measures) should be based on a public policy document.

In view of the above mentioned role, it is of major importance to know the related issues, including the content, the way of initiating, elaborating, monitoring public policy documents, as well as the active involvement of both public authorities and civil society in this process. Consultation and participation of civil society structures in public policy making is essential to meet the needs of society at a certain point in time. This requires close cooperation between the public authorities belonging to the three powers of the state, between the political and executive levels of the administration, as well as between the public administration and the civil society. It also requires the development of the knowledge and skills of all the partners involved in the policy-making process.

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² According to the Government Decision no. 870/2006 on the approval of the Strategy for the improvement of the system of public policy development, coordination and planning at the level of the central public administration.

In Romania, the main normative framework in this field is given by Law no. 90/2001 on the organization and functioning of the Romanian Government and Ministries³, Government Ruling no.775/2005 for the approval of the Regulation regarding the procedures for elaboration, monitoring and evaluation of public policies at the central level⁴, Government Ruling no.870/2006 regarding the approval of the Strategy for the improvement of the public policy development, coordination and planning system at the level of the central public administration⁵ and the Government Ruling no. 561/2009 for the approval of the Regulation on Procedures, at the Government level, for drafting, endorsing and presenting draft public policy documents, draft normative acts, as well as other documents in order to be adopted/approved⁶.

The aforementioned regulations define the public policy documents, establish the categories of public policies, their initiators, the adoption procedure and their monitoring, aspects that will be the subject of the analysis in this study.

2. Public policy documents

2.1. Definition and classification

According to art.3 of the Government Ruling no.561/2009, the public policy documents are decision-making tools through which the possible solutions for public policy issues are identified. These also include information on impact assessment, measures of monitoring, evaluation and implementation of identified solutions.

Public policy documents, defined and structured in accordance with the above mentioned regulatory framework are: the strategy, the plan, and the public policy proposal.

Regarding the relationship between these documents, the relevant rules in the field do not lay down strict rules, showing in this respect that in practice it is not always necessary to respect all the hierarchical stages of the public policy documents. The choice of the type of policy document used depends on the subject and the purpose of the public policy, so if in some cases it is necessary to elaborate all types of public policy documents mentioned, in other cases the implementation of the policy and the elaboration of the relevant normative acts can follow immediately after a strategy. The approach is therefore flexible, precisely in order to allow the instruments prescribed by the law to adapt to the concrete problem-solving approach. Incidental regulations in the field foresee that there

³ Official Gazette of Romania, Part I, no. 164 of 2 April 2001.

⁴ Official Gazette of Romania, Part I, no. 685 of 29 July 2005.

⁵ Official Gazette of Romania, Part I, no. 637 of 24 July 2006.

⁶ Official Gazette of Romania, Part I, no. 319 of 14 May 2009.

may be cases where a strategy generates several plans and a few public policy proposals or cases in which normative acts are directly generated by a strategy.

We emphasize that the formulation of public policies is not the same with strategic planning, the latter being a management tool for organizing activities and allocating resources within an organization.

2.2. Short description

The strategy is a medium and long-term public policy document that defines, in principle, Government policy on a particular policy area where decisions need to be made on a wide range of issues.

The strategy is structured as follows: introduction (the decisions that led to strategy development, over time strategy implementation, stakeholders involved in strategy development and workflow); relevant general information (description of the current situation based on the main socio-economic indicators); priorities, policies and existing legal framework; defining the problem (at a general level); objectives (which the Government undertakes to achieve by initiating measures in a specific public policy area); general principles; directions of action (sets of activities relevant to each specific objective); the results of public policies (changes in the economic, cultural and social environment); the results of the actions (services or products provided by an institution depending on its purpose and those to which it is fully responsible); indicators (measurable factors showing the extent to which the results were achieved); implications for the budget; legal implications; monitoring procedures, evaluation; subsequent stages and responsible institutions. As Government Ruling no. 870/2006 expressly states, this structure is not exhaustive and can be completed as needed.

The plan is a document designed to ensure policy implementation. It may be in the medium or short term, depending on the purpose of the policy and its implementation period. The plan can be developed both for implementing a strategy and for implementing a policy proposal. The objectives, the general guidelines, the results of the policies included in the plan must coincide with those in the strategy, supplemented with details of concrete activities, responsible institutions, deadlines and resources. Sometimes several plans can be derived from a single strategy. The plan may be medium-term (3 years) or short (1 year). The medium-term plan consists of the following parts: relevant general information (the reason for the development of the medium-term plan and the strategic or public policy document it derives); defining the problem; specific objectives; directions of action; the results of public policy; the results of the action; indicators; time planning; implications for the budget; monitoring procedures, evaluation. The short-term plan follows essentially the same structure, adapted to the timeframe considered.

Public policy proposal is a document designed to solve specific problems where there are several possible options for solution or if a conceptual agreement on the background of the regulation is needed. The policy proposal has the following structure: description of the problem; identification and evaluation of options; the specification of the social, economic and financial impact, as well as the budgetary implications of each option; legal implications and time planning; monitoring and evaluation; subsequent stages and responsible institutions.

Although not the subject of this study, it is noted that, apart from the three categories of public policy documents, Government Ruling no. 561/2009 also regulates an instrument that can establish decisions in the central public administration with a high degree of flexibility, namely the memorandum. According to art.10 of the mentioned normative act, the memorandum may be elaborated if a Government decision on a certain issue is necessary. It is endorsed by the institutions involved and includes a description of the problem and proposals for its resolution. The Memorandum is an internal act of the Government, which is not published in the Official Gazette of Romania. Proposals in the Memorandum may also include the adoption of a policy paper, the Memorandum emerging from this perspective as a precursor to the adoption of public policy documents. The Memorandum is, as we have stated, a flexible tool, which can target the most diverse aspects, sometimes with a high degree of complexity. Thus, given the very close link it has with the field of public policy, we believe that more detailed regulation of its legal regime would be needed, as well as the regulation of the obligation to monitor the measures established by the memorandum, similar to the public policy documents.

3. Procedural aspects: initiation, adoption, monitoring of public policy documents

3.1. Initiators of public policy documents

Under the relevant legislative framework⁷, the following public authorities have the right to initiate draft public policy documents for the adoption / approval by the Government, according to their attributions and their field of activity:

a) the ministries and other specialized bodies of the central public administration, subordinated to the Government, as well as the autonomous administrative authorities;

b) the specialized bodies of the central public administration subordinated or coordinated by the ministries, through the ministries in whose subordination or coordination they are;

⁷ Art. 1 of the Government Ruling no. 561/2009.

c) the prefects, the county councils, the General Council of the Bucharest Municipality, according to the law, through the Ministry of Administration and Interior.

3.2. Elaboration and adoption of public policy documents

Making a public policy document involves firstly **identifying the public policy issue** ("deciding what needs to be decided"⁸). It is, as outlined, "a crucial component of the policy-making process, which often takes place in a context marked by many uncertainties."⁹ In order to identify the major issues to be addressed, should be analyzed the governance program, the sectorial and general strategies of the central public administration authorities initiating draft normative acts, with reference to the issues that arise during the governance and which have a significant economic, social and environmental impact. Policy papers that will be developed in response to the identified public policy issue should also milestone legislative policy on the field under consideration, thus structuring the regulatory effort in line with the medium and long-term needs identified.

The activity of identifying, choosing and substantiating the options is carried out within the institution where the public policy is initiated, by the specialized departments under the coordination of the public policy units within the ministries, in consultation with the non-governmental organizations, the social partners, the professional associations and the representatives of the private sector involved, affected or interested in how the issue is resolved. This may entail carrying out studies and analysis of the opportunity to solve the problem; presentation of options; the estimated budget for each option; the estimated impact of the identified option; the criteria for assessing variants and choosing the one that is recommended for implementation; the action plan for the recommended option. The public policy formulation process also includes impact analysis, allowing for a better structure of the public policy planning process and an optimal decision based on sound and carefully considered arguments. We believe that it is essential to involve civil society at this stage in order to reflect as accurately as possible the needs of the social body.

The public policy proposal, which contains the public policy option chosen to be implemented, is approved by the head of the initiating institution and goes through the stages of the public consultation, according to Law no. 52/2003, as well as inter-institutional preliminary consultation.

Upon completion of the elaboration and consultation procedure, the initiating public authority has the obligation to submit to the General Secretariat of the Government, both on paper and in electronic / PDF format for registration,

⁸ Helen Wallace, Mark A. Pollack, Alasdair R. Young, *Policy-Making in the European Union*, Oxford University Press 2010, European Institute of Romania, 2011, p. 43.

⁹ *Ibidem*.

drafts of public policy documents, signed by the lead / rulers of the initiating public authority / authorities. By the authority of the initiator, on the same day they were submitted to the General Secretariat of the Government, draft public policy documents are also sent to the institutions that are to approve the project, accompanied by an address for submission. At this stage, draft public policy documents which has to be endorsed by the Ministry of Public Finance, the Department for European Affairs, or, as the case may be, the Ministry of Justice, will be sent to these institutions for the analysis. The said Ministries have the obligation to send a point of view to the initiator only following the notification of substantive issues within their own area of competence. Upon receipt of draft public policy documents, the General Secretariat of the Government shall immediately register, publish it on the website and verify that the formalities are met. The advisory public institutions must submit to the initiator the draft public policy document, in original, approved, within maximum 3 working days after its registration. In order to obtain the assent, draft public policy documents shall be sent to the General Secretariat of the Government in original, together with a copy, only after obtaining all the opinions of the interested public institutions. The deadline for the endorsement is 3 working days after it is registered with the General Secretariat of the Government. After receiving the opinions requested by the advisory institutions, the draft normative acts and / or the public policy documents shall be submitted for approval, as the case may be, to the Ministry of Public Finance, the Department for European Affairs and the Ministry of Justice.

After the **inter-ministerial approval process of the draft public policy document has been finalized**, the final form accompanied, if necessary, by the observations of the advisory institutions and the justification note on their non-issuance shall be transmitted, by the initiators, to the Court of Accounts of Romania, The Supreme Defense Council, the Economic and Social Council and / or the Superior Council of Magistrates, as the case may be, in order to obtain their advisory opinions, if obtaining them is mandatory, according to the legal dispositions in force. After obtaining the advisory opinions of these institutions, the initiator will transmit to the general Secretariat of the Government, in original, the final form of the draft public policy document, along with any observations and proposals of all advisory institutions, as well as the explanatory note regarding acquiring or disposing of them, as the case may be.

The public policy document is approved in the **Government meeting**. The General Secretariat of the Government **publishes the public policies documents** approved by the Government on the General Secretariat of the Government website, in the public policies database, within 5 working days from the approval. The public policy documents approved by the Government are published by the initiator on their personal web page, within 5 working days from the approval, and are kept on the web page throughout the duration of their validity.

3.3. Monitoring and evaluation of public policies

Monitoring and evaluating public policies are activities that take place at the level of all central public administration authorities during and after the implementation of public policies, aiming to establish the degree of achievement of public policy objectives. These activities should highlight: the institutional changes that have occurred following the implementation of public policy; changes in the status of target groups, both during implementation and completion; implementation costs; respecting the deadlines and content of activities under the action plan; delays in doing business and the reason for their occurrence.

The criteria for evaluating a public policy regard: the extent to which the results of public policy implementation are consistent with those set out in the public policy formulation phase; the relation between the costs of obtaining the results and those expected at the policy formulation stage and specified in the implementation strategy; compliance with the content of activities and deadlines set out in the action plan.

We believe that the success of achieving the objectives assumed by a public policy document is to a large extent determined by the quality of monitoring and evaluation. From this perspective, it is necessary to clearly identify the persons/ structures with monitoring responsibilities and the schedule of their activity. We also consider it important to periodically report, under the conditions set out in the public policy document, and to ensure the publicity of reporting, in order to ensure that the measures set out in the public policy documents continue to be correlated with the socio-economic needs and developments.

4. The role of public policy documents

4.1. Substantiation of the legislative activity and, from this perspective, the achievement of the principle of legal certainty

We highlighted on several occasions the importance of ensuring the principle of legal certainty¹⁰. The legal certainty, in both its dimensions, namely the law-making and the interpretation of the law, are included in art. 1 par. (3) and (5) of the Constitution, according to which "*Romania is a state of law, democratic and social, in which the dignity of man, the rights and liberties of the citizens, the*

¹⁰ Marieta Safta, *Unconstitutional Legislative Solutions Due to Non-Observance of the Legislative Techniques*, in the volume of the International Law, European Studies and International Relations Conference on "Legislative Policy between European, National and International Regulation", organized by Titu Maiorescu- Faculty of Law, Bucharest, 24-25 May 2013, Hamangiu Publishing House, Bucharest, 2013, pp.622-632; Marieta Safta, *Valorisation of the normative legal norms in the constitutionality control*, in the Legislative Information Bulletin no. 2/2016, pp.3-23;4. Ion Predescu, Marieta Safta, *The Principle of Legal Security, Fundamental to the Rule of Law*, in the Bulletin of the Constitutional Court no. 1/2009, pp.5-17.

free development of human personality, justice and political pluralism are supreme values, the democratic people of the Romanian people and the ideals of the Revolution of December 1989, and are guaranteed "; "In Romania, observance of the Constitution, of its supremacy and of the laws is mandatory". In another paper¹¹, we have shown that the Court's statutes have been most frequently mentioned in the context of examining the issue of the quality of legislation, with important consequences for the realization of fundamental rights. This is because legality, including a transparent, accountable and democratic process for law enforcement, as well as legal certainty, are essential elements of the rule of law¹², together with free access to justice, prohibition of arbitrariness, respect for human rights, non-discrimination and equality laws. The development of the principle of legal certainty in the case-law of the Constitutional Court - and we refer in this context to its meaning, which concerns in particular the law-making process – led to important considerations regarding the need to observe the hierarchy of normative acts¹³, the endorsement of the draft laws,¹⁴ and the avoidance of parallelism¹⁵, the proper substantiation of legislative initiatives and the preliminary assessment of the impact of new regulations¹⁶, the stability of legislation, and compliance with the requirements of the form and style of drafting legal acts: clarity, precision, foreseeability and predictability¹⁷. We have extensively analyzed the case-law in the cited studies.

In our view, an effective remedy for the deficiencies found by the Court and sanctioned by finding the unconstitutionality of the disputed regulations is the substantiation of legislation through carefully prepared and constantly monitored policy documents. Public policy proposals should therefore be seen as tools for limiting the number of normative and normative acts normative acts, namely to ensure the logic of normative governmental and parliamentary intervention.

Besides, according to Article 1 paragraph (3) of the Law no.24 / 2000 on normative technical norms for the elaboration of normative acts "*Legislation activity is the main way to implement public policies, providing the necessary tools for implementation of the solutions economic and social development, as well as*

¹¹ Marieta Safta, *Constitutional Law and Political Institutions*, vol. I, Ed Hamangiu, 2016, pp.195-196.

¹² Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), www.venice.coe.int.

¹³ Decision no. 666/2007, the Official Gazette of Romania, Part I, no. 514 of July 31, 2007; Decision no. 710/2009, Official Gazette of Romania, Part I, no.358 of 28 May, 2009; Decision no. 1658/2010, Official Gazette of Romania, Part I, no. 44 of 18 January 2011.

¹⁴ Decision no. 39/2008, Official Gazette of Romania, Part I, no.122 of 15 February 2008.

¹⁵ Decision no. 415/2010, Official Gazette of Romania, Part I, no.294 of 5 May 5 2010.

¹⁶ Decision no. 710/2009 and Decision no. 1658/2010, cited.

¹⁷ Decision no. 61/2007, Official Gazette of Romania, Part I, no. 116 of 15 February 2007; Decision no. 604/2008, Official Gazette of Romania, Part I, no. 469 of 25 June 2008; Decision no. 26/2012, Official Gazette of Romania, Part I, no. 116 of 15 February 2012; Decision no. 1258/2009, Official Gazette of Romania, Part I, no. 798 of 23 November 2009.

for the exercise of public authority ". The provisions of art. 6 of the Law no. 24/2000 stipulate in this respect that *"(1) The draft normative act must establish the necessary, sufficient and possible rules leading to the greatest legal stability and efficiency. The solutions contained therein **must be thoroughly based** on the social interest, the legislative policy of the Romanian state and the requirements of the correlation with all the internal regulations and the harmonization of the national legislation with the Community legislation and with the international treaties to which Romania is a party, and the jurisprudence of the European Court of Human Rights "and that " (4) **Normative acts that impact on the social, economic and environmental domains, on the consolidated general budget or on the legislation in force are elaborated on the basis of approved public policy documents by the Parliament or by the Government. The government defines the types and structure of public policy documents.**"*

The substantiation of draft normative acts, their motivation, and therefore the presentation of the underlying reasons (which should result, in particular, from well-structured public policy documents), are an "integral part of the law-making process"¹⁸ and constitute, in our opinion, a "pillar" of legal security. The coherent articulation of public policies with normative work, setting a short, medium and long term projection of legislative measures, and assessing their impact on these parameters is undoubtedly a necessity to achieve a solid and stable legal system.

At the same time, we emphasize that the issue of the quality of regulation itself is the subject of public policy documents at both national and EU level. Thus, at the national level, was adopted the Better Regulation Strategy 2014-2020, approved by the Government Ruling no. 1076/2014¹⁹, whose general principles refer to the actions concerning the active body of the legislation, to the process of initiating, implementing and monitoring the regulations, the capacity to implement them at central public administration level. These are requirements such as transparency, proportionality, substantiation of the impact of regulations, proper implementation of the consultation process, simplification of legislation. The objectives focus in particular on improving the quality of the process of drafting and implementing normative acts. At the EU level, a key theme of the European Commission's agenda is better regulation²⁰, which involves a set of objectives and measures to design and evaluate European Union policies and laws in a transparent, evidence-based and sustained way with the opinion of citizens and stakeholders. It covers all policy areas and pursues specific regulation that does not go beyond what is necessary to achieve the objectives and brings benefits at a minimum cost.

¹⁸ Ioan Vida, *Legistica formală. Introducere în tehnica și procedura legislativă*, Ed. Universul Juridic, Bucharest, 2012, p. 97.

¹⁹ Official Gazette of Romania, Part I, no.917 of 17 December 2014.

²⁰ <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how>, consulted on 10.04.2018.

The articulation of the national strategy with the European one and the systematic approach of the issue of drafting / amending / repealing the normative acts is a necessity, under the current normative "inflation" and the increasing number of the decisions of the Constitutional Court in which exceptions / objections of unconstitutionality are admitted for violation of Article 1 paragraph (5) of the Constitution.

4.2. Developing institutions which are essential to the proper functioning of the rule of law; creating the bases for replacing international/supranational monitoring instruments with own national instruments

For example, in the field of justice, there is a supranational monitoring tool, namely the Cooperation and Verification Mechanism (CVM) established by the European Commission²¹. The internalization of the objectives of this Mechanism and the monitoring of its achievement can be realized, in our opinion, through the development of instruments created by national policy documents, such as the Judicial System Development Strategy 2015-2020 and the National Anticorruption Strategy 2016-2020²².

The Strategy for the Development of the Judicial System 2015-2020²³ is a public policy document agreed and assumed by the main institutions of the judiciary system²⁴, in line with the recommendations of the European Commission formulated in the MCV, with the main recommendations made by the World Bank experts in the project "Analysis Functional Judicial Function in Romania", as well as recommendations and conclusions formulated in other recent projects on the optimal functioning of the Romanian judicial system. The main directions of action are the efficiency of justice as a public service, the institutional consolidation of the judiciary, the integrity of the judiciary, the transparency and computerization of the act of justice, and the guarantee of free access to justice. Each direction of action has associated general and specific objectives. The Action Plan

²¹https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_ro, consulted on 10.04.2018.

²² elaborated in the light of the conclusions of the Ministry of Justice's assessment of the implementation of the National Anticorruption Strategy 2012-2015, as well as the conclusions and recommendations of the Independent Impact Assessment Report 2012-2015

²³ adopted by the Government Ruling no. 1155/2014, published in the Official Gazette, Part I, no. 19 of 12 January 2015.

²⁴ The Ministry of Justice (MJ), the Superior Council of Magistracy (SCM), the High Court of Cassation and Justice (HCCJ), the Prosecutor's Office attached to the High Court of Cassation and Justice (PÎCCJ), with its specialized structures - the National Anticorruption Directorate (DNA), The Directorate for the Investigation of Organized Crime and Terrorism (DIICOT).

for the implementation of the Judicial Development Strategy 2015-2020 was approved by the Government Ruling no. 282/2016²⁵ and details the measures, responsibilities, indicators and timetable for implementing the Strategy. Thus, the Action Plan comprises 6 activity lines (from A to F), which are detailed in 19 strategic objectives, which are in turn devoted to 153 measures. For each measure, the Action Plan sets deadlines, targets and performance indicators. Monitoring of the Plan is carried out by the Strategic Management Board (CoMS), composed of representatives of the Ministry of Justice, the Superior Council of Magistracy, the High Court of Cassation and Justice and the Public Ministry, together with the Monitoring Committee and a Technical Working Group established to support the activity of the Board.

The National Anticorruption Strategy (SNA), approved by the Government Ruling no.583/2016²⁶, constitutes a framework for cooperation of all public institutions representing the executive, legislative and judicial power, local public authorities, the business environment and civil society, in order to prevent corruption. To achieve this, precise (general and specific) objectives, performance indicators, milestones, monitoring and reporting obligations are set. The general goals of the Strategy, assumed by the Government, are: developing a culture of transparency for open government at central and local level; increasing institutional integrity by including corruption prevention measures as mandatory elements of managerial plans and their periodic assessment as an integral part of administrative performance; strengthening integrity, reducing vulnerabilities and corruption risks in priority sectors and areas of activity; increasing the level of knowledge and understanding of integrity standards by employees and beneficiaries of public services; strengthening the fight against corruption through criminal and administrative means; increase the degree of implementation of anti-corruption measures by approving the integrity plan and periodic self-evaluation at the level of all central and local public institutions, including those subordinated, coordinated, under authority, as well as public enterprises.

The implementation of the SNA is done under the authority and coordination of the Minister of Justice, but with a wide institutional and civil society involvement, because prevention of corruption is and must be a goal at the level of the whole of society. In order to have a permanent dialogue on all levels, cooperation platforms were developed respectively: the platform of independent authorities and anti-corruption institutions; the central public administration platform; business platform; the civil society platform. Specifically, these platforms imply meetings of representatives of those sectors convened quarterly or whenever necessary, at the Ministry of Justice, to discuss issues raised by the implementation of the strategy, namely to identify with progress in implementing SNA

²⁵ Official Gazette of Romania, Part I, no. 311 of 22 April 2016.

²⁶ Official Gazette of Romania, Part I, no. 644 of 23 August 2016.

issues in order to correct them, but also to increase the level of knowledge, understanding and implementation of measures to prevent corruption in the public and private sector.

The Technical Secretariat (operating at the Ministry of Justice), with the support of the institutions represented at the platform level, carries out activities which involve monitoring and institutional support for the implementation of the strategy, including centralization and regular updating of the implementation status of the measures of institutional transparency and prevention of corruption on the basis of reports of self-assessment; documentation and dissemination of identified anticorruption practices; organizing the thematic evaluation missions; exchange of best practices. By Order of the Minister of Justice no. 1361/C/2017 what has been approved in this respect is the Methodology for monitoring the implementation of SNA 2016-2020.

As was emphasized by the meetings with representatives of the European Commission, the Strategic Management Board and the instruments created by the two Strategies as a whole can ensure both effective judicial monitoring and corruption prevention, and can be further adapted and developed to replace the Cooperation and Verification Mechanism set up by the European Commission. Of course, this requires a careful follow-up of the results and adaptation of the indicators, in line with the developments. The first Monitoring Report on the state of implementation of the Action Plan for the Judicial Development Strategy 2015 - 2020, endorsed by CoMS, was published on the Ministry of Justice website and includes the analysis of the fulfillment of all 258 indicators, both those with the implementation which was before December 31, 2017 (inclusive), and those who have a deadline after that date to get an overview of the achievement of the entire Action Plan. The report proposes measures to remedy the deficiencies found, also allowing for a re-adaptation of the Plan in line with the developments. Regarding the SNA, a result of the cooperation platforms provided by the Strategy is the implementation of the thematic evaluation missions at the level of the public institutions, regulated by the OMJ no. 1361/C/2017, which aims at finding effective mechanisms for implementing anti-corruption measures. For the year 2017, the themes of the evaluation missions were: the declaration of gifts, the protection of public-interest whistleblowers, sensitive functions. The use of evaluation questionnaires as well as the evaluation visits allowed the assessment team, together with the SNA Technical Secretariat, to monitor the implementation of preventive measures, identify examples of good practice at institutions and formulate recommendations. These three objectives are also reflected in the structure of the evaluation reports (findings, good practices and recommendations). Thus, this monitoring mechanism proves to be a useful tool in terms of quantifying the level of knowledge of the legal provisions on the integrity and implementation of anti-corruption measures. Such missions are to be carried out in 2018. The cooperation platform meetings allow the exposition of progress made by institutions and the identification of problems encountered in the SNA implementation, as well as

providing support and guidance in SNA implementation. During December 2017 cooperation platform meetings, the draft Standard Methodology for Corruption Risk Assessment within Central Public Authorities and Institutions was presented, as well as the draft Ex-post Methodology of Integrity Incidents, needed to achieve General Objective no. 2 of the SNA - *"Increasing the institutional integrity by including corruption prevention measures as mandatory elements of managerial plans and their periodic evaluation as an integral part of the administrative performance"*, which, in our opinion, corresponds to the internalization of the specific objectives of the prevention of corruption contained in the MCV and justifies the role we have assigned to this Strategy.

The elements that I briefly highlighted²⁷ present objectives, concrete activities, measures, including legislation, adopted as a result of some Strategies, in fact their benefits as a public policy tool. As can be seen, the two Strategies cover complementary areas, corresponding to those covered by the MCV, a true coherent framework that would allow the maintenance and development of progress over the 10 years since it operates. The constant pursuit of the achievement of the objectives of the two Strategies, the substantiation of new measures based on the results obtained are likely to serve the purpose of internalizing the cooperation and evaluation mechanism in the above-mentioned sense.

4.3. Achieving the obligations assumed by the Romanian state at both national and international level; solving systemic problems

An example in this regard is the national Strategy for Social Reintegration of persons deprived of liberty 2015-2019, approved by the Government Ruling no. 389/2015²⁸. It provides for 49 activities to be carried out in the four years of implementation. The fields of intervention, correlated with the problematic aspects identified in practice, imply, from the perspective of creating the premises to facilitate social reintegration and implicitly to reduce the risk of relapse: adapting the educational programs, psychological assistance and social assistance to the needs of the persons deprived of their liberty; diversifying the supply of education and psychosocial assistance programs and activities, with a view to involving as many people who have been deprived of their freedom as possible; community empowerment and awareness of the importance of social reintegration of people deprived of their liberty and those who have executed custodial sentences; facilitating post-detention assistance; regulate, insure and access specialized services or centers to support the social reintegration efforts of persons who have

²⁷ See, detailed, Marieta Safta, <http://europunkt.ro/2018/01/30/interviu-marieta-safta-secretar-de-stat-la-ministerul-justitiei-realizarea-obiectivelor-sna-inseamna-in-esenta-promovarea-unei-culturi-a-integritatii-la-nivelul-societatii/>, consulted on 10.05.2018.

²⁸ Official Gazette of Romania, Part I. Nr. 532 of 16 July 2015.

served custodial sentences, with a focus on supporting the proximate communities. Coordination of implementation and monitoring of the Strategy is carried out by the Inter-ministerial Commission for Coordination and Implementation of the Strategy, which includes the following institutions: the Ministry of Justice (MoJ), which is also the President of the Commission; Ministry of Labor and Social Justice (MMJS); Ministry of National Education (MEN); Ministry of Internal Affairs (MAI); Ministry of Health (MS); National Probation Directorate (DNP); National Penitentiary Administration (ANP). The Commission's technical secretariat is provided by the National Penitentiary Administration.

The implementation of the Social Reintegration Strategy of persons deprived of their liberty is among the measures included in the Governance Program, as part of the Justice chapter²⁹. The strategy harmoniously complements the 2018-2024 timetable for the resolution of overcrowding and detention conditions in the execution of the pilot judgment *Rezmives and Others v. Romania* delivered by the European Court of Human Rights on April 25, 2017, approved through Memorandum by the Government³⁰ and, from this perspective, has the capacity to respond to the obligations assumed by the Romanian state on this segment, which has an important resonance, both at a national and international level.

5. Conclusions

The issue of public policy documents has represented and continues to represent a concern at the level of the central public administration; an obvious regulatory effort has been made to prepare Romanian state for EU membership, in order to link this issue to the European incident framework.

Taking into account the role of public policy documents, they must continue to benefit from increased concern both from decision-makers and civil society. Attention must be given, of course, to the process of their elaboration, correlating the national / supranational / international plans, objectives for which manuals and guides have been elaborated. In our view, however, greater attention should be paid to the monitoring and reporting process, so that the assumed objectives do not remain ineffective. Regarding normative acts, there is a presumption of knowledge, but this is a legal fiction that fades more and more in the context of a real "inflation" of regulations and an increase in their complexity by overlapping national / European / international plans. Even more so with regard

²⁹ In 2017, the activity of the Interministerial Commission focused on accelerating the implementation of the activities of the National Plan of Implementation of the GD no. 389/2015 and the mobilization of all the partner public institutions, in order to assume the responsibilities established according to the normative framework.

³⁰ <http://www.just.ro/wp-content/uploads/2018/01/calendar-masuri.pdf>, consulted on 10.05.2018.

to public policy documents, it is necessary to ensure real knowledge and awareness of their role, including through the elaboration, modification, application of normative acts.

We have focused here more on the issue of the link between public policy documents and the adoption of normative acts. Also for this background, but also for what policy documents provide as a whole, full transparency is needed in the process of drafting and monitoring, publicly available publicly accessible information, identifying ways of engaging civil society, to dynamize the achievement of the objectives of public policy documents. These are all measures that ultimately help to achieve a legal system characterized by stability and predictability, linked to national needs as well as to the international reference framework.

Last but not least, although it is not qualified as a public policy document, the memorandum remains, in our opinion, an act whose legal framework should be clarified at a future amendment of the relevant regulations in the sense of establishing clear founding, elaboration, monitoring, and public disclosure rules.

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The administrative disputes law, between complementarity and incompatibility

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Abstract

Are these two framework regulations (the Administrative Disputes Law - ADL and the Civil Code) complementary or incompatible? The referee of this relationship should be "the specificity of public power relations" between the administration and those administrated. Therefore, the first objective to be established is to clarify the content and the limits of this notion. And, as our doctrine and case law formed after the entry into force of the current form of article 28 of ADL does not provide decisive arguments, it is necessary to investigate the fundamentals of administrative law. The second objective - to which the results of this study are related - is the review of the main civil law institutions and their reporting to the already studied notion. Thus, the regime of goods, obligations and contracts, succession and prescription, but not only, shall be the subject of the test of compatibility with the specificity of the legal relations of public power. And the conclusions - obviously divergent, in the sense that some civil law institutions have passed this test, others have not, should for the future, be a reference point for judicial practice in those situations where they are confronted with such legal issues, not extremely frequent but of an appreciable difficulty.

Keywords: contentious matter, the Civil Code, legal act, freedom to enter into agreements, legal relations of public power.

JEL Classification: K19, K23, K41, K49.

1. Pandora's box... or not?

According to art. 28 par. (1) of Law no. 554/2004 on administrative litigation, a text called **Supplementation by ordinary law**, "*The provisions of this law are supplemented by the provisions of the Civil Code and of the Civil Procedure Code, in so far as they are not incompatible with the specific nature of the balance of power between the public authorities on one hand, and the persons whose rights and legitimate interests have been injured, on the other hand*".

Prima facie, it would seem that the tiny law on administrative litigation has two giants standing behind it: two Codes, with over 3,500 articles, if we add them. Art. 28 par. (1) thus seems a portal towards another legal universe, a portal which, once opened, cannot exclude any kind of surprises.

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Therefore, it would have been expected that the quoted provisions be subject to a careful scrutiny mainly by the doctrine, as it represents an important source of potential contradictions... Unfortunately however, in the best case the doctrine merely reminds of the existence of this legal text, without attempting, at least as a matter of principle, to confront the two regulations that, as we shall see, should be considered incompatible at a first sight.

Nonetheless, the same text also establishes a “filter”: **the compatibility with the specific nature of the public power balance** between the administrative authorities and the citizens. Nevertheless, we soon notice that none of the definitions attached to art. 2 of the law makes any reference to these notions (and it may be for the best), so that up to this moment, nothing has even been discussed, much less settled. In other words, up to this moment, nobody in our legal system has tried to find whether the provisions of art. 28 allow a massive infiltration of private law rules into the administrative litigation or, to the contrary, the “filter” of the specific nature of the public power relationships attenuates the presence of these rules into the public law to such extent that the private law can barely make its presence here known.

This is why my approach tries if not to fill a gap – as such a gap could hardly be filled with a ten-page analysis – at least to signal its existence as well as the challenges it raises. Thus, after this brief introduction to the issue of this study (1), it would be a matter of priority (2) to establish which are the specific features or the public power relationships, features that would make them incompatible with the general principles of the Civil Law (principles that, therefore, would be inapplicable). Then, after eliminating the provisions of the Code considered incompatible, I shall determine whether and why there still remains something complementary to the administrative litigation (3).

2. On the public power relation and its specificity

The legal relationship, one of the main notions of the General Theory of Law, consists mainly of a relationship between two legal entities (persons) which engenders, modifies or terminates rights and/or obligations (legal effects). Another characteristic of the law is the dichotomy between the two fundamental types of legal relationships: one governed by private law and the other by the public law (the public authority).

(a) **The private (civil) law legal relationship**, mainly regulated by the Civil Code, has two red lines: (1) it *is configured* based on the idea of **freedom**: any person undertakes only *as many* obligations as he/she decides, *if* and *when* he/she decides so². Everything rests of course, between the limits of law and morale. Then, once the legal relationship is formed, (2) it *works* based on the idea of **equality**: this must not be construed in a simplistic (and therefore faulty) manner

² Undertaking civil obligations, the person waives, in reality, a part of his/her freedom.

in terms of identity of rights/obligations, or in terms of equality of their number. The equality of the parties is visible in the identical character of their legal status: in case of a failure to comply with the obligations to which it is entitled, any of the parties can apply to the judicial authorities to seek justice (the so-called “recourse to the coercive force of the state”). Likewise, viewed *in a negative construction*, equality means that neither of the parties has as a matter of principle, the right of taking justice in one’s hands. This is simply because it does not have the benefit of the public authority to exercise it over the other party.

(b) The public power relationship however, is not confined to the shape of a single model: between the legal persons governed by public law, or between them and those governed by private law different (sub)types of legal relationships can be configured: some **horizontal**, suggesting a certain equality between the parties (the so-called “collaboration” relationships between the authorities); others **vertical**, of a strict subordination (these are also between public authorities, some of the hierarchically superior to others over which they exercise the hierarchic control). However, the “traditional”, “classic” public power relationship, the one established between a public authority (a legal entity holding the public power) and a common private person (a private law entity that, by definition, lacks the exercise of this “special” power), does not fit into any of these types, given that the two parties are not equal from the point of view of their legal powers, nor can we say that there is subordination (this is an exaggerate idea, how can we be considered subordinated to the ones that we elected³?). Consequently, from a geometric point of view, this relationship is ... **oblique!** The public authority has more legal powers than the private person with which it enters the respective relationship given that while the latter has to seize the administrative litigation court in order to seek recognition of the possible rights arising from this relationship, the former, having itself the exercise of the public power, can make itself justice. Therefore, within such a legal relationship, *there can be no equality*. On the other hand, considering that the privilege of the unilateral nature of the administrative acts is the first and most important element of the exorbitant regime enjoyed by the administrative act⁴, the legal relationship arises regardless of the existence of the consent of the addressee of the administrative act. Therefore, *there can be no freedom* within such a legal relationship, at least from the perspective of the private person involved in it.

³It cannot even be said that the sanctioned person is subordinated to the one applying the sanction given that the sole power of the authority is (during the first stage) to draw up an administrative act applying a sanction and, then, to enforce the sanction, whilst the exercise of a power even to impose sanctions, is too little for the general idea of subordination within a legal relationship. Much less can we talk about subordination within a legal relationship in which for example, the mayor of an administrative territorial unit refuses to issue a building permit to an applicant.

⁴For details, see Ov. Podaru, *Actul administrativ (I) repere pentru o teorie altfel*, Hamangiu & Sfera juridică Publishing House, Bucharest, 2010, no. 11-12.

Here are two major sources of incompatibility of the public power relationship with the Civil Code. I shall address each of them below.

2.1. The incompatibility with the idea of equality, a complete incompatibility

I have already stated the basic idea: it remains to be seen whether the Civil Code comprises explicit legal provisions instituting the idea of equality between the parties of a civil law relationship. Thus, undoubtedly, the *spirit* of the entire Code resonates with this idea of equality of the legal entities when entering among themselves, into different civil law relationships, but one cannot find at every turn, explicit regulations bluntly stating this rule. Here and there, one can however find such regulations.

a) thus, from the regulation concerning the *defects of consent* (art. 1214 par. (2) – intentional fault, 1216 par. (1) – violence, 1222 Civil Code– damage), clearly results this principle of equality in that all these defects must be relied on in court, the only one that can decide the annulment of the contract concluded under these circumstances. Evidently, all these provisions are incompatible with the administrative litigation field, in the case of public power relationships: in these situations, if the administration's consent is vitiated, it will certainly not seize the administrative litigation court instead countermanding itself the fraudulent act⁵, as the doctrine unanimously admits that the administrative acts issued by fraud (and, all the more, through violence) are always revocable;

b) likewise, the rules concerning the *possession* (art. 916 and the following of the Civil Code) are not compatible with the public power relationships, perhaps because of the inequality between the administration and the particulars (from the perspective of their legal status): neither the *bona fide* possession, nor the usucapion/acquisitive prescription can be manners of acquiring the public property; whilst nothing prevents the administration to acquire through these manners, the property of particulars if the legal conditions are met.

c) finally, neither the rules concerning the *civil dismemberments of the ownership* (surface right, usufruct, use, housing right, sometimes servitude/easement right) are not applicable for the same reason to the publicly owned goods: the legal inequality, having as its source the principle of the priority of the public

⁵Thus, the rule of principle – art. 1 par. (6) of Law no. 554/2004, - according to which the issuing public authority must seize the administrative litigation court to seek the annulment of the acts entered into the civil circuit, thus becoming irrevocable, does not apply, in our opinion, to this situation given that in the case of fraud used by the beneficiary of the respective act, the stability of the legal relations cannot be relied on to its benefit. That this is true, it is a fact often recognized by the special regulations. For instance, according art. 146 of Law no. 1/2011 concerning the national education: „*The rector can annul, with the approval of the University Senate, a certificate or a diploma when it is proved that it was obtained through fraudulent means or with the breach of the provisions of the University ethics and deontology Code*”.

interest over the private interests, prevents the creation of dismemberments characterized by legal stability. On the contrary, the public property allows its own dismemberments (administration, concession, free use) which by their very nature are *precarious*, meaning that they can be countermanded whenever the public interest requires it. Therefore, it is precisely the inequality specific to the public power relationship that prevents the formation of these civil dismemberments the existence of which is devised by the Civil Code starting from the contrary principle, that of the equality of the parties of the legal relationship thus formed.

2.2. The incompatibility with the idea of freedom, a partial incompatibility

Much more provisions suggest or bluntly state the idea of freedom enjoyed by the civil law entities. Here are some of them, obviously incompatible with the public power relationship. Of course, I do not claim to have made an exhaustive review, but I have grouped them into two categories: the first one concerning the actions of the public administration; the second concerning the addressees of the administrative acts:

a) *The freedom of an administrative body*

(i) the freedom to enter into agreements, even free of charge. According to art. 12 par. (1) of the Civil Code, “*Anyone has the right to dispose freely of its assets unless otherwise provided by the law*”, and according to par. (2) “*Nobody has the right to dispose free of charge as long as it is insolvent*”.

The freedom to dispose freely of one’s own patrimony, synonymous up to one point with the freedom to enter into agreements, ultimately represents a form of the freedom to act (freedom of action). However, in the case of the public power relationships, this freedom is quasi-inexistent:

i.1. concerning the publicly owned goods, the administration cannot dispose of them given that they are inalienable. They can only be administered (managed). Therefore, in a subtle way it could be argued that in the case of the public power relationships, **the law always explicitly provides otherwise**, so the final sentence of the text in the Civil Code applies.

i.2. the freedom to enter into agreements is almost inexistent. Once the need (the public interest) appears, the **necessity** to enter into agreements also appears. And then it is obvious that considering the complexity of the procedures existing in the field of public procurement or of concessions, the administration is not free to choose the contractor, conserving only a limited freedom to negotiate certain contractual clauses which do not prejudice the regulatory part of such a contract. Consequently, the provisions of art. 1169 of the Civil Code, according to which “*The parties are free to conclude any contract and to establish their content, within the limits provided by the law, by the public policy and by the principles of morality*”, has an extremely limited applicability in the field of ad-

ministrative contracts. Finally, art. 1168 of the Civil Code recognizing the freedom of the civil law entities to enter into innominate contracts, is not applicable at all: the public administration can only enter into those agreements expressly permitted by the law, otherwise we would completely ignore the notion of “competence”.

i.3. the freedom to make ... donations is completely unknown to the public administration. This is on one hand because a donation (as construed in the civil law) cannot serve the public interest; on the other hand, the donee is no longer equal to the others in front of the donor authority. True, there is the concept of subsidies, allowances, etc. which are donations as a matter of principle, but even when they are made with the intention to gratify (given for instance, the highly precarious state of the donees), in this case it is not a donation, but an obligation! This is because in order to comply with the principles stated above, the administration is always under the obligation to treat in the same way all those placed on similar positions; consequently, such subsidies, allowances etc., are not singular⁶.

(ii) the freedom of the form. From the stipulations of art. 1240 of the Civil Code clearly results one of the great principles of the private law: *that of mutual consent*. What matters is the consent, not the form in which it is expressed. Therefore, the written form, the verbal form, and also an unequivocal attitude, any of them is enough to carry a valid consent. This is thus another form of the freedom to enter into agreements. On the contrary, the *formalism principle* is the one governing the entire activity of the public administration, so we are obviously in the presence of a complete incompatibility between the principle of the mutual consent and the contrary one: both the administrative acts, and the administrative contracts can only be issued/concluded in written form. Therefore, the provisions of art. 1240 of the Civil Code definitely cannot supplement the provisions of Law no. 554/2004.

(iii) time-sharing (“multiple ownership”). According to art. 687 of the Civil Code, there is multiple ownership “*where several persons exercise successively and repetitively the prerogative of use specific to a ownership right over a movable or immovable property, for specific, equal or unequal periods of time*”. This atypical legal regime, regulated by art. 687-692 of the Civil Code, arises, according to art. 688 of the Civil Code, based on a legal act that two or more legal entities are free to conclude. Obviously, however, this type of co-ownership is incompatible with the public property (the only type of ownership that gives rise to public power relationships), given that it is unconceivable that the same property could intermittently be assigned and not assigned. Moreover, even if it could scarcely be admitted that a certain property is assigned to the public use only during a certain season, for instance, it is rather difficult to conceive that that state

⁶ For details see also Ov. Podaru, *Drept administrativ, vol. II – Dreptul administrativ al bunurilor*, Hamangiu Publishing House, Bucharest, 2011, no. 117.

and the administrative territorial unit would accept the risk posed by the private ownership regime all throughout the time where the public use is not present.

b) The freedom of the addressee of an administrative act. The unilateral act as a source of obligations

According to art. 1327 par (1) of the Civil Code, “*The unilateral commitment made with the intention of undertaking obligations regardless of the acceptance, is binding only for the author*”, and according to par. (2) “*The addressee of the act can refuse the right arisen this way*”. Read in its spirit, this text is obviously incompatible with the public power as, in the first place it tells us what **cannot be imposed** to a third party through the someone’s unilateral will: **obligations!** Not even the rights can be imposed to the third party that has not expressed its consent to the act. On the contrary, specific to the public power relationships is to impose obligations to the addressees without their consent. Regarding the rights, if there are **exclusively rights**, it is true that they cannot be exercised, like any other right, unless the holder intends to do so; here is therefore, a partial compatibility with the idea of freedom from the civil law. However, there are also examples of *rights-obligations*, and in their case, the public power relationship admits no freedom for the addressee of the administrative act.

3. What is left?

3.1. As a matter of principle, nothing!

This blunt answer can be rooted in the provisions of art. 2 of the Civil Code, called **The object and the content of the Civil Code**. According to par. (1): “*The provisions of this Code regulate the property and personal (non-proprietary) relationships between persons, as civil law entities* [my italics, Ov.P.]”. However, if it is so, given that within the public power relationships, even admitting that they are formed between two persons (at least one of them pertaining to the public law), they do not act as civil law entities⁷, the Code itself seems therefore, to deny its applicability, even subsidiary, to the public power relationships. The idea seems confirmed by par. (2) of the same legal text: “*This Code integrates a set of rules representing the ordinary law for all the fields encompassed by the letter of the spirit of its provisions*”. However, the rule providing that the **spirit of the Code** is meant to apply only to the private law legal relationships had just been stated.

Could there be any chance left with its **letter**?

⁷ Of course, it is not unlikely for a civil law legal relationship to be created between a public law person and a private law one, or even between two public law ones, so that the two parties of the relationship would act in their capacity of civil law entities. But, in this case, the relationship envisaged is not a public power one and if it becomes a litigation, the competent court is not the administrative litigation one but the ordinary law court, and thus the matter is of no interest for the present study.

3.2. Still...

Starting from this idea, I have read through and through the Civil Code, looking for some texts that could apply to these public power relationships. I have found that many times, the “letter” of the Code, that is the legislator’s intention expressed concerning specific aspects, surpasses its principled “spirit”, that is its general intention to be applied only to the private law legal relationships. Consequently, not only there are certain provisions that can be very well applied to the public power relationships, given that practically, the nature of the legal relationship regulated seems irrelevant (I have called these rules – “technical”), but there are moreover, certain rules that can only be applied to the public administration and to the public law legal persons. Therefore, the Code itself derogates at some points, from its basic idea. This is the reason why I shall examine first these rules and their relation to the administrative litigation, then, at the end of the study, I shall bend over the others.

a) The rules concerning directly and exclusively the public administration

Reviewing the provisions of the Civil Code, we shall notice that within its content there are at least four categories of atypical rules which are inapplicable to the civil law entities, being closely related to the public law capacity and the public power relationships entered by the public law persons. These regard: (i) the territorial jurisdiction of the public authorities; (ii) the public law legal person and its liability; (iii) the public property; (iv) acquisition of vacant heritage (estate without known heirs). A few words about each of them:

(i) The territorial jurisdiction of the public authorities. According to **art. 7 par. (1) of the Civil Code (Territoriality of the civil law)**, “*The normative acts adopted by the central public authorities and institutions are applicable over the entire territory of the country, unless otherwise provided*”, and according to par. (2), “*The normative acts lawfully adopted by the local public authorities and institutions are applicable only within their territorial jurisdiction*”. Surprising is not the content of these stipulations (which otherwise comprise unchallenged legal truths) but the place where they are: why would the Civil Code regulate the territorial scope of the normative administrative acts? The answer is found in the marginal title: because from the point of view of the Code, the normative acts instituting substantive law rules, are a species of the “civil law”, which offers food for thought: could it be that, at least in some respects, the Civil Code uses this feature – “civil” in its wider meaning, that of “non-criminal”, so that the its applicability as a matter of principle should be reconsidered? Here is a first challenge on which our doctrine should start a constructive debate.

Just as surprising is the regulation – albeit somewhat indirect, – of one of the sanctions of the legal act only acknowledged for the administrative law: the

inexistence⁸. It is thus acknowledged that outside the territorial jurisdiction of the local public authorities, their acts *are not applicable*, therefore being legally in-existent.

(ii) **The public law legal personality and the liability (apparently civil) of a legal entity that (also) has such a capacity.** According to **art. 191 par. (1) of the Civil Code (The public law legal person)**, “*The public law legal persons are established by law*”, and according to par. (2), “*By way of exception to the provisions of par. (1), in cases especially provided by the law, the public law legal persons can be established by the acts of the authorities of the central or local public administration or by other ways expressly provided by the law*”. The public law legal personality, meaning the special capacity that allows the administrative bodies of the state or the administrative territorial units to exercise the public power with a view to enforce the law (thus creating public law legal relationships), can only be an emanation of the law: (a) either such legal personality is *directly* recognized by the law to a category of legal persons⁹, (b) or following the explicit permission given through a legal text, thus *indirectly*, such legal persons can be established as a rule, through individual administrative acts.

On the other hand, according to **art. 221 (The liability of the public law legal persons)** “*Unless otherwise provided by the law, the public law legal persons are liable for the lawful and unlawful acts of their bodies, under the same circumstances as the private law legal persons*”, an idea continued by the provisions of **art. 224 (The civil liability of the state and of the administrative territorial units), par. (1)** “*Unless otherwise provided by the law, the state is only liable in subsidiary for the obligations of the public bodies, authorities and institutions which are legal persons and none of these legal persons is liable for the obligations of the state*”, respectively **par. (2)** “*The provisions of par. (1) apply correspondingly to the administrative territorial units which only liable in subsidiary for the obligations of the public bodies, institutions and services subordinated to them wherever they have legal personality*”.

Supplemented by the provisions of art. 16 of Law no. 554/2004 instituting the liability of the person “*who contributed to the drafting, issuing or the conclusion of the act or, as the case may be, who is guilty for the refuse to solve the application concerning an individual right or a legitimate interest*”, the above-mentioned provisions mainly outline the general framework within which the

⁸For further details concerning this concept, see T. Drăganu, *Actele de drept administrativ*, Ed. Științifică, Bucharest, 1959, p. 149-156.

⁹For instance, according to art. 39 of Law no. 90/2001 on the organization and functioning of the Romanian Government and of the ministries, these latter have legal personality. Likewise, according to art. 2 par. (2) of Law no. 340/2004 concerning the Prefect and the Prefect's Institution, the latter has legal personality. In reality however, the text is inaccurately formulated: the law does not establish public law legal persons namely determined (The Ministry of Economy, the Prefect's Institution for Cluj County etc.), it only recognizes the legal personality of a certain category of public authorities/institutions etc., considering that, by its very essence the law is a normative act, so it cannot be addressed to a single legal entity.

public law legal persons are financially liable for the damage caused to the particulars first of all through the **misuse of the public power**.

(iii) **Vacant heritage**. By far the most ancient text of the civil legislation (a similar provision being found in the former Civil Code, with the only difference the beneficiary was the state and not the administrative territorial units), **art. 963 (Heirs at law) par. (3)**, which states that “*Lacking the heirs at law or the testamentary legatees, the estate of the deceased is passes to the commune, the city or, as the case may be, the municipality within the territorial range of which were situated the goods at the time the succession was opened*”, mainly contains a public law rule: on one hand, this legal text itself recognizes the fact that in the case of vacant heritage, the commune, the city or the municipality are not heirs at law or testamentary legatees thus, implicitly, they are not civil law entities even if the ownership passes is a private one and, consequently, the acquisition of this patrimony illustrates a public power relationship; on the other hand, according to art. 1138 second thesis of the Civil Code, this provision cannot be excluded by *de cujus* without establishing legatees, an idea that suggests the same legal nature of the legal relationship constituted through the opening of the succession¹⁰. Also worthy of notice is the expression used by the latter text “*any testamentary provision is deemed **unwritten**...*”, the word rather suggesting the sanction of **legal inexistence** of the act than that of its **invalidity**, a sanction specific rather to the administrative law.

(iv) **Public property**. The Civil Code assigns to this theme, fundamentally a public law one, an entire title (Title VI of Book III – arts. 858-875), a theme about which I have said on other occasion¹¹ that its inclusion into the Civil Code is at least questionable. On the contrary, the subject matter should be integrated into another code (Administrative Code or, within a more advanced legal system, even a Domain Code), devised in a unitary manner as starting from other premise, other legal principles than those on which the Civil Code is founded (the freedom and the equality of the legal entities, as shown above). Without the necessity at this time of an analysis of the provisions of this chapter, it must only be said that they apply exclusively to the goods managed by the public administration, thus the supplementation of the administrative litigation regulation would have taken place even lacking the explicit provision of art. 28 of Law no. 554/2004.

b) “*Technical*” rules

Even if the word “technical” is not perhaps, the most appropriate one, it refers to those legal institution regulated in detail, as a whole, by the Civil Code. Consequently, the special regulations settle to make reference to them and in the

¹⁰I have elaborated this subject on another occasion, which is why here I restrain to making the necessary reference (Ov. Podaru, *Drept administrativ, vol. II – Dreptul administrativ al bunurilor, op.cit.*, no. 105).

¹¹Ov. Podaru, *Comentariu – Cartea a III-a. Titlului VI. Proprietatea publică, in Noul Cod civil. Comentarii, doctrină și jurisprudență*, Vol. I. Art. 1-952, Hamangiu Publishing House, Bucharest, 2012, p. 1177 et seq.

absence of any provisions to the contrary, this “ordinary law” is entirely applicable¹². Further, I shall only recall these regulations, not because they are not worthy of a detailed analysis, but because in some situations I have already made this analysis and in others... maybe some other time!

(i) Prescription and limitation. On these two institutions I have already written two articles, analyzing even the compatibility of arts. 7, 11 and 19 of Law no. 554/2004 with those of the Civil Code (arts. 2500 et seq.)¹³. Obviously, the most important derogations are related to the length of the prescription and limitation periods, and to the concept of “serious grounds” connecting the two notions, respectively.

(ii) The terms of the legal act. Regulated by art. 13296-1420 of the Civil Code, there is no reason why these regulations should not apply most of them, also to the administrative acts¹⁴.

(iii) Joint liability. According to art. 16 of Law no. 554/2004, the officer guilty for the unlawfulness of the administrative act shall be liable towards the injured party jointly with the defendant issuing authority, for the damage caused. Obviously, the legal regime of this joint obligation should be the one regulated by arts. 1443-1460 of the Civil Code, but it is not unlikely that the case-law might someday, highlight some cases of incompatibility of this regulation with the public power relationships.

(iv) Neighbourhood relationships. The Civil Code has always comprised, although minimally, some urban planning rules, such as the minimum distance for buildings (art. 612), the minimum distance for the sight window (art. 615), or the right of way (art. 617). Naturally, the competent authorities must have regard to these regulations in their procedure for the adoption/issuance of the administrative acts (as a matter of principle, these are urban planning documentations, adopted by the local councils, or building permits, issued by mayors, respectively).

(v) Land book. The relevant provisions (arts. 875-925 Civil Code) are applicable also to public property goods (creating public power relationships). Also worthy of notice is the fact that there are some provisions applicable exclusively

¹² The fact that civil law is the common law in the area of administrative litigation is one aspect that was also considered in a commentary on Decision no. 1754 / 15.12.2016 of the Pitești Court of Appeal, to which we refer with this occasion (Andreea Tabacu, *Refuzul nejustificat în materia contenciosului administrativ. Termenul în care trebuie sesizată autoritatea publică*, în „Revista română de jurisprudență”, no. 1/2017, p.68)

¹³Ov. Podaru, *Despre prescripție și pseudo-prescripție în contenciosul administrativ*, in „Curierul Judiciar” no. 1/2014, p. 29-41; Ov. Podaru, „Termene în tandem în contenciosul administrativ – între coabitare și divorț”, in „Curierul Judiciar” no. 3/2014, p. 151-158.

¹⁴On other occasion I have however, shown that the public law is not very friendly with the resolutive condition, because of its retroactive effects, which is why it has to be treated carefully (Ov. Podaru, *Actul administrativ. Repere... op.cit.*, no. 34).

to these goods (and, relationships respectively): for instance, the public ownership is acquired through expropriation even without registration with the land book (art. 887 par. (1) Civil Code).

(vi) **Absolute nullity.** An inexhaustible subject both in the civil and the administrative law, nullity has lately found some indisputable landmarks. It is cert for instance, that in the case of administrative acts the nullity is only one (in other words, starting from the provisions of the Law on administrative litigation, we shall notice that there is a single regime of the nullity of the administrative act). However, leaving behind the derogatory provision in arts. 7 and 11 of Law no. 554/2004 (prescriptibility of the action), we are in front of an “absolute” nullity, borrowing the terminology of the Civil Code, so that its legal regime, regulated by the provisions targeting this type of nullity (they are found in arts. 1256 and 1265 of the Civil Code), could apply in addition to the administrative litigation law (the rules concerning the redrafting (art. 1259) and the conversion of the act (art. 1260) are, in my opinion, real “gold mines” for the administrative law).

c) Provisions that... simply do not fit!

I left at the end three categories of provisions (not even here do I claim an exhaustive approach) which have normally been elaborated by the compilers of the Code exclusively for the private law. However, maybe by chance, maybe simply because on these aspects, the law must be a monolith, these provisions could be considered fundamental for the administrative law as well, given that the public power relationship cannot be built based on rules different from these. Here are the relevant provisions:

(i) **Bona fide and the abuse of right.** According to art. 11 of the Civil Code, *„The agreements or the unilateral legal acts cannot derogate from the laws concerning the public policy and the accepted principles of morality”*. Then, according to art. 14, par. (1) *„All natural and legal persons must exercise their rights and perform their obligations in good faith, according to the public policy and the accepted principles of morality”*, and par. (2) *„Good faith is presumed in absence of proof to the contrary”*. Finally, according to art. 15, *„No right can be exercised with the purpose of harming or damaging another, or in an excessive and unreasonable manner, contrary to good faith”*.

About these fundamental concepts of law (good faith, public policy, accepted principles of morality, abuse of right) entire monographs can be written. I shall restrain here to show that transferring the idea to the administrative body’s “right” to exercise its powers, we shall notice that we are in the presence of explicit legal provisions establishing that **the discretionary power of the administration cannot be exercised with the purpose of harming or damaging the potential addressees, or in an excessive and unreasonable manner, in bad faith**. I wonder whether the administrative litigation court invested with the settlement of the merits of the case would not always have this legal ground at hand

to censure the opportunity of the administrative act when the evidence adduced show that the public power has been exercised unreasonably (excessively)¹⁵.

(ii) The application of the rules of the contracts to the unilateral acts. According to art. 1325 of the Civil Code, „*Unless otherwise provided by the law, the legal provisions concerning the contracts apply correspondingly to the unilateral acts*”. Therefore, this provisions transfers, *mutatis mutandis*, the rules applicable to the civil contracts, to the field of unilateral acts (with the aid of art. 28 of Law no. 554/2004, of course). Two of these categories of regulations have a special importance:

ii.1. The object and the “cause” of the legal act. Transposing these rules to the field of administrative litigation, we shall reach to the following conclusions: (a) both the object and the cause of an administrative act must exist, must be legal and moral – arts. 1226, 1236 of the Civil Code (a rule so broad, that it allows – and needs – extremely many further developments); (b) if the administrative act only represents the means of circumventing the compulsory legal provisions, there is a evasion of the law (art. 1237 of the Civil Code); (c) the sanction for breaching these rules is the nullity of the administrative act (art. 1238 of the Civil Code).

ii.2. The interpretation of the legal act. The transposition of the rules of interpretation of the contracts to the field of administrative acts also provides us with valuable legal rules: (a) the articles of an administrative act must be interpreted in a coordinate manner, the act representing a whole (art. 1267 of the Civil Code); (b) the act must be interpreted so that it engenders legal effects, not in a way that it cannot engender such effects (art. 1268 par. (3) of the Civil Code). This rule must be understood as meaning that, **if an administrative act can be construed in two different ways, one of them making it lawful and the other unlawful, the correct interpretation must be towards its lawfulness**, given that this interpretation, a kind of conversion, saves the act from nullity. (c) Still maybe the most important rule of interpretation is the subsidiary one. My affirmation might be bold, but, from the point of view of the drafting of its content, the administrative act is more like the adhesion contract, because in both cases, the acts have a single author that conceived them. Consequently, a major impact rule in the field of administrative law would be the one inferred from the application of art. 1269 par. (2) of the Civil Code, according to which **the unclear administrative act is interpreted against its author and in favour of the citizens (its addressees)**.

¹⁵ Of course, these provisions are perfectly supplemented by those of Law no. 554/2004 which, in art. 2 par. (1) let. n) defines the **abuse of power** as the *exercise of the assessment right of the public authorities in breach of the competence stipulated by the law or in breach of the rights and freedoms of the citizens*. However, the texts of the Civil Code, at least for a theoretician, seem less technical and with a seemingly broader applicability.

(iii) **The obligation of communication of the act to its addressee.** According to art. 1326 of the Civil Code, „(1) *The unilateral act is subject to communication when it establishes, modifies or terminates a right of its addressee as well as whenever the nature of the act imposes the information of the addressee.* (2) *Unless otherwise provided by the law, the communication can be made in any appropriate manner, depending on the circumstances.* (3) *The unilateral act produces effects from the moment that the communication reaches the addressees, even if he/she has not acknowledged it for reasons that are not imputable to him/her*”.

In the absence of an Administrative Procedural Code, the Civil Code is surprisingly, the one establishing by law, three important rules in the field of the individual administrative act: (a) the communication of this act to its addressee is *compulsory* (because, practically, all the situations are covered by the hypotheses listed in par. (1); (b) the communication must be *efficient* (meaning that the medium diligence addressee, could reasonably have the chance to acknowledge in due time the content of the act); (c) until the communication reaches the addressee of the act, it *does not produce any legal effects*. There are rules worthy of a more detailed analysis but this cannot find its place within this study, dedicated only to a “preliminary” meeting between the administrative litigation and the Civil Code.

4. Conclusions

A general conclusion is hard to sense. It is beyond any doubt: the Civil Code enriches considerably the field of administrative litigation, sometimes giving it surprising shades. Moreover, it is also into the Civil Code that we find rules that, in the absence of an Administrative Code, represent unwritten rules for the administrative litigation. These are however, easier to accept by the practitioners of law when they are explicitly established by the text of an organic law.

On the other hand, the vigilant legal expert shall always take with distrust the “helping hand” generously extended by the Civil Code to the administrative litigation: could that rule be compatible with the specificity of the public power relationships? Or is it... just a poisoned apple? We shall probably find the conclusion for each case, after long years of case-law...

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Commission institution - 'guardian of the treaties' and deputy of the execution and administration functions in the European Union

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Abstract

As the guardian of the Treaties, the Commission is the institution that promotes the general interest of the Union. From this perspective, the Commission exercises its legislative proposal, harmonizing the Union's interest with the national one. The Commission is therefore entitled to inform and prosecute the failure to comply with Union law, including the management of safeguard clauses. The Commission's execution and management functions presuppose, on the one hand, its power to adopt non-legislative acts and, on the other hand, to exercise the European Social Fund management rights.

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JEL Classification: K23, K33

1. Preliminary remarks

Also called the "Guardian of the Treaties"², the Commission, through its members, exercising its full independence, is the institution that promotes the general interest of the Union (Article 17 (1) TEU). In this capacity, and in particular from the perspective of the exercise of legislative promoters, the Commission, through the requests of the experts and experts from the Member States, harmonises the interest of the Union with the national one.

With regard to the supranational character of the Commission, which has been highlighted many times since its inception, it is explained by the fact that its members - commissioners - although appointed by the governments of the Member States, among their citizens, act in full independence and are not subject to any influence from the states that proposed it.

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² Thanks to art. 17 TFEU which provides, that "the Commission shall supervise the application of Union law". See, Pierre Mathjisen, *Compendium of European Law*, Ed. Club Europa, Bucharest, 2002, p. 112; Cornelia Lefter, *Fundamentals of Institutional Community Law*, Economica Publishing House, Bucharest, 2003, p. 172.

2. The Guardian of the Treaties³

The Commission supervises the application of Union law under the control of the Court of Justice of the European Union, thereby fulfilling its role as "Guardian of the Treaties".

Representing the Union's interest, the Commission ensures that the treaties and acts of the institutions (regulations, directives⁴, decisions, etc.) are enforced by individuals (natural or legal persons), Member States and even institutions.

"Guardian of Treaties" means⁵:

- information and prevention powers;
- powers to control and prosecute failure to comply with Union law and, ultimately, to impose it;
- the power to manage safeguard clauses.

2.1. The right of the Commission to be informed

The right of the Commission to be informed corresponds to the obligation of the Member States to take any general or specific measure to ensure fulfillment of the obligations arising from the Treaties or resulting from acts of the institutions of the Union. To this end, Member States:

- facilitates the Union's fulfillment of its mission;
- refrain from any measure which could jeopardize the achievement of the Union's objectives (referred to in Article 4 (3) TEU);
- fulfill the obligations laid down in special provisions, for example: art. 108 par. 1 TFEU, art. 114 par. (4) TFEU, Art. 121 par. (3) TFEU.

The Commission's right to be informed also follows from the acts of the institutions - in particular those directives containing a clause requiring the Member State to notify the Commission of the measures it is required to take to comply with that directive. This information and verification competence concerns both individuals and legal entities, for example Art. 337 TFEU, according to which "in order to carry out the tasks entrusted to it, the Commission may request and receive all **information** and may carry out all **necessary verifications**, within the

³ See, Ioana-Nely Militaru, *European Union Law, Timeline. Streams. Principles. Institutions. The internal market of the European Union. Fundamental Freedoms*, 3rd Edition, revised and added, Universul Juridic Publishing House, Bucharest, 2017, pp. 264-266.

⁴ See also C. Cojocaru, *Romanian Business Law. Fundamental concepts*, Universul Juridic Publishing House, Bucharest, 2018, p. 15.

⁵ See, G. Isaac, M. Blanquet, Isaac Guy, Marc Blanquet, *Droit communautaire general*, 8 éd, Dalloz, Paris, 2001, p. 61.

limits and under the conditions laid down by the Council, acting by a simple majority in accordance with the provisions of the Treaties"⁶.

On the basis of its **preventive power**, the Commission is particularly empowered to draw the attention of Member States to the risks of offenses, with a general competence expressed through recommendations (Article 60 TFEU, Article 97 TFEU) and **opinions** (Article 258, Article 126 (2), (3) and (4), Article 228 (4), Article 144 (3) TFEU) addressed to them.

2.2. The Commission has the power to monitor, monitor the failure to comply with Union law (primary and secondary law) and enforce the legislation concerned in order to respect it by individuals, Member States and institutions (the Union).

Violations of Union law committed by individuals (natural persons or legal entities) are in principle prosecuted and sanctioned by national authorities, but the Commission may itself apply sanctions, particularly in the areas of competition⁷ and transport - areas where the Commission can impose fines and penalties or security controls based on TEuratom⁸.

Compared to the Member States, the Commission has control powers over the special procedures imposed by Art. 96, art. 106 par. 3 and art. 108 TFEU, based on Art. 258 TFEU and Art. 141 TEuratom (under the same conditions as Article 258 TFEU), having the possibility to refer the matter to the Court of Justice following a pre-litigation procedure in which it is able to ascertain the Member States' failure to fulfill their obligations under the Treaties.

In the case of institutions, the Commission may initiate legal proceedings when it considers that their acts are in breach of Union law by way of contentious proceedings (Article 265 TFEU, Article 263 TFEU) and by way of consultation by the Court of Justice (Article 218 11 TFEU).

2.3. The Commission's right to manage safeguard clauses.

This right consists of the possibility for the Commission **to authorize**, in certain particular cases, **derogating measures from the provisions of the Treaties**.

We exemplify in this sense:

- in particular during the transitional periods, where the level of customs duties applicable to goods imported from a third country is liable, on entry into a

⁶ In this respect, the European Anti-Fraud Office (OLAF) has an important role to play.

⁷ On the distortion of the single market through State aid and the measures that the Commission can order see Cătălin-Silviu Săraru, *State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law* in Cătălin-Silviu Săraru (ed.), *Studies of Business Law – Recent Developments and Perspectives*, Peter Lang, Frankfurt am Main, 2013, p. 44.

⁸ See G. Isaac, M. Blanquet, *op. cit.*, p. 62.

country or territory, to (...) distort trade to the detriment of one of the States **it may ask the Commission to propose to the other Member States the necessary measures to remedy this situation** (Article 201 TFEU);

- in the field of capital and payments, **only on a proposal from the Commission** and after consultation of the ECB, the Council may adopt safeguard measures for a period of up to six months in respect of third countries where such measures are strictly necessary (Article 66 TFEU);

- in the field of harmonization of legislation, **the Commission** shall, if necessary, analyze a particular public health issue that has been the subject of harmonization measures, **proposing appropriate measures to the Council**. These measures may also include a safeguard clause (Article 114 (8), (9) and (10) TFEU);

- in the context of economic and monetary policy, where the Council has not provided the mutual assistance recommended by the Commission or where the mutual assistance granted and the measures taken are insufficient, **the Commission shall authorize the Member State** with a derogation in difficulty **to take measures safeguarding** which conditions and rules they define (Article 143 (3) TFEU). In the event of an unforeseen balance of payments crisis, a Member State with a derogation may provisionally take the necessary safeguard measures. On a recommendation from the Commission and after consulting the Economic and Financial Committee, the Council may decide that the Member State concerned shall amend, suspend or abolish the safeguard measures referred to in Article 144 (1) and (3) TFEU.

3. The Commission's coordination, implementation and administration functions⁹

3.1. Coordination function

According to art. 121 par. 3 TFEU, for closer coordination between economic policies, the Commission reports to the Council monitoring economic developments in each of the Member States and the Union, as well as the consistency of economic policies with the general guidelines.

In this context, the Commission encourages cooperation between Member States and facilitates the coordination of their action in all areas of social policy. To this end, the Commission works closely with the Member States through studies, opinions and consultations (Article 156 TFEU).

In most areas covered by the Treaty, the Commission can take any initiative to promote the coordination of Union action with those of the Member States. These areas are: public health (art. 168 par. 2 par. (Article 181 (2) TFEU),

⁹ See Ioana-Nely Militaru, *op. cit.*, p. 268-271.

industry (Article 173 (2) TFEU), research, technological development and space (Article 181 (2) TFEU) 214 (6) TFEU).

3.2. Execution function

As regards **the enforcement function**, the TFEU contains a general provision in this respect, in Art. 291 par. (2) TFEU, which states that **"where uniform conditions for the implementation of legally binding Union acts (adopted by the Parliament and the Council) are required, those acts shall confer implementing powers on the Commission"**.

The Treaty of Lisbon also introduced new rules and general principles on "mechanisms for Member States to control the exercise of implementing powers by the Commission" (Art. 291 par. (3) TFEU and Regulation (EU) No. 182/2011]. They replace the previous mechanisms for committees with two new instruments, **the consultation procedure and the examination procedure**. Parliament's and Council's right of scrutiny is formally included and an appeal is provided for if there is a conflict. Article 291 par. 2 TFEU shall be supplemented by special provisions expressly providing for specific cases in which the Commission institution has implementing powers, for example: Art. 105 TFEU, art. 154 TFEU, etc.

In the process of enforcing EU legal acts, it has imposed, since the 1960s, comitology, and the practice of using the committees. To monitor the way the Commission exercises its executive power, the Council has created three types of committees composed of national experts: the Advisory Committee, the Management Committee and the Regulatory Committee. They may, in some cases, by their unfavorable vote, withdraw the Commission's decision to return it to the Council. This procedure was considered by the CJEC to be in line with the Institutional Treaties, as long as the institutional balance is not changed. Thus, the term **"comitology"** appeared, which means, in community language, the practice of using committees in the execution process. The procedural rules concerning the exercise by the Commission of the powers conferred by the Council were laid down by Council Decisions laying down the procedures for the exercise of implementing powers conferred on the Commission. "Comitology has given rise to years of political disputes between the Council and the Parliament, which have expressed their concern about the imbalance of the interinstitutional balance by excluding Parliament from the procedures for implementing the rules adopted by the Council.

The practice of "comitology" has been replaced by **the Treaty of Lisbon by the "delegated acts" system, which delegates to the Commission the power to adopt non-legislative and general acts which supplement or amend certain non-essential elements of the act legislation** (Article 290 (1) TFEU).

The new procedure makes a clear distinction between legislative and non-legislative acts. "The consequences of these changes are extremely important for

the EP, as it has reached historical maturity and is on an equal footing with the Council”¹⁰.

The Treaty of Lisbon opens a "new era" for delegated acts and implementing acts. According to him, powers delegated to the Commission will have to be subject to special conditions and limits and to control and surveillance mechanisms¹¹. The objectives, content and duration of each delegation case must be defined "in an express and meticulous manner" in each act (regulation, directive and decision).

We exemplify in this respect the Commission's competence to put forward proposals on the development and implementation of the common agricultural policy, including the replacement of national organizations with one of the forms of common organization provided by Art. 40 TFEU, as well as the implementation of the special measures provided for by the Treaty (Article 43 (1) TFEU).

The Commission also has an execution function, according to art. 105 par. 1 TFEU in that it ensures the application of the principles governing competition policy, principles established by art. 101 and art. 102 TFEU.

4. Administration function

As regards **the Commission's administration function**, it is exercised over the European Social Fund set up to improve the employability of workers in the internal market and to contribute to raising their standard of living (Articles 162 and 163 TFEU). In carrying out this task, the Commission is assisted by a Committee chaired by a member of the Commission and made up of representatives of governments and trade union organizations (Art. 163 par. (2) TFEU).

5. Conclusions

The Commission is the main promoter of legislative initiatives, with the monopoly of executive powers in areas such as competition and foreign trade. The Commission was made up of at least one Commissioner, but no more than two Commissioners per Member State. Initially, the Treaty of Lisbon provided for a number of Commission members equal to two thirds of the Member States as of 1 November 2014. In parallel, an element of flexibility was introduced which allows the European Council to determine the number of Commissioners [Article 17 (5) of the TEU]. In 2009, the European Council decided that the Commission should continue to be composed of a number of members equal to

¹⁰ The rapporteur of the EP Committee on Legal Affairs said, József Szájer [Group of the European People's Party (Christian Democrats), Hungary]; to be seen www.europarl.europa.eu/sides-getDoc.do?la, consulted on. 1.04.2018.

¹¹ *Idem*.

the number of Member States¹². The Commission leads the committees responsible for implementing Union law. also, 'comitology has been replaced by the' implementing acts and delegated acts' system.

The Commission is also the main interlocutor of Parliament in legislative and budgetary matters. In order to ensure greater democratic legitimacy of Union governance, Parliament's scrutiny of the Commission's work program and its implementation is increasingly important¹³.

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¹² See Petr Novak, April 2017, *Technical sheets on the European Union*, European Commission, http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuId=FTU_1.3.8.html, consulted on. 1.04.2018.

¹³ *Idem*.

Public legal person vs. public authorities. Delimitations. Legal framework. Categories

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Abstract

*The article is organized as an analytical study of the **public legal person** that stems on the finding that this concept is less known by law practitioners. The review opens on a number of conceptual delimitations grounded on civil law enforcement practice. It continues with the definition of a legal person, presentation of the substantive conditions of legal persons and then presentation of the substantive conditions of public legal person. Browsing the relevant legal framework, the article concludes with the identification of main categories of public legal persons.*

Keywords: *public legal person, public authorities, decision and executive bodies, legal entity, contracting authority.*

JEL Classification: K23

1. Terminology clarifications

In the absence of an Administrative Code or an Administrative Procedure Code to ensure consistency of terminology, law practitioners face the difficulty to switch among various laws that comprise inconsistent terminology and phrases, which may not be conflicting, but they overlap and generate confusion, ambiguity and lack of clarity. This is the case with phrases of *public legal person* vs. *public authorities*, where terminological inconsistency leads to practical blockages converting in delay of justice delivery, time lag, money lost and undue stress.

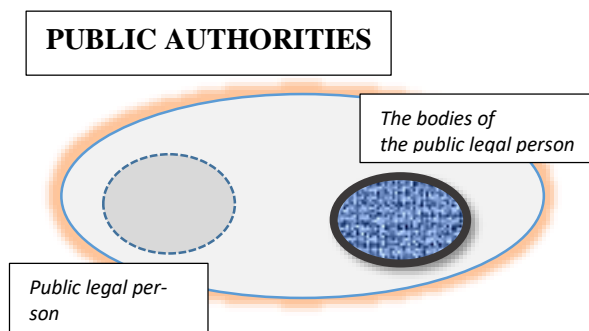
The initial blockage stems right from the Romanian Constitution. The constituent body of 1990 introduced in the Constitution the syntagmatic structure *public authorities*, a common language phrase, followed by no explanation, but lie on top to an unspecific enumeration causing a general confusion, a trap that still captures even experienced practitioners such as lawyers, judges, solicitors as well as those called to develop primary or secondary law.

Semantically, *public authorities* are a phrase enclosing two related institutions belonging to the same field of the administrative law, yet completely different from a legal perspective:

- *public legal person*; and

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- *decision and executive bodies of the public legal person.*



The above diagram shows the relationship between the three notions (public authorities, public legal person, the decision and executive bodies of the public legal person), namely:

**public authorities = public legal person + its decision and executive bodies;
and
public legal person \neq its decision and executive bodies**

Indeed, from a common sense perspective, unless we need to make a legal distinction between the holder of the legal person status (the holder of rights and obligations) and the enactor of will (the one holding the exercise of the rights and obligations), *public authorities* is a correct syntagmatic structure. Things change, however, when we transplant the *public authorities* phrase to the legal circuit and when a court does not distinguish between the holder of the legal person status and the enactor of will. A commune, for instance, is a *public legal person* that holds legal rights and obligations, whereas its local council is the decision body of the commune and the enactor of its will, but does not hold a legal person status.

From author practical experience as a civil law enforcement lawyer (bailiff), I must say that we encounter difficulties in serving around 50% of the court decisions where the debtor is a public legal person. Many times, courts established an obligation to a body and not to the legal person. For instance, a court may order to the *Local Land Acts Enforcement Committee* (a body) to pay 50,000 RON instead of obliging the payment on *Commune of Urzicuța* (the legal person). Poor Local Land Acts Enforcement Committee, it only has a passive procedural standing and no legal personality status, let alone that it holds no assets of its own. A body of the legal person cannot possibly be a subject of law and neither can it hold legal rights and obligations. It is the legal person who makes the subject of the legal rights and obligations, the Commune of Urzicuța in our case (a public legal person), the holder of the legal person status and of the assets and it is against this person that a court decision can be enforced.

Such situations are caused by the ambiguity contained in the notion of *public authorities* who traps legal practitioners one by one:

- *Lawyers* who miss the objective of civil lawsuit to serve a sentence and get the money to their client- the plaintiff; So they do not focus to bring the legal person to court. They wrongly address the writ of summons to the mayor, to the local council or to the local committee charged with the enforcement of Law 18 and they lose sight of the fact that these bodies do not hold a legal person status neither their own assets. Hence, they cannot uphold an obligation and since they hold no assets of their own, foreclosure is out of the question.
- *Judges* who comfortably perpetuate this confusion (between the person and its bodies) and fail to exercise their roles in an active way. In the clarification stage, judges should call on the parties to bring precision to the court actions and sue the legal person instead of a body that holds no legal status and no assets to be later foreclosed.

The litigation parties are not correctly identified. First the lawyer doesn't correctly spot the defendant and the wrong entity is sued in the civil action. Secondly, the judge doesn't trouble to examine and to clarify the legal person that has the quality of defendant. This is why we are confronted with deficiency judgment decision. On the last stage, the civil law enforcement phase, fingers are pointed to the bailiff, who else? The creditor is rightly frustrated when the bailiff will explain that, after the 2-3 years it took to settle a case, the decision cannot be instantly enforced, but he has to go back to court to lodge a *clarification action* asking to identify who is the person incurring the obligation, who is the debtor that satisfies the claim².

This is the result of a generalized confusion about what meaning of the phrase the *public authorities*, which actually brings together two distinct institutions: (1) the public legal person and (2) the decision or executive body that issues the administrative act on behalf of the public legal person. Confusion originates in law school, when first year students slide through administrative law institutions. The Law Professors do not emphasize so much on terminological nuances, forgetting that they train the future lawyers and judges. As a result, law school graduates take their first steps into the legal world without a solid understanding of the notions in administrative law. And neither are such notions furthered in the

² In our bailiff practice, we came across a situation when, for reasons of expediency, we tried to overcome the shortcomings of a legal decision that incurred the payment to a Local Committee. We addressed our enforcement order to the public legal person, i.e. commune X, but the order was quashed in the local court, in the challenging proceedings. The chance of the creditor was that specialist judges from the county court sustained the enforcement during the appeal, but the proceedings caused the party, the creditor to whom the payment was due, a lot of delays and additional stress.

National Institute of Magistracy (INM³ in Romanian) or the National Institute for Lawyers' Professional Training and Development (INPPA in Romanian). Besides, admission exams to enter lawyer or judge professions do not include topics pertaining to administrative law; the study of legal entities is limited to their capacity and there is no going into details about legal persons and completely ignore the public legal persons.

It is nevertheless true that the syntagm that points to the author of the administrative act is both abstract and very long, made of three words, i.e. *public legal person*. How many of us use such long syntagms in our everyday language? Very few, I believe. The same stands for civil law notions, excepting that civil law has been thoroughly scrutinised and is less abstract – though only few of the first year students will use the *private legal person* syntagm and they would rather replace it with the word *company* or *S.R.L.* (limited liability company).

Things do not only seem complicated. They really are. A professor teaching administrative law has a difficult task ahead, especially since the target public meant to grasp the notion of *public legal entity* is made up of first year students, who are less experienced and rather novices in terms of legal education. Understanding the delimitations among a *public legal person*, *public authorities and decision and executive bodies* requires students to make a considerable effort, to first be conversant with the notion of legal person and then its subcategories (*public legal person* and *private legal person*). A professor should have the right teaching skills to succeed in clarifying the legal relationship between a mayor – as executive body – and the commune – a legal person – when they are both comprised in the generic name of *public administration* in common language.

To distil the elements of administrative law is obviously very difficult, not only because of the countless regulations that require mutual harmonisation, but also because of the inconsistent and often irregular language used by the law-maker, where terms are many times ambiguous and carry different meanings and nuances. We believe, however, that this coding effort is not out of reach and that it must be made to the benefit of all the citizens of our country, the good operation of public institutions and rendering public justice.

Given the considerations listed above, the next sections of this article will dwell on an analytical review of the notion of public legal person, comprising its definition and the essential conditions to be met to enter this category. We will also present a synopsis of the different legal texts, which will result in an enumeration of the various categories of public legal persons subject to public law.

³ Courses delivered by the National Institute of Magistracy focus on the immediate needs of future local court judges, i.e. civil and criminal law as well as the related procedural rules. Local courts do not have a specialised administrative contentious section/chamber. This specialisation starts with county courts and it is only at this level that we may encounter specialist practitioners who have a full understanding of these notions.

2. Persons – holders of legal entity status

Art. 25. para. 1 of the Civil Code provides that only legal entities are subjects of law. Consequently, the holders of legal rights and obligations are both natural and legal persons. It is these persons that make the subject of legal relations and are parties to legal agreements. That also means that some of the critical features of the legal entity status, such as proprietorship, are exclusively attributed to persons.

Subjects of law, i.e. persons, are divided into:

- ✓ natural persons – human beings/individuals – pursuant to Art. 25 para. (2) of the Civil Code, "a natural person is an individual human being, seen as a holder of civil rights and obligations";
- ✓ legal persons – non-human entities – pursuant to Art. 25 para (3) of the Civil Code, "a legal person is any form of organisation/association that, compliant with the legal requirements, is the holder of civil rights and obligations". A legal person is also called an artificial person or a fictitious person.

Whereas humans, i.e. natural persons, do conclude legal agreements themselves, legal persons are non-human entities because they lack a physical body, the corporality that would allow them to participate in the civil circuit as such⁴. A legal person must make up for the lack of a human body and replace it, which explains the need to establish decision and executive bodies through which they take part in the legal circuit.

By means of consequence, it is only the person, either natural or legal, who is the holder of legal rights and obligations. Persons acquire rights and assume obligations through the legal agreements they conclude. A natural person, i.e. an individual, does it on its own. Deprived of a physical body, a legal person enters legal agreements through its decision and executive bodies.

A natural person, i.e. a human individual, with take direct part in the legal life (enter legal agreements) and, pursuant to Art. 1240 of the Civil Code⁵, give expression to its will in the following ways:

- in oral form – through words;
- in written form – through documents;
- non-verbal sign– a sign, gesture or conduct.

⁴ Paradoxically, a legal entity is sometimes referred in English as a "*corporate person*", whereas what a legal person lacks is precisely a physical body that would allow it to take part directly to the civil circuit.

⁵ The Civil Code

Art. 1240 Expression of consent

(1) The will to enter a legal agreement may be expressed orally or in writing.

(2) The will may be apparent in a type of behaviour that, pursuant to law, agreement, long standing practice among the parties or common practice, will leave no doubt over the intention to produce the related legal effects.

For lack of a body, a legal person will take indirect part in the legal life (enter legal agreements) through the agency of its decision and executive bodies that give expression to its will. In the light of Art. 212 of the Civil Code⁶, we derive that legal persons typically and mainly express their will in the form of written legal agreements, which may be inferred from the phrase "*resolutions and decisions shall only take effect as of the date they are released*". The term *release* points to the written form, not to agreements expressed verbally or through signs. By means of exception, under exceptional circumstances, such as natural disasters, a legal person may give expression to its will verbally - take, for instance, a mayor's instructions or a prefect's orders under such extreme circumstances. Also by means of exception, the will of a legal person is apparent in signs, such as the sign instructions of a road policeman or the level crossing barriers; they are administrative acts and breaking them entails the liability of a civil fine.

3. Legal persons

A legal person is an association where people sharing the same goal. The oldest form of association may be that of two people joining efforts to move a boulder away⁷, but this rudimentary form of association does not make a legal person. Legal persons are non-human entities, a fictitious person existing in law, an imaginary construct serving the evolution and operation of what we now know as human society.

We consider that a legal person is a form of human association enjoying legal recognition, which entitles it to hold legal rights and obligations. These rights and obligations allow for the integration of the legal person in the legal circuit, such as the legal capacity to conclude legal agreements or the right to sue and to be sued.

Participation in the legal circuit allows a legal person to attain the goal embedded in its establishment:

⁶ The Civil Code

Art. 212 Documents issued by the bodies of the legal person

(2) Towards *third parties*, the *resolutions and the decisions* made in compliance with legal requirements, arising from the articles of incorporation of the by-laws *shall only take effect as of the date when they are released*, under the situations and conditions provided for by the law, except for the case when it can be proven that third parties were in the known by any other means.

⁷ To emphasise the fact that people get together and form an association only when they have a common goal, I resort in seminars to the following scenario: (1) on a grave voice, I ask a student to help me move the desk. (2) When one of them comes to help me, I wait for him to pull the desk in one direction and then I pull the opposite way. The purpose is to show that when two people do not share a goal and make a collective effort, things don't move forward, so the pair does not form an organisation. (3) We then place the desk on the floor and I inform why I needed help and what is the purpose of the organisation: the purpose is to move the desk in front of the door, for instance. (4) We then carry out the decision and move the desk in front of the door. The exercise is fun but also explanatory towards the idea that a legal person is an association of human individuals that pursue a goal.

- to achieve the public good, for public legal persons; or
- to achieve the private trade, industrial, not-for-profit interests of its founders, for private legal persons.

Before the adoption of the New Civil Code taking effect as of 2013, Romanian law did not explicitly provide for a legal person definition⁸, which is why the role of defining the legal person rested with the doctrine. Without exception, the definitions in the doctrine relied on seeing a legal person as a "collective subject of law", in other words, and entity resulting from an association of individuals. Legal persons are a legal fiction by means of which non-human entities are entitled to participate in the legal circuit⁹.

The New Romanian Civil Code effective as of 2013 is harmonised with international regulations that unanimously recognise that a legal person enjoys the status of subject of law. Following a long process of Romanian law modernisation, a *legal person* currently stands for a distinct, self-standing institution, specifically regulated under the Civil Code. The Code devoted the entire Title IV of Tome I, Art. 187 – 251, to the general regulation of the legal person. Given however the variety of forms legal persons come with, we believe that the current legislation fails to cover the whole range of countless legal persons participating in legal life.

Current regulations provide a legal definition of a legal person, pursuant Art. 25, para. (3) of the Civil Code, namely, *"a legal person is any form of association that, under the conditions provided for in the law, is the holder of civil rights and obligations"*.

The Civil Code also clarifies the constituent elements of a legal person. *Section 1* under Chapter II introduces the substance prerequisites, namely Art. 187 provides for the constituent elements of a legal person, stipulating that: *"Any legal person shall have a self-standing structure and assets of its own that are deployed to achieve a legal and moral goal, in line with general interest"*.

The lawmaker thus acknowledges the quality of legal persons to all entities that cumulatively meet the constituent elements. These constituent elements make up the necessary as well as sufficient mandatory substance prerequisites to acquire legal personality status. The necessary prerequisites to enjoy legal personality status¹⁰ are: (1) own structure, (2) own assets and (3) legal and moral goal.

⁸ An important piece of regulation in the evolution of the legal person concept was *Decree no. 31 of 1954 on natural persons and legal persons*. It contained general provisions regarding legal persons and was the reference text for 57 years, before the adoption of the New Civil Code. The field of law applicable to different legal persons was detailed in specific legislation that developed especially after 1990, once the political regime changed and the country made its transition to democracy.

⁹ The oldest legal person was the Romanian State itself (*res publica*): it held assets, had the right to inheritance and had its debtors. This model was replicated in the organisation of cities.

¹⁰ The Civil Code Art. 187.

Once we have established that an entity simultaneously meets the three conditions regarding structure, assets and goal, we infer that such an entity is circumscribed to the legal personality status. The effects of acquiring legal personality status are presented in Art. 193, para (1) of the Civil Code, *"A legal person will participate in the legal circuit on its own behalf and is liable for the assumed obligations limited to its own assets, unless the law provides otherwise"*.

In order to establish the applicable rules of the game, in other words the applicable law regulatory framework, we will further dwell on the twofold classification of legal persons:

4. Classification of legal persons

The Civil Code distinguishes between public legal persons and private legal persons (Art. 189), which is common in most regulations from other countries.

Thus, legal persons are classified either as:

- private legal persons (e.g. corporations, associations, foundations) or
- public legal persons (ex: commune, town, county, ministry, government, school inspectorate, etc.)

Classification in either one or the other of the categories is based on several elements pertaining to (1) manner of establishment, (2) the mission of the person and (3) the applicable law regulatory framework, namely:

- a public legal person is established based on a law vs. a private legal person is freely established through the will of the parties, but subject to legal constraints;
- a public legal person is governed by public law vs. a private legal person, which is subject to private law, where parties are on equal footing;
- public legal person mission is to achieve public interest vs. a private legal person's mission that is either a patrimonial or non-patrimonial individual interest, based on the will of its founders.

This classification is of interest in practice especially because it reveals the legal framework governing the legal relationships either of the categories may enter and thus sets out the applicable rules.

Natural persons/individuals and private legal persons are subject to private law and except in some cases they are not at the source of administrative acts. Public legal persons, on the other hand, are subject to public law and will issue administrative acts. Consequently, building on the administrative act theory, we will be concerned with specific public legal persons, precisely because they are the authors of administrative acts.

Acts are unilateral in public law, which means that we are dealing with the author or the act vs. its receiver. The receiver of and an administrative act is the citizen, while the author is the party that dictates the expression of will. By

means of consequence, a *public legal person* is vested with public power and is the author of administrative acts.

5. Substantive conditions for a public legal person

Once we have established that an entity simultaneously fulfils the three prerequisites regarding (1) structure, (2) own assets and (3) a legal and moral goal it means that it belongs to the legal person's category. But not all the legal persons are also public legal persons. This section will dwell on the conditions a legal person should meet to enter the distinct category of public legal persons.

Public entities come in a large variety of forms. In the absence of codification in the field of public administration, the doctrine is left with the important task to identify the specific conditions that a legal person has to fulfill in order to enter the distinct category of public legal persons. These elements are the mandatory conditions to acquire public legal personality and they refer to: (1) the manner of establishment, (2) the mission pursued (3) the applicable law regulatory framework.

The regulations we examined before do not only yield an enumeration of public legal persons. By analysing them, we can distinguish the elements that make the difference between a public and a private legal person. The requirements for a legal person to be considered a public legal person (in its own right) emerge from a correlation between the provisions enclosed in the Civil Code and those enclosed in the Law on administrative contentious, which leads to the following:

- a public legal person is established through a law (not the free will of the parties) - Art 191 of the Civil Code;
- a public legal person is subject to public law (is not governed by private law/civil law) – Art. 2 of Law no. 554 of 2004
- the mission of a public legal person is to achieve public interest (not the interests of individuals) – Art 2 of Law 554 of 2004.

Thus, for an entity to qualify as a public legal entity, it has to fulfil 6 conditions, all in the same time. The first three qualify the entity as a legal person, whereas the additional three are specific to the distinct category of public legal entity. They are the following: (1) own structure, (2) own patrimony (3) legal and moral mission, (4) established through law, (5) subject to public law regime and (6) serving the achievement of public interest.

6. Identification of the various categories of public legal persons

It may seem simple to draw an enumeration, but not so much so when it comes to public legal persons. Public legal persons come in a wide and varied range of forms, which does not make their rather abstract and complicated analysis any easier.

Which are the public legal entities? Since Romania does not have an administrative code, the question will lead us to the analysis and synthesis of several pieces of legislation, starting with the *Constitution of Romania*, going on with the Civil Code and the framework legislation governing public administration, i.e. the *Law no. 215 of 2001 on local public administration* and *Law no. 554 of 2004 on administrative contentious*.

In reference to contracting bodies in the sense that they are public legal persons, they are mentioned in the legislation included in the law package on public procurement adopted in 2016¹¹.

Public legal persons according to constitutional provisions. The Constitution addresses public legal persons as follows:

- *Title I - General Principles* – refers to the first public legal person, mentioned in the very title of Art 1, called: *The Romanian State*.

- *Title III - Public Authorities* - comprises special chapters regulating each of the entities implementing the functions of the state: the legislative, executive and judicial powers, as follows:

-Legislative function

-Executive¹² function

Chapter I – The Parliament

Chapter II – The President of Romania

Chapter III – The Government

Chapter V – Public Administration

Section 1 –Central Specialist Public Administration

Section 2 – Local Public Administration

-Judicial function

Chapter VI – Judicial Authority

From the perspective of the administrative act theory, our interest lies with the authorities delivering public services and implementing the executive function, namely the President of Romania, the Government as well as Central and Public Administration.

By interpreting Art. 52¹³ from the Constitution, which acknowledges a party's right to remedy for an injury caused by a public authority, there emerges that the notion of "*public authority*" is used in its large sense therein, namely in

¹¹ Law no. 98 of 2016 on public procurement, Law no. 99 of 2016 on sectorial procurement and Law no. 100 of 2016 on assignment.

¹² There are also other titles regulating different other authorities, e.g. the Ombudsman, Title II, Art. 58-60, The Constitutional Court, Title V, Art. 140, The Economic and Social Council, Art. 141.

¹³ Constitution of Romania, Art. 52 – The right to remedy of a party injured by a public authority

(1) The party whose right or legitimate interest has been injured by a public authority, either through an administrative act or by failure to settle a claim within the legal deadline, is entitled to the recognition of the claim or legitimate interest, annulment of the act and remediation of the damage.

(2) The conditions regarding the exercise of this right and limitations shall be enshrined in an organic act.

(3) The state is liable for damage caused by judicial errors. Liability of the state is regulated and does not remove the magistrates' liability for bad-faith or severe negligence in the exercise of their duties.

the sense of a *public legal person*. Hence, the public authorities that are listed in the Constitution are actually *public legal persons*.

Public legal persons from the central administration			
The Government	Authorities subordinated to the Government		Authorities subordinated to the Parliament
	Ministerial administration	Extra-ministerial administration	
<ul style="list-style-type: none"> - <i>Departments and similar structures holding specific tasks</i> - <i>Prefects</i> 	Ministries Institutions which are subordinated to the ministries, are coordinated by them or work under the authority of the ministries: authority, agency, inspectorate, office, committee, fund <i>Example:</i> - <i>The Fund for the Environment</i> Devolved services: <i>Examples:</i> - <i>County School Inspectorate;</i> - <i>County Pension House.</i>	Central specialist bodies: Authority, agency, inspectorate, office, committee <i>Example:</i> - <i>Competition Office</i>	Autonomous administrative bodies: <i>court, council, committee, service, society, college, agency</i> <i>Examples:</i> - <i>National Audio-visual Council</i> - <i>The Romanian Court of Accounts</i>

Table 1. Public legal persons from the central administration

Public legal persons according to the Civil Code provisions. The New Civil Code is a recent piece of regulation, about 25 years younger than the constitution. That explains why it includes up-to-date provisions and correctly uses the phrase public legal person – to which it devotes a special subtitle¹⁴ – rather than taking over from the constitution the syntagm *public authorities*. *Section 3* reviews the special provisions that regard public legal persons, making distinct reference to their patrimonial independence, sanctioned in the text of Art. 222 of the Civil Code.

Two of the four articles of this special section devoted to public legal persons, namely Art. 223 and Art. 224 mention in their very title¹⁵ the *state* and the *territorial-administrative units*, which allow us to infer that the *state* and the *territorial-administrative units* are public legal persons.

To conclude, the Civil Code explicitly mentions the state, communes, towns and counties as public legal persons.

Public legal persons according to the provisions of Law no. 554 of 2004 on administrative contentious. Being an older regulation, Law 554 of

¹⁴ Title IV Legal Person, Chapter II, Section 73 refers to public legal persons and is called Special Considerations.

¹⁵ The Civil Code, Art. 223 The State and Territorial-administrative Units; Art. 224 Civil Liability of the State and of the Territorial-administrative Units.

2004 on administrative contentious¹⁶ uses the phrase from the constitution, namely that of *public authority*.

Despite making use of the *public authority* syntagm, this piece of legislation brings clarifications to the notion of public legal person by underlying the goal and the applicable law regulatory framework. It also expands the meaning of the *public authority notion* to encompass two other categories assimilated to the notion of public legal persons, namely those that:

- (1) acquired the public service status or
- (2) are authorised to deliver a public service.

The Law on administrative contentious brings completions to the constitution as well as several relevant clarifications, such as:

- it outlines the entities within the scope of the *public authority* notion;
- it introduces the distinction between fully fledged public authorities and the entities assimilated to them;
- it outlines the conditions for an entity to qualify as public authority/public legal person [(1) a body belonging to the state or territorial-administrative units (2) governed by public law (3) to achieve public interest].

Public legal persons according to Law no. 98 of 2016 on public procurement. The law package on public procurement adopted in 2016 reflects the European terminology and uses the notion of *contracting authority* in the sense of *public legal person*. The legislative technique is somehow confusing because, though we are dealing with a law package made up of three laws with consecutive numbers¹⁷, each law comes with its own now overlapping now complementary definitions.

We may infer from the text of the two laws that the quality of *contracting authority*, in the sense of *public legal person*, rests with any of the following:

- public central or local authorities and institutions as well as their component structures that enjoy delegated powers as authorising officers and are competent in the field of public procurement;
- public bodies;
- associations comprising at least one of the contracting authorities listed before.

The lawmaker also makes an effort to cast a clear light on the meaning of *public bodies*, which are defined as any entity, irrespective of its form of establishment or structure, that cumulatively meets the following conditions:

¹⁶ Law no. 554 of 2004 on administrative contentious, Art. 2.

b) public authority – a body belonging to the state or the territorial-administrative units subject to public law that acts towards the achievement of public interest; the entities assimilated to public authorities in the sense of this law are private legal persons that have legally acquired the status of public service or are authorised to deliver a public service;

¹⁷ Law no. 98 of 2016 on public procurement, Law no. 99 of 2016 on sectorial procurement and Law no. 100 of 2016 on assignment.

(1) they are established to serve general interest needs, without having a commercial or industrial nature;

(2) they enjoy legal person status;

(3) they are mostly funded by public entities or bodies, or they are subordinated to them, placed under their authority, coordination or control, or they have more than half of the decision making board members appointed by a public entity or body.

In our opinion, these attempts at defining the *contracting authority* notion can only pave the way to the notion of *public legal entity* whose substance prerequisites were debated in the previous section.

To wrap up, the analysis of the relevant legislation, i.e. the Constitution, the Civil Code and the framework legislation on public administration evinces the fact that public legal persons come in a variety of forms and with an even higher diversity of inconsistent names that we have strived to organise in a most logical sequence further down:

- **Public legal persons:**

1. The Romanian State;
2. Central public administration (e.g. the President of Romania, the Government, ministries, devolved services, specialist bodies subordinated to the Government, prefects);
3. Local public administration – territorial administrative units, TAUs (communes, towns, counties);
4. Autonomous authorities (e.g. Ombudsman, The Legislative Council, The Competition Council, etc.);
5. Other public legal persons can be established following a decree issued by central or local public administration authorities or any other means provided for in the law (Art. 191 of the Civil Code);

- **Entities assimilated to public legal entities:**

6. Private legal person granted with the public utility status (e.g. associations¹⁸, foundations, political parties);
7. Private legal persons authorised to deliver a public service (régie autonome, companies)

7. Conclusions

To conclude, the public legal persons identified above (the state, central and local public administration – territorial administrative units, TAUs, i.e. communes, towns, counties) take part to legal circuit by through their decision and

¹⁸ In practice, we identified only one case when an association, foundation – private legal persons that acquired the public service status – issued an administrative act. This is R.E.N.A.R.- The Romanian Accreditation Association – that was recognised by the government as the *single accreditation body in the country*. We believe that we should appreciate an *accreditation certificate* issued by R.E.N.A.R. to be an administrative act.

executive bodies. In spite of that, it is the persons who hold legal rights and obligations. Therefore liability for legal acts, including administrative ones, also rests with the person, not the bodies. That is why enforcement proceedings are only directed against persons, because only the persons are the holders of rights and obligations, as well as the patrimony.

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Short comparison between the Financial Supervision Authority of Romania (ASF) and the Security and Exchange Commission of U.S.A. (SEC)

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Abstract

The work consists of two main parts: the first, in which there are described the establishment, the competence as well as the organization and operation of ASF, according to the updated Governmental Emergency Ordinance 93/2012 and according to the presentation site of ASF. The second part of the work presents the same elements for SEC of U.S.A., as they are described in detail on the SEC site of the American Government. At the end of the work, there is a conclusions part, through which there are compared the main features of the two institutions with all the fundamental difference between them, regarding the activity duration, SEC operating since 1934 (being established through the Foreign Exchange Act of 1934) based on the old federal laws and those that regulated in the USA the capital market, long before we have a capital market in Romania that would need the establishment of ASF (2012).

Keywords: *Financial Supervision Authority, Security and Exchange Commission of USA, capital market, financial instruments.*

JEL Classification: K22, K23

1. Financial Supervision Authority (ASF)

ASF (Financial Supervision Authority) is an agency established by the Romanian Government in April 2013.

ASF is an autonomous administrative authority with prudential supervision of the capital market, the insurances sector and the private pension funds system and is included in an institutional dynamic at European level.

ASF has taken all the functions and attributions of the National Security Commission, the Insurances Supervision Commission and the Private Pension System Supervision Commission, authorities that have been dissolved.

A difference from the European Union will consist in the fact that in Romania, under the ASF authority, there has not been integrated also the banking supervision that has exclusively remained the task of the National Bank.

The normative document (Governmental Emergency Ordinance 93/2012 regarding the establishment, organization and operation of ASF, approved

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through the Law no. 113/2013)² through which there has been done this unification project, has as main object maintaining and consolidating the trust for the Romanian financial system, by establishing a frame of supervision of the markets, institutions, activities and financial instrument at national level.³

According to article 1(2) from the updated Governmental Emergency Ordinance 93/2012, the Financial Supervision Authority, hereinafter A.S.F., is being established as an autonomous administrative authority, of specialty, with legal personality, independent, self financed, that performs its attributions according to the provisions of this emergency ordinance, by taking and re-organizing all the attributions and powers of the National Security Commission (C.N.V.M.), the Insurances Supervision Commission (C.S.A.) and the Private Pension System Supervision Commission (C.S.S.P.P.).

Article 2 (1) provides that „According to this emergency ordinance, A.S.F. performs attributions of authorization, regulation, supervision and control over:

a) operations intermediaries with financial instruments; services companies of financial investments; collective investment schemes; companies for the investments management; advisers of financial investments; financial instruments markets; system and market operator; central depositaries; compensation-payment houses; central counter-parties; market operations; securities issuers; investors compensation fund; other physical or legal persons that develop activities according to the provisions of the Law no. 297/2004 regarding the capital market, with the ulterior modifications and amendments, Government Emergency Ordinance no. 32/2012 regarding the collective investments schemes in securities and the investments management companies, as well as for the modification and amendment of Law no. 297/2004 regarding the capital market, the Government Emergency Ordinance no. 25/2002 regarding the approval of the National Security Commission Status, approved with modifications and amendments through the Law no. 514/2002, with the ulterior modifications and amendments, Law no. 253/2004 regarding the definitive character of the payment in the payment systems and in the systems of payment of the operations with financial instruments, with the ulterior modifications and amendments, the Government Ordinance no. 9/2004 regarding some agreements of financial warranty, approved with the ulterior modifications and amendments through the Law no. 222/2004, with the ulterior modifications and amendments, the Government Emergency Ordinance no. 99/2006 regarding the credit institutions and the capital adequation, approved with modifications and amendments through the Law no. 227/2007, with the ulterior modifications and amendments;

² See also Law no. 148/2015 on the approval of OUG 94/2013 for modifying and amending OUG 93/2012 on the incorporation, organization and functioning of ASF and for modifying and amending Law no. 136/1995 on insurances and reinsurances.

³ <https://www.wall-street.ro/tag/asf.html>, consulted on 5.04.2018.

b) insurance and reinsurance companies, mutual societies, hereinafter referred to as insurers, reinsurers, and insurance intermediaries, the supervision of insurers and reinsurers operating in or out of Romania, the supervision of the activity of insurance and reinsurance intermediaries, as well as other activities related thereto, according to the provisions of Law no. 136/1995 on Insurance and Reinsurance in Romania, as amended and supplemented, Law no. 32/2000 regarding the insurance activity and the supervision of insurance, as subsequently amended and supplemented, Law no. 260/2008 on compulsory insurance of housing against earthquakes, landslides and floods, republished, Law no. 503/2004 on financial recovery and bankruptcy of insurance companies, as subsequently amended;

c) the private pension system, according to the Law no. 411/2004 on privately managed pension funds, republished, as subsequently amended and supplemented, Government Emergency Ordinance no. 50/2005 on the establishment, organization and functioning of the Private Pension System Supervisory Commission, approved with amendments and completions by Law no. 313/2005, as subsequently amended and supplemented, Law no. 204/2006 on voluntary pensions, as subsequently amended and supplemented, Law no. 187/2011 on the setting up, organization and functioning of the Private Equity Guarantee Fund, Government Emergency Ordinance no. 61/2008 on the implementation of the principle of equal treatment between men and women as regards access to goods and services and the supply of goods and services, approved with amendments by Law no. 62/2009;

d) to all the entities, institutions, market operators and issuers of securities, as well as the operations and financial instruments regulated by the secondary legislation issued prior to the coming into force of this Emergency Ordinance by the National Securities Commission, the Insurance Supervisory Commission, The Private Pensions Supervisory Commission in support of and implementation of primary financial market legislation.”

In art. 3. from the updated OUG 93/2012, it is stated that “The supervision exercised by ASF, provided in art. 2 par. (1) shall be carried out by:

a) granting, suspending, withdrawing or refusing to grant, as the case may be, according to the law, authorizations, approvals, opinions, attestations, derogations;

b) the issuance of regulations, which shall be published in the Official Gazette of Romania, Part I;

c) controlling the entities and operations provided for in art. 2 par. (1) on the basis of the reports received and on-the-spot checks;

d) disposition of measures and application of sanctions.

(2) In cooperation with the European Insurance and Occupational Pensions Authority (EIOPA), A.S.F. has the following obligations:

(a) to ensure the fulfillment of its obligations as competent authority under Regulation (EU) No 1094/2010 of the European Parliament and of the Council

of 24 November 2010 establishing the European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/79/EC;

(b) to communicate to EIOPA all necessary information on the Member States in which the entities within its authorization, regulation and surveillance area operate;

(c) to immediately inform EIOPA when granting a prior operating authorization to an entity in the case of cross-border activity;

d) to immediately notify EIOPA of the reasoned decision to ban the activities of an entity, adopted according to its competence;

(e) to report to the EIOPA national provisions of a prudential nature relevant to the field of private pensions not covered by employment and social security legislation and ensure that this information is updated at least once every two years;

f) to inform EIOPA and the European Commission of any major difficulties encountered in the exercise of its activity, regulated by national rules harmonized with European Union law.”

As regards the independence of ASF Board members and staff, they will not seek or accept instructions of any kind from any other institution, body or authority in the exercise of their powers.⁴

In accordance with art. 5 of the updated EGO 93/2012 “In exercising the attributions and prerogatives provided by this Emergency Ordinance, A.S.F. contributes to strengthening an integrated framework for the functioning and supervision of markets, participants and operations in these markets and aims at:

(a) ensuring the stability, competitiveness and orderly functioning of the markets for financial instruments, promoting confidence in these markets and investing in financial instruments, and ensuring the protection of operators and investors against unfair, abusive and fraudulent practices;

b) promoting the stability of the insurance activity and the protection of the rights of the insured;

c) ensuring the effective functioning of the private pension system and protecting the interests of the participants and beneficiaries. ”

The regulations of A.S.F. may be in the form of regulations, rules and instructions.⁵

In art. 7. (1) specifies “any natural or legal person has the right to appeal to the competent courts if they consider themselves injured by the misapplication or non-application by A.S.F. of the provisions of this Emergency Ordinance.”

As regards the leadership and organization of ASF Cap. III of EGO 93/2012, in art. 8. (1) provides “A.S.F. is led by a Council of 11 members, in-

⁴ See art. 4 of OUG 93/2012 updated.

⁵ See art. 6 para. 2 of OUG no. 93/2012 updated.

cluding a chairman, a first vice-president and three vice-chairmen who are executive members. Each of the three vice-presidents has specific attributions for one of the three financial supervision sectors. The decision of the Romanian Parliament to appoint them establishes the financial supervision sector for which they are appointed. The other 6 members are non-executive members.

(2) The members of the A.S.F. are appointed by the Parliament in the joint meeting of the two Chambers on the joint proposal of the Committee on Budget, Finance, Banking and Capital Market and the Economic, Industrial and Service Commission of the Senate and of the Budget, Finance and Banking Commission and the Committee on Economic Policy, Reform and Privatization of the Chamber of Deputies.

(3) The joint committees referred to in para. (2) perform the selection of candidates to be appointed as members of the ASF Board, exclusively on the basis of professional experience in the financial field, credit institutions and / or non-banking financial institutions for at least 10 years.

(4) The appointment of the members of the A.S.F. is done for a period of 5 years, with the possibility of renewing the mandate, observing the provisions of para. (2) and (3) and art. 9.

(5) The appointment of the members of the ASF Council, in the number provided in par. (1), shall be made by Parliament, under the terms of this Emergency Ordinance, by 30 June 2013.”

According to art. 9. from the updated OUG 93/2012, the members of the A.S.F. must meet the following conditions:

a) to be Romanian citizens domiciled in Romania with good reputation and professional training and appropriate professional experience in areas where A.S.F. has skills;

a1) hold a long-term higher education diploma;

b) not be senators, deputies or members of any political party or political organization during the exercise of the mandate;

c) not to exercise another profession or not to hold public or private office, except for the possibility of teaching and scientific research, avoiding the conflict of interests;

d) not be members of the boards of directors, supervisory boards, directorates or censors committees, not to hold the position of director or other functions in the following entities:

1. Those relating to the activity of intermediaries in financial instruments and collective investment undertakings;

2. Investment management companies;

3. Those relating to the activity of insurers, reinsurers, insurance and reinsurance intermediaries and other related activities;

4. Those referring to the private pension system, according to Law no. 411/2004, republished, as subsequently amended and supplemented;

5. Financial investment companies;

d¹) they and / or their family members up to the third degree including, directly or indirectly, do not own a holding of more than 5% of the capital of the entities referred to in (d) or voting rights or shareholdings that enable them to exercise significant influence over the decision-making in the general meeting or in their board of directors;

e) not to be a member of the management of a commercial company which, in any form, has ceased its activity without complying with its obligations to third parties or which has been declared bankrupt as a result of the results of the period in which the person has exercised his mandate and for which he is responsible;

f) not have criminal and fiscal records.

In art. 12 (4) members of A.S.F. have a period of 30 days from the date of appointment in order to remove any incompatibilities resulting from the provisions of art. 9.

In art. (5) the members of the A.S.F. have the obligation to immediately notify, in writing, A.S.F. and to the Parliament the occurrence of any of the incompatibilities referred to in art. 9. Until Parliament's decision to appoint a new person, the mandate of the member of the Council shall be suspended by law.

As regards the representation of ASF in relations with third parties, the provisions of Art. 13, which provides in (1) "The President represents A.S.F. as an autonomous administrative authority, as a legal person governed by public law and in common law relations and is an authorizing officer."

(2) "In case of temporary impossibility of exercising the prerogatives of the president, the representation of A.S.F. the first vice president."

Further Art. 14 provides "(1) The convocation of the A.S.F. shall be made by the Chairman and / or the First Vice-president whenever necessary or at the request of at least 9 members.

(2) The A.S.F. deliberately deliberate in the presence of at least half plus one of its members, including the President or, in its absence, the first Vice-President.

(3) The decisions are adopted with the vote of 2/3 of the number of the members present.

(4) The adopted decision is mandatory for all members of the ASF Council, the separate opinion of the members who voted against or who abstained from voting is recorded in the minutes of the respective meeting".

A.S.F. responds within the limits of its own patrimony, according to art. 16 of the same ordinance.

Art. 17 regulates the destination of the results of the ASF activity, as follows: (1) On behalf of the ASF, the President of the Council shall submit to Parliament, by 30 June of the following year, the annual report of the ASF, including its activities, the financial statements annual reports and audit report, to be debated without being put to the vote in the joint sitting of the two Chambers of Parliament;

(2) the ratio referred to in paragraph (1) shall be published by ASF after its submission to the Parliament in the Official Gazette of Romania, Part III.

2. General aspects of the Securities and Exchange Commission in the United States⁶

The US Securities and Exchange Commission (SEC) is an independent federal government agency of the United States. SEC has the primary responsibility for the application of federal securities laws, the proposal for securities and securities industry regulation, the exchange of shares and options of the nation, and other activities and organizations, including the US securities markets.⁷

SEC has a three-pronged mission: protecting investors; to maintain fair, orderly and efficient markets; and facilitating capital formation.

In order to fulfill its mandate, SEC fulfills the statutory requirement that public and other regulated companies submit quarterly and annual reports as well as other regular reports. In addition to annual financial reports, company directors must provide a narrative account called “Management Discussion and Analysis” (MD&A) that describes the previous year's operations and explains how the company evolved during that period. MD&A will also usually reach next year, presenting future goals and approaches for new projects. In an attempt to balance the field of action for all investors, the SEC maintains an online database called EDGAR (electronic system for collecting, analyzing and recovering data), from which investors can access this and other information submitted to the agency.

The quarterly and bianual public sector reports are essential for investors to make robust decisions when investing in capital markets. Unlike the banking sector, investments in capital markets are not guaranteed by the federal government. The potential for high earnings has to be weighed against considerable losses. Compulsory disclosure of financial information and other information about the issuer and security itself provides individuals and large institutions with the same basic data about the public companies they invest in, thus increasing public control, while reducing insider trading and fraud.

SEC makes reports available to the public through the EDGAR system. SEC also provides publications on investment-related topics for public education. The same online system also takes the recommendations and complaints from investors to help SEC investigate the violation of securities laws. SEC adheres to a strict policy of never commenting on the existence or status of an ongoing investigation.

⁶ See <https://www.sec.gov/>, consulted on 5.04.2018.

⁷ <https://translate.google.ro/translate?hl=ro&sl=en&u=https://www.sec.gov/&prev=search>, consulted on 5.04.2018.

Regarding the organizational structure of the SEC, according to the same site⁸, SEC commissioners can not be partisans, no more than three commissioners may belong to the same political party. The president also appoints one of the commissioners as chairman, CEO of the ERA. However, the President does not have the power to trigger the appointed commissioners, a provision that has been taken to ensure the independence of the EAA. This issue arose during the presidential election in 2008 in connection with the financial crises that followed.

Within SEC, there are five divisions. Headquartered in Washington, DC, SEC has 11 regional offices across the US.

The SEC divisions are:

- Corporation Finance
- Trading and markets
- Investment management
- Executive
- Economic and risk analysis

a) Corporation Finance is the division that oversees the disclosure made by public companies and the recording of transactions such as mergers by companies. The division is also responsible for the operation of EDGAR.

b) The Trading and Markets Division supervises self-regulatory organizations, such as FINRA and the Municipal Council for Securing the Securities (MSRB), as well as all broker-dealer firms and investment houses. This division also interprets the proposed changes to the regulations and monitors the operations in the industry. In practice, the SEC delegates most of its enforcement and regulatory authorities to FINRA. In fact, all companies not regulated by other SROs must register as members of FINRA. Individuals trading securities must pass the examinations administered by FINRA to become registered representatives.

c) The Investment Management Division supervises the registered investment companies including mutual funds as well as registered investment advisers. These entities are subjected to extensive regulation under the various federal securities laws. The Investment Management Division administers various federal securities laws, in particular the Investment Firms Act of 1940 and the Investment Advisers Act of 1940. The responsibilities of this Division include:

- assisting the Commission in the interpretation of laws and regulations for inspection and public enforcement personnel and security and security control;

- responding to the applications which were not the subject of the action and to the applications for relief;

- reviewing the files of investment firms and investment advisers;

- assisting the Commission in enforcement matters involving investment firms and advisers; and

⁸ *Idem.*

- advise the Commission on the adaptation of ESA rules to the new circumstances.

d) The Executive collaborates with the other three divisions and other Commission offices to investigate violations of securities laws and regulations and to bring actions against alleged suspects. Generally, SEC carries out private investigations. SEC staff may request the submission of documents and testimonies voluntarily, or may request a formal investigation procedure from the EAC, which allows staff to compel the production of documents and testimony of witnesses. The EA may file a civil action in a US District Court or an administrative procedure heard by an independent administrative judge (ALJ). The SEC has no criminal authority, but can address state and federal prosecutors. CEO of the SEC Enforcement Division, Robert Khuzami, left the office in February 2013.

e) Specific activities of economic and risk analysis.

In terms of communications, SEC has two categories:

- **Commenting letters.** The Commenting letters are issued by the SEC's Corporate Finance Division in response to the public filing of a company. This letter, initially private, contains a detailed list of requests from SEC. Each comment in the letter asks the file to provide additional information, modify the submitted file, or change the way it reveals future applications. The file must respond to each item in your comment letter. SEC may then respond with further comments. This correspondence is subsequently made public.

In October 2001, SEC wrote to CA, Inc., covering 15 articles, in particular about CA's accounting, including 5 on revenue recognition. The CA Chief Executive, to whom the letter was addressed, pleaded guilty to fraud at the CA in 2004.

In June 2004, SEC announced that it would publicly publish all commenting letters in order to give investors access to the information. A review of regulatory leaks in May 2006 over the past 12 months indicated that SEC did not make what it said it would do. The analysis found that 212 companies reported receiving comments from the SEC but only 21 letters for these companies were posted on the SEC's website. John W. White, Head of Corporate Finance, told the New York Times in 2006: "We have now solved the obstacles to sending information ... We expect a significant number of new posts in the coming months."

- **Letters without action.** The letters without action are letters from SEC staff indicating that staff will not recommend to the Commission that the SEC should take enforcement action against a person or company if the entity engages in a particular action. These letters are sent in response to requests made when the legal status of an activity is not clear. These letters are published and increase the ability to know what is accurate and not allowed. These are interpretations of the staff of the securities laws and, although convincing, are not binding on the courts.

Such use, between 1975 and 2007, was conducted at the Nationally Recognized Statistical Rating Organization (NRSRO), a rating agency issuing credit

ratings that the SEC allows other financial firms to use for certain regulatory purposes.

Freedom of information. Performance Processing Act. In the last effective government analysis center of 15 federal agencies receiving calls published in 2015 (with available data from 2012 and 2013), SEC was among the most common 5 weakest performers, won a D - by a score of 61 out of 100 possible points, meaning it did not get a satisfactory overall score. It has deteriorated from a D - in 2013.

3. Conclusions

ASF was established in 2012 as an autonomous administrative authority with legal personality, exercising its duties according to the updated OUG 93/2012, undertaking the powers and prerogatives of the National Securities Commission, the Insurance Supervisory Commission and the Supervisory Commission of the System Private pension.

The US Securities and Exchange Commission (SEC) is an independent federal government agency of the United States. SEC has the primary responsibility for the application of federal securities laws, the proposal for securities and securities industry regulations, the exchange of shares and options of the nation, and other activities and organizations, including the US securities markets.

ASF has as its main objectives:

(a) ensuring the stability, competitiveness and orderly functioning of the financial instrument markets, promoting confidence in these markets and investing in financial instruments, and ensuring the protection of operators and investors against unfair, abusive and fraudulent practices;

b) promoting the stability of the activity of insuring and defending the rights of insured persons;

c) ensuring the efficient functioning of the private pension system and protecting the interests of the participants and beneficiaries.

The SEC divisions are:

- Corporation Finance
- Trading and markets
- Investment management
- Executive
- Economic and risk analysis

a) Corporation Finance is the division that oversees disclosure by public companies and the recording of transactions such as mergers by companies. The division is also responsible for the operation of EDGAR (Electronic Data Collection, Analysis and Recovery).

b) The Trading and Markets Division supervises self-regulatory organizations, such as FINRA and the Municipal Council for Securing the Securities (MSRB), as well as all broker-dealer firms and investment houses. This division

also interprets the proposed changes to the regulations and monitors the operations in the industry.

c) The Investment Management Division supervises registered investment companies including mutual funds as well as registered investment advisers. These entities are subject to extensive regulation under the various federal securities laws. The Investment Management Division administers various federal securities laws, in particular the 1940 Investment Firms Act and the 1940 Investment Advisers Act.

d) The Executive collaborates with the other three divisions and other Commission offices to investigate violations of securities laws and regulations and to bring actions against alleged suspects. In general, the SEC carries out private investigations. SEC staff may request the submission of documents and testimonies voluntarily, or may request a formal investigation procedure from the EAC, which allows staff to compel the production of documents and testimony of witnesses. The EA may file a civil action in a US District Court or an administrative procedure heard by an independent administrative judge (ALJ).

e) Specific economic and risk analysis activities.

As regards the leadership and organization of the ASF, it is headed by a 15-member council, one of which holds the function of president and 3 as vice-president, appointed by Parliament, in the joint sitting of the two Chambers.

Regarding the organizational structure of the SEC, according to the same site⁹, SEC commissioners cannot be partisans, no more than three commissioners may belong to the same political party. The president also appoints one of the commissioners as chairman, CEO of the SEC. However, the President does not have the power to trigger the appointed commissioners, a provision that has been taken to ensure the independence of the EAA. This issue arose during the presidential election in 2008 in connection with the financial crises that followed.

With regard to incompatibilities for commissioners, both regulators are not allowed to be commissioners who are in conflict with the interests of the institution.

ASF regulations may be in the form of regulations, rules and instructions.

As SEC communications there are two categories:

- Commentary letters
- Letters without action

In the last effective government analysis center of 15 federal agencies receiving calls published in 2015 (with data available for 2012 and 2013), SEC was among the most common 5 weakest performers, won a D - by a score of 61 out of 100 possible points, meaning it did not get a satisfactory overall score. It has deteriorated from a D - in 2013, while ASF is in the early stages of its work.

A difference between ASF and similar institutions in the European Union will be that in Romania, under the authority of the ASF, was not integrated also

⁹ *Idem.*

the banking supervision, which remained exclusively under the care of the National Bank.

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**CONTEMPORARY CHALLENGES IN
PUBLIC ADMINISTRATION**

Correlation good administration – good governance in the context of Romania's integration in the European Union

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Abstract

In this study we will deal with the right to good administration which includes: any person's right to be heard before taking any potentially harmful individual action; people's right of access to their own file, in compliance with legitimate rights regarding confidentiality and professional and trade secrecy; administration's obligation to state the grounds for their own decisions. We will mainly introduce the most important aspects regarding central and local public administration's adaptation to the concept of good administration and good governance throughout Romania's integration in the European Union. Additionally, the study will analyse the characteristics of good governance: political dimension of the concept, which involves a competitive multi-party system in the democratic policies and observance of human rights; institutional dimension represented by how the country's affairs are managed; the technical dimension capitalised by the management quality and institutional capacity. Establishment of the European Ombudsman by the Maastricht Treaty, taken over in Romania by the institution of the People's Lawyer, creates the premises of a control over the public institutions or public authorities with regards to maladministration.

Keywords: *good administration, good governance, administrative control, administrative reform*

JEL Classification: K23, K33

1. General grounds

Good governance constitutes an essential security and prosperity condition, the instrument by which the democracy goes from the conceptual and theoretical level to the level of real life. It is the cumulative unit of measurement by which social life validates the result of the democratic elections, tests the realism of programmes and the capacity of the political forces to accomplish their promises, in strict observance of democratic principles.

Good governance evaluates the success of measures to combat insecurity, inequity and poverty and sets out the appropriate correction measures. The main factors involved in this process are the state and the civil society, the rule of law representing a key feature of good governance. The state bodies participating to democratic good governance are: legislative power, executive power, judiciary power, local public authorities. The main non-state actors are: political parties;

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unions, employers' associations and other professional organisations; non-governmental organisations and other forms of participation to the civil society; management bodies of public interest companies; mass-media.

An important role in the consolidation of stability and security of the new democracies in the Central, Eastern and South-Eastern Europe is proven by the states and societies' capacities to promote an efficient management of the public interests, to guarantee an efficient and responsible exercise of power, in full harmony with the democratic principles and the requirements relating to human rights and their observance. The first steps in the affirmation of the European Union as a democratic structure were seen in the attempt to transpose at European level the national mechanisms of the representative democratic model.² This affirmation is supported by article 10 (1) Treaty on the European Union³ according to which "*the functioning of the European Union shall be founded on representative democracy*", which proves that in the European Union, as a whole, and in each Member State, as a part, representative democracy is consolidated.

By the White Paper regarding European governing of 2001⁴, the European Commission launched a major reform of governance with a view to strengthening its democratic character and proposed four main amendments: a better involvement of citizens, clear definition of policies and legislation, involvement in the global governance and setting objectives for institutions and political environment.

Although over the past years the European Union has taken important steps towards allowing the beneficiaries of the decisions made by the European institutions – the Union's citizens – to actively participate to making such decisions, one may see a poor communication by European institutions with citizens and a poor involvement of citizens in the decision-making process or a failure to become aware of the rights conferred by the European treaties. The civil society itself should follow the principles of good governance. Article 11 of TUE institutes representative democracy" (1) *The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.* (2) *The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.* (3) *The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.*

The past experience shows that the good governance has sometimes been in jeopardy as a consequence of the activities conducted by some groups of ille-

² Constanța Mătușescu, *Institutional Law of European Union*, ProUniversitaria Publishing House, Bucharest, 2013, p. 141.

³ Treaty on the European Union, published OJEU, C 326/13 din 26.10.2012 consolidated version.

⁴ White Paper of the European Commission, COM (2001) 428.

gitimate interests or undemocratic forces which attempted to exchange the democratic power; some of these actions delayed fulfilment of strategic objectives of paramount importance to Romania, mainly in relation to integration in the European and Euro-Atlantic political, economic and security structures. The efficiency of the public administration constitutes an essential condition to ensure security and prosperity of the Romanian citizens. The process of joining the European Union has highlighted that both the real efficiency of central and local administration and the public image of such administration may be affected by a series of factors among which: corruption; excessive bureaucracy; insufficient authority and efficiency of justice; reduced capacity to absorb European funds. Elimination or correction of such aspects has represented and continues to represent a major priority for our country.

A democratic and efficient public administration implies dramatic improvement of the institutional capacity at central and local level, by ensuring transparency, fairness and responsibility in relation to holding the public position. To this end, the institutions of the public administration should be competent, flexible, adaptable to the new requirements and in the service of the citizen. In the process of European integration they should be capable to implement public policies of regional development and to ensure full, efficient and legal use of structural and support funds.

As major pillar of good governance, consolidation of independence and efficient justice as well as enhanced trust of people in the act of justice represent another important priority meant to guarantee the European quality of this activity. In its turn, justice has to go through the entire programme of transformation in order to become efficient and credible. In the context of this national effort, the state institutions are invited to ensure the legislative, organisational, human and material conditions necessary to make possible the task of dramatic transformation of justice and its increased contribution to achieving the strategic objective of integration.

Achieving these desiderata is the main duty and responsibility of competent bodies governing the activity of the justice, in the context in which the process of real and full integration of Romania in the European Union depends to a significant extent on how the Romanian justice system will prove its independence, non-partisan nature, professionalism and capacity to act according to requirements of the rule of law, as well as the real efficiency of the fight against big corruption cases. The efforts made in this domain mainly result in significant reduction and taking control of this phenomenon called corruption, creation of appropriate mechanisms to prevent, deter and counter, changes in mentality among population and a process of changing public perception.

At present, in the fight against corruption, it is absolutely necessary that the institutions function in accordance with the law, collaborate and be integrated

in a system in which vital information should circulate professionally, legitimately and opportunely, the responsibilities should be clear and separate and tasks accomplished within legal limits, timely and as efficiently as possible.

2. Implementation of concepts of good governance and good administration in Romania throughout integration in the European Union

Currently, Romania has powerful democratic institutions undergoing a dynamic process of consolidation and improvement, capable to ensure normal functioning of the state. The functional market economy, the credible and responsible institutions in the service of the citizen, independent justice and appropriate structures to enforce the law, are all major landmarks of the fact that the state functions stably and democratically, under values and principles defining the status of Romania as a Member State of the European and Euro-Atlantic community. Moreover, the quality and the capacity of the public administration to take actions have generated a series of preoccupations relating to the quality and the efficiency of the joining process. The joining requirements and the need to ensure functional compatibility with the system of the European Union impose a series of actions aiming at: consolidation of institutions and credibility of the public administration; its functioning in full transparency and strict observance of the law; effective implementation of some policies regarding decentralisation and local autonomy.

The concept of *Good Governance*, promoted by liberal democracies in the European space means involvement of citizens in the decision-making process, enables more efficient use of material, human and financial resources, guided towards satisfying priority needs.

Good Governance is not a goal in itself; it is subordinated to the final goal – achievement of general interests. Recognition is given to four *characteristics of good governance*:

1. *political dimension* of the concept, which involves a competitive multi-party system in the democratic policies and observance of human rights. The essence of the “European” model of public administration is rapprochement with political power based on elective and multi-party democracy and the principle of separation of powers.⁵
2. *institutional dimension* represented by the manner in which the priority objectives of a state are managed;
3. *technical dimension* capitalised by the quality of the management of the institutional capacity.

⁵Ion Imbrescu, *Elements of Administration Science, Theory of Public Administration, Administrative Practice*, Lumina Lex Publishing House, Bucharest, p. 51.

4. *sociological dimension* which implies: ensuring a legal and economic political environment; enhanced efficiency and effectiveness of governance; decentralisation of public administration; promotion of cultural diversity; protection of the environment and equal treatment.

Therefore, public administration may only function in a social environment constituted by a series of systems, structures or forms of organisation, external to this administration, which are susceptible to periodically influence the structures, the forms and the content of the administrative authorities' activities.⁶

The initial concept of good governance was identified within the Common Foreign and Security Policy of the European Union (CFSP). However, when the European Commission set the imperative reform of European governance as a strategic objective, *the White Paper on European Governance* was elaborated. This is a fundamental document which pinpoints *the principles of the European good governance: openness; participation; accountability; efficiency; coherence*. As shown in the Paper, each principle is important in establishing democratic governance on which democracy and observance of law rely.

Openness does not mean only active communication on decisions taken; it means use of an accessible language that can be understood by the public opinion. The Union's institutions grant the citizens and the representative associations "*the opportunity to make known and publicly exchange their views in all areas of Union action*" and "*maintain an open, transparent and regular dialogue with representative associations and civil society*" (article 11 (1) and (2) of TUE). To ensure coherence and transparency of the Union actions, the European Commission carries out broad consultations with parties concerned. The European Parliament and the EU Council adopt provisions on procedures and conditions required to present a civic initiative, according to article 11 of TUE, so that the will of the Union citizens may be heard and taken into consideration⁷.

According to article 15 of the Treaty on the functioning of the European Union⁸ (TFUE), to promote good governance and ensure participation of the civil society, the Union's institutions should observe the principle of transparency according to which any citizen of the Union and any natural or legal person residing or having its registered office in a Member State shall have "*the right of access to the documents of the Union's institutions, bodies, offices or agencies of the Union, whatever their medium*".

The Chart of the Fundamental Rights of the European Union represents "a landmark in the European construction, in the sense that this time, the integration aimed at the values specific to citizens and their rights and not the economic

⁶Cezar Corneliu Manda, *Science of Administration*, Lumina Lex Publishing House, Bucharest, p. 76.

⁷P. Craig, Grainne de Burca, *European Union Law, Comments, Jurisprudence and Doctrine*, 4th edition, Hamangiu Publishing House, Bucharest, 2009, p. 84.

⁸Treaty on the European Union, published OJEU, C 326/13 of 26.10.2012 consolidated version.

values”⁹, “*a genuine catalogue of the rights from which all European citizens should benefit in relation to all European Union institutions and Member States whenever the latter enforce the European legislation*”. At European level, the citizens of the UE Member States as well as the citizens of third states¹⁰ benefit from a right of good governance in relations to the European Union institutions and bodies, according to article 41 of the Chart of the Fundamental Right of the European Union.

With regards to *participation*, quality, relevance and efficiency of the EU policies depend on ensuring a large participation, from conception of decision to its implementation. The opportunity given to citizens to express themselves by legislative initiatives represents an important step towards ensuring legitimacy and consolidating participative democracy at Union’s level. The opportunity given to citizens to express through legislative initiatives represents an important step in ensuring legitimacy and consolidation of the participative democracy within the Union. Therefore, the European citizen is ensured a new perspective and is given the opportunity to actively participate to elaboration of decisions which concern him directly. Once instituted, this mechanism of promoting the interests of the European citizens enhances the internal democracy of the European Union and capitalises on the manifestations of the civic concerns on the European territory¹¹.

The right of access to the documents of the European Council, Commission and Parliament is granted by provisions of article 191A (225) paragraph 1 introduced in the EC Treaty of Amsterdam, taken over in article 15 (3) of TFUE and article 42 of the Chart of Fundamental Rights of the European Union. In line with provisions of this article, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the European Parliament, Council and Commission, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3 (they refer to potential limits of such right of access, on grounds of public or private interest; each institution shall set by internal rules and regulations specific provisions on public access to their documents). Citizens’ involvement and transparency of the decision-making process in the European institutions are also conferred by Regulation no. 1049/2001 of the European Parliament and Council of 30 May 2001 regarding free access to documents of the European Parliament, Council and Commission (OJ L 154/31.05.2001).

⁹Elena Simina Tănăsescu, *The Chart of the Fundamental Rights of the European Union: Advantages and Effects to European Citizens*, „Romanian Magazine of European Law”, no. 4/2010, p. 17.

¹⁰ Oana Mihaela Salomia, *Autonomy of the Chart of the Fundamental Rights of the European Union*, „the Law Magazine” no. 2/2013, p. 253.

¹¹European Citizens’ Initiative, Europe Direct Information Centre in Bucharest, European Institute in România address: <http://ec.europa.eu/citizens-initiative>, consulted on 1.05.2018.

Efficiency and effectiveness condition the exercise of policies in a prompt manner, with clear objectives. In addition, efficiency also depends on the implementation of the policies and the choice of the level at which the measures are taken¹². One of the principles of democratic governance promoted by the Treaty of Lisbon is the *participative democracy*. By virtue of this principle, the European citizens may participate under different forms to the political process of the Union. One such form is the *citizens' initiative*. The Treaty also recognises the importance of consultations and dialogue with associations, civil society workers and employers, churches and non-confessional organisations. The right to information and the European citizens' initiative come to meet the demand relating to rapprochement of the decision with the citizens. It represents methods by which citizens may propose legislative bills on the agenda of the European Union, in fields in which the Union has powers and competences to legislate.¹³

The Maastricht Treaty (1992), enhanced by the Treaty of Lisbon¹⁴ (2007), also grants the European Parliament the right of initiative and allows it to request the Commission to submit a proposal. Regulation of the citizens' initiative comes in the context of correcting the democratic deficit of the European Union and the lobby activities carried out by the main associates of the civil society within the Member States. The European citizen hereby becomes a new player in the classic decision-making triangle of Europe, made up of the European Commission, the European Parliament and the Council of the European Union.

Good administration is closely related to good governance. In our opinion, the ratio is from part to whole¹⁵. If *government represents the manner in which power is exercised, good governance implies* "the imperative of the consensus of people governed in relation to objectives and methods of government, responsibility of government representatives, *efficiency of government and citizens' right to be informed chiefly on how financial resources of government are used and distributed*"¹⁶. The final goal of good governance and implicitly of good administration, aims to achieve general interests.

As indicated by article 41 (2) of the Chart, *the right to good administration implies* (1) ***any person's right to be heard before taking any potentially***

¹²Vasilica Negruț, *Reflection of the Right to a Good Administration of the Romanian Legislation*, paper presented at the 16th International Scientific Conference Knowledge organized by the Academy of Land Forces "Nicolae Bălcescu" in Sibiu, 25-27 November 2010, published in "The Conference Proceedings", p. 552-556.

¹³*Idem*.

¹⁴Treaty of Lisbon to amend the Treaty on the European Union and the Treaty on Establishing the European Union, OJEU, 2007/C 306/01.

¹⁵Vasilica Negruț, *The Europeanization of Public Administration through the General Principles of Good Administration*, „Acta Universitatis Danubius Juridica” no. 2/2011, p. 5-15.

¹⁶Cristian Ionescu, *From the Concept of Government to the Practice of Good Governance*, paper presented at the International Conference "Public Administration at the Beginning of the 3rd Millennium", 21-22 November 2005, organised by the National School of Political and Administrative Studies.

harmful individual action; (2) any person's right of access to their own file, in compliance with legitimate rights regarding confidentiality and professional and trade secrecy; (3) administration's obligation to state the grounds for their own decisions.

The right to be heard, consecrated in article 66 (2), the paragraph 5 of CECO Treaty represents the opportunity given to parties to present their position before the High Authority sets out some actions. The jurisprudence of the CJEU with regards to *the right to be heard* is constant in the sense that this right should be observed “in any procedure initiated against a person and susceptible to lead to prejudicial allegations; it represents a fundamental principle of the Union's right and should be ensured even in the absence of any regulation on such procedure”.¹⁷

The right of access to their own file is the principle according to which the parties concerned may examine documents used by the administration during the procedure. This right is conditioned by observance of the legitimate interests concerning confidentiality and professional and business secret. In the matter of officials disciplinary regime, in a case filed against the advice issued by a discipline commission, the Court considered that such advice represents a harmful act and that it may be the subject matter of an action, as the advice mentioned, despite its issuance by a consultative body, had been issued upon the completion of an investigation which the commission should have conducted in full independence and in accordance with a special, distinct procedure, of contradictory nature and subjected to the fundamental principle of the right of defence¹⁸. A fortiori, such a reasoning should by analogy apply in case of decisions adopted in application of article 10 (2) the first thesis of Regulation no. 1073/1999¹⁹, as these decisions come from an independent community body and are also taken in relation to or upon completion of an investigation which should be carried out in full compliance [...] of the right of the persons concerned to express their opinions on actions which regard them”²⁰.

The obligation to state the grounds for the decisions made forces the authority issuing an administrative act to show the actual elements which led to adoption of such decision. Motivation represents an essential element in forming citizens' conviction on the legality and opportunity of the administrative act and

¹⁷In this case the plaintiff Maurice Alvis contested his dismissal in the absence of defence, as he was not informed on the grounds thereof. In its decision of 4 July 1963, the Court highlights the administration's obligation to give the officials the possibility to defend themselves prior to taking any disciplinary decision which may affect them. The court considers that this obligation represents a general principle of the administrative law in the Member States of the European Union (Court of Justice, Case 36/62 Alvis vs. Council, 1963).

¹⁸Decision of Court 29 January 1985, F/Commission, 228/83, Rec., p. 275, point 16.

¹⁹Regulation (EC) no. 1073/1999 of the European Parliament and Council of 25 May 1999 regarding investigation carried out by the European Anti-fraud Office (OLAF).

²⁰Decision of the EU Public Function Court of 28 April 2009 in jointed F-5/05 and F-7/05, subject matter being an action filed on grounds of articles 236 EC and 152 EA.

also a guarantee of having chosen the optimal solution by the decision-making body²¹. The obligation to state the grounds takes account of the decisions which may affect the individual rights and freedoms. Its objective is to reduce the discretionary power of the entities that have the authority to decide and to therefore eliminate the abuses and illegalities by the administration²². The full scope and the details depend on the nature of the act adopted whereas the requirements which the motivation should comply with depend on the circumstances of each individual case, as decided by the Court of Justice. The motivation confers the act transparency - the individuals may check whether the act is properly substantiated - and enables the jurisdictional control exercised by the Court²³. In case 72/74 *Groupement des fabricants de papiers and Others versus the Commission*, the Court accepts that in the event of a similar case, the solution may be grounded briefly; the community authority concerned shall provide explanations on its reasoning²⁴.

In Romania, on the basis of the principle of transparency of administrative procedure consecrated by the Constitution (with exceptions set forth by article 53 of Constitution), Law no. 24/2000 regarding the norms of legislative technique to elaborate normative acts sets out the motivation as a condition proving the legality of such acts. In terms of motivation of individual administrative acts, this obligation is stipulated either without making the distinction between the acceptance and the refusal of application settlement, or only for situations when the application is not settled favourably.

At European level, when a decision made by an institution fails to meet the legal obligation regarding motivation, any person or institution, body, office or agency may file with the Court of Justice an action for cancellation by virtue of article 263 of TFUE. In addition, we point out the aspect highlighted by the jurisprudence of the Court of Justice according to which distinction should be made between *the obligation to state the grounds for the decisions*, which represents *a fundamental procedure norm*, and *the issue of the grounds in the motivation*, which relates to the substance legality of litigations. Consequently, the reasons by which the grounds of an act are contested are not sufficient when it is about an act for which there are no grounds or the grounds are insufficient²⁵.

The European Code of Good Administrative Behaviour provides in art. 4-25 the principles of good administration: (1) *legality* which represents the official's obligation to carry out his activity in accordance with the law and under the

²¹Dana Apostol Tofan, *European Administrative Institutions*, C.H. Beck Publishing House, Bucharest, 2006, p. 46.

²²Verginia Vedinaş, *Deontology of Public Life*, Universul Juridic Publishing House, 2007, p. 224.

²³Octavian Manolache, *Community Law*, 4th edition, C.H. Beck Publishing House, Bucharest, 2003, p. 620.

²⁴Case 72/74 *Groupement des fabricants de papiers and Others versus Commission*.

²⁵CJEU, Decision of 22 March 2001, France/Commission, C -17/99, Rec., p. I – 2481, points 35-38.

rules and procedures stipulated in the European legislation; (2) *absence of discrimination* which imposes observance of equality principle by officials; (3) *proportionality* which pursues provision of an equilibrium between measures taken by officials and the objective considered as well as the correlative obligation to deprive the citizens of no rights which should enable them to achieve their goals; (4) *absence of abuse of power* represents the obligation to strictly observe the competence set by the law for each authority; (5) *impartiality and independence*, aspects which force the official to refrain from any form of differentiated treatment; (6) *objectivity*, which implies exclusion of subjective factors from the official's activity; (7) *legitimate expectations, consistency and advice*, requirements imposing the official to be consistent in his administrative behaviour as well as in the administrative activity of the institution; (8) *fairness*, fact which implies partiality of the official; (9) *courtesy*, characteristic of the official's behaviour which forces him to be open in his relations with the public, irrespective of the form in which the latter addresses him (by telephone, electronic media etc.); (10) *obligation to reply to letters in the language of the citizen* forces the official to consider that each and every Union's citizen or Member State who writes the institution should receive a reply in the same language; (11) *acknowledgment of receipt and indication of the competent official; obligation to transfer to the competent service of the institution* occurs when a specific petition is conveyed to a directorate general, directorate or unit with no competence; (12) *the right to be heard and make statements*, which imposes observance of the right of defence in all stages of taking the decision; (13) *reasonable time-limit* to take the decision imposes the official to take the decisions and to settle the complaints within a reasonable time-limit; there is a provision for a maximum time-limit which may not be exceeded; (14) *duty to state the grounds of decisions; indication of possibilities of appeal*; (15) *data protection* enforceable by officials who process personal data of the citizen; (16) *notification of the decision, request for information*, the official shall provide the persons with the information requested; (17) *request for public access to documents; keeping of adequate records*, in all departments within the institutions; such records will show incoming and outgoing documents and measures to take; (18) *right to complain to the European Ombudsman; publicity of the Code*, the institution shall take measures to inform the public with regards to their rights and shall ensure publicity of the provisions stated in the documents adopted.

Although not expressly set forth in the Romanian legislation, *the right to good administration* results implicitly from different normative acts. *Law no. 52/2003 regarding decision-making transparency in public administration* creates the premises of rapprochement between civil society and decision-making activity conducted by the public administration. According to this normative act, the citizens, individually or grouped in associations, may get directly and actively involved in the procedure to elaborate normative administrative acts. Therefore, as a general rule, it is necessary to have the policy of public administration on

openness and transparency. In general, by nature of their organisation and functioning, the public administration authorities have the tendency to be discreet; the open governing style is considered to be an essential standard for public administration.

Moreover, article 31 of the Constitution, as amended and republished, establishes the fundamental right of the person to have access to any information of public interest which may not be restricted. Established under the influence of international legal instruments, this right has a double regulation in the Romanian legislation, namely the Constitution and the Law 544/2011 regarding public access to information of public interest²⁶. This right institutes both the person's right to be accurately informed on any information of public interest and the authorities' obligation to inform the citizens on public affairs and matters of personal interest. The principle of informing the citizens represents a fundamental principle in conducting activities by authorities and institutions in România, be they of central or local nature. The principle sets the right of citizens to know the concrete mechanisms on the public access to information of public interest or the transparency in the decision-making process as well as the right to inform the citizens which triggers the correlative obligation of the authorities to create the bases required to inform the citizens on every decision taken or administrative act concluded.

Law no. 571 of 14 December 2004 regarding the protection of public authorities, public institutions and other units which points out violations of law in article 4 letter e) establishes *the principle of good administration*, according to which public authorities, public institutions and other units provided for in article 2 shall carry out their activity with a view to achieving the general interest, with a high degree of professionalism, in conditions of efficiency, effectiveness and as inexpensively as possible in terms of using resources.

Law no. 7/2004 regarding the Code of Behaviour of Officials, as republished, states that the objectives of this code of behaviour pursue to ensure the increase of the quality of public service and also to contribute to the elimination of bureaucracy and corruption in public administration.

Government Ordinance no. 27 of 30 January 2002 regarding regulation of activities on petition settlement, by virtue of article 1 (1), regulates the manner in which citizens may exercise their right to convey public authorities and institutions petitions filed on their behalf as well as how such petitions should be settled.

²⁶ Consolidated form of Law no. 544/200 on 20 July 2016 is achieved by including the amendments and additions brought by: Rectification no. 544 of 12 October 2001; Law no. 371 of 5 October 2006; Law no. 380 of 5 October 2006; Law no. 188 of 19 June 2007; Law no. 76 of 24 May 2012; Law no. 144 of 12 July 2016.

The administrative codification also pursues to achieve an efficient, unitary administration and “enhances the citizens’ trust in the continuity and durability of legal regulation”.

The process of codifying the normative acts which regulate matters of substantial law, started in 2008, with *a broad stage of analysis of the legal framework in force with a view to rigorously substantiate the Administrative Code*, as stated in the first chapter of the *Preliminary Theses of the Administrative Code Draft*, approved by Government Decisions no. 196/2016.

In accordance with Chapter I of Government Ordinance no. 196/2016, *“In the sector of public administration, adoption of a code enables use of a unitary terminology for the same juridical realities, institutions, principles and concepts, the risk of interpreting them in a differentiate and contradictory manner being thus reduced.*

Adoption of some code, which should be stable in time, enhances people’s trust in the continuity and durability of legal provisions and equally favours the business environment and encourages the potential investors who are permanently concerned with a stable and coherent legislative framework.

Seen as a constant preoccupation of the Romanian government policy, as early as the period of preparation for Romania’s joining the European Union, the need to systematise the legislation was doubled by a dynamics in the changes which led in time to some parallelisms, contradictions and inadequacies in relation to the normative acts, and sometimes, paradoxically, by a legislative void, by the absence of some legal texts which should deal with some concrete issues occurred in a such diversified administrative practice.

The issues of the Romania legislative framework, including in the sector of public administration, are known to the state authorities who, by a series of strategic and programmatic documents, decide on the necessity to rationalise and systematise regulations, including by instruments of codification. This necessity is also signalled out in the context imposed by the European Union which lays special emphasis on “good governance” and “intelligent regulation”.

The intention of the Romanian government to codify the legal framework in the domain of public administration, by an Administrative Code and a Code of Administrative Procedure, was established as early as 2001, in relation to government programmes and legislative programmes of the Government. At present, the Government’s priority regarding elaboration of the two codes, seen as main instrument in simplifying public administration legislation, is reiterated in the Strategy for Consolidation of Public Administration 2014-2020, approved by Government Decision no. 909/2014; this Strategy represents both the Government’s vision document on the public administration reform and ex-ante conditionality in the dialogue with the European Commission for the programme timeframe 2014 -2020. Furthermore, the codification of the legislation is considered as a measure to increase the quality of the decisions act, in the Strategy regarding good regulation 2014-2020, approved by Government Ordinance

no. 1.076/2014. Romania's government programme approved by Government Decision no. 1/29.01.2018 includes in Chapter Public Administration. Regional policies to be undertaken by the Government to fulfil the objectives in the sectors of administration: Legislative amendments for central and local administration, the prefect's institution and the decentralised services, the exercise of the right to the public and private property of the state or administrative-territorial units, the status of the public servants, the administrative accountability. All these measures will be fulfilled by adoption of the Administrative Code.

The subject matter of the regulation of this Administrative Code Draft is represented by the following domains: central public administration; the prefect, the prefect's institution and decentralised public services; local public administration; the status of the public servants and the legal status applicable to contract staff in the public administration; the exercise of the right to the public and private property of the State or administrative-territorial units; administrative accountability; public services.

The Government Decision no. 196/2016 states that the European Union's legislation does not include provisions on codification of the normative acts of public administration. At European level, there are only initiatives regarding codification of the civil law rules or rules on adoption of some common principles of good governance.

Upon elaboration of this study, the Administrative Code is under debates in the Chamber of Deputies.

The goal of good governance is to increase welfare of local communities. On the other hand, good administration is a right of the European citizens. This right may be achieved and guaranteed only within a democratic society of which citizens have access to information on all issues and may participate to the analysis of the political endeavour in its various stages²⁷.

3. Role of administrative control in the process of enforcing European regulations in Romanian law system

The important role played by the administrative control activity in ensuring legitimacy of the public administration as well as enforcement of the community acquis, has gradually led to configuration of some specialized structures with control responsibilities or reorganisation of the current structures, bearing in mind the expansion of the control scope, in the sense of corroborating it with the requirements imposed by the European Union's bodies. *Reconsideration of*

²⁷Vasilica Negruț, *Reflection of the Right to a Good Administration of the Romanian Legislation*, paper presented at the 16th International Scientific Conference Knowledge organized by the Academy of Land Forces „Nicolae Bălcescu” in Sibiu, 25-27 November 2010, published in „The Conference Proceedings”, p. 552-556.

the institutional and functional basis of such structures or even institutional simplification, in the sense of reducing the number of authorities endowed with control responsibilities, by removal of the structures exercising similar competences, as well as creation of some specialized structures which should be the only ones responsible in the sector, would optimise the role of the administrative control in Romania.

As for the control exercised through independent *ombudsman*-like authorities, by comparison of the legislative framework reserved to the institution of People's Lawyer to other similar regulations of Member States, including of European Union, which establishes the European Mediator, one may state that the Romanian legislation carries out the relating European requirements and provides a new juridical institution meant to defend citizens' rights and freedoms in their relation to the public administration.²⁸ The institution of the People's Lawyer is a national institution set to promote and protect human rights, within the meaning laid down by the Resolution of the General Assembly of the United Nations (UN)²⁹ no. 48/134 of 20 December 1993, by which the Principle of Paris were adopted³⁰.

Distinct from similar European institutions, in accordance with the Constitution, as revised, the People's Lawyer is entrusted with enhanced prerogatives, especially in relation to control of constitutionality of legislation. Therefore, pursuant to constitutional provisions of article 146 of Constitution, People's Lawyer has the prerogative to inform the Constitutional Court on the unconstitutionality of laws, *prior to their promulgation and he may also* directly raise the exception of unconstitutionality before the same Court, in connection with a law entered into force. *Thus he may entail the law constitutionality control a posteriori.* The outlining of a form of additional administrative control within the grasp of an autonomous administrative authority, the performance of duties deriving from the capacity of People's Lawyer to protect the citizens' rights, the positive results of this institution, determine us to believe that implementation of this institution of the **ombudsman** in the Romanian system has been successful, to the benefit of the citizen and also of consolidating the rule of law.

Moreover, unlike other national law systems, People's Lawyer acts exclusively in the best interest of the citizens and not of the legal persons; from this point of view, the legal framework of is restrictive. Roughly speaking, we can say that the legislative framework of this institution is appropriate and in line with the role conferred the Romanian ombudsman by the Constitution.

The activity of the People's Lawyer should focus on the central idea of getting a real and substantial support of the authorities in the administration in

²⁸Cezar Corneliu Manda, *Administrative in the European Space*, Lumina Lex Publishing House, Bucharest, 2005, p. 267.

²⁹Resolution of the General Assembly of the United Nations (UN) no. 48/134 of 20 December 1993

³⁰Ion Muraru, *People's Lawyer – Ombudsman-like Institution*, All Back Publishing House, Bucharest, 2004, p. 118.

relation to clarifying a potential violation of the law, in observance of the constitutional provision of article 59 (2) according to which public authorities shall provide the People's Lawyer with the support required in holding this position. In accordance with this article, no public authority shall refuse the Romanian Ombudsman the assistance and the support requested.

Law no. 35/1997 regarding organisation and functioning of People's Lawyer³¹ was amended by Law no. 9/2018 to amend and supplement Law no. 35/1997 regarding organisation and functioning of the institution of People's Lawyer so that he is assisted by deputies specialised in the following domains of activity: a) human rights, equal chances between men and women, religious forms and national minorities; b) rights of family, young persons, retired, disabled persons; c) defence, protection and promotion of child's rights; d) army, justice, police, penitentiaries; e) property, labour, social protection, taxes; f) prevention of torture and other punishments or cruel, inhuman or degrading treatments applied in detention places, by the National Preventive Mechanism.

The main duties of People's Lawyer are: a) petition settlement; b) activities on constitutional contentious: c) submitting points of view, upon request of the Constitutional Court; d) he may refer to the Constitutional Court with regards to unconstitutionality of laws, prior to their promulgation; e) he may directly refer to the Constitutional Court in relation to the unconstitutionality of laws and ordinances; f) activities on administrative contentious: he may inform the administrative contentious court, under terms and conditions of the administrative contentious law; g) promoting the appeal in the interest of the law before the High Court of Cassation and Justice with regards to law matters which were settled differently by courts of law, by irrevocable court judgments; h) he submits his reports the two Chambers of the Parliament, which are annual or upon the request of the former; the reports may contain recommendations on amending the legislation or measures of a different nature to protect the rights of freedoms of citizens; i) he submits reports to the presidents of the two Chambers of the Parliament or, where appropriate, the prime minister, in cases he finds during investigations conducted, legislative gaps or serious cases of corruption or failure to enforce the national laws.

4. Conclusions

The good governance should not be only a desideratum for the civil society and therefore one should understand that, in our capacity of citizens, we are all involved in public administration. Consequently, it is necessary to avoid being

³¹ Law 35/1997 regarding the organisation and functioning of People's Lawyer*) – Republished in the Official Gazette 181 of 27 February 2018 was amended by Law no. 9/2018 for amendment and addition to Law no. 35/1997 regarding organisation and functioning of People's Lawyer.

passive to issues which concern us and which we can change or improve directly or indirectly. According to the Constitution of Romania, article 119 „public administration of the administrative-territorial units are based on the principle of local autonomy and the principle of decentralisation of public services”.

The principle of local autonomy takes into account the organisation and functioning of the local public administration starting from “the right and the actual capacity of local public authorities to solve and manage on their own behalf and under their responsibility, an important part of the public affairs, to the benefit of the local communities which they represent”, central administration authorities, in line with the principle of subsidiarity. They shall intervene providing that and only to the extent to which the objectives may not be achieved by local authorities. The level of local autonomy should be reasonable, in the margin practiced by the European Union – from low to high. The decision on Romania’s level of local authority is a political one and relates not only to the arguments of administrative efficiency, but also to other types of arguments – symbolism, local patriotism etc.

The local public administration in developed countries relies on the principle of local autonomy and we consider that in Romania the energy should also be channelled towards a real, efficient and functional local administrative and financial autonomy. This gives the advantage of some adaptable strategies and tactics harmonised with local realities.

The reality demonstrates that for nearly fifteen years there has been an attempt to adapt to transformations of administrative, political and legal nature which occur in developed states. There is a series of legislative or institutional gaps which hinder the implementation of the reform in administration:

- failure to optimise the decision-making process as local authorities failed to assume their local autonomy in full;
- failure to clearly identify the responsibilities and relations between different institutions;
- incomplete decentralisation and failure to fulfil the rapprochement of some responsibilities and decisions with the citizen’s interest; in addition, failure to completely transfer the material and financial resources which ensure rapprochement between decision and economic reality, transfer which would confer a better use of the resources.
- budgets of the local communities are mainly dependent on the state budget as the local budgets do not exceed 25% of the local resources required; in line with the European model, the financial reform aims at a quantum of approximate 50%.
- scarce communication between the local authority and the citizen;
- failure to implement a functional system in all administration branches;
- there is a discontent among the citizens determined by the miscorrelation between the urban comfort provided by authorities and the high amount of money which should be annually paid to the local budget.

Elaboration of a decentralisation law represents a starting point for an administrative reform. Such reform will clarify the issues on distribution of powers among the elected representatives and the officials, competences of territorial communities and state communities. The transfer of competence and transfer of resources necessary to exercise these competences have to occur together. An enhanced decisional capacity also involves accountability of the decision-making factors with no possibility to impute the responsibility upon other persons except in certain conditions rigorously set, as all authorities want to be able to decide but all “run away” from responsibilities.

In addition, it is necessary to create conditions of a participative democracy by ensuring information and participation of citizens in relation to solving major issues of the community, enhancing the right to expression of local elected representatives, ensuring the transparency of the administrative acts. The procedures on citizens’ consultation in relation to fundamental issues should be included in a future law regarding organisation and conduct of the referendum set forth in the Constitution.

The administrative reform in Romania is necessary providing that it is will be achieved in a thorough manner and will have positive effects. Although the developed European states represent a model, reform should not be made only because the European Union says so, but because Romanians need such reform.

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Regionalism in Spain

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Abstract

"Regions" and "regionalism" have formed a central part of the political discourse that has accompanied constitutional reform, devolution and/or decentralisation the United Kingdom, France and Spain. In the recent period all three have been in transition from post-imperial nation to constituent state of an increasingly integrated EU, and in negotiating that transition have had to deal with periphery and regional problems inherited from the past. Some regions were fully assimilated in the process of nation-building, others resisted it in some form or other throughout.

Keywords: regions, regionalism, European Union, Spain.

JEL Classification: K23, K33

1. Introduction

Of the three states Spain is facing the most difficult regional problem and the the most advanced of the regionalising projects.

Spain's regional problem has two connected aspects dimensions, to persuade the two principal unassimilated peripheries (Catalonia and the Basque region) to accept the state, and then drawing on the resources of these regions to support development in the other regions.²

These purposes are opposite and it has been a difficult balancing act.

The case of Catalonia is suggestive.

In the past thirty years, Catalan economic development was in paralel with cultural nationalism, increasing linkages with the EU and with the wider world. The Catalan language has the main role in public life in the region, in education, and in the communications media.

The region's economic success and Barcelona's prestige as a major European city give the Catalan government a strong position in Europe stage and an advantage in negotiations with the central government.

Catalonia's increased external orientation is seen in a positive way, not simply for the economic and cultural benefits it brings, but due to the linkages with the Castillian centre.³

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² Ruane, J, Todd, J, *A Centre-Periphery Relations in Britain, France and Spain: Theorising the Contemporary Transition, Centres and Peripheries in a Changing World*. Workshop no. 4, ECPR Joint Sessions, Grenoble, 2001, p 12.

³ Ruane, J, Todd, J, *op. cit.*, 2001, p 12.

2. Historical aspects

The Spanish state was created in the XVI century.

It was not a national real unification, it was the partnership of different crowns and kingdoms.

Many of these structures maintained their own institutions and legal codes, legislative or judicial bodies or even different degrees of fiscal autonomy. In the XVIII century, after a Succession War, former Habsbourg dynasty was removed by the Bourbons kings that tried to centralize the country.⁴

Even if in other countries there were a progressive process of language imposition, in the situation of Spain there are existing important regional languages spoken in very populated areas of the country.

We are speaking here mainly about Basque country and Catalonia, where Basque and Catalan were the dominant languages among the population. In the case of Galician this language was stronger in the rural areas of the region.

The history of the XIX century in Spain is the history of the conflict between the liberal and conservative forces to build a modern nation state that, to some extent, was a failure.

The War of Spanish Succession (1701-1714), put Catalonia's future in a big danger.⁵

In 1931, an autonomous government for Catalonia was created under the name of *Generalitat*. After the Spanish Civil War (1936-1939), democratic rights were removed, media was censored, and lingual and cultural regionalism was punished. The Catalan language and symbols were forbidden in all public spaces, schools, and books, and Catalonia's Statute of Autonomy and *Generalitat* were disbanded.⁶

The *Generalitat* of was created again in 1977, and in 1979 Catalans approved their second Statute of Autonomy establishing the Autonomous Community of Catalonia, its current legal status.⁷

The Catalan opposition to Franco regime was radically different to that in the Basque Country. During the 1960s and early 1970s, political opposition to the dictatorship was in a paralel way with a cultural revival in literature, art, and music, which fostered Catalan national identity.

⁴ Lago-Penas S, Simon-Cosano P. *Regionalism in Spain*, Assembly of European Regions Study on Regionalism, 2014, p. 4.

⁵ Steffen. J, *Why Secession and Why Now? : The Political Economy of Catalonia's Push to Exit Spain*, University of Notre Dame, Spring 2016, p. 5.

⁶ Lago-Penas S, Simon-Cosano P., *op. cit.*, 2014, p. 4.

⁷ Steffen. J, *op. cit.*, p. 6.

Furthermore, Catalan nationalists joined forces with communists, socialists and liberals to fight against the dictatorship, much in the same manner they had done before the proclamation of the Second Republic.⁸

3. Democratic period

During the period of Spanish transition to democracy (1975–78), there was an growing tendency in support for political autonomy in Catalonia and the Basque Country, as a reaction to the authoritarian Spanish nationalism imposed during the previous four decades.

As a difference from the 1930s, demands for regional autonomy did not limit themselves to Catalonia, the Basque Country, and, to a lesser extent, Galicia, but spread all across Spain.

Regions like Andalusia, Aragon, Valencia, Asturias, or the Canary Islands expressed diverse levels of regional identity and claimed their own political power within a decentralized state.

This generalization of regional political demands is expressing the degree to which the idea of a democratic Spain had been associated with decentralization. From 1976 onwards it seemed clear that the state would have to rest on two pillars, parliamentary democracy and regional autonomy.⁹

The 1978 Constitution is considered to be a compromise between very diverse political forces trying to find a political solution to the national question in Spain.

The Constitution wants to reconcile the centre-periphery rivalry.

Article 2 is expressing „the indissoluble unity of the Spanish nation” while it also recognized and guaranteed „the right to autonomy of the nationalities and regions of which it is composed”.

In the problem of language, Castilian was declared the „official language of the state”, but „other Spanish languages shall be official in their respective Autonomous Communities” (article 3.).

The word „nation” was, however, reserved for the Spanish as a whole while Catalonia, the Basque Country and Galicia were considered „historic nationalities”.

According with the new conditions, Catalonia, the Basque Country and Galicia obtained their own statutes of autonomy and, throughout the 1980s, the example was followed by all regions in Spain, bringing the number of autonomous communities up to 17.¹⁰

⁸ Muro, D, Quiroga, A, *Spanish nationalism*, SAGE Publications, 2005, 5 (1), p. 19.

⁹ *Idem*, p. 20.

¹⁰ *Ibidem*.

The 1978 text was considering the Catalan, Basque and Galician ethnonational differences, while attempting to restructure Spain as a quasi-federal state.

A State of Autonomies (*Estado de las Autonomías*), replaced the centralized structure of the state. The Constitution the 1981 Law of Autonomic Harmonization (LOAPA), allowed all regions to have their own parliament and decision-making process. As a result of the implementation of the autonomic model, and the concomitant establishment of political and cultural bodies devoted to fostering regional distinctiveness, national and regional identities tend to overlap in most of the population. In our days, up to 50 percent of Spaniards identify themselves equally with their region and Spain while only 26 percent consider either the region or Spain more important than the other.¹¹

The opposition to the national political environment can have a profound effect on a Catalonians' desire to vote in favor of secession. Secession is the option of last resort, an alternative considered only when all other options working within the current system have been eliminated.

Taking into consideration that in reviewing Catalonia's proposed new Statute of Autonomy in 2006, the Spanish Constitutional Court identified parts as being unconstitutional, Catalonians may feel that they have reached an impasse in negotiation with the central government.¹²

All attempts to work within the system have been rejected.

Political change is the perceived solution to economic decline.

More than that, economic and political strains were growing after the global financial crisis of 2008-09, when the Spanish housing bubble burst and unemployment reached record highs. Already present disparities in economic performance across regions widened. This created a greater workload on advantaged regions that had to pick up the slack of increasingly disadvantaged regions while being unable to raise their own taxes resulting from horizontal fiscal imbalance.¹³

Differences in culture, ethnic identity, and language are further motivations accelerating secessionist sentiment. While increasing nationalism in their own right, these factors also serve as a lens through which to contextualize fiscal relationships.

A region's separatism is strongest when the region is possessing a unique ethnic character and is economically fitter than the country as a whole (Catalonia is a case).

The deterioration of this relationship has as reason the limited real political decision-making power given to regional governments. The quality of

¹¹ Muro, D, Quiroga, A, *Spanish nationalism*, SAGE Publications, 2005, 5 (1), p 21.

¹² Steffen, J, *Why Secession and Why Now? : The Political Economy of Catalonia's Push to Exit Spain*, University of Notre Dame, Spring 2016, p. 8.

¹³ *Idem*, p 9.

decentralization, measured by the strength of a country's stability and the reduction of incentives to secede, is highest when regional governments have an ability to represent heterogeneous preferences and when the national framework ensures conflict resolution through cooperation and compromise.¹⁴

The driving force behind Catalonia's secessionist movement is a goal for Catalonia to assume responsibility for taxation and spending policy.¹⁵

4. Autonomy and federalism

A federalist reform can resolve the majority of these tensions in theory.

This solution is involving increased fiscal responsibility under which regional government would be funded by taxes levied and collected by these governments and not by grants afforded by the central government, changed equalization schemes that rectify horizontal and vertical fiscal imbalances by matching expenditure needs with potential tax resources, and increased regional input in statewide decision making.¹⁶

Secession, even is eliminating the negative fiscal flows problem and granting full fiscal and political autonomy, has the consequences of a potential decline of sales to the Spanish market, allocation of a share of Spanish debt, and a potential exit from the EU and Eurozone.¹⁷

The Spanish market is the main customer for Catalan exports, and the border effect resulting from independence can significantly dampen trade.

While Catalonia trades much more with the rest of Spain than the rest of the world, there also has been a slow but steady increase in its openness ratio to foreign markets. The comparative importance of international trade has increased since the mid nineties, and that of interregional trade has lessened.

Catalonia exports to the rest of Spain are bigger than imports.

In the same time, it is the international import hub for the rest of Spain. In comparison with other Spanish regions, Catalonia leads in both international and interregional trade volumes.

The border effect caused by a possible secession is suggested to be a substantial 9% in Catalan GDP, but, relative to the rest of Spain, Catalonia is in a much better position to transition into an independent nation based on trade flows.

In the same time, EU and EZ membership is a deciding factor for secession. The costs of abandoning the Euro and exiting the simplified trade flows within the EU would be astronomical and, probably, conclusive in deciding the vote.¹⁸

¹⁴ Steffen. J, *op. cit.*, 2016, p 12.

¹⁵ *Idem*, p 9.

¹⁶ *Idem*, p 27.

¹⁷ *Idem*, p 28.

¹⁸ *Ibidem*.

In the matter of executive control, the dominant model of negotiation between the national government and the Comunidades Autónomas is bilateral, even there have been efforts to make intergovernmental conferences. Since 1994 there were established European Affairs conferences and policy-specific conferences that meet several times a year.

They have an ad hoc character, depending on the will of central government, and usually take form of informative sessions. In the topic of the influence of ACs in national tax policy, they only can affect it through the Senate. However, as explained before it can be overridden by the lower house.

The constitutional reform, it requires 3/5 majority in both upper and lower house on the first vote and, if the agreement fails, a two thirds majority in the lower house and the absolute majority of the Senate in a subsequent vote.

The directly elected senators can veto the constitutional amendment. However, the senators appointed by the Comunidades Autónomas are too few to be decisive in the process.¹⁹

The Spanish Constitution shows a predisposition towards the affirmation of diversified regionalism, founded on the historic element and on the acknowledgement of certain “historical rights”, which can be identified essentially in linguistic competence, in the civil law, in the fiscal regime, in the insular quality and in the organization of local bodies.

The Spanish Constitution is creating two tracks (ways) to accede the autonomy.

The “fast track” was established according to the art. 151 and was reserved to the three “historical nationalities”, the Basque Country, Catalonia and Galicia.

Even if they were not named in the constitution it was implicitly the case since it was established for those territories that has approved a Statute of Autonomy during the Second Republic.

If it is not the situation and a given territory want to access the autonomy with a “fast track” procedure it will require the approval of all the municipalities of each province and the ratification of the process through a referendum that archives the absolute majority if the electoral census of each province of the new region.

This difficult process was practiced by a single Comunidad Autonoma, Andalusia.²⁰

The “fast track” access to autonomy is giving the maximum level of devolved competences according to the list of the constitution. In article 152 it is also established that those Comunidades Autónomas would have a parliamentary

¹⁹ Lago-Penas S, Simon-Cosano P., *Regionalism in Spain*, Assembly of European Regions Study on Regionalism, 2014, p. 18.

²⁰ *Idem*, p. 6.

system, a legislative assembly, a cabinet presided by a president, who should be elected by the assembly and a High Court of Justice in the Comunidad Autónoma.

In the same time, the Constitution also establishes a basic institutional composition of the regions.²¹

The second track is known as “the slow track” and it is stipulated in the article 143 of the Constitution. This way can be used by the “pre-autonomic regimes” that had been constituted in 1978 if approved by 2/3 of all the municipalities involved in the creation of the Comunidad Autónoma that sum the absolute majority of the population in each province or insular territory. This way was called “slow” because those communities have to assume limited competences during a period of 5 years. After this period, regional governments can assume more competences but have to be bargained with the central government.²²

There were no specific provisions about the institutional framework to those ACs but all followed the same structure with a parliamentary system. According to article 145 it is forbidden the federation of Comunidades Autónomas because that could change the political and territorial equilibrium with the creation of new territorial blocks.

The fundamental law that recognizes the Comunidades Autónomas is the Statute of Autonomy, which is included in the article 147 of the constitution. The Statute of Autonomy is approved by a parliamentary assembly representing the region with different majorities depending of the AC (2/3 or 3/5). After that, it has to be passed as an “Organic Bill” in the Spanish Parliament with the favorable vote of the absolute majority of the national deputies.

For those communities that acceded to the autonomy with the “fast track” a referendum is required after the Statute is sanctioned by the national congress. The Statutes have to include the name of the community, its territorial borders, the names, seat and organization of institutional government and the competences that they assume.²³

The Constitution of 1978 guarantees the right of self-government for all AC and list 23 areas of competences for the Comunidades Autónomas (AC). We are speaking here about city and regional planning, health, housing, public works, regional railways and roads, ports and airports, agriculture and fishing, environment protection, culture, tourism, social welfare, economic development. The national government has exclusive jurisdiction over foreign policy, defence, justice, criminal and commercial law, custom and trade, currency and citizenship and immigration. In reality, there are shared competences in the first list based on bilateral bargaining process between each AC and the central government.²⁴

²¹ *Idem*, p. 7.

²² *Ibidem*.

²³ *Ibidem*.

²⁴ Lago-Penas S, Simon- Cosano P., *op. cit.*, 2014, p. 10.

In the matter of the Spanish fiscal federalism framework there are two sorts of Acs, the so-called *forales* AC (Navarre and the Basque countr) and the rest (common ACs). For historical reasons, the former enjoy a higher degree of autonomy and a radically different system of financing, which translates into a higher level of resources per capita. The regional governments of Navarre and the Basque country collect all taxes in their territories, business income tax, special excises, VAT and transfer a yearly amount to the State.

Both AC are entitled to change the structure of their fiscal system (except for the indirect taxes- subject to the harmonization rules imposed by the European Union and the central government).²⁵

The AC participation in all Spanish public spending has risen to slightly more than one third of the total after the devolution of powers on health-care to ten ACs in 2002. In fact, this share is one of the highest in the World. ACs are responsible for main powers such as education, health care, social services, and play a crucial role in infrastructure investment, research, and development policies.

Until 2002, Andalucia, Canarias, Catalunya, Galicia and Comunidad Valenciana were the only common ACs with responsibilities in health care (education). Because both public policies absorb more than fifty percent of total spending, the mean size of the budget for them was much higher than in the rest of common ACs and closer to that of the *foral* AC.²⁶

Moreover, the poorest regions have received more supplementary conditional grants from both central government and the European Union to help boost their economic performance.

5. Conclusions

The economic crisis beginning in 2008 had an impact on regionalism.

It is difficult to imagine a form of representation other than of nation-states, even when notions of nationhood become increasingly elastic.

In our days many regional and stateless structures have their own institutional bodies and governments, enabling their representation to fall squarely within the same formats that characterize those of nation-states.

Critical regionalism becomes a necessary subject of discussion.

The European Union implicitly and explicitly warns that secession of regions from the EU member states would cause them serious problems and they cannot expect to be automatically admitted to the EU.

²⁵ *Idem*, p. 11.

²⁶ *Ibidem*.

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Participatory budgeting. The role of nongovernmental organizations in the participatory budgeting

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Abstract

The objectives of the proposed study refer, on the one hand, to the analysis of the impact of the concept of participatory budgeting in the activity of the local administration in Romania and, on the other hand they refer to the way this concept intervenes in the life of the local communities and the way an active civil society can influence the action of the local administration in Romania. The research methods used to elaborate this study are: the observation of the phenomenon and the way it is reflected in the on-line space, the comparative analysis of the participatory budgeting models used by some local administrations in Romania, as well as some good international practices in the field, such as the analysis of the programmatic documents of the local administrations studied. The results and implications of the study aim at increasing the awareness of the local communities in general as well as that of the non-governmental organizations in particular regarding the advantages of the civil society involvement in the construction and the execution of local budgets, both in terms of increasing the quality of life but also in terms of diminishing the phenomenon of corruption in the local government.

Keywords: participatory budgeting; local government; good practices; civil society; NGOs.

JEL Classification: H72, K23

1. Introduction

The concept of participatory budgeting is one of the most profound democratic governance tools for a community, expressing to the highest degree the adherence of a local public administration to the principle of constitutional loyalty, respect for the citizen and the democratic principles that the application of participatory budgeting implies,

As a legal concept, participatory budgeting is based mainly on two provisions of principle, i.e. imperative norms with superior legal force.

First of all, it is based on art. 9 of the Law no. 500/2002 on public finances, article requiring the observance of the principle of publicity regarding the construction of the public budgetary system. The feature of this principle is that the budgets of public institutions must be open and transparent, these elements being achieved by public debate.

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Secondly, Law no. 52/2003 on the transparency of decision-making in public administration (republished), also establishes in art. 2, the fact that the public administration authorities have to proceed from their own initiative to the consultation of the citizens and the legally constituted associations when it comes to the adoption of administrative decisions with a major impact on the community or when the authority develops normative initiatives.

Both the state budgets and the budgets of the local public authorities must comply with the principles stated in the Fiscal-Budgetary Responsibility Act no. 69/2010, with the specific ones established by the Law on local public finances no. 273/2006, all with subsequent amendments and supplements, as well as derived legislation.

In the following, the Romanian Government adopted a series of normative acts and administrative measures designed to stimulate the participation of the civil society in the act of governance through public consultation, including the construction of budgets of central and local public authorities and institutions. These measures have a dual role: to increase the quality of citizens' lives and their degree of civic involvement on the one hand, as well as to mitigate potential phenomena associated with corruption. In this respect, we highlight here the Memorandum adopted by the Government on March 3, 2016 (Annex No. 4 to G. D²), together with the development of the transparenta.gov.ro platform, a portal for the centralization of information of public interest and the computerization of the inter-institutional interaction.

Also, in the subject matter of our study, we highlight the action of the Ministry of Public Finances which, in order to increase budgetary transparency and improve the management of budgetary resources, has, in 2016, put into operation the **National System for Verification, Monitoring, Reporting and Control of Financial Situations and Legal Engagements of Public Entities in Romania**. At the level of public institutions, this system offers the possibility to monitor in real time the allocation and use of public resources at the level of each public institution, as well as at the level of the hierarchically inferior institutions; it also allows for a dynamic redistribution of budgetary resources between public institutions within the same authorizing officer and is responsible for each public institution in fulfilling its legal obligations to register and provide information to the system.

A terminological distinction should also be made to differentiate participatory budgeting from other similar concepts, such as the open budget concept. In a

² Government Decision no. 583 of 10 August 2016 on the approval of the National Anti-Corruption Strategy for the period 2016-2020, the sets of performance indicators, the risks associated with the objectives and measures of the strategy and the sources of verification, the inventory of institutional transparency and corruption prevention measures, evaluation indicators and standards for the publication of public interest information. The document is available online at: <http://sgg.gov.ro/new/strategia-nationala-anticoruptie/> - accessed on 21.03.2018.

study published in 2015, Andra Bucur (co-ordinator) and Ovidiu Voicu³ made the best point (in my opinion) as to the distinction we make for the accuracy of the language as follows: *"Through open budgeting, we understand full transparency at all stages of the budget process, from planning to implementation, monitoring and evaluation. This also involves the use of open formats for automatic processing of published information and descriptive texts, known as citizens' budgets, which explain to the public the content of the budgets. [...]. By participatory budgeting, we are talking about creating and implementing mechanisms to facilitate citizens' involvement in all these stages. Participatory budgeting involves the transparency of the process, because we cannot talk about an informed decision in the absence of free access to information. Citizens' involvement in the budgeting process is often more complex than the opening of budget data, because it needs to ensure both-way communication."*

In view of the above, we appreciate that at the level of the Romanian administration, at least in the current stage, we are in a start-up phase with regard to the "rule of law, the democratic and social state"⁴, closer to the concept of open budget than of the participatory budget, taking into account the conceptual differences shown previously.

An open budgeting process at the level of the administration generally involves some characteristics such as the publication of relevant information and documents that have underpinned both the substantiation of the budget and its execution. The publication is also required to be effective in order to provide intelligible and enlightening information on the spending of public funds. Another important feature would be, in my opinion, the publication, alongside with the technical information on budgets, of the explanatory documents, assumed by the issuer, to understand the meaning and content of the information provided to the civil society in the form known as "budgets for citizens".

The participatory budgeting requires an additional effort on the part of the public authority to convince the community, the civil society, the citizens to engage voluntarily in the process of building the local budget in order to contribute to increasing the quality of life, preventing corruption and to undertake the meaning of the development of the concerned administrative-territorial unit.

In this sense, things are complicated a little, since the citizen's conviction is formed and maintained only by trust, and trust requires a constant and conscious action of the public administration that is constantly carried out according to the desiderata declared and assumed publicly by that authority.

³ See the results of the Open and Participatory Budgeting Project in Romania, Project funded by EEA Grants 2009 - 2014, within the NGO Fund in Romania. The study used in the drafting of this article is the Fourth Report of the Open Society Reports series, which includes five policy analyzes on open governance, transparent public-private contracts, open educational resources, open public budgets and open data in culture. <http://datedeschise.fundatia.ro/publicatii/>, accessed on 21.03.2018.

⁴ As the Constitution of Romania states in art. 1 paragraph 3.

Participatory budgeting is a direct-democratic approach to the construction of the administrative-territorial unit's budget. It generally gives citizens an opportunity to learn about government operations and about deliberation, debate and influence in the allocation of public resources. It is also a tool for educating, engaging and empowering citizens to strengthen good governance.

Increased transparency and accountability in the creation of participatory budgets can help reduce administrative / governmental inefficiency, as well as reduce local or central clientelism, which are usually associated with corruption.

Participatory budgeting also strengthens the inclusive governance by giving marginalized and excluded groups the opportunity to make their voice heard and influence the decision-making that is vital to their interests. Governments are more responsive to the needs and preferences of the citizens and more responsive to them for their performance in the resource allocation and the service delivery. By doing so, the participatory budgeting can improve the government's performance and enhance the quality of the democratic participation⁵.

Open budgeting, coupled with participatory budgeting, creates the certainty of open, sustainable and democratic governance, because it is based on transparency and popular support.

In practice, many democratic states have set standards for opening public budget data, but participatory budgeting is still in the pilot project phase. Open governance includes both the components of both transparency and involvement in the governance process, thus constituting the recipe for effective governance that facilitates the development and prosperity of a society and has been universally established as a form of good governance through the Open Government Partnership (OGP⁶), a partnership with the Romanian Government⁷.

Through the *Memorandum on the Approval of the National Action Plan 2016-2018 for the Implementation of the Commitments under the Open Government Partnership*, the National Coordination Committee for the Implementation of the Open Government Partnership in Romania was established. It is formed, according to the Steering Committee of the OGP, of an equal number of representatives of the public authorities and the civil society. The representatives of the public institutions are six, the representation being assured at the level of state secretary and substitute members of the technical staff.

⁵ Participatory budgeting, edited by Anwar Shah. This volume is a product of the staff of the International Bank for Reconstruction and Development / The World Bank -2007. ISBN-10: 0-8213-6924-5 (electronic); DOI: 10.1596/978-0-8213-6923-4.

⁶ <http://ogp.gov.ro/despre-ogp/>, accessed at 21.03.2018.

⁷ Accession to OGP was only due in 2011. This year, the first phase of the consultation session (14 April - 15 May) was launched, within the annual calendar of this action. For details, see <http://ogp.gov.ro/pna-2018-2020/>, respectively <http://ogp.gov.ro/calendar-2018/>, accessed on March 21, 2018.

2. Models of participatory budgeting in the Romanian administration

In the central administration in Romania, we cannot yet speak of a participatory budgeting of public investments, but rather of an open budget, as we have shown before regarding the actions of the Ministry of Public Finance in this respect.

This level of development of the public investment budgeting mechanisms has two types of explanation, both of which are objective, in my opinion.

First of all, it is about the state of development of the infrastructure in our country, compared to that of the EU member states. From this point of view, *the educational, transport and health infrastructures* are the most representative elements when looking comparatively at the EU countries, to which Romania has to recover significant gaps.

However, since these elements have strategic valences in terms of the state's existence and functioning, the public investment at central government level must be within the decision-making area of the strategic analysis components in the governmental area, generating a unitary vision at the national level on the appropriate approach to addressing these three issues. This vision should lead to a certain predictability and stability of the public investment in these areas of interest over longer periods and transversely over the lifespan of several governments.

In our government practice, Romania has still failed to create the legislative framework of a multiannual budgeting for longer periods, although the current legislation includes regulations on budget implementation for the current year and the projection over the next three years. This is, from my point of view, a compromise solution between the inability to determine with certainty a minimum level of budget revenues for many years and the need that the real economy feels to benefit from certain multiannual investments with fixed budgets and which should not to be subject to annual reviews. The model that should be considered more closely is the model of EU budget construction during the Commission's term of office.

Perhaps a solution for Romania would be a budget law with time coverage equal to the duration of the government's mandate that proposes and executes the budget, with annual adjustments, in the month of November of each year for the following year, depending on the national economy developments and the international commitments assumed by Romania. This means seriousness in budget planning and execution, the stability of the tax system and, implicitly, predictability in budget collection.

Secondly, it is about the level of professionalism and the mentality of the state administration staff. Let us not forget that after the events of December 1989, Romania did not replace a Communist administration functioning according to the principle of *"we shall do everything for the country / party"* with another administration of a democratic type in which the citizen and the community are the center of the public life, but tried to respond to the needs of the democratic state with a Communist-style administration, obsolete in terms of mentality and principles.

However, such a solution has caused many years of delay in implementing the democratic concepts of open government and efficient administration. Only in recent years the public administration has shown signs of change, especially the local government. This is not a coincidence, considering what has been shown, and considering the rejuvenation of the body of civil servants as a natural evolution of things.

The participatory budgeting model that has benefited from the widest publicity is the one promoted for the first time by the Cluj-Napoca City Hall. In the Participatory Budgeting Regulation of the Town Hall of Cluj-Napoca, the City Hall's action has the following objectives:

- "Increase the level of dialogue and collaboration between citizens and public administration.
- Adjustment of public policies to the needs and expectations of citizens, in order to improve the quality of life in Cluj-Napoca.
- Increase the degree of assumption and co-creation of the urban development process by citizens.
- Strengthening democracy through citizen participation in a community-wide decision-making exercise.
- Increase the transparency of the local public administration.⁸

In the workshops can participate the citizens who live, work or study in Cluj-Napoca and are at least 18 years of age, who can submit any projects they are interested in, which they comply with the requirements of the Regulation⁹.

Proposals must fit into areas such as alleys, sidewalks and pedestrian areas; mobility, accessibility and traffic safety; green spaces and playgrounds; designing public spaces (urban furniture, public lighting, etc.); educational and cultural infrastructure; the digital city¹⁰.

Another model developed by the local administration in Romania is that of the Baia Mare Town Hall. In general, this model follows the characteristics developed in the conception of the Cluj Napoca City Hall, maintaining the budget allocation rules, the selection procedures, but also introduces some particular aspects, which identify the model as a stand-alone one. According to this model¹¹, unlike the model of the Cluj-Napoca City Hall, projects aimed at creative industries, youth and projects related to local identity can also be submitted.¹²

⁸ <https://bugetareparticipativa.ro/regulament/>, accessed at 22.03.2018.

⁹ They correspond to an objective of general interest, or may be treated as an investment under the competence of the Municipality of Cluj-Napoca and concern a public space, do not fall within other programs of the Municipality of Cluj-Napoca as funding for NGOs, sports structures, etc., are not contrary to or incompatible with the plans or projects of the municipality that are already in progress, are not commercial or advertising, political or ethnic, they fall within the maximum budget allocated to a project, etc.

¹⁰ Chapter 3 of the Regulation.

¹¹ <http://www.baiaclareactiv.ro/information>, accessed at 26.03.2018.

¹² Local traditions, local history, multiculturalism, different ethnicities living in harmony, mining, generally places, objects, customs, crafts, artistic and linguistic products considered important to

In the southern part of Romania we find the participatory budgeting projection at the level of the Capital, both at the level of the City Hall of Bucharest and at the level of the City Hall of Sector 3 of the Capital.

The Sector 3 City Hall model in Bucharest brings to mind an Operational Procedure at the level of the public administration, approved by the Mayor, for carrying out these actions, which brings a novelty to the local administrations presented above, namely the right to participate in this procedure for commercial companies and non-governmental organizations in the sector 3 of the capital, which makes the participatory budgeting procedure even more democratic¹³.

Projects must be assimilated to an investment under the responsibility of the 3rd Sector City Hall and cover an area within the administration of the Local Council of Sector 3.

Another element different from the models presented above is the right of the Sector 3 citizens to vote differently, one vote for a low-impact project with a budget of up to 200,000 lei (VAT)¹⁴ and one vote for a large project, overall impact, no amount limit and multi-annual scrutiny, as appropriate.

The Bucharest City Hall¹⁵ worked successfully in 2017 and managed to impose a budget for 2018 containing funding for a total of 20 projects of the most diverse¹⁶. The campaign aimed, among other things, to adjust public policies to the needs and expectations of the citizens, to improve the quality of life in Bucharest, to increase the level of dialogue between the citizens and the public administration, to involve the citizens of the Bucharest Municipality in the process of making decisions for the whole community, increasing the transparency of the local public administration. Although the procedure was successful, the participation rate of the capital's citizens to this large-scale project was not the expected one, as in a population of over 2,000,000 inhabitants a number of 33 projects were proposed, which in my opinion reflects only to a very limited extent the needs of the population of the capital, and the degree of involvement of the citizens with the right to vote was also very low, given that, according to the lists of the Central Electoral Bureau of 12.04.2016, in Bucharest there were 1,780,307 citizens with voting rights. In such a population, the participation of 6,795 citizens who voted justifies the opinion expressed above about the real needs of the population.

However, what is very important to highlight is the successful completion of the entire procedure on the one hand and the fact that the City Hall maintains

the Baia Mare community, the pride of belonging to a community of a certain tradition, as described by the quoted site.

¹³ Projects may be submitted by citizen's resident or working or studying in Sector 3, over 18, as well as by associations, foundations, NGOs and companies having their registered office in Sector 3.

¹⁴ The Sector 3 City Hall allocates a budget for a total of 10 small projects and a budget for a large project, as it will result in the proceedings participatory budgeting.

¹⁵ The campaign entitled "Propose for Bucharest" conducted in 2017 for projects funded in 2018 <http://propunepentrubucuresti.pmb.ro/>, accessed 3/26/2018.

¹⁶ <http://propunepentrubucuresti.pmb.ro/pages/centralizator>, accessed 26.03.2018.

and continues to promote this mechanism which, in time, can become a great success, considering also the proposed budget for the twenty selected projects for 2018, that is 4,000,000 euros¹⁷.

It is also interesting, in my opinion, the approach, much closer to the real need of the city, of the areas in which the citizens of Bucharest can propose projects in the sense that, besides the general domains used in all the models presented, PMB brings as a novelty the separation and identification of distinct areas of the cultural infrastructure, namely the social and health infrastructure domains.

3. International best practices models

The international organization called The Participating Budgeting Project¹⁸ (PBP) has set out to map and support participatory budgeting initiatives around the world. The first of such projects have been recorded in Brazil since 1989. Here we also meet one of the largest and most popular projects in the city of Porto Alegre and the state of Rio Grande: between 1999 and 2002, 378,000 people participated annually in the allocation of a budget of nearly \$ 200 million. This is, however, the exception. Because of this complexity, participatory budgeting initiatives are most often happening in a locality or in districts / sectors of larger cities. The same principles can also be applied to decisions on the budgets of public institutions belonging to the community, such as schools or universities. PBP has counted over 1,500 such projects over the past 20 years, but the number of successful ones is much lower, under 100. The most interesting are found on the two American continents, and only a few in Europe, in Spain and the UK¹⁹.

Broadly speaking, in democratically established societies, the pressure for open and participatory budgeting is manifested in two ways. First, through the pressure from an active civil society, which usually requires the governance - whatever it may be - that the allocation and the spending of public money must be transparent and free of suspicion.

Secondly by international financial bodies, such as the World Bank and IMF, which put pressure on the government to provide in this way guarantees good governance to increase the predictability and efficiency of public policies.

In the last decade, we note that in the great forces of democracy (EU and US) as well as in more developed countries with democratic regimes of tradition, the civil society demands also refer to their governments' actions in international relations to ensure the promotion of human rights and of other modern democratic values.

¹⁷ The equivalent in lei, including VAT.

¹⁸ www.participatorybudgeting.org, accessed 26.03.2018.

¹⁹ See in this regard Open Society reports - Open and Participatory Budgeting in Romania, funded by EEA Grants 2009-2014, <http://datedeschise.fundatia.ro/open-ended-reports>, accessed on 23.03.2018.

The international reference tool for quantifying this issue is given by the two documents used by the IMF, namely the *Fiscal Transparency Manual*, and the *Fiscal Transparency Code* respectively. The latter tends to become the international standard for the publication of fiscal and budgetary information. The IMF also carries out studies, researches and country analyses among the clients of the institution at regular intervals. In March 2015, the *Report on Romania*²⁰ was published, with data collected by the autumn of 2014.

However, the most important international initiative devoted to open government is the Open Government Partnership (PGP), which has facilitated the assumption by various member states of various open budget commitments, with a view to their transformation into participatory budget commitments. This partnership, to which Romania joined after 2016, provides a monitoring tool - OGP Explorer²¹, which shows us which budget transparency commitments are active.

One of the most well-known is WHERE DOES MY MONEY GO²², made in the UK by the local Open Knowledge Foundation. The website provides the DAILY BREAD application, in which, by introducing the salary, you can immediately find out how much you contribute to spending in the main areas and sub-domains of government activity. Of course, this means that in the finance department's systems there is a sufficiently good record of revenue and expenditure to make such links, but also that the data is made available to the public with all the necessary information. The website also provides graphical presentations of public spending per domain for each region and the ability to see and look for departmental spending for transactions starting at a minimum £ 25,000. The whole Where Does My Money Go website is based on the OPEN SPENDING²³ platform, also developed by Open Knowledge Foundations²⁴.

4. Conclusions

From the succinct analysis presented on the previous pages we find that, at the level of Romania, there is no structured participative budget coherently structured at both the central and the local level. If at the central level the actions of the Ministry of Public Finances regarding the open budget and those of the General Secretariat of the Government regarding Romania's participation in the PGI have to be shown, there is no coherent and accessible mechanism by the local public administration as a model of good practice for participatory budgeting. In this sense, the natural conclusion that we point out in this article is that the central au-

²⁰ www.imf.org/external/pubs/ft/scr/2015/cr1567.pdf, accessed on 26.03.2018.

²¹ www.opengovpartnership.org/explorer/all-data.html, accessed on 26.03.2018.

²² wheredoesmymoneygo.org, accessed on 26.03.2018.

²³ www.openspending.org, accessed on 26.03.2018.

²⁴ See in this respect Open Society reports - Open and Participatory Budgeting, funded by EEA Grants 2009-2014, <http://datedeschise.fundatia.ro/open-ended-reports>, accessed on 23.03.2018.

thorities, perhaps the Ministry of Regional Development and Public Administration, can create a decision-making tool applicable to the local government through which the citizens can be involved in the negotiation and the distribution of the public resources, an instrument to address the need to improve the state's performance on the one hand and the need to develop participatory mechanisms within representative democracy, on the other hand.

The objectives that this instrument should pursue can be:

1. Improving the performance of local government through the transparency of the use of public funds, leading to increased credibility of the administrative bodies.

2. Increasing the quality of life of citizens in local communities, by involving them more in prioritizing the local government budget allocations, a need arising from poor involvement in participatory budgeting, as we have seen.

3. Increasing the professional performance of the local public administration staff, leading to efficiency and effectiveness in the spending of public funds.

By achieving these goals, the local government authorities find out in the most direct way what the taxpayers' real needs and desires are, which allows them to adjust their medium and long-term programs and policies.

In turn, citizens find out what the constraints on the local government resources are and which of those imply setting priorities and making choices. Better information for citizens makes them more willing to participate in a balanced way of decision-making. Last but not least, participatory budgeting, when properly used, increases equity and fosters inclusion, reducing radicalization in modern society, generating tolerance and respect.

In order to achieve a greater citizen involvement in prioritizing budget allocations specific to local communities, **some prior activities** may be needed to develop a participatory budgeting mechanism, such as the making of creative models of information tools on the benefits of citizen participation in public decision-making. The models that may result from this research activity (conducted under the authority of MDRAP, for example) will start from the current realities of Romanian society, will include the mechanisms already existing under the **Open Government Partnership** (PGP), as well as other instruments to increase public confidence in local government action.

The steps we are proposing to achieve a medium to long-term outcome are:

- a.1) the creation of a participatory budgeting consortium at the level of local authorities willing to adhere to this model, including the elected management bodies of the respective administrative-territorial units as well as universities and civil society organizations willing to participate in the activities;

- a.2) creating models of information tools for these communities that present the benefits of public participation in prioritizing budget allocations;

- a.3) organizing interactive consultation formats among the citizens from the various identified localities who want to know about participatory budgeting and discuss the projects specific to their communities;

a.4) creating a Monitoring Committee for the implementation of participatory budgeting projects, consisting of community representatives, interested and credible NGOs, as well as representatives of the economic environment in the localities where these projects are being implemented.

a.5) putting together public information sessions within the consortium on the results of participatory budgeting after the first annual financial exercise, highlighting the progress achieved in the efficiency and transparency of the spending of public money as well as, increasing the quality of life through the benefits created by the collaboration of community members, diminishing the feeling of marginalization or social exclusion, as the precursors of the social radicalization phenomenon.

We consider it prudent to introduce participatory budgeting through pilot projects at local level that include a fraction of the budget and are to be accompanied by a wider budgeting project in the sense described above in line with the prospects set out in the Open Government Partnership.

The objectives of participatory budgeting are achieved by identifying subjective elements related to the increase of the number of citizens participating in the adoption of the public decision, as well as by determining the degree of public confidence in the action of the local administration. Through repeated, medium and long-term use of these mechanisms, local government will be accustomed to working transparently, and transparency generates efficiency and effectiveness, leading to an increase in citizens' quality of life and diminishing social radicalization.

Another important component of the implementation of such a budgeting model is the regular analysis of the training of public administration staff in the field of reference, which will highlight the training needs of this professional community, so that local government staff can manage this public consultation process with a view to prioritizing the annual budget.

A key role in the success of such an endeavor, however, is held by the persistence of the local public administration and the contribution of the central administration through MDRAP and MFP, as the authorities that can create the legal framework necessary to solve any technical issues that may arise in the process.

"Participatory budgeting" can also play a role as a "school" for both citizens and state officials involved in the process, ensuring access to new knowledge, a better understanding of rights and freedoms, and the duties stemming from the status of citizen, as well as a reduction of the distances between the public administration and the citizens.

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Common Administrative Space of the European Union

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Abstract

The European Union aims to establish a Common Space where individuals and Member States benefit from the same rights and obligations on the basis of a common legal order. EU administrative law and administrative practices are the most receptive areas to uniform conditions and rules. The EU's Common Spaces cover all the regulatory areas of the Union, starting with the geographical space and ending with the political integration of the Member States (sovereign competences). For example, in the field of establishing a common organization of agricultural markets. The existence of an efficient and democratic administration is one of the most important criteria defining the modernity of a country.

Keywords: *European Administrative Space, public administration, administrative cooperation, European administrative law.*

JEL Classification: K23, K33

1. Introduction

The European Union is prone to creating a common Space where the individuals and Member States would benefit from the same rights and obligations, on the background of a *community legal order*. The EU administrative law and the administrative practice are the most receptive domains at uniform conditions and rules². The EU common space incorporates all the competent regulatory domains of the European Union, starting with the geographical area and ending with the political integration of the Member States (ceding sovereign competences)³,

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² See Cătălin-Silviu Săraru, *Spațiul administrativ European*, in Ioan Alexandru, Ilie Gorjan, Ivan Vasile Ivanoff, Cezar Corneliu Manda, Alina-Livia Nicu, Cătălin-Silviu Săraru, *Drept administrativ european*, Editura Lumina-Lex, Bucharest, 2005, p. 95-146.

³ **Terminology** (o.u.). Since the enforcement of the Treaty of Lisbon, on December 1st, 2009, the European Union has legal personality and has taken over the competence previously delegated to the European Community. Therefore, the community law became the **European Union law** and includes also all the dispositions adopted in the past, on the basis of the Treaty of European Union, in the previous version of the Treaty of Lisbon. In this article, the “community law” term shall be used when we speak about the case-law of the Court of Justice previously to the enforcement of the Treaty of Lisbon. Beside the European Union, the European Atomic Energy Community (Euratom) continues to exist. Considering that, basically the Court of Justice competence, as regards Euratom, is the same with the European Union competence – and, for clarity – any reference to the EU law shall cover the Euratom law. The Community *acquis* shall be hereinafter called the “Union *acquis*” or the “European Union *acquis*”.

for instance, in the domain of establishing a common organisation of agricultural markets⁴.

2. Common Administrative Space of the EU

The common administrative space of the EU is a concept based on the common fundaments of the European Union. We shall briefly analyse these fundaments below, without claiming to exhaust the subject⁵.

The single institutional framework. The single institutional framework allows the functioning of the EU institutions, with the purpose of them fulfilling best their missions, in democratic conditions and efficiently⁶.

The economic and monetary union. The economic and monetary represents a unique and stable currency, the consolidation of the national economies and the assurance of their convergence.

The building of the internal market. The unique market promotes the economic, social, scientific and technical progress. Within the unique market, the Union acts for the durable development of Europe, on the basis of a balanced economic growth and on the price stability, on a social economy with high degree of competitiveness, which tends to the highest workforce occupancy rate and to social progress, as well as on a high level of protection and improvement of the environment quality.

The internal market covers a space free of internal borders, where the free movement of goods, persons, services and capitals is assured, in accordance with the dispositions of the treaties.

The common citizenship. Establishing a common citizenship for the nationals of the Member States assures them of all the rights and liberties on any territory of the Member States where they want to stay. Every person holding the nationality of a Member State is a citizen of the Union. The Union citizenship does not replace the national citizenship, but it is additional to it.

The common foreign and security policy. The common foreign and security policy, inclusively gradually defining a common defence policy, which might

⁴ The Council Regulation (EC) no. 1234/2007 of the Council, of October 22nd, 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products ("Single CMO Regulation") (JO L 299, 16.11.2007, p. 1).

⁵ On European administrative convergence see also Cătălin-Silviu Sărau, *European Administrative Space - recent challenges and evolution prospects*, ADJURIS – International Academic Publisher, Bucharest, 2017, p. 15-48.

⁶ Fuerea, A., *Manualul Uniunii Europene*, 5th edition, Universul Juridic Publishing House, Bucharest, 2011, p. 281-289; Diaconu, N., *Dreptul Uniunii Europene, Tratat*, 2nd edition, Lumina Lex Publishing House, Bucharest, 2011, p. 63 - "The European Communities represent international organisations, with an original structure, different from the structure of other international organisations, which own a single institutional system, within which each institution fulfils its duties which were conferred to it in treaties, in collaboration with the other institutions, with the purpose of achieving the community ideal".

lead to a common defence, consolidates the identity of Europe and its independence, in view to promoting peace, security and progress in Europe and in the entire world.

The competence of the Union as regards the foreign policy⁷ and the common security includes all the domains of foreign policy, as well as all the issues regarding the security of the Union, inclusively the gradual establishment of a common defence policy, which might lead to a common defence.

As part of its principles and its external activity, the Union uses, defines and enforces a common external and security policy, based on the development of the reciprocal political solidarity of the Member States, on the identification of the issues of general interest and on achieving an increasingly higher degree of convergence of the actions of the Member States.

The common defence and security policy is integral part of the foreign common foreign and security policy and includes the gradual establishment of a common defence policy of the Union. This shall lead to a common defence, after the unanimous decision of the European Council. In this case, the Council recommends to the Member States to adopt a decision in accordance with their constitutional rules.

Establishing a space of freedom, security and justice. The creation of a space of freedom, security and justice facilitates the free movement of persons, providing also the security and safety of the Union peoples.

The Union offers its citizens a space of freedom, security and justice, without internal borders, assuring the free movement of persons inside it, in correlation with adequate measures regarding the border control, the right of asylum, immigration and also the prevention of criminality and fight against this phenomenon.

The common values of the Member States. The Union is based on the values of respecting human dignity, freedom, democracy, equality, rule of law, and also on the respect of the human rights, of the rights of minorities, inclusively. These values are common to the Member States in a society characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men⁸.

Unity in diversity. The Union respects the richness of its cultural and linguistic diversity and ensures the protection and development of the European cultural patrimony.

⁷ Louis Balmond, Jaques Bourrinet, *Les relations extérieures de l'Union européenne*, Presses Universitaires de France, Paris, 1995, p. 40-44.

⁸ Paul Reuter, *Droit international public*, 4^e édition, Presses Universitaires de France, Paris, 1973, p. 151.

The Union respects the equality of the Member States, in accordance with the treaties and also with their national identity, inherent to its fundamental political and constitutional structures⁹, inclusively as regards the local and regional autonomy¹⁰. It respects the essential functions of the State and, particularly, those having as object the guarantee of its territorial integrity, the maintenance of public order and the defence of the national security. Above all, national security remains the exclusive responsibility of each Member State.

The common constitutional traditions of the Member States. The fundamental rights, as guaranteed by the European Convention for the protection of human rights and fundamental freedoms, and as they result from the common constitutional traditions of the Member States, represent general principles of the Union law.

Space of prosperity and good neighbourhood. The Union develops privileged relationships with the neighboured countries, in view to creating a space of prosperity and good neighbourhood, based on the values of the Union and characterised by tight and peaceful links, built on cooperation. The Union may close up special agreements with the respective countries. These agreements may include reciprocal rights and obligations, as well as the possibility of operating *actions in common*. Their enforcement makes the object of an ongoing cooperation.

The common space of cultural, religious and humanist inheritance of Europe, where the universal values have emerged, which represents the inviolable and inalienable rights of the individual, as well as freedom, democracy, equality and rule of law¹¹.

The community of law. EU establishes a *new legal order* of international law, in favour of which the States have narrowed their sovereign rights, even if in a limited number of fields, and which subjects are not only the Member States, but also their nationals. In its research, CJEU must follow a *common framework* for all the legal orders of the Member States (Case 26/62 Van Gend & Loos).

The finality of the EU purpose. The continuation of the process of creating an increasingly tighter union between the peoples of Europe, where the decisions would be made as closer as possibly to their citizens, in accordance with the principle of subsidiarity.

⁹ Yves Guchet (sous la direction de), *Les systèmes politiques des pays de l'Union européenne*, Armand Colin, Paris, 1994, p. 51-77.

¹⁰ Jean-Bernard Auby, Jean-François Auby, *Droit des collectivités locales*, Presses Universitaires de France, Paris, 1990, p. 15. See also Joël Boudine, *La distinction entre collectivité locale et collectivité territoriale. Variation sémantique ou juridique?*, „Revue du Droit Public et de la Science Politique en France et à l'Etranger” n° 1/1992, p. 171-199.

¹¹ Paul Reuter, Jean Combacau, *Institutions et relations internationales*, Presses Universitaires de France, Paris, 1980, p. 87.

The European Communities have been created to combine efforts first of all in the direction of the European economic space. Across the history, the European Communities have gotten involved first and foremost in creating a common economic market, arriving at the creation of the European Union, institution that is not only led by economic interests, but also and mainly by the desire of building social and political links between the European peoples (as was the initial desire of those who signed the Treaty of Rome). Today, the European Union does not mean only a market of goods and services.

The public administrations from the Member States of the EU, despite their old structure, have adapted continuously at the modern conditions, inclusively adhering at the European Union¹². The constant contact between the public servants of the Member States and the Commission, the request to develop and implement the Union *acquis* at equivalent standards of trust in the entire Union, the need of a single administrative justice system for the Union and the sharing of public administration principles and values have led to a certain convergence between national administration¹³. Thus, we can understand the creation of a “common administrative space of the Union”.

The common administrative space of the Union can be understood largely as a space of the public administration of the European Union and can make the object of the administrative science, a multidisciplinary science. To this common administrative space of the Union corresponds the administrative law of the EU¹⁴.

The notion of common administrative space can be defined following the model of the economic and social space of the Union, being in connection with the large system of the legal cooperation. Traditionally, ***a common administrative space is possible when a set of legal principles, norms and regulations, are uniformly respected in a territory covered by unitary legislation.***

The legislative systems¹⁵ of the Member States of the EU are in constant process of closeness, in a lot of different fields, under the umbrella of the Union legislation, with the legislative activity of the EU institutions and by the case-law of the Court of Justice of the European Union.

The legal concepts of the EU are introduced in the national systems by means of directly applicable regulations or by directives that dispose the adaptation of the national legislation at the specificity of the Union. These two catego-

¹² Jean Rivero, Marcel Waline, *Droit administratif*, 15^e édition, Dalloz, Paris, 1994, p. 320.

¹³ Lean-Marie Becet, *Les institutions administratives*, 3^e édition, Economica, Paris, 1992, p. 225.

¹⁴ Jean-Bernard Auby et Jacqueline Dutheil de la Rochère, *A propos de la notion de droit administratif européen*, RFAP, 2007, n^o. 123, p. 373-386.

¹⁵ Lean-Claude Zarka, *Les institutions internationales*, Ellipses, Paris, 1995, p. 76.

ries of regulations have direct impact on the administrative systems of the Member States¹⁶ and lead to important changes in the legal principles applicable in the public administration – *standardisation and harmonisation*.

The decisions issued by the CJEU may generate general principles governing a common administrative law of the Union¹⁷.

Thus, we are the witnesses of the Europeanization of the administrative law.

Professor Andrei Marga considers that, in order to speak of a sense of belonging to the European space, we must take into account the following: geographical belonging to Europe: the location between Atlantic and the Ural Mountains, which are the consecrated boundaries of the continent; historical belonging to Europe: participation at the movements that gave the institutional and cultural forms of the continent, since the creation of polities, through the relationship with the Judaeo-Christian tradition, through modern revolutions in knowledge, economics and law, at the defending of the foundations of the free society; the institutional belonging at Europe: creating the organisations and legislation characteristic to an open society; cultural belonging: cultivating an attitude in knowledge and in practical life, characterised by trust in factual analysis, fallibilism and cultivation of the critical spirit. The same author considers that, if we make the distinction correctly, we must admit that – in the perspective of the process of European unification started after the War – the geographical belonging and the historical belonging do not decide the European belonging now in discussion (see, for instance, the case of Turkey, which may become a member of the European Union in the future). Geography and history are indispensable conditions, but as the European unification is first of all an institutional and cultural process, the European belonging is decided by taking into consideration institutions and culture. The position in the European geography and history does not automatically generate cultural Europeanity, as much as a cultural Europeanity can also be found in countries that do not strictly belong geographically and historically to Europe¹⁸.

The European culture contains an efficient culture of administration, based on a culture of law, characterised by personalism, legalism and formalism. Walter Hallstein considers that EEC is a phenomenon of law, in three aspects: “it is a creation of the law, it is a source of law and it is a legal system”¹⁹.

¹⁶ Georges Vedel, Pierre Delvolvé, *Droit administratif*, tome 2, 12^e édition, Presses Universitaires de France, Paris, 1992, p. 392.

¹⁷ Institut international d'administration publique, “L'administration et la construction européenne”, RFAP, nr. 48, octobre-décembre, 1988, p. 65.66.

¹⁸ Andrei Marga, *Philosophy of the European Unification*, Publishing House of the European Study Foundation, Cluj-Napoca, 2001, p. 26

¹⁹ Walter Hallstein, *Gemeinschaftsrecht und nationales Recht in der europäischen Wirtschaftsgemeinschaft*, 1966, p. 542, quoted by Andrei Marga, *op. cit.*, p. 174

In the European culture, the individual is subject, reference and purpose of legal regulations. The European civilisation represents basically material concretisations of the European culture.

In the literature of specialty, the concept of *European public space*²⁰ is also analysed; we may launch the idea that the common administrative space of the European Union is part of this.

3. Europeanization of the administration²¹

In the opinion of the author, the Europeanization of the administration implies:

- adopting a modern legislation, connected to the European (EU) legislation;

- adhering at the European Union implies connecting the entire administrative philosophy to the functioning of the supranational administration of the European Union;

- achieving an institutional structure, in order to assure efficient coordination among the national and EU administrative structures,

- adapting the administration at the new realities, creating adequate mechanisms which might guarantee performance both at national level and in the decisional system of the Union;

- the fundamental contribution of the entire administration, not only of the Government, at the implementation of the common policies of the Union;

- establishment of new relationships between the citizen and the administration, the increase and strengthening of the role that the local authorities have and the reassessment of the partnership with the civil society;

- structural and functional modernisation of the public administration.

The existence of an efficient and democratic administration represents one of the most important criteria defining the modernity of a country.

The quality of Member State of the European Union has also another meaning, with important consequences and influences in the functioning of the public authorities, of the Romanian public administration, generally, and of the administrative law, particularly. These are the consequences and influences of the European Union which are in an ongoing progress and lead to relevant interactions between the national and the European administrative law, concurrently with the establishment of an administrative interdependences in the process of harmonisation of the proper legal principles.

²⁰ Frank, Robert; Kaelble, Hartmut; Lévy, Marie-Françoise [et al.] (éd.), *Building an European Public Sphere: From the 1950s to the Present*, Bruxelles, PIE-Peter Lang, 2010, p. 78; Săraaru, Cătălin-Silviu, *Premises for the establishing of the European Administrative Space*, „Juridical Tribune – Tribuna Juridica”, Volume 6, Issue 1, June 2016, p. 176-180.

²¹ Adrian Năstase, *European Romania: a political social-democratic project*, MondoMedia Publishing House of the “Ovidiu Șincai” Social Democratic Institute of Bucharest, 2007, p. 165-169.

From a different perspective, the national administrations influence the decisional process of the European Union, these being present during the entire course of studying, defining and making of the administrative decision.

4. Administrative cooperation

The effective implementation of the Union law by the Member States, which is essential for the good functioning of the Union, represents a matter of common interest²².

Through administrative cooperation²³, the Union can support the efforts of the Member States in improving their administrative capacity of implementing the Union law.

This action may consist, particularly, in:

- facilitating the exchange of information;
- making exchange of public servants;
- supporting the training programmes.

No Member State is forced to use this support. The European Parliament and Council, deciding by regulations, in accordance with the ordinary legislative procedure, take the necessary measures in this regard, except for the harmonisation of the acts with force of law and administrative regulations of the Member States.

Enacting administrative cooperation neither obliges the Member States to enforce the Union law, nor influence the duties and responsibilities of the Commission. The same, it does not interfere with the other dispositions of the treaties, which foresee an administrative cooperation among the Member States, as well as among them and the Union. For instance, the Council adopts measures in view to establish administrative cooperation among the competent services of the Member States in the domain of the space of freedom, security and justice, as well as between the respective services and the Commission. This decides, at the proposal of the Commission, after the consultation with the European Parliament (art. 74 TFUE).

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²² Art. 197 TFUE.

²³ Jean-Marie Auby, Jean-Bernard Auby, *Institutions administratives*, 7^e édition, Dalloz, Paris, 1996, p. 341.

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Electronic administration: brief reflection on a new administration model

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Abstract

The article 14 of the Code of Administrative Procedure (CPA), approved by Decree-Law no. 4/2015, of January 7, is entitled "Principles applicable to electronic administration". This article comes with the approval of our new Code of Administrative Procedure and for the first time determines in paragraph 1 that the services of the Public Administration should, in the performance of their activity, use electronic means. It should be noted that in that provision the legislator uses the word 'should' and not 'can'. This means that the Administration have no choice. The Public Administration is forced to use electronic means, unless it is not possible. The legislator establishes an obligation of facere, whose objectives are the greater efficiency and administrative transparency, as well as a greater approximation of the services to the population. Looking to article 14 of the CPA, we will try to elucidate a concept of Electronic Administration, to reflect about this new model of Administration and the principles that apply to it, as well as to verify if this new model of Public Administration serves the public interest.

Keywords: *electronic administration; new administration model; public interest; public efficiency.*

JEL Classification: K23, K24

1. Introductory note

It is an unavoidable reality the impact that the new technologies have in the current society and consequently in the Law. In fact, since the end of the 20th century, at the beginning of the 21st century, there has been a process of transformation of the entire world society³. Information and communication technologies

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³ Irene Araguas Gálceras, 'La Administración Electrónica En España: De la "Administración En Papel" a la "E-Administración"', *Revista Chilena de Derecho Y Ciencia Política*, 3.2 (2012), 109–39 (p. 110) <<https://doi.org/10.7770/rchdycp-V3N2-art425>>.

have an essential role to play in people's daily lives, both in their personal relations and in their legal relations⁴. Thus, in the face of the growing phenomenon of the use of means such as computers, *tablets*, *smartphones*, the internet and social networks, law also had to adapt. Administrative Law, like the branch of Public Law that regulates the Public Administration, was also not alien to this new mode of interaction of society.

This text is intended to be a simple reflection about the use of electronic media by Public Administration. Our aim is to search for legal solutions that, in general terms, demonstrate the existence of a new Administration model, that is, of an Electronic Administration. We will also try, in a conclusive way, to assess the positive and negative aspects of this new model of Administration. For this purpose, we have divided this text into three points. In the first point, it gives a brief notion of Electronic Public Administration. In the second point, we will analyze the solutions foreseen in the Code of Administrative Procedure that are demonstrative of a new model of Administration. In the third and last point, we will make some injunctions regarding the pros and cons in the use of electronic means by our Administration.

2. Concept of Electronic Administration

Our Public Administration - in an organic, material and formal sense⁵ – is, increasingly, an Electronic Administration. It is important, therefore, before we analyze in what terms our Electronic Administration is configured, to perceive what, in fact, one must effectively understand by an Electronic Administration.

The term "Electronic Administration" is the Portuguese translation of the term "e-Government". The translation into the letter of the expression could, however, lead us back to a reality different from what is truly an Electronic Administration. In fact, the expression 'e-Government' should not be confused with or used as a synonym of e-Government. This is because, from the organic point of view, our Public Administration does not only understand the Government, as an administrative organ. In addition to the State and its organs, such as the Government - the highest body of public administration, under the terms of Article 182 of the Constitution of the Portuguese Republic (CRP) - other public entities and their bodies, as well as agents and workers of the Public Administration. Thus, to use the term 'e-Government' seems to us too reductive to define what we really have in mind when we think in an Electronic Administration. In fact, it is not only the Government that uses electronic means⁶.

⁴ Araguan Galcera, pp. 110–11.

⁵ See Diogo Freitas do Amaral, *Curso de Direito Administrativo - Vol. I*, 4.^a (Coimbra: Almedina, 2016), p. 32); and Fernanda Paula Oliveira and José Eduardo Figueiredo Dias, *Noções Fundamentais de Direito Administrativo*, 5.^a (Coimbra: Almedina, 2017), p. 20).

⁶ Although from a different perspective, but also by distinguishing the expressions administration électronique and e-gouvernance, see Herbert Maisl and Bertrand du Marais, 'L'administration

An Electronic Administration is an Administration that is characterized by the use of the most varied information and communication technologies and that provides its services, or most of them, using electronic means. It is a typical State Model Administration which, understood in a broad sense, means a modernized State, adept of the use of the new technologies that the market offers, in a society in a society that tends to be also modernized... It is, moreover, this modernized society that demands, directly and indirectly, a more modernized Public Administration. It can thus be said that an Electronic Administration is the reflection of the "electronic society" in which we live today.

An Electronic Public Administration is not, in our understanding, a new Public Administration, in an organic, material or formal sense. In fact, it continues to integrate public bodies, organs, agents and workers of the Public Administration, even though their number in those two cases may have changed. On the other hand, the activity exercised remains an administrative activity, ie there remain the typical instruments of action in particular the administrative act, the Regulation and the contract. What really characterizes an Electronic Public Administration, at least in the way we look at it in this text, is how it relates to each other and to individuals. It is, so to speak, the same Public Administration in an organic sense, which uses the same instruments, with the same purposes of public interest, but externalizes its will and executes its decisions, in a different way from the traditional one

3. The Electronic Public Administration in the CPA

3.1. Principles for Electronic Administration

Our current Code of Administrative Procedure (CPA), approved by Decree-Law No. 4/2015, of January 7, innovated with the enshrining in Article 14 of a set of principles applicable to Public Administration, namely when using electronic media.

In paragraph 1 of article 14, the legislator determines that the Public Administration should use electronic means in the performance of its activity. First of all, it results from a principle of preference for the use of electronic means by the Public Administration.

The way how the legislator enshrines this principle, reinforces the idea mentioned in the previous point that the use of electronic means does not mean a different Public Administration in an organic sense, but also does not mean a substitution or modification of the typical instruments of the Administration. It also means that the Public Administration, in the exteriorization of its will, whether through an administrative act, a contract, or a regulation, should make a

Électronique', *Revue Française D'administration Publique*, 110.2 (2004), 211–16 (pp. 211–12) <<https://doi.org/10.3917/rfap.110.0211>>.

preferential use of the use of electronic means. Strictly speaking, the use of electronic media will have more impact on the procedure, that is, on the *modus operandi*. This does not mean that the Public Administration fails to manifest and execute its will through a procedure. The procedure remains, what changes are, in fact, some of its formalities.

The preferential use of electronic media by the Public Administration has as its main objectives, according to the same precept, greater efficiency and transparency, as well as the approximation of services to the interested parties. From this follow, first of all, the manifestation of three guiding principles of administrative activity, but also of administrative organization: i) the principle of good administration; (ii) the principle of transparency; (iii) and the principle of bringing services closer to the public:

- i) Principle of good administration: This is a principle enshrined in Article 5 of the CPA, which states, *ipsis verbis*, that the Administration should be guided, in the exercise of its activity, by criteria of efficiency, economy and speed. Good administration is, therefore, an administration that fulfills these criteria. The concept of good administration therefore implies that the Administration is always in the best interest of the public interest⁷. Good administration is a concept traditionally linked to the merit of administrative action, but that the legislator "juridified" in the new Code of Administrative Procedure, by consecrating it as a principle of administrative activity. The use of electronic media by the Public Administration is thus seen as a way of giving greater efficiency of action to the Administration. This conclusion, which is moreover clear in the Code, allows us, on the other hand, to make a less clear inquiry, namely whether, given the inertia of the Administration in the use of electronic means - a concrete action by the Administration in the direction of its use can be demanded in the courts.⁸
- ii) Principle of transparency: As in our Constitution, we do not find an explicit reference to a principle of transparency in our Code of Administrative Procedure, in particular the principles governing administrative activity⁹. This does not mean, however, that there are no special diplomas with an explicit consecration of this principle. Concerning in particular the Code of Administrative Procedure, although the legislature does not expressly conscribe it as a general principle of administrative activity, it refers to transparency in Article 14 (1)

⁷ Mário Aroso de Almeida, *Teoria Geral Do Direito Administrativo*, 2.^a (Almedina, 2015), p. 56.

⁸ Almeida, p. 57 e 58.

⁹ About the principle of transparency in administrative law, see Débora Melo Fernandes, 'O Princípio Da Transparência Administrativa: Mito Ou Realidade?', *Revista Da Ordem Dos Advogados*, 425–457 (2015).

of the CPA and its importance is particularly visible in the consecration of a principle of open administration in Article 17 of the CPA but also in the configuration of the right to information laid down in Articles 82 to 85 of the CPA¹⁰. It should also be noted that this right to information in electronic procedures is covered by Article 82 4 of the CPA, which provides for the right of the persons concerned to have access to a restricted access service in which they can obtain electronic information on the status of the procedure. Transparency is therefore an end to be achieved by the Administration, which in this case is intended to be achieved through the use of electronic means. Although this principle does not result directly from the Code of Administrative Procedure, as a general principle of administrative activity, the truth is that, whether some special legal solutions recognize it or the doctrine itself, it identifies it as the defining principle of the administrative activity¹¹. In any case, its importance is particularly evident when the legislator imposes on the Public Administration the use of electronic means, to obtain greater transparency in the exercise of that activity, which implies, of course, that the referred means be ensured in such a way as to ensure such transparency. To that end, even if it does not exhaust it, the legislator in Article 14 (4) of the CPA requires that the use of electronic means be properly disseminated so that all interested parties can use them in the exercise of their legally protected rights and interests.

- iii) Principle of the approximation of services to the population: This principle is enshrined in Article 267 (5) of the Constitution of the Portuguese Republic and, unlike the previous ones, is an essential principle for administrative organization. Thus, along with decentralization and deconcentration, imposed by the constituent legislator, the ordinary legislator, requires the use of electronic means also as a way of promoting a closer approximation of services to the interested parties. In this way, the electronic means should work as a concrete action by the Administration in the direction of its use can be demanded in the courts. a bridge between the Public Administration and the private ones, promoting the dialogue between both poles of the administrative juridical relation.

From the aforementioned principles, it can be concluded that they are objective principles, that is, goals of a more or less theoretical nature, to be achieved by the Public Administration in the exercise of the activity. However,

¹⁰ See Sérvulo Correia, “O Direito À Informação E Os Direitos de Participação Dos Particulares No Procedimento E, Em Especial, Na Formação Da Decisão Administrativa”, *Cadernos de Ciência Da Legislação*, 9/10 (1994), 133–64 (p. 135 e ss).

¹¹ See the authors referenced in Fernandes, p. 430 a 434.

along with these principles, the legislator establishes other principles that shape that Administration, limiting it in the exercise of its activity using electronic means.

One is thinking in principles like the one of the protection of the personal data, explicitly consecrated in the article 18 of the CPA, and that as far as the Electronic Administration is implicitly of the number 2 of article 14, of the CPA, in particular where the legislature determines that access to electronic means must guarantee the availability, access, integrity, authenticity, confidentiality, conservation and security of all information submitted to the Administration. The implementation of this principle is also expressly reflected in the law on the protection of personal data, approved by Law no. 67/98, of October 26. It should be noted that this protection must be effective and that the restriction of this right to protection is in fact equivalent to the restriction of a fundamental right, in particular the privacy right reserved in Article 26 of the CRP, so that any restriction, in the name of an Electronic Public Administration, must always have legal origin, be general and abstract, be proportional, not retroactive, or collide with the essential core of that Fundamental Right, which is a right, freedom and guarantee.

Another principle which merits reference, albeit implicitly, is the principle of equality, in particular Article 14 (5) and (6) of the CPA, where it prohibits the use of electronic means in a discriminatory manner, in particular in relation to those, who in their relationship with the Public Administration, do not use electronic means.

It is clear from Article 14 (3) of the CPA that the Electronic Administration is subject to all general principles of administrative activity, ie the principles laid down in Articles 266 and 268 Of the CRP and 3 to 19 of the CPA. The subjection to some of these principles is clear, although implicitly by the legislator, in the remaining paragraphs of Article 14. However, in paragraph 3, the legislator reinforces the idea that not only those, but also others: principle of legality (Article 3 of the CPA), principle of the pursuit of public interest, respect for the rights and (Article 4 of the CPA), the principle of proportionality (Article 7 of the CPA), the principle of fairness and reasonableness (Article 8 of the CPA), the principle of impartiality (Article 9 of the CPA), the principle of good faith (Article 10 of the CPA), the principle of collaboration (Article 11 of the CPA), the principle of participation (Article 12 of the CPA), (Article 13 of the CPA), the principle of free competition (Article 15 of the CPA), the principle of liability (Article 16 of the CPA) and the principle of sincere cooperation with the European Union (Article 19 of the CPA).

Article 14 of the CPA, insofar as it establishes the principles applicable to Electronic Administration, is presented in a rigorous way as being unnecessary, given that the principles listed therein, directly or indirectly, apply to the Administration Regardless of their traditional way of doing business or using electronic means.

3.2. References to the Electronic Public Administration in CPA

It is not only in Article 14 of the CPA, that we find an express reference to the Electronic Administration. In fact, we find throughout the Code several references to the Electronic Administration that translate, in fact, in an accomplishment of the duty of use of electronic means, on the part of the Public Administration, enshrined in number 1 of the mentioned precept.

In Part III, Title I and Chapter I of the Code of Administrative Procedure, the legislator lays down the general rules applicable to the administrative procedure. Several articles of the Code of Administrative Procedure specify the terms in which the use of electronic means by the Administration should be processed, developing Article 14 of the CPA. Those provisions essentially apply to the administrative procedure, which is understood to be a “*legally ordered sequence of acts and formalities for the preparation and expression of the practice of an administrative act or its implementation*”¹². The regulation of the administrative procedure accepts, without a doubt, several objectives, namely the rationalization of the means to be used by the Administration, greater clarification of the Administration's will, protection of the legally protected rights and interests of citizens that relate to the Administration, and finally, the participation of those interested in training of decisions¹³.

The use of electronic media by the Administration has a greater impact on the administrative procedure, as defined in the previous paragraph. As mentioned above, it is not the organic nature of the Administration, which remains the same, nor its typical instruments of action, but the manner in which the Administration externalizes its will or executes its decisions. Let us see, therefore, what changes were introduced in the procedure, and foreseen in the CPA, so that one can effectively speak today in an Electronic Administration:

- i. Article 61 of the CPA: This article is entitled “use of electronic means”, and translates the reinforcement of the ideas already enshrined in Article 14 of the CPA. In fact, from that precept, it is a duty to use electronic means at the stage of instruction of procedures, aiming for greater transparency, simplification and speed in the procedure. Article 61 of the CPA ensures that the interested parties have access to the electronic identification of the bodies responsible for the direction of the procedure and of the body with competence to decide, as well as to monitor the deadlines, simplification and procedure of the procedure. For this purpose, the interested parties have the right to know, through electronic means, the processing of the procedures that

¹² Diogo Freitas do Amaral, *Curso de Direito Administrativo - Vol. II*, 3.^a (Coimbra: Almedina, 2015), p. 266.

¹³ Amaral, *Curso de Direito Administrativo - Vol. II*, p. 268 e 269.

- concern them and, also, to obtain the necessary instruments for the communication, by electronic means, with the services.
- ii. Article 62 of the CPA: this article provides a set of rules applicable in the context of a procedure that starts and develops in an electronic one-stop-shop¹⁴. Thus, whenever a procedure starts or develops within that scope, it must provide clear and accessible information to any interested party on the documents necessary for the presentation and instruction of the corresponding applications and conditions for obtaining the intended legal effects with the request; on the means of electronic consultation of the status of applications; on the means of electronic payment of fees due, where appropriate; on the complete information regarding the legal discipline of the administrative procedures that can be carried out through the electronic counter in question; the address and contact of the administrative entity with jurisdiction for the direction of the administrative procedure in question; and, finally, information on the means of judicial and extrajudicial reaction to resolve any disputes. The electronic one-stop shop should be able to intervene in the procedures to be developed between the interested parties and the Administration, receiving the acts of one and other, upon delivery of the respective receipt. The legislator admits that there are technical failures, in particular when it provides for a reduction in the time between submission of documents at the counter and its delivery to the recipient, when there is a technical interruption in the operation of the electronic means necessary for transmission.
 - iii. Article 63 of the CPA: This article establishes that the communications of the Administration with interested parties throughout the procedure can only be processed by electronic mail, when the interested party has given their written consent, and for this purpose, in its first intervention in the procedure, or later, indicate the electronic mailbox, under the terms provided in the public service of the electronic mailbox. This public electronic mailbox service was created by Decree-Law no. 93/2017 of 1 August and assumes its association with a unique digital address, which corresponds to the e-mail address freely chosen by the individual. In paragraph 2, the legislator establishes a presumption of consent for the use of the means indicated, in particular when the person concerned has established regular contact with one of them.

¹⁴ For further developments on the electronic counter, see: Ana França Jardim and Miguel Assis Raimundo, 'Balcão Único Eletrónico', in *Comentários Ao Novo Código Do Procedimento Administrativo*, ed. by Carla Amado Gomes, Ana Fernanda Neves, and Tiago Serrão, 3.^a (Lisboa: AAFDL, 2016), pp. 515–50 and Miguel Prata Roque, 'O Procedimento Administrativo Eletrónico', in *Comentários Ao Novo Código Do Procedimento Administrativo*, ed. by Carla Amado Gomes, Ana Fernanda Neves, and Tiago Serrão, 3.^a (Lisboa: AAFDL, 2016), pp. 493–514 (pp. 497–502).

- iv. Article 64 (5) of the CPA: Article 64 of the CPA provides for the obligation to prepare documents and terms of oral proceedings, which must be integrated in an administrative process in paper format. However, in paragraph 5, it recognizes the possibility of the electronic administrative process.
- v. Article 88 (5) of the CPA: Excludes the application of the delays provided therein to situations in which the acts and formalities of the procedure are practiced through electronic means.
- vi. Article 94 (2) of the CPA: Provides, regarding the final decision of the procedure, that when it is delivered through electronic means, it must be affixed electronic signature or other appropriate means of authentication of the competent body holder.
- vii. Article 104 (1), al. c) and paragraph 5 of the CPA: It provides for the possibility of submitting applications using electronic means, and the application must observe the format established in the institutional site of the public entity.
- viii. Article 105 (4), CPA: This article provides for the registration of the submission of applications, and in the services that provide electronic means of communication, the registration of the submission of the application must be made electronically.
- ix. Article 106 (3) of the CPA: determines, with respect to the receipt of the delivery of applications, that the electronic register automatically issues a receipt proving the delivery of the applications submitted by electronic data transmission, indicating the date and time of submission and registration number.
- x. Article 112, paragraph 1, al. c) and paragraph 2, al. a), of the CPA: This article governs the form of notifications. These can now be made by electronic mail or electronic notification automatically generated by the system incorporated into an electronic site belonging to the service of the competent body or to the electronic one-stop-shop. Such notifications may be made by the Administration, regardless of consent, for computer platforms with restricted access, or for the e-mail addresses indicated in any document presented in the administrative procedure, in the case of legal persons. In other cases, the electronic notification will have to obtain the consent of the interested parties, that is to say, when the notifications are not made in the framework of electronic platforms or are not made for legal persons.
- xi. Article 113 (5) and (6) of the CPA: This article is very important because it determines the moment at which notification using electronic means is deemed to be made. Thus, notification by electronic means is considered to be effected, in the case of electronic mail, at the moment the recipient accesses the specific mail sent to his electronic

mailbox, and in the case of other notifications by electronic data transmission, at the moment the recipient accesses the specific mail sent to his electronic account, opened with the computer platform provided by the institutional website of the competent body. A first question arises immediately: how is the Administration aware of the moment when the person concerned accesses the specific mail sent? This assumes that the notified party confirms receipt of the notification, which for obvious reasons may not happen. Paragraph 6 seems to resolve the issue, stating that in the absence of access to the electronic mailbox, or the electronic account opened on the computer platform provided by the institutional website of the competent body, notification should be twenty-fifth day after its dispatch, unless it is established that: i) the notifier communicated the alteration of that one; (ii) it is demonstrated that such communication was impossible; iii) or that the electronic communications service has prevented the correct reception, in particular through a filtering system not attributable to the interested party. But here we have another doubt: as we mentioned above, Article 64 of the CPA provides that for the purpose of electronic communications, the interested party must identify the electronic mailbox that holds, under the terms provided in the service electronic mailbox. As we also mentioned, the public electronic box service is subject to legal discipline, namely Decree-Law no. 93/2017 of 1 August and its article 8 disciplines the sending and receiving of electronic notifications made for the public service of electronic notifications, providing in its paragraph 3 that '[t]he notification sent to the public service of electronic notices shall be presumed to be made on the twenty-fifth day after its dispatch, of that notice in the service support system of electronic notifications'. In this way, it becomes difficult to understand which of the two presumptions must be valid: that of the CPA, or that of Decree-Law 93/2017, of August 1? Unless it is accepted that the electronic notification can be made for an electronic mail that is not part of the public service of notifications, however, this hypothesis does not seem to be the one that goes against the solution enshrined in Article 64, CPA and that for obvious reasons will be the one desired by the legislator¹⁵.

4. Final notes: pros and cons of this new model of administration

The intention of the legislator to promote the use of electronic media in relations between the administration and the parties is well-known. This trend is

¹⁵ In the sense that the electronic notification can be made for an electronic mail that is not integrated into the public service of notifications, veja-se Roque, pp. 510–11.

seen not only in the General Administrative Law, and in the Code of Administrative Procedure in particular, but also in the so-called special branches of Administrative Law, such as Urbanism Law and Environmental Law.

See, for example, the field of public procurement. Our Public Procurement Code (CCP)¹⁶ is rich in references to the use of electronic means, and there is also a public procurement portal whose objective is to centralize the most important information on public procurement, in particular matters relating to pre-contractual procedures and the execution of contracts already in place of celebrated. Publication of contracts is required by Article 465 of the CCP for reasons of transparency and protection of competition between the various economic operators.

But it is not only in public procurement that we find the reference to the use of electronic means. As mentioned, other special branches of Administrative Law follow the evolution of new technologies. Take as an example, in the Law of Urbanism, Article 8-A, of the Legal Regime of Urbanization and Building (RJUE)¹⁷ which provides for the electronic processing of the procedures provided for in the Scheme, such as the licensing procedure, authorization of building use, prior information and prior notification. Also note in Environmental Law, the single environmental licensing regime, approved by Decree-Law no. 75/2015, of May 11, and whose procedure involves the use of electronic means, within the scope of an electronic one-stop-shop.

These are just a few examples, of a more specific nature, in which Public Administration relates to individuals through the use of electronic means. Effectively, the electronic advances within the Public Administration is, today, an undeniable reality. The question, however, is whether this increasingly intensive use of electronic means has only advantages, or whether it has some drawbacks.

The advantages are many and it is enough to read the precepts, listed above, to understand what they are: efficiency, economy, speed, sustainability, convenience, transparency, simplicity, among others. Notwithstanding the undeniable advantages, we must, however, consider possible drawbacks that may result from the use of electronic means.

As for the drawbacks, one might think of aspects of a more practical nature, such as the existence of flaws in computer systems, sometimes the inability of the platforms to support the loading of certain files, their slowness, practical problems that can undermine the purpose of the system and make it simpler to simplify administrative activity in an even more bureaucratic and inefficient way.

However, the main drawback that we see in the use of these means is the fact that not everyone has access in equal conditions to such electronic resources. It is a fact of our country that not all people have access to a computer, or even the internet. Sometimes the problem can not be a matter of access, but of knowing

¹⁶ Approved by decree-law no. 18/2008, of January 29.

¹⁷ Approved by decree-law no. 555/99, of December 16.

how to use those technological means. It is true that Article 14 (5) CPA provides for a prohibition of discrimination between those who deal with the Administration using electronic means and those who do not. It seems to us, however, that the solution to the discriminatory problem must go further than this. Our catalog of Fundamental Rights is not, nor can it be, in the face of the evolution of society itself, a closed catalog. Is it not justified today to talk about a Fundamental Right of access, of all, to the Internet? In the face of the network society that today imposes itself, it may be thought that it will not be the responsibility of the State to ensure that everyone, on an equal footing, can intervene in this networked society, particularly when the Public Administration itself has the same new reality. We think that it is necessary to rethink, at least in this part, with regard to the open spirit of our Constitution.

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Ensuring a good administration by granting the petition right

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Abstract

The aim of this piece of research is to analyze the way of ensuring a good administration by granting the petition right. The objective of this paper is to analyze the correlation between the ensuring of a good administration by granting the petition right. The approach of ensuring of a good administration of the rule of law on behalf of the citizens is an actual legal issue. At a constitutional level, a good administration is ensured by granting the guarantee rights. Therefore, by granting the petition right in Romania, is assuring a juridical protection of all the supreme values of the citizens, ensuring therefore a good administration of the State on the citizens behalf. The methods used in drawing up this study are: the historical method, which was used in the analysis of the historical evolution of the studied field, the logical method served to analyse the current research in the field and the sociological method that helped to study the social impact. The quantitative method was used to study the relevant applicable legislation. The results of this research have highlighted on the one hand the need of citizens to benefit from a good administration by public authorities as well as the role of guaranteeing the fundamental rights of citizens in ensuring a good administration. The implications of research for ensuring the good administration of citizens, reveals how important it is to ensure the supreme values, namely the petition right, a fundamental right analysed in this study.

Keywords: *granting of the petition right, good administration, ensuring the supreme values, Romanian Constitution, public authorities.*

JEL Classification: H83, K23

1. Introductory aspects

1.1. The right to petition ensures and guarantees the right of every citizen to petition and correlatively the obligation of the public authorities to respond to the petition within the terms and conditions established by the organic law².

1.2. Guarantee rights, which includes the right to petition, are rights that ensure good administration of public authorities for the benefit of citizens. Thus, by guaranteeing them as fundamental rights, they form the basis and foundation of the legal protection of all fundamental human rights.

1.3. The researched scientific issue consisted in analyzing how to ensure good administration by guaranteeing the right to petition.

1.4. The novelty of this research consisted of addressing a less analyzed topic so far, namely ensuring good administration by guaranteeing the right to

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² Regarding the content of the right of petition, see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C.H. Beck, Bucharest, 2016, p. 203-205.

petition. The novelty elements could be found in the way the author approaches the subject, as well as in the presentation of some selective aspects regarding the correlation between ensuring good administration and guaranteeing the right of petition, as well as in the conclusions and recommendations made by the author.

1.5. The present study presents the analysis of its component parts: historical and constitutional milestones on guaranteeing the right to petition, ensuring good administration as well as the author's conclusions and *de lege ferenda* proposals.

1.6. The methods used in the elaboration of the present study are: the historical method that was used to analyze the historical evolution of the studied field, the logical method by which the current research in the studied field was analyzed and the sociological method by which the social impact was studied. Using the quantitative method, the relevant legislation was studied.

1.7. The results of this research have highlighted current trends and the need for citizens to benefit from good governance from public authorities. The implications of research for ensuring good administration of citizens reveal the importance of ensuring the supreme values guaranteed by the Constitution and the right of petition, as fundamentally analyzed in this study.

2. Historical and constitutional reporting on the guarantee of the right of petition

The right to petition, as a fundamental right, ensures and guarantees the right of every citizen to petition and correlatively, the obligation of the public authorities to respond to the petition within the terms and conditions established by the organic law.

As far as the historical origin of the right to petition is concerned, our studies have been identified and recognized by the *Magna Carta*³ (*the Great Charter of Freedoms*), a document dating back to 1215.

Thus, in my opinion, the right to petition was the first fundamental human right recognized by Magna Carta in 1215. Thus, from the analysis of the British document, it was found that, according to him, "following a petition announcing an injustice, it will resolve within 40 days."⁴

Another British document, the *Bill of Rights*⁵, recognized in 1689 that "citizens who submit petitions to the King will not be condemned or accused of formulating them."⁶

³ Francis Lieber, „*On Civil Liberty and Self-Government*”, Philadelphia, Lippincott, Grambo and Co, 1853, Reproduction by Forgotten Books, London, Volume II, Great Britain, 2015, pp. 178-201.

⁴ *Ibidem*, p. 190.

⁵ *Ibidem*, pp. 221-227.

⁶ *Ibidem*, p. 224.

On December 15, 1791, the First Amendment to the Constitution of the United States of America⁷, which is part of the Bill of Rights, "which guaranteed the right of petitioning citizens to repair injustices, was adopted."⁸

Following the analysis of the Development Status of the Paris Convention of 7/19 August 1858, a statute which had the value of the Constitution of Romania, which was adopted by the Lord of the United Romanian Principalities, Alexandru Ioan in May 1864, Article XV was originally that: "Only the Ponderator's Body has the right to receive petitions and to discuss them if necessary"⁹, and, following the changes, the form of Article XV was: "The petitions submitted to the Senate will be sent to an ad-hoc Commission, which will examine and report to the Government."¹⁰

The right of petition is part of the fundamental rights, freedoms and duties of the citizens of the Romanian Constitution¹¹.

In the contemporary legal system, the right of petition, as a fundamental right in Romania, is regulated in art. 51 of the Romanian Constitution, republished in 2003: "(1) Citizens have the right to appeal to public authorities through petitions formulated only in the name of the signatories. (2) Legally established organizations have the right to petition exclusively on behalf of the collectives they represent. (3) The exercise of the right of petition is exempt from the tax. (4) The public authorities have the obligation to respond to the petitions within the terms and conditions established by the law."

The right of petition was guaranteed by the Constitution of the Republic of Moldova¹² by Article 52, which provides that: "(1) Citizens have the right to address to public authorities through petitions formulated only on behalf of the signatories. 2. Legally established organizations shall have the right to petition exclusively on behalf of the collectives they represent."

The examination of anonymous petitions was declared unconstitutional by the Constitutional Court of the Republic of Moldova: "*citizens have the right to address to the public authorities through petitions formulated only in the name of the signatories ... it is clear that any petition is to be signed, the petitioner's*

⁷ Elena Simina Tănăsescu, N. Pavel, „*Constituția Statelor Unite ale Americii*”, Ed. All Beck, Bucharest, 2002, pp. 53-86.

⁸ *Ibidem*, p.72.

⁹ Ioan Muraru, M.L. Pucleanu, G. Iancu, C.L. Popescu, *Constituțiile Române – Texte. Note. Prezentare Comparativă*, Ed. Regia Autonomă „Monitorul Oficial”, Bucharest, 1993, p. 12.

¹⁰ *Ibidem*, p. 14.

¹¹ The Romanian Constitution, revised in 2003, published in the "Official Gazette of Romania", Part I, no. 767 of 31 October 2003.

¹² The Constitution of the Republic of Moldova, published in the Official Gazette no. 1 of the Republic of Moldova on 12.08.1994.

identification data. The Court held that, by its express wording, the constitutional text neither establishes nor protects legally an anonymous right of petition."¹³

Compared to the previously studied norms, we have noticed that in the Republic of Moldova, it is not stated in the Constitution or in other laws that petitions are exempt from tax, comparing with the norms of the right of petition in the Romanian Constitution, which can lead to tax postal, office, travel, etc. from petitioners by public authorities in the Republic of Moldova.

The right of petition was defined by some Romanian authors as a "*citizen's right of tradition in the Romanian legal system*".¹⁴

The right to petition was considered by the same authors¹⁵ as "*a first-generation right*", as its invocation results in action by the public authorities concerned, not just confirming receipt of complaints from citizens.

A second author¹⁶ has remarked on the right to petition that he is part of the "*main human rights (...) that is exempt from tax*".

A third author has characterized the right of petition as "*a citizen's right of tradition in the Romanian legal system, classified as guarantee rights, as a general legal guarantee for the other rights and freedoms*".¹⁷

According to art. 51 of the Romanian Constitution, the right of petition belongs to citizens and legally constituted organizations, who make petitions only on behalf of the signatories and exclusively on behalf of the collectives they represent. Petitioners' right concerns the petitioner's responsibility and does not encourage anonymous petitions.

The right of petition was regulated at the legislative level in Romania, according to art. 7 of the Government Ordinance no. 27/2002¹⁸ regarding the petitions settlement activity, approved with amendments and completions by Law no. 233/2002, which stated that "*anonymous petitions or those in which the petitioner's identification data are not passed are not taken into account and classified according to the presence of the ordinance*."

3. Insurance of good administrations

Good governance is the result of good public administration.

¹³ Decision no. 25 from 17.09.2013 for the control of the constitutionality of certain provisions regarding the examination of anonymous petitions published in the Official Monitor of the Republic of Moldova no. 276-280 / 44 of 29.11.2013.

¹⁴ Ioan Muraru, Elena Simina Tănăsescu (coord.), „*Constituția României, Comentariu pe articole*”, Ed. C.H. Beck, Bucharest, 2008, p. 511.

¹⁵ Ibidem, p. 512.

¹⁶ Vasile Gionea, Nicolae Pavel, *Curs de drept constituțional*, Ed. Scaiul, Bucharest, 1996, p. 66.

¹⁷ Ioan Muraru, Elena Simina Tănăsescu, „*Drept constituțional și instituții politice*”, edition 15, Volume I, Ed. C.H. Beck, Bucharest, 2016, p. 186.

¹⁸ Government Ordinance no. 27/2002 regarding the petitions settlement activity, approved with amendments and completions by Law no. 233/2002, is based on the publication in the Official Gazette of Romania, Part I, no. 84 of 01.02.2002.

In the specialized doctrine, a first author¹⁹ said: *"There is no universally valid definition of good administration, apart from the normative texts that refer to this concept."*

A second author²⁰ said: *"Although there is no express provision as to the right to good administration in domestic law, the elements of this right are largely contained in the provisions of the fundamental law."* The same author retained in its previous article quoted, that, by correlating the fundamental provisions of the Constitution of Romania, namely: art. 16 Equality in rights, art. 21 Free Access to Justice, Art. 24 Right to defense, art. 31 The right to information, art. 51 Right to petition, art. 52 Right of the person injured by a public authority, art. 115 Legislative Delegation, Art. 120 Basic principles guarantee the right to good administration, these fundamental rights being essential components of the right to good administration.

A third author²¹ referred to the right to good administration that: *"it is a complex legal institution and has the legal nature of a fundamental right with a general content including a multitude of attributes related to the organization and functioning of the administration, recognized as rights self-contained. Thus, in relation to the state, the right to good administration is manifested as a sum of its obligations in relation to the organization of public administration, on the one hand, and, in order to guarantee the effectiveness and compliance with the law of the public administration, on the one hand on the other hand."*

As regards the right to good administration, it has been expressly expressed in Art. 41 of the Charter of Fundamental Rights of the European Union²².

The text of this article is part of Title IV of the Charter, entitled *Citizens' Rights, Article 41 Right to good administration*:

"1. Everyone has the right to a fair, equitable and reasonable treatment of his or her problems from the Union's institutions, bodies, offices and agencies.

2. This right shall include in particular:

(a) the right of any person to be heard prior to any individual measure likely to affect him;

(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.

¹⁹ Radu Carp, „În direcția unui drept administrativ european? Buna administrare potrivit normelor cu și fără forță constrângătoare ale Consiliului Europei și Uniunii Europene”, in „Revista de drept public”, no. 4/2010, Ed. C.H. Beck, p. 2.

²⁰ Virginia Vedinaș, S.C. Ambru, *Bazele constituționale ale dreptului la o bună administrare*, in E. Balan, C. Iftene, D. Troanta, G. Varia, M. Văcărelu, *Dreptul la o bună administrare. Între dezbaterile doctrinară și consacrarea normativă*, Ed. Comunicare.ro, Bucharest, 2010, p. 46.

²¹ Emanuel Albu, *Dreptul la o bună administrație în jurisprudența Curții Europene a Drepturilor Omului*, in „Curierul Judiciar”, Ed. C.H. Beck, no. 12/2007, p. 129.

²² The Charter of Fundamental Rights of the European Union was published in the Official Journal of the European Union, C83/02/30 March 2010, p. 389.

3. *Everyone shall have the right to compensation by the Union for any damage caused by the institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*

4. *Any person may write to the institutions of the Union in writing in one of the Treaty languages and receive a reply in the same language."*

The Charter of Fundamental Rights of the European Union does not replace the constitutional systems of the Member States and does not interfere with the protection system guaranteed by the European Convention on Human Rights. The international bodies, the European Union and the national institutions of the Member States have the obligation to comply with the Charter. Any citizen of the Union has the right to apply to the Court of Justice, insofar as the rights set out in the Charter are violated, the Court of Justice has jurisdiction to examine the case and the Commission has the power to initiate the appropriate procedure.

The right to good administration was regulated at European level in the Recommendation CM/Rec(2007)7 of the Committee of Ministers of the member states of the Council of Europe.²³

The Committee of Ministers, in its previous recommendation, considered that *"good administration is an element of good governance; this is not just a preoccupation with regard to the legal regime; it depends on the quality of organization and management; it must meet the requirements of effectiveness, efficiency and relevance to society's needs; it must maintain, support and protect property and public interests; it must comply with budgetary requirements; must exclude any form of corruption."*²⁴

The right of administration was regulated at constitutional level by Article 39 of the Constitution of the Republic of Moldova²⁵: *"(1) Citizens of the Republic of Moldova have the right to participate in the administration of public affairs directly, as well as through their representatives. (2) Any citizen shall be granted, according to the law, access to a public office."*

As regards the right to petition, this fundamental right provides citizens with the opportunity to address a public authority and receive an answer. The right of petition is the constitutional guarantee that was the basis for the adoption of Government Ordinance no. 27/2002²⁶ regarding the petitions settlement activity, approved with amendments and completions by Law no. 233/2002.

²³ Recommendation CM/Rec (2007) 7 was adopted by the Committee of Ministers on 20 June 2007 at the 999th Meeting of Ministers of the member States of the Council of Europe. The document is available online at <https://wcd.coe.int/ViewDoc.jsp?p=&id=1155877&Site=CM&direct=true> consulted at 19 April 2018.

²⁴ *Ibidem*.

²⁵ Constitution of the Republic of Moldova of 29 July 1994 published in the Official Gazette no. 1 of 27 August 1994.

²⁶ Government Ordinance no. 27/2002 regarding the petitions settlement activity, approved with amendments and completions by Law no. 233/2002, published in the Official Gazette of Romania, Part I, no. 84 of 01.02.2002.

The right of petition is a legal guarantee of all fundamental rights. By doing so, it is ensured that the citizen's right to request, to make a petition, which means *"the request, the complaint, the complaint or the proposal made in writing, or by e-mail, which a citizen or a legally constituted organization can address central and local public authorities and institutions, decentralized public services of ministries and other central bodies, national companies and companies, county or local commercial companies, and autonomous regies, hereinafter referred to as public authorities and institutions."*²⁷

Thus, several types of petitions have been regulated in practice and the manner of solving them by the public authorities, thus guaranteeing the right of the citizen to address to any public authority and establishing correlatively and the obligation of the respective authorities to respond legally to petitions of citizens.

Good governance is, in our view, the way in which the state provides good administration to citizens, and they benefit from the legal protection of fundamental rights provided by guarantee rights, which in fact guarantees the realization of all the fundamental rights of citizens in a state right.

In our opinion, ensuring good administration is done through the realization of rights guarantees. Thus, warranty rights ensure good governance. The protection of citizens' rights in front of public authorities is achieved at constitutional level through the correlation between the right of petition and the right of the person injured by a public authority.

Thus, by guaranteeing the right to petition, a good administration of the rule of law in favor of citizens is achieved.

4. Conclusions

4.1. The right to petition ensures and guarantees the right of every citizen to petition and correlatively the obligation of the public authorities to respond to the petition within the terms and conditions established by the organic law.

4.2. Guarantee rights, which includes the right to petition, are rights that ensure good administration of public authorities for the benefit of citizens. Thus, by guaranteeing them as fundamental rights, they form the basis and foundation of the legal protection of all fundamental human rights.

4.3. Thus, in my opinion, the right to petition was the first fundamental human right recognized by Magna Carta in 1215. Thus, from the analysis of the British document, it was found that, according to him, *"following a petition announcing an injustice, it will resolve within 40 days."*²⁸

²⁷ Art. 2 of the Government Ordinance no. 27/2002 regarding the petitions settlement activity, approved with amendments and completions by Law no. 233/2002, published in the Official Gazette of Romania, Part I, no. 84 of 01.02.2002.

²⁸ *Ibidem*, p. 190.

4.4. The right of petition is a legal guarantee of all fundamental rights.

4.5. Good governance is, in our view, the way in which the state provides good administration to citizens, and they benefit from the legal protection of fundamental rights provided by guarantee rights, which in fact guarantees the realization of all the fundamental rights of citizens in a state right.

4.6. By guaranteeing the right to petition, good administration of the rule of law in favor of citizens is achieved.

5. Author's recommendations

As a result of this analysis, the following proposals for *de lege ferenda* have been formulated.

Having regard to Recommendation CM / Rec (2007) 7 of the Committee of Ministers of the member states of the Council of Europe, we consider that its provisions, part or all, may be included in the following revision of the Constitution of Romania as follows:

1.1. The principles of good administration can be considered as follows:

1.1.1. The principle of legality

1.1.2. The principle of equality

1.1.3. Principle of impartiality

1.1.4. The principle of proportionality

1.1.5. The principle of legal certainty

1.1.6. The principle of taking action within a reasonable time

1.1.7. The principle of participation

1.1.8. The principle of privacy

1.1.9. The principle of transparency

1.2. Recommendations of the Committee of Ministers to the Member States:

1.2.1. Promoting good governance within the principles of the rule of law and democracy;

1.2.2. Promoting good governance within the organization and functioning of public authorities, ensuring efficiency, effectiveness and resource optimization. These principles would require Member States to:

- Ensure objectives are set and performance indicators are designed to regularly monitor and measure the achievement of objectives by the administration and civil servants.

- Obligate public authorities to regularly verify, under the law, whether services are provided at an appropriate cost and whether they should be replaced or withdrawn.

- Oblige the administration to seek the best means to obtain the best results.

- Performing an internal and external monitoring of the administration and the work of civil servants.

1.2.3. Promoting the right to good administration in the interests of all, by adopting, if necessary, the standard model of the Code of Good Administration annexed to the recommendation, ensuring its implementation by Member State officials and adopting the measures allowed by constitutional systems; legal systems to ensure that local and regional governments adopt the same standards.

Thus, the Constituent may decide, on the one hand, which of these principles can be introduced in the Constitution of Romania and, on the other hand, on the introduction in the Romanian Constitution of a new article in the content of Title II Fundamental Rights, Freedoms and Duties, Chapter II Fundamental Rights and Freedoms, entitled "Right to good administration" and more, on the possibility of recognizing the Code of Good Administration by its nomination in the text of the Constitution of Romania, its contents being individualized as an annex to Recommendation CM/Rec (2007) 7 of the Committee Ministers of the member states of the Council of Europe.

We also believe that a good governance code could be developed in Romania that could contain the provisions mentioned in the CM/Rec (2007) 7 Recommendation of the Committee of Ministers of the member states of the Council of Europe.

At the same time, the recommendation could be the basis for the elaboration of an Administrative Procedure Code, adopted in Romania, a project that was discussed and was not finalized at the date of the present proposal.

Considering the content of Article 51, regarding the right of petition, we consider in the Constitution of Romania that the provisions that are not found in the Constitution of the Republic of Moldova in the content of art. 52 on the right to petition, in whole or in part, could be included in the following revision in the Constitution of the Republic of Moldova by completing Article 52 of the Constitution of the Republic of Moldova with the following paragraphs: "(3) *The exercise of the right to petition is exempt from the tax.* (4) *The public authorities have the obligation to respond to the petitions within the terms and conditions established by the law.*"

These recommendations were made by the author following the completion of this paper and other studies on the subject.

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Free access to information of public interest, a premise of good governance of public companies

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Abstract

An individual's right to information is a fundamental right, guaranteed by the Romanian Constitution, in its art. 31. For the practical efficiency of this right, public authorities must ensure free access to information of public interest, both upon request and by default. The free exercise of the right of access to information is an expression of participative democracy and is closely related to the decision-making transparency of the authorities and public institutions using or managing public financial resources. In their activity, public companies should be driven not only by obtaining high economic results, but also by the creation of a feeling of public trust both in the goods and services they offer, and in terms of efficiency and efficacy of usage of public funds and in their contribution to the development of society. A major role in ensuring decision-making transparency is held by governors, who, on the one hand, must provide a suitable legislative framework, and, on the other hand, through the governing authorities of public institutions, should implement legal regulations so as to ensure a sustainable development of such entities. When talking of good governance, we must consider the decision making and implementation process, as well as the transparency of such processes in the social environment.

Keywords: right to information, corporate governance, public companies, decision-making transparency.

JEL Classification: H83, K10, K23

1. General considerations

When dealing with corporate governance, a particular focus is placed on the need to create a stable, integer, transparent, responsible business environment, able to generate both economic growth and social inclusion. One cannot talk of good governance without considering transparency as a “key element of good governance”.²

The activity of public companies has a two-fold purpose: achieving profit for governmental resources and reaching social goals. Some authors³ consider

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² Transparence budgétaire: Les meilleures pratiques de l'OCDE, 2002 <https://www.oecd.org/fr/gov/budgetisation/Transparence%20budg%C3%A9taire%20meilleures%20pratiques%20COM-PLET.pdf>, 12.03.2018.

³ Bernier L., Farinas L., “Finances publiques, gouvernance et intérêt général: les sociétés d'État au Québec”, *Éthique publique* [En ligne], vol. 10, n° 1/2008, mis en ligne le 09 septembre 2015,

that these companies should be first seen as “tools of social policy” and then as providing profit. In case their only role was to analyse profit, the authors consider that these companies should be moved to the private sector (capitalized). The role of public companies in social policies should be seen in the development of the region where they develop their activity, in the creation of new workplaces, in the performance of social services or management of natural resources, etc.

Such companies operate within a competitive market and they must meet the same challenges as private organizations; hence, they should be governed by the same principles: efficiency, efficacy, transparency, integrity, responsibility, trust, so that they achieve the desired economic performance.

In 2016, a group of prominent and influential business leaders at a global level drew up a range of “common sense” principles of corporate governance⁴, i.e. recommendations or guidelines regarding the roles and responsibilities of administrative boards, companies and stakeholders, regarding public companies. They include public reporting, expressing their belief that “transparency regarding quarterly financial results is important”, “long-term objectives should be revealed and explained in a specific and measurable way”. Likewise, public companies should act like private ones, substantiating long-term strategic visions which they could “clearly explain to shareholders”, as they should explain the operations they develop (“mergers, purchases of materials, major capital commitments”).

When dealing with good governance, one should consider the responsibility of public authorities in making decisions and the transparency of the decision making process. More precisely, regarding the corporate governance of public companies, transparency should gain a wider meaning, not only the presentation of certain information, activity reports, but also how and why certain decisions were made, whether they are compatible with the relevant legislation in the field, whether the decisions meet social needs. Likewise, all stakeholders should be able to participate in the decision making process, after having been provided with information and after having been consulted on the decisions to be adopted.

Philip Armstrong, Senior Advisor, Corporate Governance, International Finance Corporation,⁵ argues that, beyond profit (which should not be neglected, properly organized public companies may help improve health, welfare, education and infrastructure, reduce poverty and foster inclusive economic growth, and “improving the transparency of public companies implies international effort and

consulté le 07 mars 2018. URL: <http://journals.openedition.org/ethiquepublique/1718> ; DOI : 10.4000/ethiquepublique.1718.

⁴ “*Common sense Principles of Corporate Governance*”, http://www.governanceprinciples.org/wp-content/uploads/2016/07/GovernancePrinciples_Principles.pdf, 18.03.2018.

⁵ Philip Armstrong, “*Corporate Governance and State-owned Enterprises – How improvements in SOEs can help emerging markets address their development challenges*”, 2015, http://www.ifc.org/wps/wcm/connect/1299668047f4ee8bae58ff299ede9589/EB_IFC_Phil_Armstrong.pdf?MOD=AJPERES, 12.03.2018.

a global challenge”. The author considers that “politics and good governance represent a complicated combination”, which is why decision making transparency is needed, especially in terms of appointing the board of public companies (members of administrative boards, executive directors, etc.).

The Organization for Economic Cooperation and Development (OECD)⁶ promotes policies able to “improve the economic and social well-being of people around the world”. To this purpose, it cooperates with governments, provides consultancy and disseminates good practice, thus helping increase the competitiveness, efficiency and transparency of public companies. The organization supports governments around the world to: “restore confidence in markets and the institutions that make them function; re-establish healthy public finances as a basis for future sustainable economic growth; foster and support new sources of growth through innovation, environmentally friendly ‘green growth’ strategies and the development of emerging economies; ensure that people of all ages can develop the skills to work productively and satisfyingly in the jobs of tomorrow.”

2. The principles of good governance of public companies

The World Bank published in 2014 “Corporate Governance of State-Owned Enterprises: A Toolkit”⁷, a document directed to government officials, public company managers, as well as other stakeholders: regulatory bodies and institutions, the private sector, consumers, citizens, etc. As the authors say, the toolkit aims at improving practices in public entities with a commercial profile, rather than in those playing a public policy part. The authors admit that no universally valid recipes exist, but they consider that certain concepts should be taken into account, principles that are applicable in most cases for the corporate governance of state-owned enterprises.

Chapter 7 of the toolkit is dedicated to the transparency, openness and control of public companies and outlines the role of the public disclosure of financial and non-financial information, which are relevant, useful and reliable. The authors argue that these processes protect the integrity and efficiency of the governance and operations of state-owned companies. This openness implies the disclosure of information to the wide public (financial statements, annual reports, etc.), as well as the supply of information dedicated to target groups interested in the company's activity (shareholders, creditors, etc.). The following guidelines are thought to be useful to achieve the goal of transparency and openness: the use of

⁶ The organization was established in 1961, is headquartered in Paris and includes 35 member states, <http://www.oecd.org/about/>, 12.03.2018

⁷ World Bank. 2014. “*Corporate Governance of State-Owned Enterprises: A Toolkit*”. DOI: 10.1596/978-1-4648-0222-5. Washington, DC: World Bank. License: Creative Commons Attribution CC BY 3.0 IGO, <https://openknowledge.worldbank.org/bitstream/handle/10986/20390/9781464802225.pdf;sequence=1>, 12.03.2018.

standard reporting requirements in the financial field; the observance of international standards in terms of transparency; the stock exchange listing of public companies may result in their improved governance, by assimilating the rules imposed on these markets; the achievement of suitable transparency by improving reporting and disclosures (consistent information supplied to the audience and stakeholders); the improvement of the control environment (internal control and risk management, internal audit, external audit).

OECD and the G20⁸ published their first Principles of corporate governance in 1999, revised them in 2004 and in 2015, with the support of experts from relevant international organizations⁹, proceeded to a new revision. The principles¹⁰ aim at helping decision makers adopt the best policies with a view to “supporting economic efficiency, sustainable growth and financial stability”. It is the authors’ aim that the principles should be concise and understandable by the entire community, without making them compulsory and without describing in detail how they should be transposed into national legislations. One of the listed principles refers to the “timely and accurate” transparency and disclosure of information regarding economic performance, shareholders, etc.

In 2017, OECD and G20 revisited the principles¹¹ and redefined them, so that they would remain “relevant and valid”. As for “disclosure and transparency”, the principle is still found in the vision of OECD, underpinning the belief that a “corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.”

Regarding public companies, OECD drew up, in 2005, the “OECD Guidelines on Corporate Governance of State-Owned Enterprises”, which were updated in 2015¹², in the context of the review of the above mentioned principles. They are actually standards, recommendations addressed to governments as shareholders, so as to make sure that “the governance of SOEs is carried out in a transparent

⁸ G20 – the forum of major world economies (19 states and the European Union), <https://www.g20.org/en/g20/what-is-the-g20>, 12.03.2018

⁹ Banca Mondială (WBG), the Basel Committee for Bank Supervision (BCBS), the Financial Stability Board (FSB)

¹⁰ OECD (2015), “*G20/OECD Principles of Corporate Governance*”, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264236882-en>, <http://www.oecd-ilibrary.org/docserver/download/2615021e.pdf?expires=1520421294&id=id&accname=guest&checksum=1BE807BDE96FF67D59BB4C0DC4E4D07C>, 12.03.2018

¹¹ OECD (2015), “*G20/OECD Principles of Corporate Governance*”. <http://www.oecd-ilibrary.org/docserver/download/2615021e.pdf?expires=1521789878&id=id&accname=guest&checksum=DDFEF21C84F297B0ADE2F782DA095775>, 12.03.2018

¹² OCDE (2015), “*OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition*”. <http://dx.doi.org/10.1787/9789264244221-en>. http://www.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en, 12.03.2018.

and accountable manner, with a high degree of professionalism and effectiveness”, with no excessive intervention from the state. As for information disclosure and transparency, OECD recommends “high standards of transparency”, including significant information on: the enterprise objectives and their fulfilment, financial results, the ownership structure and capital sources, the remuneration of board members and key executives, the appointment of board members, foreseeable risk factors and measures taken to manage such risks, financial assistance, including guarantees, received from the state, material transactions with the state and other related entities, any relevant issues relating to employees and other stakeholders. Likewise, according to the same principle, it recommends that annual financial statements should be subject to an independent external audit, and that the ownership entity should publish information on such companies on a regular basis, as well as an annual web-based report, to facilitate access by the general public.

A report¹³ of OECD aims at providing an answer to the question “why transparency and disclosure” and concludes that the disclosure of financial and non-financial information on public companies is beneficial for all stakeholders: the government proves that it can be an effective owner, the Parliament may evaluate the performance of the state as an owner, the media may raise awareness on SOE efficiency, and taxpayers and the general public may have a comprehensive picture of SOE performance.

3. The transposition into Romanian legislation of the principle of transparency as a fundamental element for the corporate governance of public companies

Government Emergency Ordinance no. 109/2011¹⁴ of the corporate governance of public companies was adopted pursuant to the objectives undertaken by Romania in its letter of intent¹⁵ to the International Monetary Fund, and its preamble lists the principles of corporate governance of state-owned companies, as stipulated by OECD, considering that this legislative tool establishes “mechanisms to guarantee the objectiveness and transparency in the selection of management and administrative board members, to ensure the professional and accountable nature of management decisions, additional mechanisms to protect the rights of minority shareholders and an increased transparency to the public,

¹³ OECD – “*Transparency and disclosure measures for state-owned enterprises (SOEs): Stocktaking of national practices*”, Global Knowledge Sharing Network on Corporate Governance of State-owned Enterprises, 7-8 June, 2016, <http://www.oecd.org/daf/ca/2016-SOEs-issues%20paper-Transparency-and-disclosure-measures.pdf>, 12.03.2018.

¹⁴ Emergency Ordinance no. 109 of November 30, 2011 on the corporate governance of public companies, published in: The Official Gazette no. 883 of December 14, 2011.

¹⁵ Approved by the Government through the memorandum of June 7, 2011, revised.

both regarding the activity of state-owned companies and the state's ownership policy".

The legislative document refers to public companies who are Romanian public entities and establishes information transparency guidelines both for them and for the governing public authority.¹⁶ Thus, Chapter V is devoted to transparency and reporting obligations, as public companies have to publish a range of documents and data on their websites¹⁷, which are subject to concrete disclosure deadlines set by the lawmaker.

Art. 55 (1) of Government Emergency Ordinance no. 109/2011 also sets obligations on the information of the general assembly of shareholders by the administrative board or by the supervisory board of the public company, as applicable, on a semestrial basis, through a report¹⁸ on the administration activities. Moreover, par. (2) sets the obligation to draw up an annual report¹⁹ on the

¹⁶ An institution coordinating or supervising one or several public companies (companies set up by the state or by an administrative or territorial unit) exercises, on behalf of the state or the administrative or territorial unit, the position of shareholder in a public company (national companies whereby the state or an administrative or territorial unit is a single shareholder, a majority shareholder or a controlling shareholder), coordinates the exercise of the position of shareholder or associate to a controlled company by one or several public institutions.

¹⁷ Art. 51 par. (1): Through the diligence of the chair of the administrative board or the supervisory board, public companies must publish on their websites, for the access of shareholders or associates and the public, the following documents and information:

- a) the decisions of general assemblies of shareholders, within 48 hours from the date of such meeting;
- b) annual financial statements, within 48 hours from their approval;
- c) semestrial accounting reports, within 45 days from the end of the semester;
- d) the annual audit report;
- e) the list of administrators and directors, the CVs of members of the administrative board and directors or of the members of the supervisory board and directorate members, as the case may be, as well as their remuneration;
- f) the reports of the administrative board or the supervisory board, as applicable;
- g) the annual report on the compensation and other benefits awarded to administrators and directors, respectively to the members of the supervisory board and the directorate, during the financial year;
- h) the Code of Ethics, within 48 hours from its adoption, respectively from May 31 of each year, in case it is revised."

¹⁸ This report includes "information on the performance of the mandate contracts of directors, respectively directorate members, details on operational activities, on the company's financial performance and its semestrial accounting reporting".

¹⁹ This "shall include at least information regarding:

- a) the structure of the remuneration, explaining the share of the variable and the fixed component;
- b) the performance criteria substantiating the variable component of remuneration, the ratio between the achieved performance and remuneration;
- c) the considerations justifying any scheme of annual bonuses or non-financial advantages;
- d) any additional or anticipated pension schemes;
- e) information on the duration of the contract, the negotiated notice period, the amount of liquidated damages for unjustified cancellation."

“remunerations and other benefits awarded to administrators and directors, respectively to the members of the supervisory board and directorate members within a financial year”, and to submit it to the general assembly of shareholders approving annual financial statements.

The directors of autonomous public companies also have disclosure obligations, as per art. 23 of Government Emergency Ordinance no. 109/2011, i.e. to inform the administrative board on a quarterly basis “on executive management activities and the company's evolution” and, on an annual basis, they should also draw up and submit to the governing public authority “a report²⁰ on remunerations and other benefits awarded to administrators and directors”.

For disclosure to the general public, art. 56 of Government Emergency Ordinance no. 109/2011 sets the deadline of May 31 of the year following the year reporting is made for, by which the administrative board or the supervisory board, as applicable, draws up an “annual report on the activity of the public company”, which has to be published on the website of the public company.

As mentioned, the governing public authority has obligations of disclosure to the general public, i.e. the duty to draw up, on an annual basis by the end of June of every year, a report on the public companies subordinated to it, coordinated by it or included in its portfolio.²¹ This will be published on the website of the governing public authority.

The Ministry of Public Finance also has disclosure duties, i.e. The obligation to draw up an “annual report on public companies”, submit it to the government and publish it on its website, by the end of August of the year following the one reporting is made for.

The lawmaker establishes that the failure to meet the obligations set for the proper corporate governance of public companies “entails, according to the law,

²⁰ The report shall include at least the information stipulated under art. 55 par. (3) (see note 18).

²¹ As per art. 58, the report “shall include at least information regarding:

- a) the ownership policy of the governing public authority;
 - b) strategic changes in the operation of public companies: mergers, divisions, transformations, changes in the capital structure, etc.;
 - c) the evolution of the financial and non-financial performance of public companies subordinated to it, coordinated by it or included in its portfolio: reducing outstanding payments, profit, etc.;
 - d) the economic and social policies implemented by the public companies subordinated to it, coordinated by it or included in its portfolio and their costs or advantages;
 - e) data on the reserved opinions of external auditors and their concern to remove or prevent them;
 - f) other elements established by a decision or order of the governing public authority.
- Information regarding the ownership policy of the governing public authority shall include at least:
- a) the objectives of the ownership policy, expressed in the letter of expectations and included in the mandate contract;
 - b) economic, financial and non-financial indicators, related to targets undertaken publicly, in the letter of expectations or in the revenue and expenditure budgets of public companies;
 - c) the evolution of state participation in public companies (privatisation, obtaining new shares);
 - d) the value of dividends allocated to the state as a shareholder;
 - e) the selection of administrators and directors, the performance of their mandate.”

the disciplinary, civil or criminal liability of persons in charge” with the enforcement of legal provisions, as the case may be.

We may notice that a domestic legislative framework transposing the OECD Principles on corporate governance of public companies exists.

However, in December 2017, the Romanian Parliament adopted a draft to amend Government Emergency Ordinance no. 109/2011, exempting about 100 public companies from the enforcement of this law. The members’ motivation for this decision is that the legislative proposal on the establishment of the Sovereign Fund for Development and Investments - S.A., and on the amendment of legislative acts (L. 506/2017) includes provisions on professional management, based on performance indicators. However, analysing the draft law²² submitted to the Romanian Senate, we may notice that it does not reproduce OECD principles and does not mention anything in terms of transparency and reporting obligations, though the explanatory statement²³ stipulates that “the idea to establish the fund is agreed by the European and international institutions (European Commission, IMF, OECD)”.

Fondul Proprietatea²⁴ reacted to the attempt to amend legislation on the corporate governance of public companies through a press release for public disclosure purposes.²⁵ In terms of transparency and access to information of public interest, the Fund (Fondul Proprietatea) considers that the amendments voted with a view to amending Government Emergency Ordinance no. 109/2011 include, *inter alia*: cancelling the obligation of public companies on the public and transparent disclosure of annual and semestrial statements; cancelling the duty to publish the identity, professional experience and remuneration of managers of public companies cancelling the possibility of minority shareholders to appoint members in the Administrative Boards of public companies and restraining their access to company information; cancelling the duty of companies to transparently publish the shareholders’ decisions on the companies’ websites”. As previously shown, such duties are not included in the draft Law no. 506/2017 and we may conclude that it would be equivalent to an infringement of the principle of information transparency and disclosure.

²² <https://www.senat.ro/legis/PDF/2017/17L506FG.pdf>, 18.03.2018

²³ <https://www.senat.ro/Legis/PDF/2017/17b574EM.pdf>, 18.03.2018

²⁴ Fondul Proprietatea (“the Fund”) was created to indemnify Romanian citizens whose properties had been seized by the former communist regime. After the international auction announced in December 2008, Franklin Templeton Investments assumed the official investment management and the sole administration of the Fund, as of September 29, 2010. https://www.fondulproprietatea.ro/files/live/sites/fondul/files/ro/press-releases/Amendamente%20Guvernanta%20Corporativa_21%20Dec%202017.pdf, 18.03.2018.

²⁵ “Cea mai neagră zi din istoria guvernănei corporative în România”, press release of Franklin Templeton Investment Management Limited UK, Bucharest Branch, of 21.12.2017, https://www.fondulproprietatea.ro/files/live/sites/fondul/files/ro/press-releases/Amendamente%20Guvernanta%20Corporativa_21%20Dec%202017.pdf, 18.03.2018.

The legislative proposal for the amendment of Government Emergency Ordinance no. 109/2011 was challenged at the Constitutional Court, and the objection of non-constitutionality was admitted: “After deliberations, the Constitutional Court unanimously admitted the objection and found that the Law to amend art. 1 par. (3) of Government Emergency Ordinance no. 109/2011 on the corporate governance of public companies is non-constitutional.”²⁶

4. Conclusions

Though Romania is not a member of the OECD yet²⁷, the enforcement of corporate governance principles and policies is important for its sustainable development, for the achievement of economic goals and the creation of a transparent and reliable business environment.

Each legislative change should represent a progress on information transparency and disclosure; hence, some amendments to the draft law no. 506/2017 should be adopted, stipulating clear transparency principles, concrete data disclosure deadlines (as per Government Emergency Ordinance no. 109/2011), avoiding unclear legislative phrases, such as “are reported in a timely manner”. Moreover, the provisions on posting relevant information on the website (which ensures public access to information) should be maintained.

A high degree of transparency in making economic decisions and policies on public companies guarantees the right to information and the protection of minority shareholders and is an insurance that the information is not abusively used by the majority shareholder. Thus, the adoption of “unwanted decisions, generating bad perception or likely to be challenged in court” is avoided.²⁸

The transparency and disclosure of information on public company funding, the undertaken operations, the use of funds, etc. is a way to identify and prevent the abusive use of funds²⁹, to fight corruption and promote a business environment with integrity.

The study mainly dealt with the free access to information and decision making transparency as a part of corporate governance of state-owned enterprises. However, the access to information also has some limits, as regulated by

²⁶ Press release of CCR of 13.02.2018 - the decision was not published as of the completion of this study, <https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-285>, 18.03.2018.

²⁷ Romania's goal is to become a full member of the OECD <http://gov.ro/ro/media/comunicate/guvernul-romaniei-a-fost-reprezentat-la-consiliul-oecd-de-la-paris&page=2>, 18.03.2018.

²⁸ “Corporate Governance: Relationship of State Owned Enterprises with other Shareholders”, Originally published as chapter 3 of “Corporate Governance of State-Owned Enterprises – A Survey of OECD Countries” (ISBN 92-64-00942-6; OECD 2005), CESifo DICE Report 3/2007 <https://www.cesifo-group.de/DocDL/dicereport307-rr2.pdf>, 12.03.2018.

²⁹ OECD – “Combating corruption and promoting business integrity in state-owned enterprises: Issues and trends in national practices”, Global Knowledge Sharing Network on Corporate Governance of State-owned Enterprises, 7-8 June, 2016, <http://www.oecd.org/daf/ca/2016-SOEs-issues-paper-anti%20corruption-and-business-integrity.pdf>, 12.03.2018

law, i.e. keeping commercial secrets and not disclosing information that might affect the commercial interests of state-owned enterprises. Moreover, regulations on personal data protection, limiting access to certain information, are also applicable in this field.

However, the limitations of free access to information of public companies should be circumscribed to legal provisions, and the restriction of the right to information should not affect the essence of that right. Transparency, i.e. disclosing useful, clear and actual information to the public and stakeholders should be considered as a good governance principle.

Moreover, as a particular feature to the general legislative framework on access to information of public interest, we may mention a distinct situation under art. 51 par. (2) of Government Emergency Ordinance no. 109/2011, establishing that online information should be kept for three years, a particular term, that has no correspondence in Law no. 544/2001³⁰. The issue at stake is whether access to such information can also take place after the concerned three-year deadline and, in the spirit of free access to information, we consider that the idea is that data should be available on demand, after the expiry of the period when they are automatically available. The clarification of this aspect would be useful, with the next legislative amendment, so that no differentiated treatments based on a distinct interpretation of this text of law might arise in practice.

Public trust cannot be built if the public does not receive enough information on the companies' activity, the decision-making process, their medium and long-term vision, so that citizens may take part in the decision making in full awareness.

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The intellectual capital a vector of innovation in the public sector

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Abstract

The term intellectual capital is not new. As early as 1836, economist William Nassau emphasized that intellectual capital is an important factor in production. The scientific concerns regarding the intellectual capital issue are not recent, they date back to the '80s. Over the years, the issue of intellectual capital has experienced an exponential development. If at first there were scientific concerns aimed at defining and publicizing the importance of the concept, acceptance is now on a deeper analysis of the management of the implications deriving from the management of intellectual capital in different organizations. Over time, intellectual capital has been defined in many ways. For some authors intellectual capital represents the knowledge that can be converted into value. Where do we need knowledge to create something new that adds value? Innovation. Intellectual capital plays a key role in innovative processes, it is responsible for innovation and with the help of innovative capital we can designate organizations that have the capacity to innovate. Purpose of the paper - the purpose of this paper is to analyze the role and importance of intellectual capital in innovative processes. To achieve a logical connection between intellectual capital and innovation, this connection brings innovative capital. The deadline for introducing the capacity of innovation organizations. We will present a framework model linking the two themes. Methods - in terms of research methodology, qualitative methods are considered. Conclusions - research will highlight the importance and role of intellectual capital in factual processes.

Keywords: innovation, intellectual capital, innovative capital, innovative processes.

JEL Classification: H83, O3

1. Introduction

The world is in constant change. The economy is changing as well. The traditional basis of competitive advantage has eroded. In recent years, some new steering forces have emerged. These include globalization, globalization of business and international competitiveness, more sophisticated customers, competitors and suppliers, increasing technical capacities, shortening the production cycle, etc. Traditional society is moving towards a knowledge society. This is where information signifies power in the most general sense - whether it be political, economic or financial - that obtaining, mastering and superiorizing information is the foundation of this society. It confirms the famous maximum, issued by

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Francis Bacon over three and a half centuries ago, "knowledge is power." It is the culmination of the development of human society, in which knowledge is the last and the highest fundamental source of social power, succeeding other sources that have marked the development of human society - violence (force) and wealth (money)².

In the new economy, capital became knowledge. Even the coins have changed. Money has become a crypt-coin. We still can not know what the cryptomonas will be. What we know for certain is that it has been proposed to change the accounting standards so that these "virtual currencies" can also be recorded in the accounting records.

Intellectual capital could not be included in traditional financial statements. The explanation would be that an asset (according to international accounting standards) is a resource controlled by the organization as a result of past events and from which it is expected to generate future economic benefits for the organization. Therefore, spending on research, trades, advertising, branding, recognition criteria can not be included in assets. But they are intangible assets.

2. General considerations

The scientific concerns regarding the intellectual capital issue are not recent, they date back to the '80s. The intellectual capital study had 3 stages, namely:

a) 1980 - 1990 stage of defining and publicizing the importance of the concept of intellectual capital and its role in supporting the competitive advantage

b) 1990-2000 stage of development, measurement and reporting of intellectual capital

c) after 2004, the emphasis was on the deeper analysis of the managerial implications deriving from the management of intellectual capital in different organizations

The origin of intellectual capital dates back to 1836 when economist William Nassau senior emphasized that intellectual capital is an important factor in production. In the '50s, Peter Drucker underlined the importance of knowledge as a resource for an organization, and Edith Penrose highlighted in his important book *The Theory of Growth of the Firm* that business organizations are a "resources, divided between physical goods and human capital, instead of talents and know-how, united together by an administrative framework."

It seems that this phrase of intellectual capital is attributed to the american economist John Kenneth Galbreith.

² Tofler, Alvin, *Powershift. Puterea în mișcare*, Antet Publishing House, Bucharest, 2005.

In a letter to the economist Michal Kalecki, Galbraith wrote: "I wonder if you realize, each one of us, how much we owe to your intellectual capital that you have shown in recent years.

In 1969 Garbreith suggested that this concept means more than just knowledge or pure intellect, it means action. Thus, intellectual capital is a way of creating value and a resource in the traditional sense. It is not enough to have people with a special intellectual capacity in an organization if these resources are not used properly in the process of value creation.

The concept of intellectual capital emerged in the last decade of the 20th century. The concept was defined and rigorously argued for the first time by Thomas A. Stewart in a series of articles published in the magazine *Fortune*. Thomas Stewart, the pioneer of this field, has been discussing this issue since 1997 in his books *Intellectual Capital: The New Wealth of Organizations* and *Wealth of Knowledge*.

Thus, according to Thomas A. Stewart, intellectual capital is "the sum of everything he knows from the company and gives him a competitive advantage," or intellectual capital is intellectual material - knowledge, information, intellectual property, experience, and can be used to create wealth. It is the collective intellectual power"³

For Leif Edvinsson (Skandia) and Pat Sullivan, intellectual capital represents "knowledge that can be converted into value".⁴

Hugh Mac Donald said is "knowledge that exists in an organization and that can be used to create a competitive advantage."⁵

David Klain and Laurence Prusak try to capture a more pragmatic picture of intellectual capital. They regard intellectual capital as "intellectual material that has been formalized, captured and used to produce assets of greater value."⁶

Ulrich suggests that IC comes from the competencies and employee involvement, IC would favor growth if both conditions are met simultaneously. Roos, Edvinsson and Dragonetti pointed out that IC is a kind of thinking and language designed to lead the company for future achievements.

Al Ali suggested that IC is the knowledge, experience and mental strength of employees as well as the organization's databases, systems, processes and philosophy.

Regarding what intellectual capital is, we will try to give a practical example, that if we take water, sugar and caramel, we mix them, we do not get Coca-Cola, we only get a drink. Intellectual capital is more. It is a unitary one and can not be seen fragmented.

³ Stewart Th.A., *Intellectual Capital: The New Wealth of Organizations*, 1999, p 11.

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⁵ Stewart Th.A., *op. cit.*, p. 11.

⁶ *Idem*, p. 67.

3. The interaction between the intellectual capital and innovation

In order to develop a framework / model of interaction between intellectual capital and innovation, which can then be applied in public administration, we must first see what is the relationship within the intellectual capital.

We will start from the "classic" model of intellectual capital, the model designed by Nick Bontis. We chose Nick Bontis' model because it is a classic model.

This model was also used at EU level when the Ricardis projects (measurement and reporting of intellectual capital in universities) and Meritum (measurement of intellectual capital) and other studies were carried out. It is a simple but complex model in its simplicity.

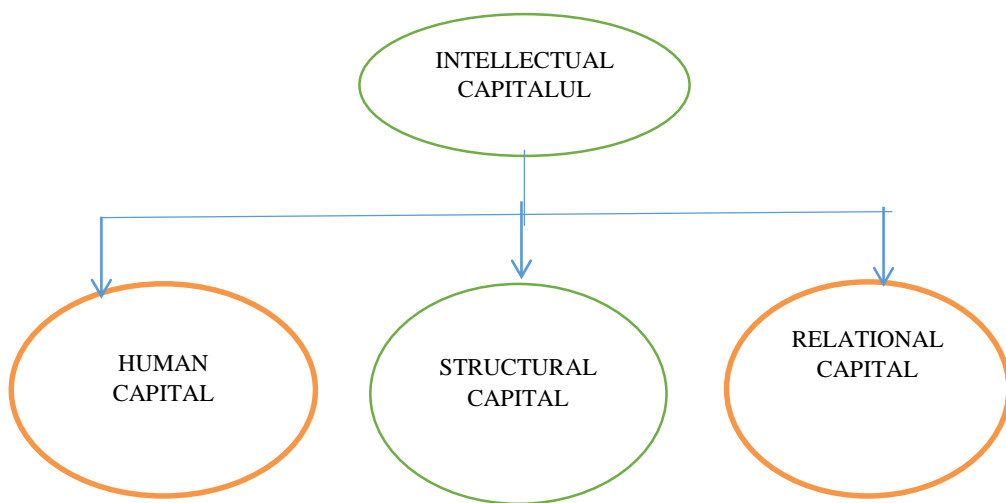


Fig. 1. Intellectual Capital model after Nick Bontis

Human capital. The concept of human capital has been popularized by Gary Becker, Nobel Prize economist and laureate at the University of Chicago, and Jacob Mincer. It refers to the stock of knowledge, customs, social attributes and personality, including creativity, embedded in the ability to perform work to produce economic value.

From the perspective of the human capital component of intellectual capital, it represents the totality of the knowledge of an organization as represented by the employees. It is the value accumulated in trainings, skills. Human capital is hidden knowledge hidden in the minds of people working in the organization.

Human capital is important because it is a source of innovation and strategic renewal.

The essence of human capital is the pure intelligence of the members of the organization.

The purpose of intellectual capital is limited to knowledge (it is in the employee's mind).

Can be measured though difficult. It is the hardest to codify of the three components of intellectual capital.

- When looking at the reporting of human capital we should consider the following, the most important aspects:

- 1 - employee profile
- 2 - staff transfer
- 3 - education
- 4 - involvement and motivation
- 5 – training
- 6 – results

Employee Profile - This section should include gender and age distribution data, number of employees per department.

Personnel transfer - should include beginner data, resignation personnel, staff turnover expressed as a percentage.

Education - should include employee academic performance, experience, qualified staff, unqualified staff, graduates of middle, upper, doctoral, international experience.

Commitment and motivation - work in pair. The commitment includes, among other things, senior people (seniors) and % of staff trained in total staff, % of staff who feel explicit recognition, % of staff who feel like their idea is taken into account or who are happy in the work environment.

Training - includes indicators of training provided by the organization. Indicators such as number of days, investment in training.

Results - general satisfaction with work. Absences due to illness, etc.

Structural capital. The concept of structural capital refers to the value left by human capital. It is what remains after the employees go home. Databases, customer lists, registered organizational marks, etc. According to Bontis, the structural capital "structural capital includes all the non-human knowledge deposits of the organization reflected in databases, internal procedures, organigrammes, routines, whatever their value is greater than their material value".

- When looking at structural capital reporting, we should consider the following, the most important aspects:

- 1 - general infrastructure
- 2 - transfer of knowledge
- 3 - innovation
- 4 - quality and improvement of projects
- 5 - customer relations

6 - administrative processes

General Infrastructure - acts as an indicator of office equipment, computers, telephones, etc.

Knowledge transfer - Intranet and database utility.

Innovation - Collecting information about investment in the development process.

Quality and improvement of projects - No employees with ISO certificates.

Customer Relations - Getting the organization closer to current or potential customers.

Administrative processes - Effectiveness in response.

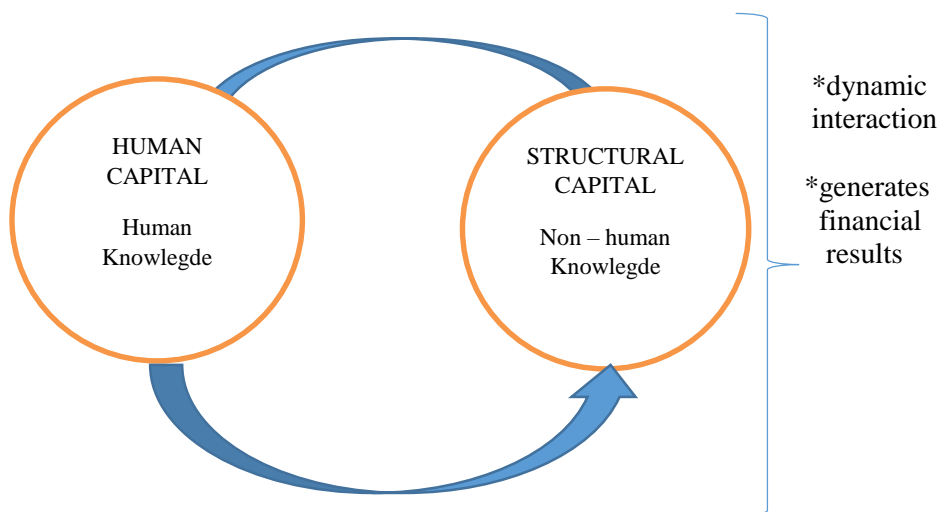


Fig. 2. The relations between the human capital and the structural capital (source the author)

Human capital determines structural capital, the better the structural capital, the better the human capital.

The interaction between human and structural capital is a dynamic one.

Human capital and structural capital show us the future value of the company and the ability to generate financial results.

Therefore, a more systematic method of reporting and measuring these intangible dimensions is needed.

Relational capital. Relational capital represents relations with stakeholders (internal and external). It is the knowledge embedded in organizational relationships with customers, suppliers, stakeholders, strategic partners, etc.

Knowledge built into the relationship with the external environment.

• When looking at relational capital reporting, we should consider the following, most important aspects:

- 1- Customer Profile
- 2- The image of customers and stakeholders
- 3- Networking
- 4- Intensity, collaboration, connectivity

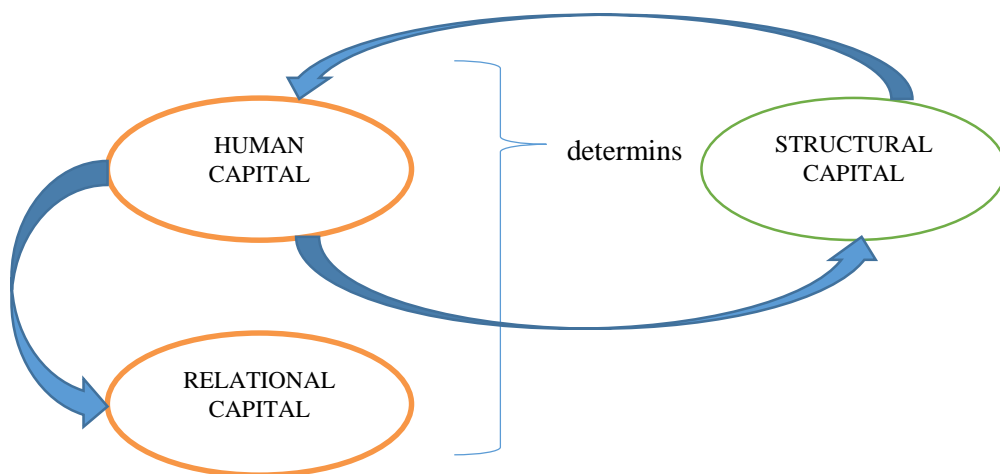


Fig. 3. The relations between the 3 capitals human, relational and structural (source the author)

In our attempt to create a framework model for interaction between intellectual capital and innovation, we will have to create a model of intellectual capital reporting.

Generally in Romania, at the level of the organizations, this concept of intellectual capital is not known. There are many countries around the world where not only is this concept known, but it is also developed. A good example would be Austria. Austrian public universities are the first higher education institutions in the world that are required to produce and disseminate the Intellectual Capital Reports (called Wissensbilanz).

The Intellectual Capital Report seeks to evaluate the intangible assets of each university. In addition, some of its numerical indicators are important measures for budget allocation based on formulas, apply as a base for the basic budget, and can also be used for internal control and external communication.

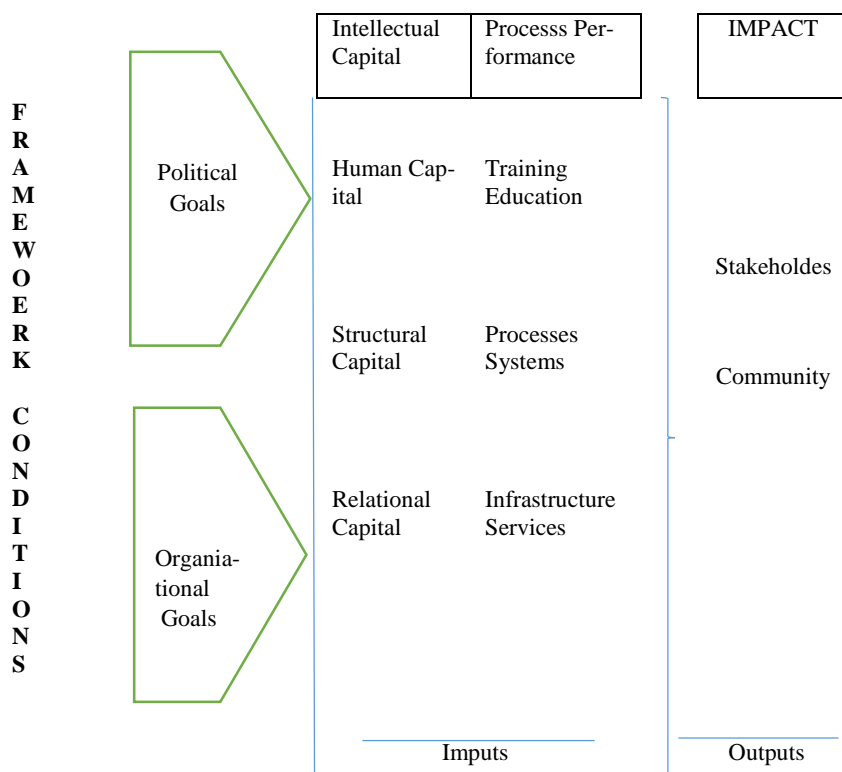


Fig. 4. The Model of Intelligent Capital Reporting in Austrian Universities (adaptation of the author)

The first comprehensive intellectual capital report was published for 2007, and Austrian universities must present it annually, following the calendar year.

Under the 2002 Law on Universities, the report on intellectual capital contains mainly:

- university activities, social objectives and self-imposed goals and strategies;
- its intellectual capital, divided into human, structural and relationship capital;
- the processes set out in the performance agreement, including results and impacts.

Every university has to report on input, output and performance indicators for teaching, research, and third mission. The Report of the Intellectual Capital should be prepared for the entire institution and probably for the scientific fields. In addition, each university is free to publish RICs for other sub-levels,

such as departments or faculties. The concept of the Intellectual Capital Report described by UG 2002 is based on the model developed and applied by the Austrian Research Centers Seibersdorf (ARC), the pioneering European research institute in applying IC models to manage its intangible properties and to report that information.

The original model starts from examining the contextual conditions of the institution, analyzing its objectives and strategic missions and incorporating the three categories of IC: human capital, structural capital and relational capital. The core of the model is performance processes: research, education, training, research and knowledge transfer, which can be broadened or reduced according to the university profile (obviously, art colleges, technology universities or business schools have different goals and strategies strategic)

Finally, the impact on the various stakeholders (academic community, government, industry, etc.) Considering the mission and core activities of higher education institutions, most of them will be non-financial, so that descriptive elements become essential for contextualizing and better understanding information provided by figures. Such a model could also be implemented in Romania. If we had such reports, we could better evaluate public institutions.

These reports may be annual and may have general or specific items.

In the following we will present a model of interaction between intellectual capital and innovation.

The external conditions given by the initiator of the innovative process that has support (politics, partners, shareholders) have an impact on intellectual capital and influence all three components of intellectual capital. The goal of innovation is to create added value that impacts on the individuals or groups affected by the organization, that is, innovative capital.

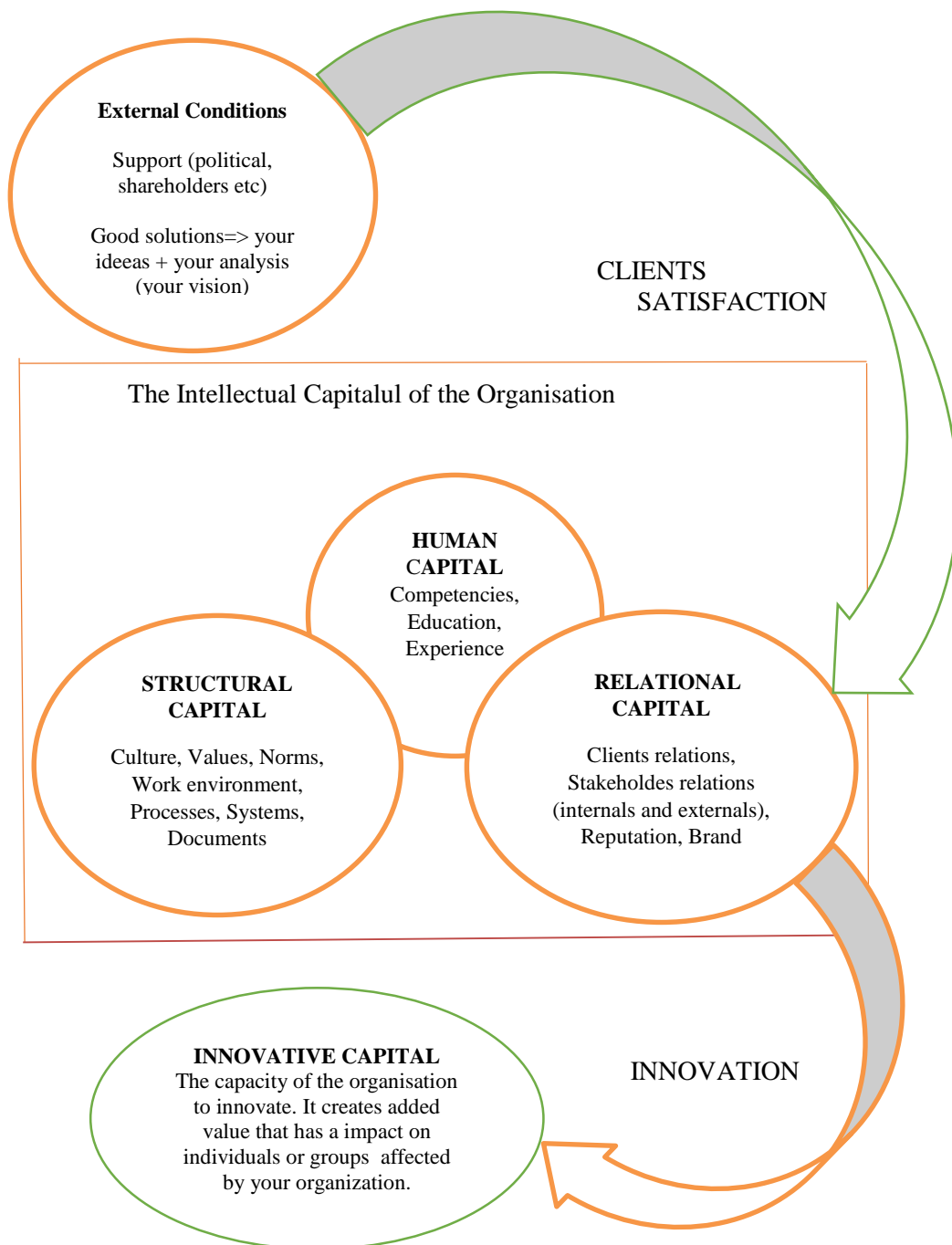
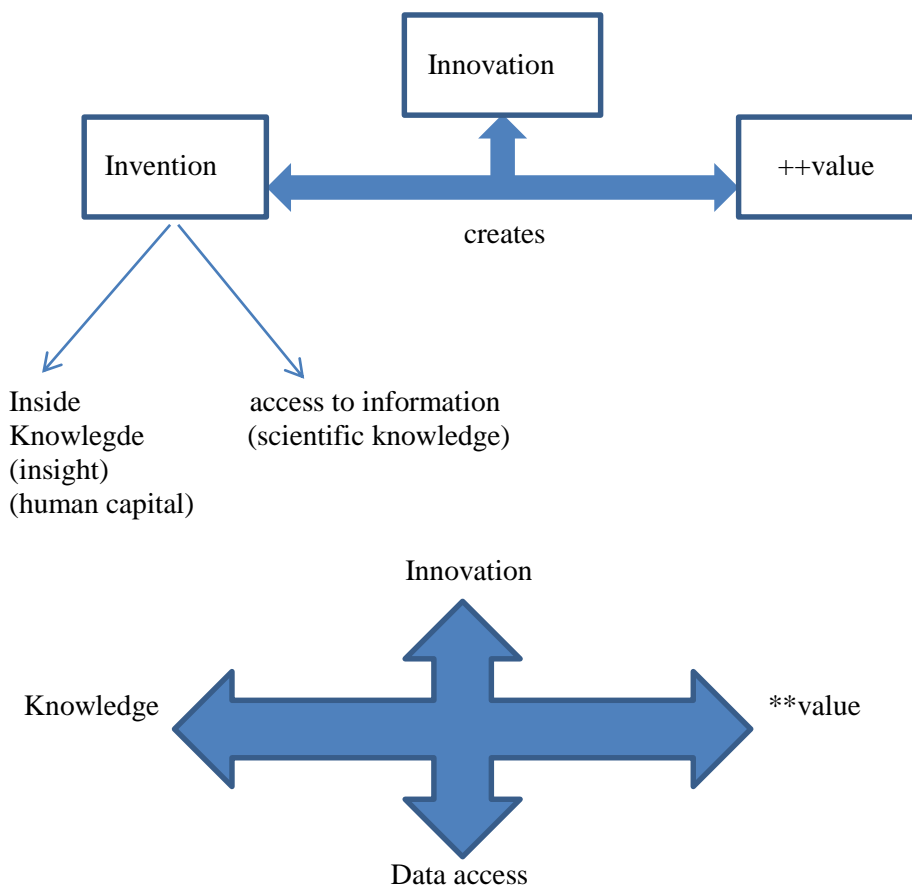


Fig. 5. A model of interaction between the intellectual capital and innovation
(Source the author)

We must see innovation as follows:



For a product to be an innovation we need a knowledgeable invention, access to data and create value added.

Example an electric motor

Knowledge (mechanical knowledge) + access to data (engine creation)
=> electric motor (++ value).

Innovation is a recurring problem in public administration. In this sense, it can be considered a magical concept that is used to accommodate the necessary transformation of the public sector so as to improve not only its efficiency and effectiveness but also its legitimacy.

Innovation is a concept that inspires people and political decision makers because it offers the promise of radical change. As a result, the desire to innovate in the public sector has a long history, which is sometimes linked to reform

programs to meet budget cuts, to meet the introduction of new management and governance ideologies (such as new public management or "open" governance) or to bring about the introduction of new information and communication technologies (such as e-government).

The main engine of public innovation is that that creates public value, which is more than just efficiency.

In the present paper, we aimed to create a model reflecting the influence of intellectual capital on innovation. It can be synthesized by the "Intellectual Capital a Vector of Innovation".

In addition, the value created by innovation in public administration can be expressed through the concept of public value. Concept created and defined by Mark Moore in its book "Creating Public Value":

- Public value is created when state institutions use financial resources and the authority they are invested to produce goods that benefit individuals;
- Public value is created when state institutions abide by citizens' and elected officials' expectations of being responsible for their (efficient, fair, open and responsible) performance.

In the literature, innovation is a component part of intellectual capital. The proposed term, namely innovative capital, is new (it has not been introduced so far by any author).

By introducing this term, we want to highlight the ability of organizations to innovate. Not all organizations have the ability to innovate. We also need to emphasize that adapting to market requirements is not innovation. That is, from our point of view, starting from the definition we adopted in terms of innovation, technology is not innovation but adaptation.

Technology would be innovation if, once an organization had been technologized, using that technology the human capital of that organization would produce innovative products that would create added value eg. new software.

The major objectives of the knowledge-based society are to produce knowledge, mainly through scientific research, transmission through education and training, dissemination through information technologies and the use of innovation.

In an economy where knowledge is becoming true capital and the most important driver of development, organizations face new challenges in terms of performance and accountability. To meet the challenges, entities need to impose high standards and strict discipline to ensure their full integration into the global competitiveness area.

4. Conclusions

Organizations are living organisms, therefore they are dynamic, so that the Intellectual Capital Report is a dynamic report, it shows the direction in which the intellectual capital of the organization develops.

Intellectual capital does not appear in the accounting reports. Therefore, the reporting of intellectual capital shows us another perspective on the organization. Reporting and measuring intellectual capital is important because it determines the value of our innovative capital.

An organization that has a high intellectual capital can also have a large innovative capital. The proposed framework model that we can generically call "The Intellectual Capital of Innovation" aims at correlating two concepts, namely intellectual capital and innovation.

From the combination of the two emerged a new concept, the innovative capital, synthesized in the created model.

The proposed model is in the pilot phase and will be tested and validated in the future.

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Police requirements as a public service

PhD. Ioan Laurențiu VEDINAȘ¹

Abstract

The present study aims to reveal some features of the police, as a public service provided by the administration, through which it contributes to ensuring order and public peace, the state of legality and respect for the fundamental rights and freedoms of persons. There are taken into account the changes that this public service has undergone in the context of the normative framework in force, both in terms of its organization and functioning, as well as the status of its staff, especially the policeman, as a civil servant with special status. The demilitarization of the police, as a public service and the status of the staff, has led to some changes, in terms of the way in which the activity and the relationship with the beneficiaries are carried out, as well as with the other administrative structures that are part of the national system of public order. The conclusion that we want to develop is that, despite the progress, there are still deficiencies that affect the quality of the service, the trust of the beneficiaries in the one that provides it, the overall image of the perception at the level of the public debate. It continues to express confusion with the similar service of the totalitarian regime, evoked, with a pejorative character, by the concept of "militia". It is therefore necessary to continue the preoccupations, the actions for professionalization of the police activity and the public service, as a whole.

Keywords: police, policeman, public service, Ministry of Internal Affairs, professionalism, legitimate trust.

JEL Classification: K23

1. General considerations regarding public service in general and police as a public service, in particular

Public service is one of the ways in which the public administration carries out its work. For a long time, it has been considered the main form in which public administration acts, the administrative law itself being defined as a *right of public services*². Through it, the needs of public interest of citizens are met, in a regime of public power, which may be an **exclusive regime of public power**, when the public service is provided by a public body or by a combined or a **mixed regime, of public and private law**, when the service is provided by a private agent authorized by a public body, in the form and procedure provided by the legal provisions. This may happen in the context in which the public service, by

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² See Antonie Iorgovan, *Tratat de drept administrativ*, vol. I, 4th ed., All Beck Publishing House, Bucharest, 2005, p. 12.

its nature, can be privatized. We say this because they are public services *monopolies of state*, which, due to their specific nature, cannot be the subject of privatization. Among these are *justice*, *foreign policy*, to which we consider it can be added the public service provided by the *police*.

By their object, the role of police services is to ensure public order and peace, citizen's safety, good morals, the rights and freedoms of individuals, within the limits of their competencies recognized by law. We say this because responsibilities in the listed fields above belong also to other public authorities, either belonging to the system of public order and national security, or are outside of it. From the first category we can mention the local police³, the gendarmerie⁴, and from the second category we can mention the local public administration bodies, the Public Ministry, the prefect, the Ombudsman, and the examples may continue.

Without this name, specific activities of the public police service have been provided since the earliest times. This is because it has always felt the need to protect collectivities against some forms of disruption of peace, order, personal or microsocial safety.

In the medieval period, including the one regulated by the Organic Regulations⁵, there was the *logothete of internal affairs*, who was a correspondent of the secretary of the interior at present, along with the *logothete of foreign affairs*, which was the correspondent of the secretary of state of our day.

The totalitarian regime devoted to the service of the contemporary police the term *militia*, which has, over time, acquired a pejorative dimension, determined by the quality of the personnel that provided this service and which was not revealed by special virtues in the professional training, the general culture or the way of the relationship with the beneficiaries of the service rendered. We could say that the workers in this field have become, in time, the symbol of the idea of a limited civil servant, without a general or professional culture, without too much knowledge, bordering often illiteracy. This despite the importance of their work for society, their role in the good life of society. Such an approach has led the training in educational institutions, lack of exigency in selection and training, putting more emphasis on physical qualities than intellectual and psychic ones.

In terms of the character of the job performed, the former *militiamen* exercised a *military function*, similar to those existing in the army or state security services. After 1990, the name of the public service and its related function were changed to *police* and *policeman* respectively.

³ The organisation and functioning of local police are regulated by Law no. 155 of July 2010, published in the Official Gazette no. 339 of 8 May 2014.

⁴ See Law no. 550/2004 on organisation and functioning of Romanian Gendarmerie, published in the Official Gazette no 1175 of 13 of December 2004.

⁵ We have in mind the Organic Regulation of Moldova and Muntenia from 1831 and 1832.

Regarding the military character of the legal status, it was maintained until 2002, when the Law no. 360 on the status of the policeman⁶ was adopted, whereby the policeman and the civil service itself were *demilitarized*, the policeman becoming a *career civil servant serving the community*, integrated into an administrative structure in which the *military grades* were replaced by *professional degrees*, and the hierarchical subordination within this structure has been complemented by subordination to the public interest and the needs of the community.

There have been changes in the content of the work and the quality of the personnel who perform it, in the positive sense of the term, obviously occurred, without completely negating the image of the assimilation, with the same pejorative content, of the image of the policeman with the former *militiaman*. However, the almost three decades passed the totalitarian regime's abandonment cannot be enough to completely change the form and the background of some institutions or professional categories. What is undoubtedly is that *we are indeed on the right track*, and the negative aspects, which previously represented the rule, tend to be transformed from rules, as they were *previously*, into exceptions which, as any other *exception*, are of *strict interpretation* according to the principle contained in the Latin adagio *exceptio est strictissimae interpretationis*.

2. Current constitutional framework

The Constitution of Romania, revised⁷ and republished⁸, contains provisions on public order, good morals, citizens' safety, which in our previous work we have qualified as "*constitutional and legal foundations on public order and national security*".⁹ We have identified, in this context, provisions such as art. 26 which recognizes **the right of the person to dispose of himself**, provided that he does not violate public order and good morals.

The notion of *public order* is the "*state of law and fact which allows the maintenance of the balance based on the social consensus of any society within the limits of the internal constitutional framework and international regulations ratified by Romania in order to protect the fundamental rights and freedoms of citizens, and the other values declared supreme and guaranteed by the Constitution and the laws of the state.*"¹⁰

The notion of *public order* is also used by art. 53 on restricting the exercise of rights and freedoms, along with others, of the same nature, such as *public morality, public health and national security*. This text is very important because

⁶ Published in the Official Gazette no. 440 of 24 of June 2002.

⁷ By Law no. 429/2003, published in the Official Gazette no. 758 of 29 October 2003.

⁸ The republishing was made in the Official Gazette no. 767 of 3 October 2003.

⁹ Ioan-Laurențiu Vedinaș, *Statutul poliștilor local*, Universul Juridic Publishing House, Bucharest, 2017, p. 42-57.

¹⁰ *Idem*, p. 43-44.

it reports the possibility of restricting a right or a freedom to protect values, among which **public order** is the first to succeed the most profound and special, the first in enumeration, as is normal, **the national security**.

In addition to these constitutional provisions which refer to values to whose the police contribute, the current Basic Law also contains a provision expressly referring to *police officers*. It's about **art. 40 par. (3)**, which lists **the categories of persons, officials or public officials who cannot be part of a political party**, including the **policemen**¹¹. The text uses the concept of *civil servants* in its final part in a *lato-sensu* concept, which includes both *civil servants*, *administrative*, such as police officers and categories of personnel exercising different public dignities or functions suited to them, the first three categories in the enumeration. As for the *active members of the army*, it is natural that they do not have political affiliation, because the only "*party*" to which they belong and which they have the mission of defending is **the Romanian people**.

We find that the police officers are part of the categories of civil servants enjoying a constitutional recognition, which means that they and their service, through *reductio ad absurdum*, could only be abolished by amending the Constitution by "deleting" from the list in art. 40 par. (3) and any other constitutional text.

Regarding the regulation by law of the police legal regime and the legal status of the policeman, they have to distinguish between them. The police, as a public service, is not part of the areas the Constitution reserves, by art. 73 par. (3) or by other text, to the regulatory areas of an organic law. On the other hand, the legal status of the policeman, being a special status of a civil servant, naturally is governed by an organic law, given that, according to art. 73 par. (3), lit. j), the civil servant status is one of the subjects to be regulated by an organic law.

3. Current legal framework. Management. Mission. Objectives

At government level, the organization and functioning of the public police service are managed by a ministry that has the traditional name of the *interior ministry*. As far as Romania is concerned, since 1990, the ministry has undergone a continuous evolution since its changes in its structure reflecting the changes in its legal status and its material competence. In a *first period* - and vision - the Ministry of the Interior functioned distinctly with the task of managing, at national level, the issues related to the organization and functioning of this public service and of the structures with local and material competence, providing it. In fact, its law of organization and functioning was one of the first regulations

¹¹ The text stipulates that "the judges of the Constitutional Court, the lawyers of the people, magistrates, active members of the army, **police officers** and other categories of civil servants established by law cannot be part of political parties." (o.u. I.L.V.)

adopted by the democratically elected Parliament at the first free elections held after December 1989¹².

In a *second period*, after 2005, has begun the process of unification of the Ministry of the Interior with the former Ministry of Public Administration, which has embraced a succession of forms and names¹³, in present returning to the name of the Ministry of the Interior, which also manages some components of public administration, such as prefects and sub-prefects, or the National Civil Servants' Agency.

We find together with it, the Ministry of Regional Development, Public Administration and European Funds, which has in competence, among others, the local public administration at the level of the basic administrative-territorial units (communes, cities, municipalities) and the intermediate level (counties).

As we can see, a **ministry of public administration that existed in Romania by 2005 no longer exists**, which determines us in this context to ask whether its disappearance from the central public administration architecture is legitimate or not. This in the context in which **the public administration is an essential component of the state activity and of the administrative-territorial units**. It is a component of the executive power, but there are states, like America, where there is talk of a genuine administrative power, distinct from the executive or embracing it. We believe that the solution that should be imposed in the future should be **the re-establishment of this important ministry, which will manage, in a unitary vision, both central and local government**. It is true that the latter operates on the basis of the constitutional principles of local autonomy, decentralization and deconcentration of public services, but also based on the **principle of legality**, which obliges it **to obey the law**, with all the consequences deriving from it.

The organization and functioning of the Romanian Police are currently regulated by Law no. 218/2002¹⁴, and in terms of the personnel that is specific to it, we refer to Law no. 360/2002, already mentioned, on the status of the policeman.

But the Interior Ministry officer is not the only category of staff that bears this name. The *local policeman* who does not belong to this ministry is added, the organization and functioning of the local police regrouping at the level of the basic administrative-territorial units (communes, towns, municipalities), and there are no local police in the counties. Moreover, the Framework-Law no. 155/2010 stipulates that the local police can operate either as *a structure without legal personality*, respectively a compartment within the specialized apparatus of the mayor (including the mayor general) or as *a public institution of local interest, with legal personality*.

¹² Is about the Law no. 40 of 18 December 1990.

¹³ Example Ministry of the Interior and Administrative Reform (M.I.R.A.).

¹⁴ Republished in the Official Gazette no. 307 of 25 April 2014.

If the *policeman* within the Ministry of the Interior enjoys a special status, the *local policeman* does not have such status, being subject to the general statute of civil servants, regulated by Law no. 188/1999¹⁵. This despite the fact that the mission they perform has strong similarities, according to the law. Thus, by art. 2 of the Law no. 360/2002 states that *"the policeman is entrusted with the exercise of public authority, during and in connection with the fulfillment of his responsibilities and duties, within the limits of the competences established by the law"*. The local policeman, according to art. 17 of Law no. 155/2010 *"shall be entrusted with the exercise of the public authority, during and in connection with the performance of the responsibilities and the duties of the service, within the limits of the powers established by law and shall benefit from the provisions of the criminal law regarding the persons performing a function involving the exercise state authority - sub-district. ns. -I.L.V.)*. I have emphasized in the text the part that reveals **the identity of the significance of the policeman, regardless of whether we refer to the one from the Ministry of the Interior or the local one**. This allows us to continue to further promote the thesis that **the difference in legal status between the two types of policemen is not justified**¹⁶.

We are moving from the reality that we have revealed from the first section of this study, namely that the image of the police in general is far from being a positive majority in the eyes of the citizens. Despite the progress, there is still a lack of confidence in the quality of both the personnel and the service they provide. Therefore, we appreciate that it would be necessary to consider **the solution** of having a **unitary law, which would regulate both categories of policemen**. Which to impose common values and requirements for the policeman in general, regardless of his type. Citizens, the public service beneficiaries, do not have the necessary knowledge to make a difference between one category or another. And then a negative image encompasses all the police officers, a situation which, on the one hand, needs to be made aware, and on the other hand, it acts to eliminate the causes that cause it.

Equally, care must be taken to increase the training and professional training of police officers. And under this aspect it is necessary to integrate the local police in what we can recall by the phrase *"general police"*, because the training system for the local policeman is far from satisfactory.

Another aspect that we are considering is that, in our opinion, the philosophy about the role and the mission of the police and the way in which it performs its tasks should be changed. **Police, we think, you need to feel more than to see it. To feel its effects, the permanence of the activity, to feel permanently protected, as a man, even if you meet it less often than it is happening to us**. We believe that we are tributaries of a conception evoked by the popular dictum

¹⁵ Republished in the Official Gazette no. 365 of 29 May 2007.

¹⁶ This thesis I supported in a previously-mentioned paper on the status of the local policeman.

"*Fear keeps the melon field*", which makes us feel good when we are safely supervised with the "*organ*" next to us.

In states with strong democracies, the police do not excel through their presence, but through the action, the efficiency and speed with which they respond.

4. Conclusions

We have proposed, in the present material, to set out some ideas of principle regarding the significance that the police have, but, in particular, will have to have in the future, as a public service essential for both the state and the citizen. We believe that it is necessary to rethink both the status of the policeman and his way of acting, both for the purpose of increasing efficiency and increasing the trust, the image of this public service in front of the citizen. The values it is called upon to defend are essential to both man and society. In correlation with the improvement of these aspects, the education of the beneficiaries of its services cannot be neglected in terms of knowledge, appreciation and relationship.

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Legal news on penal protection of cultural patrimony: the experience of the Republic of Moldova

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Abstract

The basic purpose of the present scientific research has purpose the analysis of lawmaking updates introduced in the Criminal Law of the Republic of Moldova. Methods of research have been chosen: systemic method, comparative method, analysis and synthesis. As a result, the present study of penal legal norms was performed in a systematical and comparative way. Especially, there have been concluded that some lawmaking solutions settled in the legislation and penal doctrine of Romania would constitute a relevant scientific support and a good lawmaking sample in order to formulate some suggestions of legislative improvement in the sphere of protection of the cultural heritage by means of Criminal law. Finally, after a critical research there have been detected a great amount of unclear expressions and deficiencies of the modern lawmaking procedure used in the process of creating legal norms, and have been formulated new proposals to reform.

Keywords: *cultural heritage; goods of cultural heritage; misappropriation of goods of cultural heritage; destruction of goods of cultural heritage.*

JEL Classification: H41, K14

1. Introduction

The problem researched in this scientific study is the critical approach of some legislative amendments regarding the legal and criminal protection of the cultural heritage, according to the criminal law of the Republic of Moldova.

This research raises some sensitive aspects of the legal-criminal norms contained in the Special Part of the Criminal Code of the Republic of Moldova and identifies shortcomings in the legislative gaps. In this perimeter, it is demonstrated the urgent necessity of removing some deficiencies which, in our opinion, lead to an ambiguous and extensively unfavorable interpretation, which is contrary to the principle of the criminal law stipulated in paragraph (2) art.3 of the Criminal Code of the Republic of Moldova in the text - CP of the Republic of Moldova), unfavorable extensive interpretation and analogous application of the criminal law are forbidden.

Structurally, this scientific study addresses the situation in criminal doctrine and contemporary criminological science, examines the criminal law of the Republic of Moldova on the protection of cultural heritage and contains conclusions and proposals *de lege ferenda*.

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In order to obtain valid results, we have addressed the existing literature in the field, especially we have valorized the works of the reputed authors who meticulously treat the legal aspects of safeguarding and protecting the cultural heritage (S. Brînza, V. Stati, A. Calugariță, L.M. Crăciunean, G. Georgescu, A. Lazăr, D. Nica-Badea, G. Niculescu, C. Măruțoiu) and we examined some legislative documents from the Republic of Moldova. We have noticed that the completion of the CP of RM Special Party has only partially removed the existing legal deficiencies in the field, and as a result, we have come up with the proposal *de lege ferenda*, the purpose of which is to create an independent article (Article 1996 of the Criminal Code of the Republic of Moldova "The stealing or extortion of cultural heritage assets") instead of the introduction of distinctive qualifying signs in the legal and criminal norms of the eviction of cultural heritage assets.

2. Situation in criminal doctrine and contemporary criminological science

Every generation needs not only an economic and social education, but also cultural. Thus our descendants must be able to "*transmit cultural heritage, and the destruction or degradation of heritage would mean disappearing the memory and cultural identity of the citizens of a country and, consequently, the inability to pass this legacy to future generations.*"²

It is clear and indisputable that the cultural heritage requires responsible and sustainable protection and that its exploitation will enhance the creation, saving and maintaining of a balance between cultural resources, their economic exploitation and the ability of the offspring to use them. Risk factors that can cause damage or even destruction of cultural heritage are: the human factor; biological factors; physicochemical factors; natural disasters; other factors³.

Among the risk factors of the built heritage are the long-term abandonment of historical monuments (abandoned buildings in various stages of degradation), uncertain ownership regime or prolonged litigation on property rights and poor education of the population⁴. The degradation of cultural goods is the spontaneous effect of destructive agents and processes with uncontrolled evolution, the

² Historical Monuments Protection Strategy from Alba County 2018-2023, Department of Territorial Planning and Urbanism (the document is available on-line at: <http://www.cjalba.ro/wp-content/uploads/2018/01/%20%20protection%20a%20monuments%20historical%20%20Alba.pdf>. Last visited date: 13.02.2018).

³ Georgescu Cr. *Distrușgerea și degradarea bunurilor de patrimoniu* (the document is available online at: <https://www.bcuculuj.ro/bibliorev/arhiva/nr18/carte3.html>, date last accessed: 11.02.2018).

⁴ Nica-Badea D., Niculescu G., Măruțoiu C. *Salvgardarea obiectelor d epatrimoniu cultural prin acțiuni de conservare preventivă și restaurare*, „Analele Universității “Constantin Brâncuși” din Târgu Jiu, Seria Litere și Științe Sociale”, 2013, no. 1 (the document is available online at: <http://www.utgjiu.ro/cadre/cv/nbd.pdf>, date of last visit: 12.02.2018).

result of a succession of physicochemical processes that gradually alters the appearance, shape and nature of the materials from which the objects are made, their resistance to the stage that makes it impossible their use as testimonies of human history and civilization. Destructive agents are grouped as criteria the specific modalities in which they act on cultural goods in exogenous factors (physicochemical factors of the environment, biological factors, etc.) and endogenous (such as the nature of the constituent material of the works of art, the compositional characteristics and structural-textural features of the constituent material, the physical and mechanical characteristics of minerals and rocks in the artifact constitution, etc.)⁵.

In a different way, the Romanian author A. Lazar states: "*The process of awareness of the responsibility for the national cultural heritage and the concerns about the protection of cultural goods had a long and difficult evolution, as social progress progressed in history culture ... in normative acts and jurisprudence, leading to the emergence of the first measures to protect the cultural heritage*"⁶.

Contemporary criminological science introduces a new notion of "*archaeological poaching*"⁷. In this respect, the author quoted emphasizes that the *archaeological poaching* in sites classified as historical monuments, some of the UNESCO World Heritage Sites, is a crime that was frequently encountered, , off-road vehicles, radio communications, guard dogs and even weapons⁸. As a result, sites were frequently targeted by raids of poachers' "crews" who then carried out detection and then unauthorized excavations in the perimeter of some archaeological sites, where they had stolen thousands of pieces (treasuries, jewelry, funeral artefacts, weapons and military equipment). As a consequence of these unlawful actions, the archaeological context is devastated and various pieces thrown or destroyed are left on the scene⁹.

The author, A. Calugărița, warns: "*The illicit trafficking of mobile cultural goods already embraces some of the main features of other organized crime, such as the international character, the use of organized crime networks, the difficulties of the authorities in controlling these actions and, consequently, the need of coordinated retaliation, also at international level.*"¹⁰ As the author rightly mentions, experience has shown that it is necessary that the national legislation of the

⁵ *Ibidem*.

⁶ Lazăr A. *Metodologia investigării infracțiunilor contra patrimoniului cultural național*. P.193 (the document is available online at: http://www.uab.ro/reviste_recunoscute/reviste_drept/annales_10_2007/lazar_ro.pdf, date of last visit: 12.02.2018).

⁷ *Ibidem*.

⁸ *Ibidem*.

⁹ *Ibidem*.

¹⁰ Călugărița A. *Protecția juridică a patrimoniului cultural național mobil în România și Germania: Rezumat al tezei de doctor*. – Bucharest: Ministry of Internal Affairs, Police Academy "Alexandru Ioan Cuza" Doctoral School Public Order and National Security, 2014, p.7.

states and the management of the whole activity of protection of the national cultural heritage to cover all aspects of the problem but also to give priority to the prevention of the illegal exit of these values in the country contrary to the risk of their disappearance or reaching them in uncontrollable spaces or with unpredictable regulations or the impossibility of recovering them, even in case of identification¹¹.

An acute problem according to Annex no. 1 to the Government Decision of the Government of the Republic of Moldova no. 271 of April 9, 2014, is the admittance of architects and architects to the designing of monuments (preservation, restoration, repair, adaptations, etc.) unprofessional structural engineers (without theoretical and practical knowledge in the field of cultural heritage protection). The issue of granting the right to execute monument intervention works to construction companies with no practical experience in the field and qualified employees (workers, site managers, etc.) is no less stringent¹².

The Romanian authors D. Nica-Badea, G. Niculescu, C. Mărtuoiu consider that *cultural goods are all kinds of material objects associated with cultural traditions, including architectural monuments, constructions of historical or artistic interest, archaeological sites and various mobile objects of artistic, historical, archaeological and scientific interest*¹³.

As the Romanian author A. Calugarița correctly mentions, *culture* is, in essence, the mirror of the reflection of society, functioning, by its nature, both as a forming matrix and as an ambassador for a nation or for a historical-cultural region¹⁴.

Culture involves an ensemble of spiritual, material, intellectual and psychic features that characterize a society or a social group. Culture can be viewed both in a narrow sense (*the traditional conception*), which refers only to art and literature) and in a broad sense (*the anthropological conception*), which includes, besides art, literature and traditions, ways of life, ways of living together, systems of values, traditions and beliefs, etc.).

In the anthropological sense, culture emerges entirely as a "*subjective concept, capable of receiving different meanings depending on different peoples and contexts*", which can be useful in protecting the cultural rights of members of minorities¹⁵.

¹¹ *Idem*, p.7-13.

¹² Annex no. 1 to the Government Decision of the Republic of Moldova no. 271 of 9 April 2014: Culture Development Strategy "Culture 2020". (the document is available on-line at: http://lex.justice.md/UserFiles/File/2014/mo92-98md/an.1_271.doc, date of last visit: 12.02.2018).

¹³ Nica-Badea D., Niculescu G., Mărtuoiu C., *op. cit.*, 2013.

¹⁴ Călugăriță A., *op. cit.*, 2014, p.7-13.

¹⁵ Crăciunean L.M. *Protecția diversității culturale în dreptul internațional: modelul uniți în diversitate*, Hamangiu, Bucharest, 2013, p.7. (the document is available on-line at: http://www.hamangiu.ro/upload/cuprins_extras/protecția-diversității-culturale-în-dreptul-internațional-modelul-uniti-in-diversitate_extras.pdf, , date of last visit: 12.02 .2018).

In this context, we are reminded that culture is also a factor of territorial development, internationally acknowledged, both politically and through dedicated investments, and cultural tourism generates economic value and can be a developmental solution for some communities.

It should be noted that every person has the right to participate in cultural life, to have access to culture, has the right to freedom of artistic expression, respect for cultural identity, the right to identify himself with a cultural community and his material or immaterial heritage, the right to cultural, religious and linguistic diversity, the protection of creative activities, the right to intellectual property, the right to education, the right to freely conduct cultural activities.

In the native space, the definition of the heritage concept is complex and includes the alternative formulation of "cultural heritage".

The term "heritage" is extremely extensive, always attaching to the objective to which value, significance, quality, integrity, authenticity and, above all, perennial for many generations. Thus, natural "heritage" is the ethical decision and the responsibility of a society to deliver a healthy environment, together with its complex and complicated biological components, to future generations¹⁶.

Cultural heritage is defined as the expression of the protection and promotion of the ideals and principles, modes of life that a community has developed and which it transmits from generation to generation, including traditions, practices, objects, expressions and artistic values¹⁷. It contains material representations of values, beliefs, traditions, and lifestyles, and contains these visible and tangible traces of antiquity until the recent past.

3. Criminal Law of the Republic of Moldova in the field of cultural heritage protection

Pursuant to the provisions of Article 133 of the Criminal Code, cultural values of a religious or secular nature are the values indicated in the United Nations Convention on Education, Science and Culture of November 14, 1970, on measures aimed at prohibiting and preventing the introduction, removal and transmission illicit property rights over cultural values.

In another theoretical context, we will draw some delimitation points for the offenses provided at art.199¹-199⁵ CP RM. Thus, the generic legal object of the crimes stipulated in art.199¹-199⁵ CP of the Republic of Moldova is the social

¹⁶ The strategy for developing an economy that protects natural and cultural resources in Romania and Bulgaria: executive summary. January: Interreg, 2017. (The document is available online at: <http://www.cciamh.ro/Strategia%20Heritage-executive-summary-ianuarie-2017.pdf>, date of last visit: 12.02.2018).

¹⁷ *Ibidem*.

relations ensuring the prospecting, identification, scraping, inventorying, preservation and restoration, guarding, maintenance and valorisation of the archaeological assets, as well as the lands in which are these.

As a special legal object of art.199¹ CC of the Republic of Moldova (Damage or destruction of cultural heritage assets), social relations are established regarding the assurance of the integrity of the cultural heritage assets, and as material object will be recognized cultural patrimony goods.

With special attention being paid to other norms in the Special Part of the Criminal Code, we observe the presence of a special rule inserted in paragraph (c) paragraph (2) of Article 288 of the Criminal Code (Vandalism), which provides for criminal liability for vandalism, i.e. defaming edifices or other rooms, as well as the destruction of goods in public transport or other public places, committed on goods that have historical, cultural or religious value.

In the examination of these two norms (art.199¹ CP RM and letter c) paragraph (2) art. 288 CP RM) certain points of similarity may appear which can lead us to the wrong conclusions regarding the double criminality of one and the same act. Although the act of vandalism has on goods that have a historical, cultural or religious value is manifested through degrading and destruction - "defiling edifices", "destroying property ... in other public places" is, in reality, a special rule (c) paragraph (2) art. 288 CP RM) in comparison with the norm provided by Art. 199¹ of CP RM, which is supposed to be a general one. Consequently, in our opinion, there can be no real contest of the criminal deed of vandalism and the criminal offense provided in art.199¹ CP of the Republic of Moldova.

The special legal object of the offenses referred to in paragraph (1) and paragraph (2) of art. 199² CP RM (Making unauthorized works in archaeological sites or in areas with archaeological potential) is the social relations regarding the observance of the authorized search order treasures or excavations, construction works, as well as other soil-related activities. The material object of the offenses referred to in paragraphs (1) and (2) art.199² CP RM is the soil from the archaeological sites, the soil in the areas with archaeological potential.

It should be specified that the objective aspect of the standard version provided in paragraph (1) of art. 199² CP RM has the following structure: 1) damaging action manifested in one of the following forms: a) carrying out the construction works; b) carrying out other intervention activities; 2) the place of the act: a) archaeological sites; b) areas with archaeological potential; 3) other circumstances: lack of archaeological discharge certificate.

The objective side of the type variant provided in paragraph (2) art. 199² CP RM includes: 1) damaging act manifested in one of the following forms: a) performing unauthorized excavations; b) Treasure hunt; 2) the place of the act: a) archaeological sites; b) areas with archaeological potential; 3) other circumstances: lack of authorization.

The special legal object of the offenses provided for in art. 199³ of the Criminal Procedure Code (Suspicion or illegal keeping of movable archeological assets) is social relations with respect to the legal circuit of mobile archaeological goods. As a material object of the crimes stipulated in art. 3.03 CP RM, the movable archaeological assets belonging to the following categories are recognized: a) movable archeological assets, including treasures discovered by chance; (b) movable archeological assets, including treasures in land-use works; or (c) movable archeological assets, including treasures in interventions by means of metal detectors or other remote sensing devices.

The prejudicial acts provided for in art. 199³ CP RM are manifested in one of the following variants:

- the concealment of movable archeological assets, including treasure;
- illegal storage of movable archeological assets, including treasure;
- failure to notify public authorities in a timely manner of the random discovery of movable archaeological assets, including treasures;

In accordance with the provisions of art. 199⁴ CP RM (The unauthorized marketing of movable archaeological assets and classified movable cultural goods), the special legal object is the social relations regarding the respect of the authorized order of trading of movable archaeological goods and the classified movable cultural goods. The material object of this crime is movable archaeological goods and mobile classified movable goods.

From the point of view of the objective side, two mandatory conditions must be maintained:

- 1) The detrimental act manifested in the commercial form of movable archaeological goods and classified movable cultural goods;
- 2) Other circumstances: lack of authorization.

As correctly stated by S. Brânza and V. Stati, only the unauthorized commercialization of movable archaeological assets and of classified movable cultural goods falls within the scope of art. 199⁴ CP RM. Other operations of alienation (temporary use, donation, exchange, etc.), even if not authorized, can not be qualified under this article¹⁸.

As correctly mentioned by the authors S. Brânza and V. Stati¹⁹, in all cases the public monuments have the status of monuments belonging to the cultural heritage within the meaning of letter a) paragraph (3) of art.1 of the Protection Law monuments, no. 1530 of 22.06.1993²⁰.

¹⁸ Brânza S., Stati V. *Protecția penală a patrimoniului cultural din perspective amendamentelor operate prin Legea nr.75/2016*, „Studia Universitatis Moldaviae”, 2016, no. 3(93), Social Sciences Series, p.12-25.

¹⁹ *Ibidem*.

²⁰ Official Gazette of the Republic of Moldova, 1993 no.15-17.

At the same time, the analysis of judicial practice in the matter demonstrates to us that courts often face difficulties in delimiting the attack on cultural heritage against other forms of patrimony attack.

Thus, in one case, *the court of first instance found that defendants T.V. and M.I., were accused of committing the offense provided by art.221 of the Criminal Code, with the hallmarks - the intentional deterioration of the monument of history and culture, taken under state protection. Between March and May 2014, in Chisinau, mun. Chisinau, acting intentionally, ignoring the provisions of art.16 al. 2, 52, 59 of the Law no.1530 of 22.06.1993 on the protection of monuments in the absence of a positive opinion from the Ministry of Culture of the Republic of Moldova and without coordinating the draft of the works with the Ministry of Regional Development and Construction of the Republic of Moldova, 3 Chapter IV, subchapter B, of the Government Decision of the Republic of Moldova no.1009 of 05.10.2000 on the approval of the Regulation on natural and built protected areas, TV instigated the inhabitants of the village of Kolonița, mun. Chisinau, to the deterioration of the historical fence of the Church "Nașterea Maicii Domnului"("Nativity of the Mother of God") from Kolonița, mun. Chisinau. As a result, M.I. and other inhabitants not identified by the criminal prosecution body of the village of Kolinita, Chisinau, destroyed an approximately 45-meter section of the historical fence of the Church of the Nativity of the Mother of God in Kolonița, Chisinau, which is included under no. 282 in the State Registry of Monuments of the Republic of Moldova, approved by the Decision of the Parliament of the Republic of Moldova no.1531-XII of 22.07.1993, thus destroying the historical monument, taken under state protection²¹.*

The Board of Appeal held that defendants T.V. and the M.I., did not know that the Church "Nativity of the Mother of God" in the village of Kolinita, mun. Chisinau is included in the list of historical monuments taken under the state's protection, lacking any informational signs, so, in the court's opinion, may be accused of intentionally intervening in the deterioration of the monument of history and culture. Moreover, such a monument is itself the Church of the Nativity of the Mother of God, and not the single fence surrounding the cemetery of both the village and the church. There is no reason not to believe the statements of the defendants, the witnesses, the injured party's representative that the state of the cemetery and the church fence posed a danger to the life and health of those around them, and to the circumstances established in the case, referring to the provisions of art.14, 29 of the Law on the local public administration no.436-XVI of 28.12.2006, the Regulation on cemeteries, approved by the Government Decision of the Republic of Moldova no. 1072 of 22.10.1998, finds that the operation and maintenance of the cemeteries is the responsibility of the local public administration. By the evidence he had found no confirmation of the guilt of T.V. and

²¹ Archive of the Supreme Court of Justice of the Republic of Moldova. File no.1ra-1217/2017. Criminal College Decision of September 26, 2017.

M.I. in committing the offense provided for in Article 221 of the Criminal Code, and therefore, in the actions of the defendants, the objective and subjective side of the offense referred to above are not subject to criminal liability for the offense and are to be discharged.

As for the *funeral monument*, it can also accumulate the quality of a monument belonging to the cultural patrimony within the meaning of letter a) paragraph (3) of the Law on the protection of monuments²².

However, using the notion of "funerary monument" in Art. 222 of the Criminal Code, the legislator did not implicitly take into account the fact that this is a good belonging to the national mobile cultural patrimony. As a result, profanation by destruction or deterioration of a public monument attracts exclusive liability in accordance with Article 222 of the CP of the RM. If, by destruction or deterioration, a monument is buried, which, besides the fact that it is a funerary one, represents a good cultural heritage, the committed ones will represent the concurrence of the crimes stipulated in art.199¹ and 222 CP RM²³.

In this research area we will point out that, according to the phrase used by the legislator in art. 199⁴ CP RM (Unauthorized Marketing of Movable Archaeological Goods and Classified Movable Cultural Goods), the material object is the mobile archaeological assets and the classified movable cultural goods. In this sense, we agree with the authors of S. Briza and V. Stasi who draw attention to the incorrect use of the word "and" instead of "or", which, under the law, will unduly restrict the circle of objects material of the offenses concerned.

For the purposes of Article 199⁵, the content of the article needs to be reworded in "Unauthorized access to metal detectors, unauthorized access to other remote sensing devices and their use in archaeological sites or areas with archaeological potential" in "Unauthorized access to metal detectors, unauthorized access to other remote sensing devices or their use in archaeological sites or areas with archaeological potential", which will ultimately allow the application of criminal law also in cases where only unattended access with remote sensing devices to seek treasure or to perform other prohibited archaeological operations. In our view, in order to remove the ambiguities and in order to ensure the clarity and predictability of the criminal law, the special purpose of these actions should be inserted, to expects: "in order to search for treasure".

At the same time, we agree with the proposal of the law that belongs to the Romanian author A. Lazar and which consists in supplementing the legislation by criminalizing the act of preventing the return of cultural goods, a law that seeks to protect the goodwill holder (collector, dealer, etc.) willing to return the cultural

²² Brînză S., Stati V., *op. cit.*, 2016, p.12-25.

²³ *Ibidem*.

goods during the activity of the judicial bodies to recover the damage and to reunite the national cultural heritage, and to draft a law to prevent the illegal their recovery²⁴.

4. Conclusions and proposals *de lege ferenda*

In our opinion, the completion of the Special Part of the Criminal Code has only partially removed the legislative deficiencies that existed before these amendments entered into force. Critically analyzing the provisions of the Criminal Code of the Republic of Moldova, I have observed that the norms granting legal and penal protection of cultural heritage are not included in a separate chapter, but rather as qualifying signs in other norms of a character general (such as theft, robbery, fraud, smuggling, etc.).

Furthermore, we note that the legislator does not grant legal-criminal protection of cultural heritage in the event of a blackmail act. In this respect, we will advocate the revision of these amendments in such a way that the legislator will abandon such legislative technique and proceed by analogy, as incriminating criminal offenses of illegal trafficking of drugs, ethnobotanics or their analogues (art. 217 -219 CP RM). In particular, we draw attention to the legislative process, which formulated the norm provided by art.217⁴ CP RM (Drug Abuse or Ethnobotanics).

We propose the following editorial for a new article:

"Article 199⁶. Extinction or extortion of cultural heritage assets

(1) Destruction or extortion of cultural heritage assets

shall be punished by a fine in the amount of 850 to 2350 conventional units or by community service from 200 to 240 hours or by imprisonment from 3 to 5 years.

(2) Same actions:

a) archaeological sites or areas with archaeological potential

b) by two or more persons;

c) using the service situation;

d) by penetration into the room, in another place for storage or at home;

e) applying non-dangerous violence to the life or health of the person or threatening to apply such violence;

f) in large proportions,

shall be punished by imprisonment from 5 to 10 years with (or without) a fine in the amount of 2000 to 3000 conventional units.

(3) The actions referred to in paragraphs (1) or (2), committed:

a) a criminal organization or a criminal organization or in favor of them;

²⁴ Lazăr A., *op. cit.*, p. 193.

b) applying violence that is dangerous to the life or health of the person or to the threat of such violence;

c) in particularly large proportions, shall be punished by imprisonment from 10 to 15 years by a fine of between 4000 and 6000 conventional units."

If the legislative technique of combating the forms of extortion and black-mail (extortion) of cultural heritage assets were accepted in one article, the quality of criminal law and its predictability would increase. Thus, the criminal offenses incriminated in art.199¹-199⁵ CP of the Republic of Moldova would appear in a logical continuity together with such an article.

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