INSTITUTIONS WITH ADMINISTRATIVE JURISDICTIONAL POWERS IN FINANCIAL MATTERS NATIONAL COUNCIL OF SETTLEMENT APPEAL

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Summary

Constitutional jurisdiction held that the existence of administrative procedures prior judicial accepted in the European Court of Human Rights jurisprudence that, in connection with the application of art. 6, paragraph 1 of the Convention on Human Rights and Fundamental Freedoms, it was stressed that "the reasons of flexibility and efficiency, which are fully compatible with the protection of human rights, previous to justify the intervention of administrative or professional programs that (....) does not satisfy every aspect as part of the requirements specified in the provisions, such a system can be claimed by legal tradition of several member states of the Council of Europe"

In our opinion the question that goes on with poignancy in the case of special administrative jurisdictions refers to the usefulness that they have in the system of law, how beneficial is their contribution in achieving justice and how it could provide a subjective motivation to litigants use this procedure

Over time, there have been various attempts of transformation and revitalization of justice, more or less successful, which led to new institutions with jurisdictional competences which have tried to supplement and improve the work of courts. Time has proved the usefulness with the consequence of the loss or disappearance of some court credentials of others – the case of the Court of Auditors of Romania[1].

Initially, before changes in the Romanian Constitution in 2003, administrative courts were legally binding; litigants have no possibility to opt for settling the dispute between a court of common law and an administrative court. This has resulted in practice and in theory a critical attitude that targets just the constitutionality of the laws establishing the binding force of "administrative courts."

The voluntary feature of the special administrative jurisdiction provided by art. 24. paragraph 1 of the Constitution republished "special administrative jurisdictions are voluntary and free" allowed litigants to choose between addressing either the administrative or judicial-court hearing.

Constitutional jurisdiction held that the existence of administrative procedures prior judicial accepted in the European Court of Human Rights jurisprudence that, in connection with the application of art. 6, paragraph 1 of the Convention on Human Rights and Fundamental Freedoms, it was stressed that "the reasons of flexibility and efficiency, which are fully compatible with the protection of human rights, previous to justify the intervention of administrative or professional programs that (....) does not satisfy every aspect as part of the requirements specified in the provisions, such a system can be claimed by legal tradition of several member states of the Council of Europe (because of Le Compte, Van Leuven and De Meyre against Belgium [2])[3]

[1] The Courtof Auditors is "the supreme institution of further external financial control" (see M. Şt. Minea, E. Iordăchescu, AM Georceanu, *Public finance law in Romania*, Ed Accent, Cluj Napoca, 2002, p. 371) on the formation, administration and the financial resources of the state and public sector - M. Şt. Minea, C.F. Costas, *Public finance law*, Ed. Sfera, Cluj Napoca, 2006, p. 189. Considered in theory by some authors as a unique institution with administrative and judicial powers to revenue, after reviewing the Constitution in 2003 and has lost its judicial powers. Following O.U.G. No. 117/2003 judicial work and court staff of the Court of Auditors have been taken by the courts.

[2] The European Court of Human Rights, by the decision given in the cause of "Le Compte, Van Leuven and De Meyer against Belgium", in 1981 held that a Belgian organization of doctors, created by law, not a form of association that covered by Article 11 of the Convention. In motivating the decision noted that the organization has an institution of public law, which, by nature of its legal functions and its own, meets a public interest, showing that in this way it is integrating into achieving goals of a general nature, both profitable to those called to be part of this organization.

In our opinion the question that goes on with poignancy in the case of special administrative jurisdictions refers to the usefulness that they have in the system of law, how beneficial is their contribution in achieving justice and how it could provide a subjective motivation to litigants use this procedure.

A particular situation of the administrative jurisdiction[4] is the special administrative jurisdiction in financial matters.

Problems reported in theory, in public acquisition.

The normative document in the field of public acquisition is G.E.O. No. 34/2006[5] concerning the award of public contracts, of the contracts awarded public works contracts and concession services subsequently approved by Law no. 337/2006.

The regulation G.E.O. No. 34/2006[6] is one of urgent legislative measures that Romania means to achieve transposition of the European Commission[7] directives on public acquisition.

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[3]C.L. Popescu "Fraud on the Constitution conducted by Law no. 174/2004 for approval G.O. No. 92/2003 on the Fiscal Procedure Code, by express qualification procedure fiscal administrative procedure as judicial" Review Curierul Judiciar No. 7-8 / 2004, p. 197.

[4] For a comparative analysis between jurisdictions of common law and special courts, see Cristina Emilia Alexe, *The judges in the civil, between active role and arbitrary*, Vol I, Ed. C.H. Beck, Bucharest 2008, p. 109-119.

[5] Government Emergency Ordinance no. 34/2006 was published in Of.M. of Romania, Part I, no. 418 of 15 May 2006 and has undergone changes and additions by the Law no. 337/2006 on the approval and completion of them by Law no. 128/2007, as well as O.U.G. No. 94/2007, published in the order shown in the Official Gazette of Romania, Part I, no. 625 of 20 July 2006, no. 309, 09 May 2007 and 676 from 04 October 2007.

[6] Through the article 305 from the Ordinance were expressly abroged not only the stipulations of the G.E.O no. 60/2001 concerning public acquisitions but also the G.O. no. 20/2002 concerning public acquisitions realised by electronic and also the Law no 219/1998 regardin concession regime and also the G.O no 16/2002 regarding the contracts of public-private partenerships.

[7] The directives referred to are four. Thus the art. 307 (2) shows: "This emergency ordinance transpose the Directive. 2004/18/EC on the coordination procedures for the award of contracts for works, supplies and services, the Directive no 2004/17/EC on the coordination of procurement procedures applied by entities operating in the water, energy, transport and postal services sectors, published in the Official Journal of the European Union (OJEU) no. L134 of 30 April 2004, with the exception of art. 41 (3), art. 49 (3) - (5) and art. 53, which transpose by the decision of the Government, the Directive 1989/665/CEE on the coordination of laws, regulations and administrative stipulations relating to the application procedures for appeal regarding the award of public supply and works, published in the Official Journal of the European Communities (OJEC) no. L395 of 30 December 1989, and 1992/13/CEE Directive, on the coordination of laws, regulations and administrative stipulations relating to the application of Community rules on procurement procedures of entities operating in the water, energy, transport and telecommunications, published in the Official Journal of the European

The haste in which to proceed, however, agree to putting the Romanian legislation with all directives within a single legal act is a process critical, because, as shown in specialty literature[8], on the whole by its size this ordinance is bushy Sometimes blurred, with many references to that fact and deepen its study becomes very difficult. Therefore the quoted author is asking herself, and we agree with her, if it was not normal that each directive has been transposed in a separate normative act, but they seemed as, each of these directives shall be published in one numbers of the Official Journal of the European Union.

Another aspect reported in the above-mentioned work[9], is the absence in the GPO No. 34/2006 of an explicit term on the contract of public-private partnership[10], which, in the absence of an indication they also, can lead to the assumption that such contracts will not be completed? If yes, where is the regulation applicable to this type of contract?

Thus, it was stressed that G.E.O No. 34/2006 did nothing but increase the ambiguity in the contract of public-private partnership, and on the other hand, although states that the procedures governing the award of the concession contract for public works and services, not only contains a few references General on this issue.

No rules for implementing the Ordinance, contained in G.D No. 925/2006, does not present details of the concessions and services, but only about the public acquisition contract. Finally, compared to the current text of O.U.G. No. 34/2006, the public-private partnership can be considered a variant of the concession contract, and as juridical nature, an administrative contract [11].

Union (OJEC) no. L76 of 23 March 1992, with the exception of art. 9-11, which are transposed by the decision of the Government. "

[8] Narcisa Rodica Petrescu, The impact of the adoption Government Emergency Ordinance on the contract of public-private partnership "Review of Public Law no. 1 / 2007, p. 97.

[9] Rodica Narcisa Petrescu, *Op. cit.*, p. 99.

[10] Spectator of the public-private partnership to see Dana Apostol Tofan, *Administrative Law* vol II, Ed. All Beck, Bucharest, 2004, p. 172, Dana Apostol Tofan, *Some considerents on the legislation in the field of public-private partnership,* in Review Drept Public no. 2 / 2004, p. 93.

[11] Largely on the administrative contract to see George Costa, *A notion of the administration contract*,
the Official Gazette and the printer, Printing central Bucharest, 1945, p. 9; Erast Diti Targul, Treaty of Administrative Romanian Law, Cernauti Glasul Bucovinei, 1944, p. 480 -482, Alina Livia Nicu, *Public institution in administrative law*, Ed Universitaria, Craiova, 2003, p. 253-261.

National Council for settling disputes, administrative body with administrative-jurisdictional activity in financial matters.

Public acquisition surpass 16% of the GDP of the European Union and are one of the main direction in which they directed public resources, it ANRMAP are under the control of Government. Court activity of the Council as an independent body to ANRMAP relate how it is spent "public money" in an area which highlighted in particular the work of the executive, in the assessment and utilization of public financial resources necessary to ensure the functioning and development of the society.

As I indicated, the normative regulations in the field of public acquisition is G.E.O No. 34/2006, which in the head. IX governing the organization and functioning of the National Council for settling disputes - hereinafter called the Council - its members, the procedure of solving the dispute before the Council, measures and the decision that it can take and remedies against the decision of the Council.

According to art. 255 of the Ordinance, "the person who is considered injured[12] in his right[13] in a legitimate interest [14] by an act of the contracting authority, in violation of laws in the field of public acquisition, has the right to dispute the act concerned about administrative jurisdiction, under this emergency ordinance, or justice under the law on administrative No. 554/2004, as amended. "

As shown by the express stipulations of law, the legal nature of the procedure for settling disputes, is an administrative court procedure[15], which

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[12]Within the meaning of art. Article 255. Line. 3 O.U.G. No. 34/2006 by the person who is considered injured means any person who performs, in effect, the following conditions:
a) has a legitimate interest in connection with a certain contract for public acquisition for its award it is applicable the stipulations of the present Ordinance.
b) suffered, is suffering or is likely to suffer a prejudice as a result of an act of the authority, likely to produce legal effects.

[13] According to art. 2. paragraph. 1 of Law no. 554/2004 by law "injured person "means - any right provided for by the Constitution, laws or other legislation, which brings a touch through an administrative act.

[14] Article 2. paragraph. 1. Letter p and r and the Law no. 554/2004 are defined the notions of "private legitimate interest "- the opportunity to claim a certain conduct, in consideration of a future as subjective and predictable, and prefigured " *legitimate public interest* "- the interest which concerns the interests of the order of law and constitutional democracy, guaranteeing rights, fundamental freedoms and duties of citizens, community needs, achieving competence of public authorities;

[15] In theory - see-Liviu Corneliu Popescu, *Administrative jurisdictions according the constitutional disposals review*, Law no. 5 / 2004, page 88 - it was shown that in order to verify whether a procedure has or not jurisdictional nature can be used two elements that are in a close relationship of subsidiary. On the one hand it is about specific qualifications required

derives both from the legislature to express the will and characteristics of this procedure[16].

Compared with the art. 257 paragraph 1 of the Ordinance, which establishes the quality of the Council as administrative-judicial body, the notes and other provisions of the GPO No. 34/2006 which will clear out the specified legislator in this regard, [17] as follows:

- Article 256 "for settling disputes, which are considered part of injured has the right to address the National Council for settling disputes." - Art. 257 Article 3 "In his work, the Council shall be subject only to the law, and meetings of the Council are legally constituted in the presence of most members."

-art. Article 257. 4 "In his decisions, the Council is independent and is not subordinated to the National Authority for regulating and monitoring public acquisitions."

- Art. 266 (1) "The Council is qualified: a) to solve complaints made under the procedure for the award before the end of the contract, complete with specialized ... .."

- Article .. 269 "procedure for settling disputes are conducted in compliance with the principles of legality and the right to defense."

On the activity of administrative jurisdiction as characteristic features, were shown as being: [18]:

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by law or in the sense that a procedure has an administrative-jurisdictional nature, or that a procedure is not jurisdictional.

In subsidiary, in the silence of the law, the legal nature of the procedure is determined by reference to the body features which are carried out and the characteristic elements of the procedure. Thus, the nature of principle, we are in the presence of a jurisdiction and judicial proceedings when: the body is fixed by law; the body and its members are independent and impartial- the lack of identification of the "judge" (broadly) by part; the body is invested with full jurisdiction, in fact and right, has the power of decision, and not just opinion; the procedure is fair and submit items of contradictory, advertising and reasonable time, respecting the right of defense, the principle of non reformatio in pejus; the trial after working through possible remedies (the compulsory jurisdiction of the act, the possibility of forced execution of a judicial act.

Further more, to be in the presence of a judicial administrative proceedings - see John Alexander, Mihaela Cărăuşan, Sorin Bucur, *Administrative Law*, Edition II, the Revised and added Ed. Lumnia Lex, Bucharest, 2003, p. 579 -court proceedings will take place in front of the judicial organs specialized only from the central and local public authorities without including in this category other public authorities.

[16] Mădălin Irinel Niculeasa, Public acquisition legislation. Comments and explanations, Publishing C.H. Beck, Bucharest, 2007, p. 433

[17]See also Coca Ceorge; Dumitru-Daniel Serban, Topics on passive quality proceedings of the National Council for settling disputes, the Right no. 10/2008, p. 96

[18]Mădălin Irinel Niculeasa, Public acquisition legislation. Comments and explanations, Publishing C.H. Beck, Bucharest, 2007, p. 440.

a) The procedure is carried out after an imperative procedure provided without fail by law. This procedure resembles the procedure for adopting the judicial decisions.
b) Legal work is based on contradiction, namely the ability of parties to manage the evidence directly in front of the body that resolves the opposition.
c) The body that resolves the opposition is independent and impartial with the parties in the conflict. This condition is regarded as defining for the legal proceedings[19].

[19]Decision No. 409 of 12 October 2004 concerning the exception of unconstitutionality of the provisions of art. 5 of Law contentious matters no. 29/1990, of Article 109. Line 2 of the Code of Civil Procedure and art. 174-187 of the Code of Procedure tax examining the conclusion of summons, the court held that:

The author of the exception argues that the legal criticized dispositions violate the constitutional provisions contained in art. Article 21. (4), according to which "special administrative jurisdictions are voluntary and free."

Examining the exception of unconstitutionality of the provisions of art. 5 of the Law on Administrative, the Court finds that it is not based. Thus, by Decision. 188 of 27 April 2004, published in the Official Gazette of Romania, Part I, no. 498 of 2 June 2004, the Court stated that the constitutional text which refers to the voluntary nature of the special administrative courts is not applicable to the provisions of art. 5 of Law no. 29/1990, which establishes the obligation of the injured person to address the administrative complaint before issuing the notification of the court to cancel the act considered illegal. Invoked a constitutional provision abolished prerequisite for judicial administrative procedure. No constitutional provision does not prohibit that, by law, to establish an administrative procedure prior non-jurisdictional, such as, for example, the graceful administrative appeal or hierarchical.

Referring to criticism of the unconstitutionality of the provisions of Article 109 line 2 of the Code of Civil Procedure, the Court hold that the request for calling into justice must respect both conditions imposed by law the intrinsic and the extrinsically ones. From the criticized disposition results that it is about extrinsic condition that has to be respected, and this means that to the competent court is informed only after the fulfilling of procedure in advance, but not in all cases, but only in those cases where the law provides that the priority of this procedure, without talking about a special administrative jurisdiction. Thus, it can not be retained either in this case a breach of Article 21. (4) of the Constitution, republished.

Under the criticize aspect, nor the provisions of the Code of Procedure tax does not establish as groundless claims the author of the exception, *Special administrative jurisdictions,* in the meaning of the Article 21. (4) of the Constitution, republished. The texts of the Code of Procedure governing tax administrative appeal procedures, which leaves the possibility of having delivered against administrative acts, or their upper bodies, to return the measures taken or to resize them within the limits prescribed by law. Such procedures, in which solving the complaints and disputes brought by those interested persons is awarded to the body itself which issued the attacked act or its superior organ, do not meet the defining activity of jurisdiction - characterized by the settlement by an independent and impartial body of the disputes on the existence or extent of the subjective rights - as being specific to the administrative functions.

Acts of settlement by the administrative bodies the disputes, and complaints made under the provisions of the Code of Procedure tax, are not therefore acts of jurisdiction, but acts subject to administrative censorship of the court.

d) The jurisdictional bodies, meet to resolve complaints, are an order of parallel and separate jurisdiction over the courts.

In this sense, in our opinion, in the Council's activities are found specific features of the administrative jurisdiction as a result of the fact that the jurisdictional powers are expressly provided by law and the procedure for settling disputes are conducted in compliance with the principles of legality, the right to defense against an independent and impartial body to the parties in conflict and also separately from the courts.

In theory [20] were formulated views - which require an intervention of the legislature or the High Court of Cassation and Justice, which calls into question the quality of the administrative body with judicial powers of the Council.

O.U.G. No. 34/2006, according to express stipulations that form it, attributed Council-judicial administrative tasks. However we can not notice some problems, and reported by the quoted author, who question the court of the Council as follows: The procedure provided by GPO No. 34/2006 stipulates no obligation in quoting parties, which allows the Council to resolve the dispute in plenary not public meting – the passing-by of the principle-and advertising, the procedure is written before the Council and the parties will be heard only if necessary (Article 276), the formation are unable to refrain accordance with art. 24 and ff C. proc civ. when found in a situation of conflict (Article 264 paragraph 3), which later may lead to a decision nullity challenged.

Thereafter the Council sparks many polemics which form the subject of doctrinal analysis, was brought into question the very constitutionality of all the norms contained in the head. IX of O.U.G. No 34/2006. In this sense it was

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In addition, the Court observes that the legal criticized dispositions are in accordance with art. Article 126. (2) of the Constitution, republished, that the jurisdiction of the courts and court proceedings are set only by law.

[20] George Coca,Dumitru-Daniel Serban, *Topics on passive quality proceedings of the National Council for settling disputes,* Law no. 10/2008, p. 85. In this respect the author of the first thesis shows: "for us to be in the presence of a" special administrative jurisdiction "as he wants to be the work of the Council must be satisfied the following cumulative conditions: the administrative-jurisdictional act must be issued by an administrative authority, has to be issued by an organ of state administration or local government (so not every public authority), the issuing authority should have powers to resolve a conflict, so an administrative-jurisdictional body; the conflict has to be solved by citing the parties (which does not happen in our case), based on principle of contradiction, the parties should be recognized the right to be assisted by a lawyer (which is not happening in reality)

Failure of one of these conditions lead to other juridical realities which exceed the legal concept of special administrative jurisdictions (eg discipline committees), etc. .... "

said [21] that was inserted in the head. IX "Settlement of disputes" would be non-constitutional and "have a character of absolute novelty, find likely to revolutionize the ground the administrative courts, local autonomy and the Code of Civil Procedure" or "without the support constitutional by emergency ordinance was established a ward administrative body, even more - a body jurisdictional-administrative activity invested with the powers of hierarchical control" and other aspects covered by this study. To those shown not only want to emphasize that the polemics remain in the background of a doctrine inconsistent regulations and reeds.

National Council of settling disputes is a public authority [22] that operates alongside the National Authority for regulating and monitoring public with the following tasks[23]:

- To resolve complaints made under the procedure for the award before the end of the contract, complete with specialized constituted under rules of organization and operation, according to art. 291[24];
- To decide on the legality of procedures and operations carried out by the contracting authority in awarding a public contract, in accordance with this emergency ordinances;
- To give opinion on the dispute judgment deducted if the court requests it in accordance with Article 287. (4) [25].

Accordingly, the subject brought before the Council, by law, may be: the cancellation of the act, obliging the contracting authority to issue an act, obliging the contracting authority to take any other measures necessary to restore documents by which was vicious the procedure of attribution.

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[21] See Jordan Nicola, *Considerations on the GUO No. 34/2006 concerning the award of public contracts, contracts awarded public works contracts and concession services*, Magazine Public Law no. 1 / 2007, p. 105-115. For a contrary view to see Dumitru Daniel Serban About constitutionality of the administrative-judicial proceedings before the National Council for settling disputes, Magazine of Public Law no. 1 / 2008, p. 121-127

[22] See Ceorge Coca, Dumitru-Daniel Serban, Op. cit, Law no. 10/2008, p. 91.

[23] See art. 266 of G. U. O. No. 34/2006.

[24] Article 291 of the G.U.O. no. 34/2006 stipulates that: (1) Within 60 days from the date of publication of this emergency ordinance, the Government, by decree, approved rules of the organization and functioning of the Council at the request of the president of the National Authority for regulating and monitoring public acquisitions.
(2) After the date referred to in art. 289. (2), rules of organization and functioning of the Council is approved at the proposal to its members, by order of the President of the Council, published in the Official Gazette of Romania, Part I. (3) The entry into force of the Regulation of organization and operation established in accordance with paragraph. (2), the rules of organization and operation approved in accordance with paragraph. (1) ceases its applicability.

[25] Article 286 (4) "The Court may request the Council's opinion on the existence of violations of the laws regarding public acquisitions."

I can form, according to art. 286[26] and Article 287[27] of G.E.O. No. 34/2006, the object of opposition the damages that may be requested by the interested party due to injury suffered "ignoring one of his rights of his times in a legitimate interest by an act of the contracting authority." The interest can be both private and public (s.n. IL) Settling the demand on the repair of prejudice remains, finally, the exclusive jurisdiction of the administrative court, according to the Administrative Law No. 554/2004[28]. The proceedings before the Council can't have, therefore, as aim a request concerning damages only contesting the act by the administrative authority[29], in violation of laws in the field of public acquisitions.

In our opinion, from the above analyses, results the special administrative jurisdiction feature in financial matters. The National Council of resolving the dispute, following the legislator in the future return on the problems reported in theory.

All these issues, even if identified some issues that, ultimately, is, in our opinion, gaps or flaws of the Law, however, ultimately the legislator will matter following the procedure for settling disputes before the Council to a catalog that administrative jurisdiction, which is conducted before a body with judicial powers, in which case the settlement issue administrative-judicial acts[30].

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[26] Article 286 (1) To resolve disputes relating to indemnification, the court is the only competent.
(2) If the person is considered injured require payment of damages, it must prove that: a) the provisions of this emergency ordinances have been violated, and b) he had a real chance of winning the contract, and this has been compromised as a result of violation of this ordinance emergency.
(3) To resolve disputes arising after the conclusion of the public, other than those relating to compensation, is only competent court.

[27] Article 287 (1) For the procedures provided for in art. 286 the provisions of Law No. contentious matters. 554/2004, as amended.

[28] Published in M. Of. No. 1154-07 December 2008

[30] Law No. 554/2007 defined the administrative court in art. 2. d "act issued by an administrative authority invested by an organic law with special administrative jurisdiction powers " definition we seem incomplete. Thus, in theory, the administrative act was defined as: "the act by which organs part of the state administration resolves disputes through legal judgments invested with a similar stability of the trial and susceptible to be executed by the force of coercion of the state. Acts whose making is based on the principles of independence in solving and contradictory" Antonie lilac, Administrative law treaty, vol I, Ed Nemira, Bucharest, 1996, p. 392, 393.