THE EXECUTION INSTANCE OF THE JUDICIAL JUDGEMENTS SENTENCED IN THE LITIGATIONS OF ADMINISTRATIVE CONTENTIOUS

ADRIANA ELENA BELU[*]
ANDREEA DIANA PAPA[**]

Abstract
The instance which solved the fund of the litigation rising from an administrative contract differs depending on the material competence sanctioned by law, in contrast to the subject of the commercial law where the execution instance is the court. In this matter the High Court stated in a decision[1] that in a first case the competence of solving the legal contest against the proper forced execution and of the legal contest that has in view the explanation of the meaning of spreading and applying the enforceable title which does not proceed from a jurisdiction organ is in the authority of the court.
The Law of the Administrative Contentious no 554/2004 defines in Article 2 paragraph 1 letter t) the notion of execution instance, providing that this is the instance which solved the fund of the litigation of administrative contentious, so even in the case of the administrative contracts the execution instance is the one which solved the litigation rising from the contract.
Corroborating this disposal with the ones existing in articles 22 and 25 in the Law, it can be shown that no matter the instance which decision is an enforceable title, the execution of the law will be done by the instance which solved the fund of the litigation regarding the administrative contentious.

Keywords: *The Law of the Administrative Contentious, the instance, the commercial law, the execution instance, administrative contracts.*

Introduction:

The Law of the Administrative Contentious no 554/2004 defines in Article 2 paragraph 1 letter ţ) the notion of *execution instance,* providing that this is the *instance which solved the fund of the litigation of administrative contentious,* so even in the case of the administrative contracts the execution instance is the one which solved the litigation rising from the contract.

Corroborating this disposal with the ones existing in articles 22 and 25 in the Law, it can be shown that no matter the instance which decision is an enforceable title, the execution of the law will be done by the instance which solved the fund of the litigation regarding the administrative contentious.

The instance which solved the fund of the litigation rising from an administrative contract differs depending on the material competence sanctioned by law, in contrast to the subject of the commercial law where the execution instance is the court. In this matter the High Court stated in a decision[2] that in a first case the competence of solving the legal contest against the proper forced execution and of the legal contest that has in view the explanation of the meaning of spreading and

[*] Senior Lecturer, Ph. D., Faculty of Law and Administrative Sciences, „Spiru Haret" University, Craiova; lawyer (email: adyelenabelu@yahoo.com).
[**] Senior Lecturer, Ph. D., Faculty of Law and Administrative Sciences, „Spiru Haret" University, Craiova; lawyer (email: papa.andreea1980@yahoo.com).
[1] The Decision no15 from the 5th of February 2007 of the High Court of Cassation and Justice in L. Mera, A. Pena, cited work, pg.119.
[2] The Decision no15 from the 5th of February 2007 of the High Court of Cassation and Justice in L. Mera, A. Pena, cited work, pg.119.

applying the enforceable title which does not proceed from a jurisdiction organ is in the authority of the court.

From the interpretation of article 25 paragraph 1 from Law it results that the execution instance apply the sanctions and gives the compensations only to the demand of the claimant, which means that these cannot be given ex officio.

In this context, provided that the claimant does not demand to the instance the application of the sanctions or of the compensations the coercive force of the state is not set going regarding the defeat of the resistance of the public authority.

Paper content:

In the case of the administrative contracts, the general disposal established in article 25 from the Law no.554/2004 presents interpretations in the sense that the law is applied no matter that the claimant is a legal person of private law or of public law. So, paragraph 4 of article 25, stipulates that the provisions regarding the forced execution are applied "adequately" to the administrative contracts because the classic situation was that of the unilateral administrative acts, in which the defendant is only the public authority.

In the case that the administrative organ resists the execution, the interested part can appeal to the services of a judicial executor who will notify the defendant a court day in which the latter can execute his obligation.

Nevertheless, given the nature of the litigation, which stood at the basis of the forced execution, the judicial executor cannot send but a summons, being only a proper execution. At the most, the judicial executor can inform the criminal pursuit organs for the putting into execution of the offence of abuse confidence sanctioned in the Criminal Code.

Law no.554/2004 stipulates in article 24 paragraph 3 a specific criminal sanction which objective side consists in the non-execution from imputable reasons or the non observance of the ultimate and irrevocable judicial decisions sentenced in the instance of administrative contentious in 30 days from the date of the application of the penalty of the leader of the public authority or, in case, of the obliged person.

The legal action against the decision of the fund instance follows the regime of the community law, in the sense that it is not subjected to the appeal, but only to the recourse, the latter being suspensive of execution. The instance which solved the fund of the litigation regarding an administrative contract does not always coincide with the execution instance, because the decision of the first instance can be attacked by recourse. The decision of the instance which solved the fund also constitutes an enforceable title providing it has not been attacked by recourse or when the recourse has been rejected.

The procedural disposals in community law sanctioned by article 400 and the following from the Code of Civil Procedure become points of law in the subject of the administrative contentious regarding the acts which have in view the execution of the decisions which regard the application and the explanation of the issued enforceable title. The legal contest at execution can be formulated against the enforceable title itself, title which is constituted of a judicial decision. The High Court of Cassation and Justice[3] decided in 2005 that the actions which have as an object the legal contest at execution of the enforceable titles represented by judicial decisions sentenced by instances of administrative contentious are admissible, and the competence belongs to the instance which solved the fund of the litigation of administrative contentious.

In the case of the litigations rising from administrative contracts, the legal contest at execution can be formulated not only by the private law person, but also by the public authority. The disposals

[3] Decision no. 5485/2005 from 16 November 2005 of the High Court of Cassation and Justice, on www.legenet.indaco.ro.

in the community law are applied in this case regarding the suspension of the enforceable title in exchange for a bail. The legal action against the decisions sentenced by the execution instance, the recourse, can be promoted by the both parts of the administrative contract, this not being suspensive of execution.

In the subject of the administrative contracts, regarding the execution of the decisions by which compensations were given for material and moral damages the disposals of the community law, namely of the 5th book in Civil Procedure Code are applicable. In accordance with article 371 "*the obligations which subject consists in the payment of a sum of money, the giving of an asset or of its use, the abolition of a building, plantation or other work or taking another measure acknowledged by law*" can be forcefully executed.

For these categories of decisions the putting into function with an executory formula is necessary in order to become enforceable titles.

As far as the administrative contracts are regarded issued in the basis of OUG 34/2006 regarding the assigning of the contracts of public achievement, of the ones of concession of public works and of the contracts of concession of services[4], article 286 establishes that the person who demands compensations has to prove that the provisions of the urgency ordinance were infringed.

In the case that the person who demands is a natural person or a legal person of private law, the situation does not impose discussions, the public authority having all the execution means given by the community law. But if the legal person of public law is the one who was obliged to pay a sum of money, the situation is different because any expense has to be registered in the budget.

Autonomy and principles of the European law

EU's treaties and regulations created an autonomous legal order that is directly imposed to member states and natural persons or legal entities within the European Union.

Thus, in the court case Costa / Enel, the European Court (former Court of Justice of the European Union-Court) has pronounced upon *the autonomy of the European law (Community law) in relation to the national law* of the member states, stating that the EEC Treaty has set its own legal order, integrated in the legal system of the member states, which is imposed to the national judicial bodies, without the member states' ability to take a subsequently unilateral action against this legal order.

The Case is based on the innovative nature of the European Communities that do not create classical interstate relationships, but a limitation of powers and a transfer of competences to the Community.

In theory it was shown that there is no contradiction in presenting the Community order as being both different from national orders and forming an integral part thereof as well[5].

In this context, it should be noted that the Community provisions' integration in national systems is done automatically, without the interference or intervention of national authorities, however, the national judge applies the European law in its quality as legal autonomous order, and not as a national one.

In its jurisprudence, the Court failed to consider the conditions under which a member state has introduced the treaty in its national law, taking into account that the receiving hadn't had the effect of transforming the treaties and that they must be applied by domestic courts to the extent that they belong to the European law and not the national one[6].

In our opinion, the provisions of art. 4 par. 3 of the Treaty on European Union -Lisbon Treaty (former art. 10 par. 2 T.E.C.), which regulates the principle of loyal cooperation, introduces

[4] Published in the Official Monitor no.148 from 15 May 2006.
[5] See Guy Isaac, Marc Blanquet, Droit general de l'Union Europeene, Publishing House *Sirey 2006, pag. 262.*
[6] Ibidem, pag. 265.

into the member states's duty an obligation "of not doing" in the sense of not taking measures that would jeopardize the application of Community provisions.

The rule instituted by the provisions of art. 267 Treaty on European Union (former art. 234 T.E.C.) establishes the cooperation procedure between national courts and the Court in Luxembourg for a uniform interpretation and in order to ascertain the validity of European rules, making the national judge the judge of the European common law, which is maintained by the Court's interpretation.

The European court case law has established the link between the principle of cooperation and the principle of direct effect of the Community law's dispositions[7].

The direct effect of the European law, as a basic principle, is that the Community provisions - clear, precise and unconditioned (are not subordinated to any further action that contains a discretionary power either of the European institutions or the member states) - may be invoked by individuals, natural persons and legal entities, directly before the national judge, when rights in their favor are created, in the absence or disregarding the contrary national rule and stating that authorities do not have discretionary power regarding the implementation of the European provisions.

The fundamental elements of the principle have been established for the first time in *Van Gend & Loos decision* (covering the direct effect of the treaty's provisions) *where the European Court has pronounced upon the autonomy of the European law against the national law*, and the fact that is biased when generating rights in favor of individuals within their legal jurisprudence, which must be protected by national courts.

We state, same as Pierre Mathijsen[8], that the direct effect of the European law has been recognized since the beginning by almost all national courts, which, by submitting "prejudicial issues" to the European court, agreed that European provisions should apply to their judicial system and confer rights which they must support.

Just by analyzing the criteria that have to be met by a European provision in order for its direct effect to be recognized (clarity, precision and unaffectedness of conditions), we note the following:

a) the *regulation* has a direct effect in accordance with art. 288 par. 2 EU Treaty (former art. 249 par. 2 T.E.C.) which states that "it is binding in its entirety and directly applicable in all member states" and consequently, the direct effect can not be opposed to a legislative provision of a national law which should compromise its essential character *(cause Orsalina Sconisio/ Ministero de l'Agricultura e Foreste)*[9].

In theory, it was shown that the regulation has a completely direct effect - vertical and horizontal, operating in the relationships between states and individuals, as well as in the relationships between individuals[10], claim which seems fair and is supported by the European court case.

b) the *directive* is mandatory for each member state regarding the result that has to be achieved, but gives the authorities in the process of transposition competence relating to form and means.

The directive does not confer in the first phase any rights or obligations for individuals, however, if properly implemented, its effects reach individuals through implementing measures taken by the state.

---

[7] Ovidiu Tinca, Jurisprudența Curții de Justiție a Comunităților Europene referitoare la principiul cooperării loiale între statele membre și instituțiile comunitare, *R.R.D.C. no. 3/2007, pag. 51.*

[8] See Pierre Mathijsen, Compendiu de drept european, VII edition, *Publishing house Club Europa 2002, pag. 48.*

[9] Indicated by Ovidiu Tinca in Efectul direct al dreptului comunitar, *Dreptul no. 11/2007 pag. 69.*

[10] See Jean-Caude Gautron, Droit europeene, *Publishing house Dalloz 2006, pag. 181.*

By analyzing the practice of the Court of Justice it ensues the fact that it has a direct effect only on condition that the member state has not adopted measures of transposition within the prescribed period or made an inconsistent transposition, the directive establishing rights that individuals and legal entities may use against the state (*Becker decision C8/81*)[11].

Therefore, the direct vertical effect of the directive can not be resisted unless its provisions are clear, precise and unconditioned against any further action or subject to a certain term.

In the French doctrine[12] it was stated that the lack of enforcement of the directive (not being transposed or its incorrect transposition) is the one that substantiates the power and the national judge's duty to directly apply it, and is a necessary condition added to the unconditional and sufficiently precise character of its terms.

As for us, we agree with this view and add that the two conditions - failure to transpose the directive and its unconditional nature - must be met simultaneously, and where, for lack of transposition or inconsistent transposition, harm has been done to individuals, the European law requires member states to compensate for damages, the national court being competent in deploying the state's willingness to assume responsability.

This will be initiated only if all three conditions are simultaneously met:

a) directive to recognize rights in favor of individuals,

b) the rights' content should be identified by means of the directive's provisions,

c) existence of a causal connection between the breach of the obligation incumbent on the state and the harm suffered by the injured party *(Francavich and Bonifaci decision C/ Italia C6/90 and C9/90)*[13].

In court case *Ratti*[14], the Court reiterated the reasons set out in the *Van Duyn case*, regarding the purpose of adopting directives and the possibility of their direct effect, stating in par. 22 that "a member state that has not adopted the implementing measures required by a directive within the prescribed period can not oppose individuals to the failure of fulfilling its obligations under the directive."

From the above, it results that the theory developed by the Court in case of directives reflects the principle nemo *auditur* propriam *turpitudinem* suam allegans.

In conclusion, it has to be shown as well that, although member states have an estimation margin (discretionary power) when implementing a directive, an individual can, through the national court, determine whether authorities have overstepped the bounds of evaluation.

c) decision under art. 288 Treaty on European Union (former art. 249 par. 4 T.E.C.) is binding in its entirety for its recipients, who may be individuals or member states.

As the Court had pronounced in the *case Franz Grand*[15], decisions addressed to individuals who qualify for the purposes of clarity, precision and unaffectedness by circumstances, have a direct vertical effect.

We conclude by arguing that if a Community disposition has a direct effect, the national judge is obliged to protect the subjective rights created for individuals, letting the national contrary rule utterly unenforceable.

For the purposes of the above, our supreme court has pronounced a decision[16] in which the provisions of Directive no. 2004/38/EC of the Council and European Parliament (on the free movement of EU citizens), came into conflict with the provisions of art. 38 of Law no. 248/2005 which restricted the exercise of this right; on conditions of the directive not being transposed on time,

---

[11] Decision from 19.01.1982 in C.J.E.U. Jurisprudence, vol. I, pag. 52.
[12] See Guy Isaac and Marc Blanquet, op.cit., pag. 277.
[13] C.J.E.U. Jurisprudence, vol.II pag. 411.
[14] Quoted by Tudorel Ştefan and Beatrice Andreşan-Grigoriu, op.cit., pag. 219.
[15] Cause 9/70 Franz Grand quoted in op.cit., pag. 214.
[16] I.C.C.J., Decision no. 5982/2007 published in *P.R. no. 1/2008.*

the national court applied the European law, protecting the individuals' rights confered by the Directive.

Besides its direct effect principle, the principle of priority of the European law is also a consequence of the obligation of loyal cooperation between member states.

Affirming the principle of priority was firstly made by the European court during the famous *case Costa / Enel* which resolved the conflict between the Treaty and an Italian law [17].

It was thus stated that the supremacy of the European law is confirmed by the provisions of the art. 288 Treaty on European Union (former art. 249 T.E.C.), according to which regulations are binding and directly applicable in all member states.

Based on these considerations, the Court stated that "the legal system of the Treaty can not be surpassed because of its special and original nature, by national legal rules, whatever their legal force, without being deprived of its character as Community law and without the legal foundation of the Community itself being called into question."

In the court case *Interntionale Handelsgesellschaft*, the Court reiterated arguments because of *Costa / Enel*, stating in paragraph 3 that "the validity of a European measure or its effect on a member state's territory can not be affected by allegations that the measure would be contrary to fundamental rights, such as those formulated by the Constitution of that member state or the principles of national constitutional structure".

From the above, and the doctrine's analysis[18], one can conclude that the principle of Community law has an inclusive effect against national constitutions and consequently any national legislation incompatible with the Community law constitutes a bar, and the national judge is the one that has to apply the Community law's dispositions.

In this respect, in the court case *C-106/77 Simmenthal*[19], seeking a preliminary ruling, former ECJ decided that the national judge should ensure the full effect of the provisions of the European law against any contrary provisions of national law, even later ones, without seeking or expecting its prior removal by legislative means or constitutional court.

In this context, it should be noted that in another case, former ECJ went further, requiring the British judge, for the case where national law forbids them to take interim measures, with the purpose of ensuring the existence of the rights invoked in virtue of the European law, to remove the application of national rules incompatible with the Community law *(C213/89 Factartome LTD/ and others)*[20].

As for us, we reject the priority thesis of the European law against national constitutions, reaching for the limited superiority of the European law, its supra-legislative value, but infra-constitutional in the same time, so that in case of a conflict with the national law, it prevails, but not in case of a normative conflict with the constitution. We argue our position with the approach adopted by the Romanian Constitution as well, which, in art. 11's provisions imposes a priority principle of all international treaties against any national laws, these having therefore a supra-legislative position in the hierarchy of legal norms, but an infra-constitutional one at the same time, meaning that if a treaty contains provisions contrary to the Constitution, it will only be ratified after reviewing the Constitution.[21]

The national judge asked to rule on the compatibility of a national legislation with the European law, can refer to the Court with an "appeal of interpretation" in order to be able to settle this issue of compatibility.

---

[17] C.J.E.U. Jurisprudence, vol.I pag. 115-*Decision C6/64.*

[18] See Octavian Manolache, op.cit., pag. 72; Tudorel Ştefan and Beatrice Andreşan-Grigoriu, op.cit., pag. 192; Jean Claude Gautron, op.cit., pag. 185.

[19] C.J.EU. Jurisprudence., vol.I, pag. 115.

[20] Jurisprudence of the C.J.E.U., Vol.II, pag. 403 .

[21] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, Teoria Generală a dreptului, Publishing house *CH Beck 2008, pag. 200-201.*

This action regulated by the provisions of art. 267 Treaty on European Union (former art. 234 T.E.C.) is also a judicial cooperation mechanism which establishes the participation of the Court of Justice to the national courts' regulation, due to the dialogue from judge to judge.

In the occidental doctrine[22] it was considered that the appeal of interpretation regulated by the provisions of art. 267 Treaty on European Union (former art. 234 T.E.C.) has three functions:

a) to ensure the unity of the Community law by avoiding differing interpretations of national jurisdictions;

b) to fill infringement appeals when finding about the state not fulfilling its obligations to which individuals have access, if a conflict between a provision of national law and a Community disposition;

c) to complete the action of cancellation (as to the validity of a secondary legislation act), to which individuals have limited access.

Being in agreement with the doctrinal statements, we can afford to supplement them by saying that the mechanism of prejudicial issues causes the accessibility of the European law to litigants and the national judge who in the future is no longer obliged to notify the Court of Justice of the European Union with an appeal of interpretation.

Regarding the obligation to notify, the Court of Justice in *case C 283/81 SRL Clif and Lanificio di Gavore SpA C / Ministry of Health*, stated that a national judicial body whose decisions are not subject to appeal under the national law is obliged, when before it it is formulated a question about the European law, to notify the Court of Justice unless it finds the question irrelevant or the European disposition was interpreted by the Court or the right way of implementing or the European law is so obvious, that it leaves no room for reasonable doubt.

When reasoning the decision stated above, the theory of "clear act" and "clarified act" from the French law is being applied.

Conclusions:

The law of the local public administration no.215/2001 establishes the obligation of the administrative- territorial units and of the Ministry of Public Finance to assure from the local budgets, respectively the state budget the compensations that Romania must pay for the lost cases at the European Court of Human Rights.

The debts consisting in the compensations owed by the state or by administrative-territorial units cannot be covered but by their money, the material means of any other nature, stock goods, personal properties and estates not being susceptible of forced execution. The problem of forced execution of public authorities presents difficulties concerning the organization of a compulsion system applied by state against the state because the execution organ is in the last instance the state through its representatives.[23]

Not even the public authorities can invoke the lack of funds to justify the non-observance of a judicial decision through which compensations were given in the subject of administrative contracts; such an attitude is not interpreted in the European jurisprudence as an infringement of the property right.

In the view of the European Court of Human Rights[24] the certain, liquid and exigible debts owned by one person are assimilated to the property right being "goods" in a broad way and including not only the personal goods, but also the patrimonial values and debt rights.

---

[22] See Jean-Claude Gautron, Droit europeen, *Publishing house Dalloz 2006, op.cit.,pag. 175.*

[23] E.D. Tarangul, *Administrative right course for second year thesis,* Litography „Romanian Book Book Store", pg.393, cf. O.Puie, cited work, pg.84.

[24] Constandache Cause against Romania, Decision on admissibility from 11 June 2002 and Constitutional Court, Decision no.70/2001 and 97/2004.

In terms of assessing the validity of the European law, the notification is required when the judge has a serious doubt on the validity of the European act contested by way of exception.

In our specialist literature it was appreciated that in case of an appeal of interpretation, we have a judge a quo who has to, and if necessary, has the possibility to suspend proceedings and send the competent judge ad quem a controversial legal issue and who the case's settlement depends on.[25]

In this context, it is clear that the European court does not replace national jurisdiction, it gives an abstract decision that affects the attitude of national judges when adjudicating a concrete solution, but does not apply the law in its place.

References:

- The Decision no15 from the 5th of February 2007 of the High Court of Cassation and Justice in L. Mera, A. Pena, cited work, pg.119;
- The Decision no15 from the 5th of February 2007 of the High Court of Cassation and Justice in L. Mera, A. Pena, cited work, pg.119;
- E.D. Tarangul, *Administrative right course for second year thesis,* (Litography „Romanian Book Book Store", pg.393, cf. O.Puie, cited work), 84;
- Constandache Cause against Romania, *Decision on admissibility from 11 June 2002 and Constitutional Court*, Decision no.70/2001 and 97/2004.
- Paul Cassia, *La mise en oeuvre du droit communautaire dans la contentieux administratif în Droit administratif Europeen*, (coord. Jean Bernard Auby şi Jacqueline Dutheil de la Rochere, Editura Bruylant 2007), 54-57;
- Jurgen Schwarze,*Le sources et principes du droit administratif europeen în Droit administratif Europeen*, (coord. Jean Bernard Auby şi Jacqueline Dutheil de la Rochere, Editura Bruylant 2007), 87-89;
- Diana-Urania Galeta, *Le principe de proportionnalite în Droit administratif Europeen, coord. Jean Bernard Auby şi Jacqueline Dutheil de la Rochere*, (Editura Bruylant 2007), 103-105;

[25] Emanuel Corneliu Mogîrzan, Noţiunea de chestiune prejudicială şi cea de acţiune în terminologia dreptului român şi în cea a dreptului Uniunii Europene, *Magazine Dreptul no. 5/2007.*