

DISPUTED MATTERS ON THE CONCEPT OF PUBLIC AUTHORITY

Elena Emilia ȘTEFAN*

Abstract

The issue on the submitting of the statement of assets and interests is a subject of great interest within the Romanian society. Starting from this subject, this study aims to analyze which are the legal entities required under the legislation in force to submit the statement of assets and interests and the penalty incurred for the failure to do so.

Furthermore, we consider relevant, in order to have an overview on the set out issue, to establish the significance of the concept of public authority. Not incidentally, we understand to discuss these two concepts, respectively the statement of assets and interests and the public authorities due to the fact that they were closely related within the judicial practice. Therefore, the qualification of a legal entity as a public authority leads to the obligation of the employees of the respective entity to submit the statement of assets and interests.

Keywords: contentious administrative law, public authorities, statement of assets and interests, Financial Surveillance Authority, civil servant.

1. Introduction

Following the occultism practiced by the totalitarian regime removed on December 22nd, 1989, the transparency became an imperative matter for the public life¹. *De facto*, this means that the public offices and functions fulfilled for personal scopes, generally material scopes, shall be avoided².

According to the accepted legal principle, the statement of assets is usually analyzed under the name of obligation of disinterestedness and makes part of the category of the duties which equally aim both the professional and the private life of the civil servant³. The statement of assets and the statement of interests represent personal deeds and they can be revised only under the terms of this law⁴. (...) Another author showed that the law seeks to prevent the cases of abuse, corruption, the use of the service in order to achieve outstanding material advantages⁵.

Each and every state has its own enacted law according to its social and political demands, to the traditions and values that it defends⁶. Therefore, the activity of the public administration bodies is governed by a mandatory set of rules and principles of conduct which aim to ensure it a social utility as high as

possible⁷. As shown in the accepted legal principle, „the characteristics of any society and form of social power are the following: a particular regulatory system and a set of conduct rules”⁸.

According to art. 1 par. (5) of the reviewed Constitution, in Romania the observance of the Constitution, of its supremacy and laws is mandatory, therefore, all the categories falling under the scope of the law shall be bound to submit the statement of assets and interests due to the fact that, as shown in the Constitution in par. (2) of art. 16:”*No one is above the law*”. Along with the same lines, as the accepted legal principle noted, the compulsoriness of the rules of law is ensured, if necessary, by the coercive power of the state⁹.

The following concepts shall be discussed within this study: public authority, civil servant and then the categories bound to submit the statement of assets and interests shall be analyzed. Therefore, the procedure of investigating the civil servants and/or high officials, performed by the integrity inspector shall be presented, and in the end we shall present a case study.

* Lecturer, PhD, Faculty of Law, “Nicolae Titulescu” University of Bucharest (e-mail: stefanelena@gmail.com).

¹ Mihai Constantinescu, Ioan Muraru, *Drept parlamentar (Parliamentary Law)*, Gramar Publishing House, Bucharest, 1994, p.55

² Mihai Constantinescu, Ioan Muraru, *op.cit.*, p.101

³ Verginia Vedinaș, *Drept administrativ (Administrative Law)*, 4th edition reviewed and updated, Universul Juridic Publishing House, Bucharest, 2009, p. 482

⁴ Art. 3 paragraph (1) of Law no. 176/2010 on the integrity in exercising the public offices and functions, for the amendment and supplementation of Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency (...), published in Official Journal no. 621/2010

⁵ Verginia Vedinaș, *Drept administrativ, (Administrative Law)*, 4th edition reviewed and updated, Universul Juridic Publishing House, Bucharest, 2009, p. 482

⁶ Refer to Elena Anghel, *Constant aspects of law*, in CKS-eBook 2011 proceeding, Pro Universitaria Publishing House, Bucharest, 2011, p. 594

⁷ Dumitru Brezoianu, Mariana Oprican, *Administrația publică în România (Public Administration in Romania)*, C.H.Beck Publishing House, Bucharest, 2008, p. 12.

⁸ Ion Deleanu, *Instituții și proceduri constituționale, în dreptul român și în dreptul comparat (Institutions and constitutional procedures in Romanian law and comparative law)*, C.H. Beck Publishing House, Bucharest, 2006, p.35.

⁹ Roxana Mariana Popescu, *Introducere în dreptul Uniunii Europene (Introduction in the law of the European Union)*, Universul Juridic Publishing House, Bucharest, 2011, p.12

2. Content

2.1. The public authority concept

The main meaning of the concept of *public authority* is that of public body, namely an organized group of people performing public powers, within the state or the local level, or within another form, an organizational structure which acts as a public power in order to achieve a public interest.¹⁰ According to another opinion, the concept of public administration has a double meaning: organization and activity.¹¹

According to the legislation, in what concerns the concept of *public authority*, art.2 par.(1) letter b) of Law no. 554/2004¹² of the contentious administrative, the private legal entities which, according to the law, have obtained the public status or are authorized in order to provide a public service under the public power regime are assimilated to the public authorities.

The Constitution of 1991, as well as the reviewed version of 2003 established and maintained several autonomous central administrative authorities and the legislation fully developed this special category of bodies without combining them in a separate unitary system, such as the local public administration which is also autonomous¹³. By means of being autonomous authorities which fulfill administrative tasks, they are not subject to the administrative custody regime, such as the autonomous authorities of the local public administration (county councils, local councils, city halls, etc.)¹⁴.

2.2. The civil servant concept

The meaning of the *civil servant* concept results from the case law of the Romanian Constitutional Court. Therefore, one of the decisions is read as follows: "as shown in the legal literature, according to the criminal law, the concept of civil servant and office holder has a broader meaning that the one awarded in the administrative law, due to the nature of the social relations protected by the incrimination of certain actions which are dangerous in social terms and to the fact that the actions of protecting the assets and promoting the community interests require a better protection by means of the criminal law¹⁵".

According to the status of the civil servants, the public office represents all the duties and

responsibilities established under the law in order for the public power prerogatives to be achieved by the central public administration, local public administration and the autonomous administrative authorities.¹⁶

1.3. The obligation to submit the statement of assets and interests

"Upon the assignment of a public office and the termination of the service, the civil servants shall be bound to submit, under the terms of the law, the statement of assets, to the head of the public authority or institution. The statement of assets shall be annually updated, according to the law."¹⁷

The recent accepted legal principle showed that (...) this obligation is incumbent on all the civil servants and high official and for a while it was regulated by Law no. 115/1996, currently being regulated by Law no. 144/2007 on the establishment of the National Integrity Agency, as further amended and supplemented.¹⁸ The provisions of this normative act (Law no. 176/2010) are applicable to the category of persons "who are bound to declare their personal assets and interests", among them being placed the civil servants, including the ones having a special status, namely they perform their activity within all the central or local public authorities, or as the case may be, within all the public institutions".¹⁹

According to the aforementioned Law no. 176/2010, art.2, the statements of assets and the statements of interests are filled in according to the enclosed model, respectively Appendix 1 and Appendix 2 and the certified copies together with the personal numeric code of the declarant shall be submitted to the Agency. Paragraph (2) of art.3 of the law states that: "*the statements are made in writing, on own risk and include the rights and obligations of the declarant, his/her spouse and dependent children*".

Law no. 176/2010 expressly shows in art. 4 the following: "the statements of assets and interests shall be submitted within 30 days as of the date of the designation or appointment, or as of the date of entering the service".²⁰ The persons provided in this law shall be bound to annually submit or to update the statements of assets and interests, no later than June 15th.

¹⁰ Dana Apostol Tofan, *Drept administrativ (Administrative law)*, vol.1, 2nd edition, C.H.Beck Publishing House, Bucharest, 2008, p.6

¹¹ Rodica Narcisa Petrescu, *Drept administrativ (Administrative law)*, Hamangiu Publishing House, Bucharest, 2009, p. 5.

¹² Law no.554/2004 of the contentious administrative, published in Official Journal no.1154/2004

¹³ Vasile Tabără, *Dezvoltarea capacității administrative (The development of the administrative ability)*, C.H.Beck Publishing House, Bucharest, 2012, p. 98

¹⁴ Ion Corbeanu, *Drept administrativ (Administrative law)*, 2nd edition reviewed and supplemented, Lumina Lex Publishing House, Bucharest, 2009, p.291.

¹⁵ Decision no. 2/2014 of the Romanian Constitutional Court, published in Official Journal no.71/2014

¹⁶ Ion Corbeanu, *op.cit.*, 2009, p.210

¹⁷ Dana Apostol Tofan, *op.cit.*, 2008, p.357; Verginia Vedinaș, *op.cit.*, 2009, p. 481; Dumitru Brezoianu, Mariana Oprican, *op.cit.*, 2008, p. 384.

¹⁸ Verginia Vedinaș, *op.cit.*, p. 482

¹⁹ Cristian Clipa, *Drept administrativ. Teoria funcției publice. Raportul juridic de serviciu- noțiune, părți, obiect și conținut (Administrative law. The theory of the public office. The service legal relation – concept, parts, scope and content)*, Hamangiu Publishing House, Bucharest, 2011, p. 348

²⁰ Law no. 176/2010 (...)

1.4. The procedure of investigating the civil servants performed by the integrity inspector

The scope of the Agency is to ensure the integrity in what concerns the performance of the public offices and functions and to prevent the institutional corruption by means of assessing the statements of assets, the data and information on the personal fortune, as well as the modification of the assets, the incompatibilities and the potential conflict of interests that the persons referred to in art.1 may be subject to throughout the performance of the public functions and offices²¹. According to the legislation in force, the investigation of the civil servant performed by the integrity inspector, in terms of assessing the acquisition of assets, in relation to the incomes earned or the investigation of the incompatibility condition consists of several stages that we will summarize in the following lines.

In this respect, the Law grants a Section entitled: „The assessment of the conflicts of interests and the incompatibilities”, namely Section III of the content of Chapter II: “Procedures of the National Integrity Agency” of Title II entitled: “*The procedures intended to ensure the integrity and transparency of the public functions and offices*” of law no. 176/2010.

A. The assessment of the conflicts of interests and the incompatibilities²²

– a.1. the integrity inspector analyzes the statement of assets and interests drawn up by the civil servant (art. 20 par. 1 of law no. 176/2010)

– a.2. if the integrity inspector finds that the civil servant does not justify, in full or in part, the fortune earned, the integrity inspector informs the latter and invites it, by means of a written invitation, to provide an explanation. The invitation sent by the integrity inspector shall be delivered by registered letter with acknowledgement of receipt.

– a.3. the investigated civil servant may be present in person, according to the invitation of the integrity inspector, at the indicated hour and location, in order to provide its explanation on the situation it is investigated for. On this occasion, the investigated person shall be entitled to submit any data or information which it considers to be relevant.

– a.4. if, after the expiry of the 15 day deadline as of the receipt of the invitation delivered by the integrity inspector, the civil servant fails to respond, the law provides the possibility that the integrity inspector draws up the assessment report. It is important to mention that the integrity inspector, in the absence of the acknowledgement referred to in par.(1), shall draw up the assessment report following the fulfillment of a new procedure for the notification of the investigated person.

B. The issuance of the assessment report

– b.1. the assessment report has the following content, according to art. 21 par.(3) of law

no.176/2010, namely it consists of four sections: the description part of the *de facto* situation; the explanation of the person subject to the investigation, if expressed; the assessment of the conflict of interests and the incompatibilities; conclusions.

– b.2 the assessment report shall be communicated to the investigated persons within 5 days as of its completion, by the integrity inspector, and as the case may be, to the criminal investigation bodies;

C. the appeal of the assessment report

– c.1. the report on the assessment of the conflict of interests or the incompatibilities, according to art. 21 of law no. 176/2010 may be appealed before the competent contentious administrative court, within 15 days as of its receipt;

– c.2. if the report on the assessment of the conflict of interests was not appeal within the 15 day deadline as of its receipt, the Agency notifies, within 6 months, the competent bodies on the initiation of the disciplinary procedure; if the case may be, the agency notifies, within 6 months, the competent contentious administrative court on the cancellation of the instruments issued, adopted or drawn up on the violation of the legal provisions on the incompatibilities.

– c.3. if following the assessment of the statement of assets, as well as of other data and information, the integrity inspector finds the existence of an incompatibility condition or of a conflict of interests, it shall draw up a report to be delivered to the investigated person (...), according to art.22 par.(4) of law no.176/2010.

– c.4. Furthermore, the law also states that in what concerns the conflict of interests, all the legal or administrative acts concluded directly or by means of intermediaries, under the violation of the legal procedures on the conflict of interests, shall be declared void. In addition to the appeal on the nullity of the respective acts, the court shall order the restoration of the parties.

2.5. Penalties for the failure to submit the statement of assets

According to art.27 of law no. 176/2010, the failure to fulfill the obligation to respond to the requests of the Agency, provided by this law, shall be sanctioned by a civil fine amounting to RON 200 for each day of delay. According to art.28 of law no. 176/2010, the action of the persons who willingly submit false statements of assets or interests represents the offense of misrepresentation and shall be punished according to the Criminal Code.

Furthermore, the law also provides civil sanctions for certain situations, as follows:

– according to art. 29, par.(1) the failure to submit the statements of assets and interests on the provided deadlines, as well as the failure to declare in the respective statement the amount of the earned income

²¹ Art. 8 par (1) of Law no. 176/2010 (...)

²² In this respect see Cristian Clipa, *op.cit.*, 2011, pp. 350-352

or to declare the income by reference to other documents represent an offence and shall be sanctioned with a fine amounting between RON 50 and RON 2,000.

– according to art. 29, par.(2) the failure to fulfill the obligations provided for by art.6 of the persons in charged with the implementation of the provisions of this law, represents an offense and shall be sanctioned by a fine amounting between RON 50 and RON 2,000. The same penalty shall apply to the head of the respective unit, if it fails to fulfill the obligations provided by this law.

– according to art. 29, par.(3), the failure to apply the disciplinary penalty or the failure to appeal the termination of the public function, as the case may be, if the ascertainment instrument remained definitive, represents an offense and shall be sanctioned by a fine amounting between RON 50 and RON 2,000, if the committed action does not represent a crime.

The ascertainment and the sanctioning of these offences provided by this law shall be performed by the authorized persons within the Agency according to the provisions of Government Ordinance no.2/2001²³.

3. Case study

It was shown in one case that, following the notification of the Financial Surveillance Authority, N.M was given a warning by the National Integrity Agency for committing the offence provided for by art.1 par.(1) of law no.176/2010, namely for the failure to submit the statement of assets and interests within the legal deadline.²⁴ The case raised several issues that the court had to clarify: if the Financial Surveillance Authority is a public authority according to the law; if the special status servants are assimilated to the civil servants in what concerns the obligation to submit the statements of assets and interests.

The Financial Surveillance Authority, under the provisions of art.1 par.(2) of Government Emergency Ordinance no. 93/2012²⁵ is an autonomous administrative authority, with legal personality, independent, which fulfills its duties by means of taking over and reorganizing all the duties and prerogatives of the Securities National Commission, Insurance Surveillance Commission and Private Pension System Surveillance Commission.

Furthermore, according to the provisions of Government Emergency Ordinance no. 93/2012 the

members of the council of the Financial Surveillance Authority are designated by the Parliament and the annual report of the Financial Surveillance Authority is discussed within the joint meeting of the two Chambers. According to the law, the Financial Surveillance Authority is an authority under the provisions of art.1 item 31 of law no. 176/2010, in connection to its certification, regulation, surveillance and control duties.

In what concerns the qualification of the special status servants as civil servants, the court noted that according to art.1 item 31 of law no. 176/2010: „the provisions of this law shall be applicable to the following categories of persons who are bound to submit the statements of assets and interests: 31. *The persons with management and control functions, such as civil servants, including the special status civil servants who perform their activity within all the central or local public authorities or, as the case may be, within all public institutions*”. Furthermore, on the date of applying the penalty, the court noted that, the applicant had the capacity of a management and control person, even if it was not a civil servant. Therefore, the court considered that the applicant's claim on the absence of its capacity of civil servant was truth, but not likely to remove the penalty since the provisions of the aforementioned article state the punishment of both the civil servants and the persons with management and control functions – even if they do not have the capacity of civil servants.

4. Conclusions

The submission of the statement of assets and interests is contemplated by a special regulation, as presented in this study. As shown on other occasions, the legislative amendments occurred at a certain point in time raise serious issues for a certain field in what concerns the construction and implementation of the normative acts²⁶. Therefore, in our opinion, an important factor for the compliance with the law is on the one side, the legislative coherence and on the other side, the unification of the legislation on fields, so that the legislation is no longer subjectively construed²⁷.

The judicial practice notes that, despite the lack of the capacity of civil servant, the persons are bound to submit the statement of assets and interests, if they perform their activity within an assimilated public authority, under the law.

²³ Government Ordinance no.2/2001 on the legal regime of the offences, published in Official Journal no. 410/2001

²⁴ Civil Ruling no. 13964/2014 District 1 Bucharest Court, unpublished

²⁵ Government Emergency Ordinance no. 93/2012 on the establishing, organization and operation of the Financial Surveillance Authority, published in Official Journal no. 874/2012

²⁶ **Elena Emilia Ștefan**, „*Contribuția practicii Curții Constituționale la posibila definire a aplicabilității revizuirii în contenciosul administrativ*”(The contribution of the Constitutional Court practice to the possible defining of the applicability of the disputed claims office revision), published in Drept Public Magazine no.3/2013, Universul Juridic Publishing House, Bucharest, pp.82-83.

²⁷ See **Elena Anghel**, *The reconfiguration of the judge's role in the romano-germanic law system*, published in LESIJ.JS XX – 1/2013, Pro Universitaria Publishing House, Bucharest, 2013, pp. 65-72

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