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A FEW REMARKS ON THE ROMANIAN ADMINISTRATIVE CODE

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Abstract: *The adoption of the Administrative Code responds to a need recognized both by most scholars and by most governments in Romania, the purpose pursued being to systematize and rationalize the legal framework available in the field of public administration. Nevertheless, this normative act which is markedly important for the manner in which the public administration activity in Romania is carried out, must be the fruit of a consensus among all the political forces existing at a certain time in the state, precisely in order to produce the mentioned effects. Otherwise, there is a danger that this act will need to be changed frequently and consistently, which goes against the principles recognized at European level regarding the observance of the rule of law.*

Key words: *Administrative Code, good governance, good administration.*

1. The Need for Administrative Law Codification

In the context of a normative inflation and the instability of the rules, the doctrine and legal practice in Romania have been constantly concerned with the systematization and simplification of administrative legislation. In terms of administrative reform, codification is of particular importance and can be used as an opportunity to improve regulations in this field.

The adoption of the Administrative Code responds to a need recognized both by most theoreticians and by most governments in Romania, the purpose pursued being to systematize and rationalize the legal framework available in the field of public administration.

Thus, by adopting a framework regulation concerning public administration, it was intended **to be promoted a unitary terminology** for the same administrative concepts, notions, principles, institutions and structures, thereby being set aside the risk of different interpretations of a unique legal reality.

Also, through codification it was intended **to take away the legislative parallelism**, but also **to fill the legislative gap** that we still find in certain areas.

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Furthermore, it was intended **to decrease the amount of existing normative acts**, with a view to ensuring legal clarity, coherence, efficiency and effectiveness in the field of Administrative Law.

As regards the administration, codification would lead to **an increase in the citizens' confidence in the continuity and sustainability of the legislative act** and would contribute to unifying and simplifying the work of the public administration staff.

2. Brief History

In order to achieve this very complex and difficult step, through a project carried out by the Central Unit for Public Administration Reform within the Ministry of Administration and Interior, a team (made up of recognized researchers of administrative law, assembled in a working group alongside representatives of the central and local public administration, public institutions of national and local interest, associations and foundations concerned with the actions of the Romanian government) undertook a tireless activity of research for that purpose, completed in 2011.

The document drafted within this project was to be subject to the approval of the Parliament, in order to be turned into a normative act and for producing the above-mentioned effects. However, this step remained a mere exercise of a theoretical nature, as some specialists involved in the project expressed their opinions even from the research period.

At the end of 2017, in the debate of the Romanian Senate was registered for debate a new draft of the Administrative Code, a legislative initiative signed by the members of parliament of the largest ruling political parties. During June and July, the draft was approved by the Senate and the Chamber of Deputies. Subsequently, for this normative act, claims concerning its unconstitutionality have been sent to the Constitutional Court by the President of Romania and a group of members of parliament from the opposition.

These claims have not yet been resolved by the Constitutional Court, which postponed the ruling.

3. Short Comments on the Administrative Code of Romania

With regard to the form of the normative act that went to promulgation there can be made some remarks, thus:

- Article 17 of the Administrative Code, titled *General Terms and Conditions for Occupying the Position of Government Member*, provides that: members of the Government may be persons who meet cumulatively the following conditions: a) they have Romanian citizenship and reside in the country; b) they enjoy the exercise of electoral rights; (c) **they have not been convicted of criminal offenses, except the case of being granted rehabilitation**. Due to the lack of any other clarification, we understand that it is about either the rehabilitation as right or judicial rehabilitation. But it is more important that in this new normative act there is still the possibility that a person who has suffered a criminal conviction can be appointed in a public office which should underlie all the executive activity of a state.

- Article 26 of the Administrative Code, titled "*Hierarchical Control*", provides that: (1) In accomplishing its role of general management of public administration, the Government exercises the hierarchical control over the ministries, the specialized bodies under its subordination, as well as the prefects. (2) In carrying out the hierarchical control, **the Government has the right to make void the unlawful, ungrounded or inappropriate administrative acts** issued by the authorities indicated in par. (1). Do these provisions not violate the European principle of legal security? And as concerns non-thoroughness or inopportunity, these are indeterminate concepts that can be used abusively in various situations that can be found in the activity of public administration.
- Article 39 of the Administrative Code, named *Conflict of Interest*, provides that: (1) The person who is in the position of a member of the Government **is in conflict of interests** when, during the holding of the public office of authority he/she is called upon to make a decision or to participate in making a decision, to issue an administrative act or to conclude a judicial document **regarding which they have a personal interest of patrimonial nature.** (2) A member of the Government who is **in a conflict of interest** under the terms of par.(1) is bound to refrain from making the decision or from participating in the decision making, from the issuance of the administrative act or the conclusion of that judicial document that could produce a material benefit for himself/herself or for the spouse or relatives up to the second degree. Therefore, the notion of *conflict of interest* regarding the Government members is maximally limited, being deemed that only decisions made for personal interest or for relatives up to the 2nd degree and with patrimonial value should be sanctioned. All other actions in which the decision is made in the interests of relatives of a degree higher than two or of friends or business associates cannot be sanctioned. I believe that, in this way, the violation of the principle of good administration, as formulated in the European doctrine and legislation, is encouraged.
- Article 228 of the Administrative Code, named *Circumstances of Conflict of Interest*, establishes that: (1) The locally elected person **is in conflict of interest** in the case when he issues an administrative act or participates in the issuance or adoption of an administrative act or concludes or takes part in the conclusion of a judicial document and **has a personal interest of patrimonial nature**. **(2) The locally elected being in a conflict of interest according to par. (1) has the obligation to refrain from issuing or participating in the issuance or adoption of the administrative act, from the conclusion or participation in the conclusion of that judicial document, which could lead to a material benefit for himself/herself or for:** *a) spouse or relatives or relatives up to the 2nd degree inclusively; b) any natural or legal person in relation to whom the locally elected person has the capacity of debtor of an obligation; c) a company in which he holds the capacity of sole associate or position of administrator or from which he/she gains profit; (d) another authority which he/she is part of (e) any natural or legal person, other than the authority which he/she is part of, who has made a payment to them, or has covered any of their expenses ; f) association or foundation which he/she is part of. Thus, in the case of the locally elected, the notion of conflict of interest is much broader than the one*

established in the case of Government members. I think this notion should be kept identical throughout the law, precisely because the purpose of codification is to create a unity of interpretation of the notions used in the administrative space.

- Article 470 of the Administrative Code, titled *Conflict of Interest Concerning Civil Servants* provides **another definition** for the same concept, as follows: (1) **The civil servant is in conflict of interest when having a personal interest of patrimonial nature that may affect the carrying out impartially of the duties of the public office**, in the following situations: he/she is asked to resolve requests, to make decisions or to participate in decision-making regarding natural and legal persons with whom he/she has **relations of patrimonial nature**; b) is appointed to participate in the same commission, set up according to the law, with civil servants who have the capacity of a spouse or relative up to the second degree inclusively; c) is required to make decisions that lead to obtaining a patrimonial nature benefit for himself/herself, spouse or relatives up to the second degree inclusively.
- Article 48 of the Administrative Code, titled *Compliance with the Principle of Lawfulness*, provides that the Government, as a whole, and each of its members are obliged to fulfill their mandate in compliance with the Constitution and the laws of the country, as well as the **Government Program** accepted by Parliament. This reinterpretation of the oldest, strongest and most recognized European principle, by assimilation of a political document - **Government Program** - with a normative act, proves a serious unfamiliarity to the norms and principles of law. Non-compliance with the Government Program may cause the reshuffling/resignation of the Government, also by a political act, according to Art. 109 par. (1) of the Constitution, which stipulates that: The Government is politically liable only to Parliament for its entire activity. Each member of the Government is politically liable jointly with other members for the Government's activity and for its acts.
- Article 200 of the Administrative Code, entitled *Checking the Lawfulness of Administrative Acts*, provides that: the dispositions of the mayor, the decisions of the local council and of the County Council are subject to the legality control performed by the prefect, according to the provisions of Article 255. Therefore, although it was initially proposed that also the president of the County Council be considered an authority of the local public administration, the acts issued by them are not subject to the legality control made by the prefect. I believe that firstly the situation of the *president of the county council* should be clarified and, naturally, there should be an equal treatment for all decisions made at local level, but without infringing on the constitutional provisions.
- Article 240 of the Administrative Code, titled *Liability Related to Administrative Acts* provides that: (1) The mayor, the president of the county council, respectively the chairman of the local council meeting, as appropriate, by signing, vest with authority the execution of administrative acts issued or adopted in carrying out their duties according to the law. (2) The evaluation of the necessity and opportunity of adopting and issuing the administrative acts belongs to the deliberative and, respectively, executive authorities. Making the reports or other documents of substantiation provided by law, countersigning or approval for legality and signing the

substantiation documents entail administrative, civil or criminal liability, as the case may be, of the signatories, in case of law violations, in relation to the specific duties. (3) **The acts of the local public administration authorities entail, according to the law, administrative, civil or criminal liability, as appropriate, for the civil servants and contractual staff within the specialized mechanism of the mayor, respectively the county council which, in violation of the legal provisions, underlie, from the technical and legality viewpoint, their issuance or adoption, or countersign or approve, as appropriate, the legality of those acts.** I believe that, through this wording, the entire responsibility for the activity of the public authorities will be assumed only by the public or contractual civil servants and the dignitaries can no longer be held accountable for the illegal acts adopted or issued.

- Article 210 of the Administrative Code, titled *Old-age Allowance for the Mayor, Deputy Mayor, President of the County Council and Vice-President of the County Council*, provides that: (1) The persons elected by citizens beginning with 1992 by universal suffrage, equally, directly, secretly, respectively through vote by ballot, indirectly and freely expressed, who held offices of executive authority, namely **mayors, deputy mayors, presidents and vice-presidents of the county councils,** who meet the conditions for standard retirement age, the reduced standard retirement age as provided in the Law No. 263/2010 concerning the unitary retirement system, as subsequently amended and completed, or those provided for by other special laws, **have the right, upon termination of their mandate, to a monthly old-age allowance**. (2) The mayors, deputy mayors, presidents and vice-presidents of county councils benefit from old-age allowance from the date on which they are given the rights for old-age retirement, but not earlier than the date of terminating the current mandate. Such provisions have been previously declared unconstitutional by the Constitutional Court, so they should not have been inserted into a new normative act.

4. Conclusions

Although the adoption of such a normative act has been considered necessary, this proposal was drafted and approved without taking into account the principle of transparency and without a previous public consultation, as provided by the legislation in force at this time.

After the Constitutional Court has also given its verdict concerning the constitutionality of the provisions of this Code, we will see how it will be virtually enforced in the public administration activity and what will be the real effects of this normative act of particular importance for the future of Romanian administrative law.

References

***Administrative Code
*** Law No. 263/2010 concerning the unitary retirement system