Bulletin of the *Transilvania* University of Braşov – Special Issue
Series VII: Social Sciences • Law • Vol. 11 (60) No. 2 - 2018

ROMANIAN COURTS' REVIEW OF THE ADMINISTRATIVE DISCRETIONARY DECISIONS

O. ȘARAMET[1] G.B. SPÎRCHEZ[2]

Abstract: *The following paper aims to make a contribution to the doctrinal debates that arise around the need to know where the legal conduct of administration objectified in the exercise of discretion ends, respectively where the abuse of right begins.*
In this regard we are interested in seeing to what extent a genuine judicial review has emerged in Romania in order to control the abuse of discretionary power and whether this review is based on coherent, consistent principles that substantiate solutions in our national case law.

Key words: *administrative discretion, judicial review of discretion, proportionality*

1. Introduction. Conceptual delimitations

By the administrative discretionary power, the doctrine - Teodoroiu and Teodoroiu (1996, p.39) understands its power (competence) "to choose between several decisions or several conducts in conformity to the law".

Moreover, in the specialty literature as well - Teodoroiu and Teodoroiu (1996, p.40) a distinction is made, on the one hand between the discretionary competence and on the other hand between the bound competence, which designates circumstances when "the decisional conduct of the administration is strictly and univocally determined through law", identifying an intermediate situation – that of the "discretion attached to legality" (Teodoroiu&Teodoroiu, p.40), the exemplifications, in this case, coming from the penalty law, where an individualization of the applicable penalties must be fulfilled.

Thus, if in the situation of the bound competence, the public authority must apply the norm to the concrete case, the law indicating "clear landmarks for the configuration of the administrative decision" (Dragoș, 2010, p.32), in the situation of the discretionary power or the appreciation of the opportunity of administrative act, we talk about the conformity of the act with the necessities in continuous change of the society (Dragoș, 2004, p.109), something that, at first sight, it is hard to judicially censor.

[1] *Transilvania* University of Braşov, oana.saramet@unitbv.ro
[2] *Transilvania* University of Braşov, georgeta-bianca.spirchez@unitbv.ro.

That is why the Romanian theoreticians outlined two theses – the one supported by the Law School of Babeș – Bolyai University of Cluj, according to which the opportunity is qualified as a condition of viability of the administrative act, but not of its legality, respectively the thesis agreed upon by the Law School of Bucharest University, according to which the opportunity is itself a dimension of the legality, in its absence the administrative act could not be legal (Apostol Tofan, 2017-Legalis database).

The Romanian scholars (Lazăr, 2003, pp.113-114) who support the thesis of the Bucharest Law School believe that ”the discretionary power is not a liberty outside the law, but one allowed by the law”, thus ”the law purpose will be the legal limit of the appreciation right (of opportunity)”.

These theorists (Lazăr, 2003, p.117) believe that it is necessary to perform a review of the administrative acts opportunity, in order to avoid the transformation of the discretionary power in arbitrary and that performing this control the limits of reasonableness and proportionality need to be maintained.

In the opinion of another author (Andreescu, 2012-iDrept database), based on some international courts case law, the purpose of the law cannot be the sole criterion to delimit the discretionary power, arguing that a legal act of the state may be issued through excess of power not only in the situation when the measures adopted do not follow a legitimate purpose, but also in the case when the measures disposed are not appropriate for the law purpose, or are not necessary with regard to the concerned legitimate purpose.

Beyond these doctrine disputes, our opinion is that of practical interest is to relate to the manner in which our law courts construe the legality – opportunity relation, respectively if it is appreciated that the opportunity of administrative acts may be legally censored, and if the answer to this last question is affirmative, which are the law principles they base their solution on.

2. The opportunity of the administrative acts and their judicial review. Case law examination

From the point of view of the legal investigation methodology, we propose a systematization of the solutions of law courts observing the geographical criterion – in order to reveal to what extent the Romanian theoreticians' theses belonging to both law schools found a reflection in the judicial practice of the afferent areas.

Thus, at the level of Cluj Court of Appeal, in a case (C.A. CJ., Dec. nr.4496/2017) where the problem of the attributions of public administration authorities was debated to adopt administrative acts with a normative and individual character regarding the establishment of the urbanistic regime of localities where these competences are exercised, with the purpose of establishing the legal regime of use of the private propriety goods existing within the perimeter, the magistrates showed pursuant to their decision that the opportunity aspects on which the adoption of an administrative act is based are the local public authorities' privilege, and the administrative disputes that the court cannot censor.

In this case it was ascertained that the local public authorities, in exercising their appreciation power, considered that, according to the needs of developing of that municipality, the interdiction to erect buildings on certain lands is imposed.

In a similar case, concerning the revocation of some Local Council decisions through which the Regional Urbanistic Plan was approved, Cluj Court of Appeal, analyzing the rights issue regarding the admissibility of the judicial review exercised on the administrative acts opportunities, acknowledged the following regarding the ruled decision (C.A. CJ., Dec. nr.2878/2009): "The administrative acts enjoy the legality presumption, but, in order to be fully efficient they must be adapted to concrete conditions, so that they become acceptable or actual. GUP expresses the full concordance, within the frame and the limits of the law, of the act with the liabilities assigned to administrative bodies, respectively the concordance between the right and the real necessities.

Although the legality – opportunity theory was constructed differently in the administrative law doctrine, the Court adheres to the opinion according to which the administrative act issued in exercising an appreciation power which a public authority has, of an option right of this between several possible legal solutions, cannot be annulled by the administrative disputes court. Therefore, the administrative disputes court exercises a legality control on the administrative acts, and not an opportunity control, and the so-called opportunity which may be the object of the court review refers to the situations in which the inopportunity state is so flagrant that would lead to illegality, respectively the issuing of the act through misuse of powers or competence breaching".

Also at the level of Cluj Court of Appeal, in a case concerning litigations regarding public acquisitions (C.A. CJ., Dec. nr.3433/2017), the appeal court ruled that the decision of annulment of the public acquisition procedure, when the contracting authority is in the impossibility to conclude the contract, because of the lack of funds afferent to the acquisition in discussion, it is an opportunity decision which cannot be verified by the law court within the administrative disputes, the analysis of the acts being performed only from the perspective of their legality.

From the perspective of legality, in the decision ruled, the Court indicated that the contracting authority communicated the auction participants that the public acquisition procedure will not be performed because of lack of funds, "an aspect that belongs to the decisional act transparency, thus from this perspective it cannot find the invalidation of the contracting authority decisions".

At the same time the Court indicated that "the decision of the contraction authority to predict the existence of necessary funds to accomplish the public acquisition in discussion, at the moment of its starting-up, does not stop the annulment of the procedure."

It is necessary to indicate, in this analysis context, is the fact that in the reasoning of the trial court we find references to the limits of exercising the discretionary power – observing the principles of proportionality and non-discrimination, as follows: "Of course, so far as the administration dispose of discretionary powers, it has to use them only within the necessary limit, these becoming illegal when they are excessive regarding the finality of the administrative action.

Breaching the principle of proportionality provided by the fundamental law of the country – art. 53, para 2 - is not anything else but exceeding the liberty of action at the disposal of the authority, that involves a power excess, a notion that can be defined as exceeding the limits of the appreciation right belonging to the public authorities in accomplishing the purpose proposed by the legislator. In the same direction, the opportunity must be analyzed with regard to the dispositions of art. 53 of the Constitution which, in regulating the restriction of exercise of some rights and liberties, constitutionalizes two principles which represent specific conditions of legality on opportunity reasons and which the administrative dispute court must have in view as appreciation methods of the direction of the power exercise of the administration, respectively that of measuring proportionality with the situation that determined it and respectively regarding non-discrimination".

Remaining in the Transylvanian area, we will refer to a judicial decision (C.A. Oradea, Dec. nr.979/2017) which indicates some aspects according to which we can appreciate the opportunity to adopt an administrative act, thus: "The opportunity is a viability condition of the administrative act and indicates criteria such as the moment of adopting the act, the location and the concrete conditions in which it will be applied, the means that the administrative decision involves, the application duration, its conformity with the life and culture conditions of the community, as well as with the proposed public interest".

We indicate that the object of the case in which this judicial decision was ruled was the annulment of two local council decisions approving the technical – economic indicators for the building of a connection road, the critical reasons indicating that this road does not find a practical justification and infringes upon the private propriety right.

Although we would be tempted to think that this appeal court is under the influence of the administrative act opportunity thesis supported by the law school in Cluj, in reasoning the quoted decisions we found the appreciation according to which "the court is competent to assess the opportunity, as viability condition of the administrative act, […], concretely whether exercising the appreciation right of the public authorities was performed by breaching the competence limits provided by the law or by breaching the citizens' rights and liberties, respectively if the public authorities manifested a power excess, defined in art. 2 letter n) of Law no. 554/2004 on administrative disputes".

While examining the case in appeal, the Oradea Appeal Court indicated that within the administrative law relations, the public interest, satisfying the community needs, the right order and constitutional democracy, the guarantee of the rights, liberties and fundamental liabilities of all citizens are the most important. In this context, the Court wanted to highlight that "we must maintain a reasonable balance between the public interest and the subjective rights or private interests".

Starting from these theoretical premises, concretely in the case to be judged, "the court indicated that, on the one hand the issuing authorities justified the public utility of the road proposed, in an ample reasoning comprised in the decisions annexed, the deviation of the transit circulation, the fluidization of traffic in the area, reducing the transportation time to destination by increasing the circulation speed, the purpose of the road being to avoid the locality S., the heavy traffic being outside the localities O. and S., thus providing a safe and rapid access road for all vehicle categories.

The court indicated that the issuers of the administrative acts reasoned with the public interests which are going to be satisfied by accomplishing this project, thus the appealing reasons being unfunded regarding the unreasoning of the connection road or non-analyzing the other options, as long as the feasibility study contains the minimum scenarios provided by the law".

Connected to the necessity of reasoning the administrative acts, relevant are the ones ruled within a judicial decision (C.A. Craiova, Dec. nr.1682/2017), which brings arguments from the European Union Justice Court case law. According to the analysis of this Appeal Court, we will highlight that "any administrative act which produces effects regarding the rights and liberties must be reasoned, especially from the perspective of a person's possibility to appreciate upon the measure of legality and rationality, respectively upon the observation of the limits between discretionary power and arbitrary.

To accept the thesis according to which the public authority issuing the act does not have to give a rationale for the acts entails the contents are emptied of the essence of democracy, of the rule of law based on the legality principle. The discretionary power assigned to an authority cannot be regarded in a rule of law as an absolute and limitless power, because exercising the appreciation right by infringing upon the fundamental rights and liberties of the citizens provided by the Constitution and by the law constitutes a power excess, according to art. 2 letter n) of Law no. 554/2004. The obligation of the issuing authorities to reason the administrative acts constitutes a guarantee against the public administration's arbitrary and it is mandatory especially in the situation of acts through which rights or individual legal situations are reversed.

Also, in the community case law it is indicated that the reasoning must be appropriate to the issued act and the algorithm indicated by the institutions which adopted the contested measure must be presented clearly and univocally, thus allowing the indicated persons to see the reasoning behind the measures and, also,

to allow the Community Courts the competence to perform the act review (case C-367/1995). As the European Court of Justice decided, the amplitude and the detailing of the reasoning depend on the nature of the adopted act, and the requirements of the reasoning must be fulfilled depending on the circumstances of each case, an insufficient or wrong reasoning is considered as being equivalent to a lack of reasoning behind the acts.

Moreover, the insufficiency of reasoning or the failure of reasoning leads to the nullity or the invalidity of the community acts (case C-41/1969). A detailing of the reasons is necessary when the issuing institutions dispose of a wide appreciation power, because the reasoning grants the acts' transparency, particulars being able to verify if the act is correctly founded and at the same time it allows the exercising by the Court of the jurisdictional review (case C-509/1993)."

In the same manner, there is the Suceava Appeal Court's decision (C.A. Suceava, Dec. nr.929/2017), which indicated that one of the *ad validitatem* conditions of the administrative acts is its reasoning as a unilateral manifestation of the issuer's will, the reasoning of the act having the purpose to "avoid the acquiring of a directionary power by the administrative authority in the absence of any argument regarding the legality and the opportunity".

Thus, focusing our attention on Bucharest Appeal Court, we identified a decision (C.A. București, Dec. nr.3643/2016) which refers to litigations against the Court of Accounts, in the reasoning of which we found the following appreciations of the court: "The notion of discretionary power indicates a certain margin of liberty in decision and action, the possibility to choose between several possible attitudes.

What is very important is that the discretionary power carries a margin of free decision, but involves in itself a certain limit, so that its exercise does not become abusive. In principle, the jurisdictional review cannot be exercised on the appreciation liberty left by the legislator at the administration's disposal, regarding the grounds of the act; contrarily, it might be exercised easily on forms and procedures imposed to the administrative body, which are mandatory to observe, even in situations when the law assigned a wide discretionary power regarding the grounds".

We indicate that in the case that we discussed above, the right problem regarding the legality of setting, by means of financing agreements, of some penalties with values different from the ones provided in the Tax Procedure Code. Therefore, the magistrates found that this is an opportunity issue, which was left by the special law to the appreciation of public authorities.

Concretely, the Court found that the discretionary power of the public authorities acknowledged by the legislator through the possibility regulated by art. 11 para 2 in Law no. 321/2006 to set the penalties by contract, must not be mistaken for excess of power.

Equally relevant is the reference to a decision of Bucharest Appeal Court (C.A. București Dec. nr. 490/2015) through which an examination of the proportionality

principles is performed, this being considered one of the main criteria which limits the discretionary power of administrative authorities. The case which we are going to report on regards the request addressed by a company to the court to invalidate an Order issued by the Competition Council which set a value of the fine, considered by the company to be visibly disproportionate in comparison to the severity of the contravention deemed as being the company's responsibility.

Concretely, criticism was brought against the fact that during the individualization process of the applied fine, the inspectors of the Competition Council relied on the overall turnover of the company, and not on the turnover resulting from the relevant breached market, speaking about the participation to an agreement / practice conducted which consisted in resigning the retail of Eco Premium type gasoline on the Romanian market.

Subjecting this critical reason to examination, the court indicated the following: "It is as principle that the proportionality principle is invoked generally in the legal procedures where the issue of the prevalence of a legal right over another legal right is discussed or in which the dispute regarding the protection of a private right in contradiction with the protection of the public interest. The concept of proportionality of the administrative measures that can be at the disposal of a state in relation to the proposed objectives and to the citizens' interests is a general principle of European law. The proportionality principle means that any measure taken by a public authority which affects the individual rights must correspond to the fulfilling of a legitimate purpose, necessary to fulfill that purpose and at the same time the most reasonable."

As concerning the applicability of the proportionality principle regarding the fines, in the same case it was indicated that it is mandatory that "the fine is set by the administrative authorities proportionally to the elements which describe the severity of the infringement, with the consequences produced and the circumstances of the deed and the offender.

The state authorities must apply these elements coherently and with an objective justification, providing the two primordial functions of the punishment are fulfilled – the repressive function (special) and the dissuasive one (general). Connecting these theoretical considerations to the normative act subjected to judgment, it can be noticed that the individualization of the sanctions is performed by the Competition Council (according to the contested instructions) in two stages as follows: in the first stage the base level of the fine is established according to the severity and the duration of the committed anti-competition deeds, and in the second stage the possible attenuating or aggravating circumstances are applied.

As a starting point in determining the base level of the fine established for the contraventions indicated in art. 51 of the law, at the first stage of the individualization, the overall turnover made by the offender during the fiscal year previous to the sanction is taken into consideration, determined according to the applicable tax regulations. In order to notice the manner in which the base level of

the fine is determined (and that is in correspondence to the overall turnover of the offender company, but also by establishing the severity of the deed) infringes upon the proportionality principle, several appreciations must be made. First of all it is noticed that in competition matters, art. 2 para. 3 of Law no. 21 / 1996 indicates that the application of sanctions by the Competition Council is made by observing the proportionality principle. It has to be noticed that theoretically the principle has two dimensions.

On the one hand it functions as a guarantee for society, for building a protection for the citizens against a tortious conduct. The sanction provides this guarantee because it invalidates the advantages that the person who breaches the protected norm acquires through sanctioned conduct. On the other hand, the sanction, by defining the conditions where it can be applied, provides a protection of the individual against the abusive tendencies of the repressive state mechanism. The idea to impose, as a fundamental right, the limitation of the repressive reaction is an important gain for the rule of law, which tries to set itself against the application of some arbitrary and disproportional sanctions. In order to check, in this case, if the imposed sanctions […] breach the proportionality principle, it must be established concretely if the administrative measures are appropriate to fulfill the legitimate purpose wanted through the breached positive norm. At the same time, it must establish if the administrative measure has an excessive effect on the sanctioned person".

As a consequence of this analysis performed in this case, the conclusion of the court was that the institution of these severe sanctions (the fine applied to the overall turnover of the company which infringes upon competition rules) is justified by the purpose followed and corresponds to the fulfillment of the legitimate purpose of the positive norm breached.

3. Conclusions

In relation to the case law review performed, we may conclude that there is no unitary approach of the national law courts regarding the jurisdictional review of discretionary administrative control.

In our opinion the main criterion to exercise control is the principle of proportionality, which we found to be developed especially in the judicial practice regarding the application of sanctions.

We believe that the application of this principle in the cases which are the object of our research, even if it does not effectively result from legal provisions, could be efficiently used, on a wider scale, as a measure of discretionary power and to prevent the right abuse committed by the authorities.

Hence, even if we did not identify, at a national level, a case law coherently crystallized around the application of the proportionality standard in certain cases,

an important role in using this principle, as a limit of discretionary power, might be the research on the doctrine outlined on this matter, and moreover the research of other law systems, respectively the examination of the international jurisdiction decisions, which we envisage as future research directions.

4. Acknowledgement

This study is published in the framework of the LOABUN Project - "Legality - Opportunity, the relationship between them in the administrative act and the identification of risk factors in order to ensure good administration", project won and developed within the 2018 Competition - "Grants for Interdisciplinary Teams" at Transylvania University of Brasov.

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