

## ADMINISTRATIVE APPEALS IN ROMANIA AND POLAND – A TOPICAL COMPARATIVE PERSPECTIVE<sup>1</sup> -

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**ABSTRACT:** *There are two major systems of administrative appeals – mandatory and optional. The first one, adopted by the large majority of legal systems (among which the German, Austrian and Dutch ones) precludes an action to a court in the absence of a prior administrative appeal. The second one (recours administratif), promoted by the French legal system and those inspired by it, attaches certain effects to the exercise of the administrative appeal (prorogation of the statute of limitations for filing an action with the courts), without making it mandatory.*

*Administrative appeals always have been considered an affordable tool for alternative dispute resolution in administrative matters, and a way of reducing the burden of litigation on the courts. Nevertheless, the two systems of administrative appeals have fueled debates concerning their effectiveness, access to justice, promotion of good governance principles and accountability, their relationship with mediation.*

*The relation with the judicial review is of critical significance, both in terms of justice administration (the number of cases that reach the courts in different systems of administrative appeals) and judicial proceedings. The conditionality between mandatory administrative appeals and judicial review also raises questions about access to justice.*

*The present article endeavors to make an embryonic analysis of the issues related to this topic, in a comparative perspective. The research conducted is a first step for more in-depth considerations about the Romanian and Polish legal systems.*

**KEYWORDS:** *administrative appeals; mandatory administrative appeal; optional administrative appeal; Romanian administrative appeal; Poland administrative appeal.*

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## 1. INTRODUCTION

Before resorting to a court for annulment/modification of an administrative decision, an interested party has the possibility of challenging the decision before the administration itself. The (internal) administrative appeal is addressed to the issuing public authority (or to the higher public authority); in most cases, this is a compulsory requirement before a lawsuit can be filed.

There are two major systems of administrative appeals – mandatory and optional. The first one, adopted by the large majority of legal systems (among which the German, Austrian and Dutch ones) precludes an action to a court in the absence of a prior administrative appeal. The second one (*recours administratif*), promoted by the French legal system and those inspired by it, attaches certain effects to the exercise of the administrative appeal (prorogation of the statute of limitations for filing an action with the courts), without making it mandatory.

Administrative appeals always have been considered an affordable tool for alternative dispute resolution in administrative matters, and a way of reducing the burden of litigation on the courts. Nevertheless, the two systems of administrative appeals have fueled debates concerning their effectiveness, access to justice, promotion of good governance principles and accountability, their relationship with mediation.

In terms of effectiveness, there are questions regarding the most effective system of administrative appeal; yet remarkably, no meaningful research on this issue is—as yet—available at the European level. The mandatory system benefits from the fact that both parties in the administrative law litigation are not only offered the opportunity but, rather, are forced to measure their forces before going to court; this can result in an amiable dispute of the resolution at the administrative level. On the other hand, in cases where the appeal is considered a ‘nuisance’ for those seeking access to justice or by the public authorities, or where administrative appeals are not treated very seriously due to a lack of accountability, the procedure can be counterproductive if it is imposed on parties; so, the optional system could be considered as being a preferable solution.

The relation with the judicial review is of critical significance, both in terms of justice administration (the number of cases that reach the courts in different systems of administrative appeals) and judicial proceedings. The conditionality between mandatory administrative appeals and judicial review also raises questions about access to justice.

The present article endeavors to make an embryonic analysis of the issues related to this topic, in a comparative perspective. The research conducted is a first step for more in-depth considerations about the Romanian and Polish legal systems.

## 2. ADMINISTRATIVE APPEAL: THE CONCEPT

In comparative administrative law, there are two major ways of appealing against allegedly unlawful decisions: the administrative appeal and the judicial review (court action).<sup>2</sup>

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<sup>2</sup> For a detailed analysis of this theme, see D.C. Dragoș, *Recursul administrativ și contenciosul administrativ* (All Beck, București, 2001); D.C. Dragoș, “National Tradition – Romania”, in S. Galera (ed) *Judicial Review – A Comparative Analysis inside the European Legal System* (Council of Europe Publishing, 2010), 97-112; For the Romanian tradition regarding administrative appeals, see C. G. Rarinceșcu, *Contenciosul administrativ român* (Universala Alcalay & Co., București, 1936), 106.

The administrative appeal is a request addressed to a public authority by which the aggrieved person asks for an administrative measures to be taken regarding the administrative decision: annulment, modification or even issuance of a decision—when this has been refused by the administration. Judicial review is a contested (adversary) proceeding by which an individual removes a conflict with a public authority to the (administrative) courts.

In principle, the two actions mentioned above are independent, and rules for their exercise normally do not interfere with one another.<sup>3</sup> Each action can be exercised separately, and those aggrieved by an administrative decision can opt freely between these two ways of contesting the decisions.<sup>4</sup> In many cases, however, the applicable law requires that prior to commencing court proceedings, an administrative appeal must be filed. Other jurisdictions, without imposing the exercise of the administrative appeal, still link—in many ways—administrative appeals to judicial review.<sup>5</sup>

A chief feature of administrative justice is that it allows parties to resolve their dispute at administrative level: they have the possibility to challenge the decision before the administration itself. It is, in a sense, an ‘alternative dispute resolution’ tool in the area of administrative justice; it has been strongly recommended also by the Council of Europe<sup>6</sup> and has found its way into most of the Council’s jurisdictions and, also, EU law.

### 3. LEGAL FOUNDATIONS OF ADMINISTRATIVE APPEAL IN ROMANIA AND POLAND

Romania does not have yet a law on administrative procedure, so the administrative appeal is regulated in the General Law on judicial review no.554/2004 and in several special laws.

The administrative appeal can be found in all of its forms: objection and hierarchical appeal (art. 7 of the Law no. 554/2004 on judicial review), and even improper hierarchical appeal (addressed to a body that is not the hierarchical superior of the issuing body). The first two (objection and hierarchical appeal) are regulated expressly by the 2004 general law on judicial review. They can be lodged together or separately, within 30 days from the communication of the decision. For third parties, the deadline counts from the date they find out about the decision. If both authorities (issuer body and superior body) are approached at the same time or consecutively and they do not coordinate the answer, the solution most beneficial to the applicant shall have priority. The deadline for court action will start, however, when the applicant receives the first answer or when the first deadline for answering the appeal has passed.

The higher body cannot refuse to deal with the hierarchical appeal on the ground that the issuer has been also notified. The explanation lies in the fact that hierarchical appeal has a rather different scope and chances of success than the objection. The first one is meant to trigger a form of external control over the issuer, while the second one is the

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<sup>3</sup>J-M.Auby and M. Fromont, *Les recours contre les actes administratifs dans les pays de la Communauté Économique Européenne* (Jurisprudence générale Dalloz, Paris, 1971),215; G. Darcy and M. Paillet, *Contentieux administratif* (Dalloz, Armand Colin, Paris, 3rd ed. 2000), 2, 22; J. Rivero and J. Waline, *Droit administratif* (Dalloz, 18th ed. 2000), 206.

<sup>4</sup>G. Darcy, M. Paillet, *supra* 2, p.22.

<sup>5</sup>J-M.Auby, M. Fromont, *supra* 2, p.219.

<sup>6</sup> See Council Of Europe, *Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties*, adopted on 5 September 2001. Available at [http://www.coe.int/t/cm/documentIndex\\_en.asp](http://www.coe.int/t/cm/documentIndex_en.asp). Last accessed August 13th, 2009.

self-control of the issuer. Apart from the objectivity of these forms of control, which can prove to be relevant, those who conduct the procedure have also a different perspective over the administrative decision.

The *quasi hierarchical appeal* can be traced in the form of an appeal to the prefect, who is assessing the legality of the decisions issued by autonomous local authorities (mayors, local and county councils, presidents of county councils). The prefect can then lodge a court action in order to annul the decision. The same attributions have been granted to the Romanian National Agency for Civil Servants, which can lodge a court action against public bodies that infringe the legal provisions regarding civil service (recruitment, disciplinary measures, etc)<sup>7</sup>. Another example is the Romanian Court of Auditors, which controls the execution of the public budgets, and the legality of expenses made by public authorities. It can refuse public authorities the discharge of their expenses.

All these forms of control can be exercised at the request of a private or public person, upon an administrative appeal. This appeal is not a typical hierarchical one, but a quasi - hierarchical or “improper” appeal.

There is also a national Romanian Ombudsman, who can act upon an administrative appeal from individuals (complaint), and also exercise an administrative appeal to the issuer or to the hierarchical body, in order to deal with the complaint.<sup>8</sup>

Generally, *administrative contracts* are benefiting from the same treatment as administrative decisions regarding administrative appeals. In Romanian law, though, in the case of administrative contracts the administrative appeal is taking the form of *conciliation*, which is specific to commercial contracts (art.7 of the Law on judicial review) and is regulated in the Code of Civil Procedure. The conciliation has to be conducted however taking into consideration the position of the parties in administrative contracts, which are governed by the public law and by the priority of the public interest.

In Poland, the administrative procedure is codified, and the most important legal act regulating administrative procedure is the Administrative Procedure Code Act of June 14, 1960<sup>9</sup>, regulating first of all the so-called general administrative procedure. Another important law is the Tax Ordinance Act of August 29, 1997<sup>10</sup>, regulating procedures in fiscal cases (e.g. tax cases). The issue of appeals in the Tax Ordinance (TO) will not be presented separately though, because after some recent amendments these regulations have become similar to those contained in the Administrative Procedure Code. In this respect attention will be drawn only to the differences between the two procedures.

The scope of application of general administrative procedure is defined in Article 1, Points 1 and 2 of the Administrative Procedure Code (APC), stipulating that the Code is to be applied by public administration bodies in individual cases falling within the jurisdiction of these bodies, adjudicated by means of administrative decisions, as well as by other public bodies and organizations adjudicating individual cases by means of administrative decisions (whether statutorily or on a contractual basis). It needs to be

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<sup>7</sup> Law no. 188/1999 on civil service.

<sup>8</sup> Law no. 35/1997 on the functioning of the Ombudsman institution (Advocate of the People).

<sup>9</sup> Administrative Procedure Code Act of June 14, 1960 (Journal of Laws of 2000, No. 98, item 1071, as amended), hereinafter: APC.

<sup>10</sup> Consolidated text: Journal of Laws of 2005, No. 8, item 60, as amended, hereinafter: TO

explained that an individual case is one that relates to a specific party (e.g. a land owner) in a specific situation (e.g. pulling down a building)<sup>11</sup>.

The right to appeal is one of the fundamental rights of parties to the proceedings guaranteed in the Polish Constitution. The Polish administrative procedure follows the principle of two instances, based on the provisions of the Polish Constitution, defined in detail in procedural acts (Administrative Procedure Code and Tax Ordinance). It follows from the said principle that each party has the right to have the merits of the case heard twice<sup>12</sup> (hence the two instances), which means that each first instance decision can be appealed against only once. In the light of legal solutions applied in the Administrative Procedure Code (Articles 15 and 127, Clause 1 of the APC), the party can appeal against any decision, and not only against negative decisions (i.e. including those decisions which approve of only a part of the applicant's claims). The party to an administrative procedure defends its legitimate interests and has the right to evaluate whether or not the party's interests have been fully acknowledged<sup>13</sup>. The principle of two instances further provides that "issuing two decisions by two bodies representing different instances" is not sufficient, because such decisions must be "preceded by a procedure – to be carried out by the deciding body – enabling the accomplishment of objectives at which the procedure in question is aimed"<sup>14</sup>. An appeal procedure cannot thus be limited to verification of arguments stated in the appeal (regarding the first instance decision)<sup>15</sup>.

#### 4. DEADLINES FOR EXERCISING ADMINISTRATIVE APPEALS

From a comparative perspective, there are several options regarding the legal arrangement of the time frames for exercising and solving the administrative appeal.

First, there is the fixed time limit, within which the applicant should lodge the appeal. Romania has a 30-day time frame. The legal nature of the time limit seems to be one of a recommending nature<sup>16</sup>, due to the fact that it is doubled by a term of 6 months, calculated from the issuance of the decision. The appeal lodged within the longer term is to be agreed by the public authority, upon assessment of the "reasoned grounds" presented by the claimant, so it's a decision taken with discretionary power. No need to say that public authorities in Romania are not too keen on considering the grounds as justified, when this claim occurs. The possible abuse in assessing the grounds for extension of the term can be reviewed by the court, when the case is brought before it.

It was argued<sup>17</sup> that "reasoned grounds" should be interpreted taking into account the criteria used by judges in re-activating the time frames for filing procedural acts (art.103

<sup>11</sup>Cf. M. Szubiakowski, M. Wierzbowski, A. Wiktorowska, *Postępowanie administracyjne – ogólne, podatkowe i egzekucyjne (Administrative Procedure in General, Tax and Enforcement Cases)*, Warszawa 1998, pages 10 – 12.

<sup>12</sup>B. Adamiak, w: B. Adamiak, J. Borkowski, A. Skoczylas, *Prawo procesowe administracyjne (Administrative Process Law)*, System Prawa Administracyjnego, Volume 9, Warszawa 2010, page 203 ff. and B. Adamiak, *Model dwuinstancyjnego postępowania podatkowego (Two Instance Tax Procedure)*, Państwo i Prawo 1998, No. 12, pages 58-63.

<sup>13</sup>Ruling of the Polish Supreme Administrative Court of July 3, 1992, SA/Wr 455/92, ONSA 1993, No. 3, item 62.

<sup>14</sup>Ruling of the Polish Supreme Administrative Court of November 12, 1992, V SA 721/92, ONSA 1992, No. 3-4, item 95; Ruling of the Polish Supreme Administrative Court 15 V 2000, V SA 2722/99, LEX No. 56632; Ruling of the Polish Supreme Administrative Court of December 12, 2000, V SA 359/00, LEX No. 51287.

<sup>15</sup>Ruling of the Polish Supreme Administrative Court of March, 22 1996, SA/Wr 1996/95, ONSA 1997, No. 1, item 35.

<sup>16</sup>A. Iorgovan, *supra* 23, p.314.

<sup>17</sup>See, for these arguments, D. C. Dragoș, *supra* 1, p.90.

of the Civil Procedure Code): circumstances that are “beyond the control of the claimant”. This opinion is shared also by the courts<sup>18</sup>. Thus, the simple fact that the public clerk was on medical leave is not a circumstance to justify the reactivation of the term for the claimant, when the appeal could be registered at the institution or sent by post, fax, etc<sup>19</sup>. On the other hand, the absence from the country of the addressee of an administrative decision communicated by posting it on the door, or by post, could be considered as a sufficient ground for exceeding the shorter term. Also, the fact that another judicial proceeding is pending, and the resolution might influence the outcome in the current proceeding, could be considered as a reasoned ground<sup>20</sup>.

The moment when the administrative appeal is considered lodged is when it is sent by mail<sup>21</sup>, or by electronic mail<sup>22</sup>, when it is registered directly at the public authority's premises, respectively when the verbal complaint is registered.

The written form of the appeal or its registration, when is expressed verbally, should be necessary in order to facilitate the proof<sup>23</sup>; nevertheless, if during the court proceedings the public authority accepts the verbal appeal, it will be not possible to invoke afterwards its absence<sup>24</sup>.

The Romanian law does not impose a requirement that administrative appeals to be motivated, although comparative studies show that this provision would be beneficial<sup>25</sup>. The motivation of the decision issued upon administrative appeal is as important as the bases for the initial decisions rendered by public authorities. In this context, a complete motivation would comprise information about both administrative appeals available, and about the judicial review. Thus, Council of Europe's Committee of Ministers recommended that member states shall “ensure that parties receive appropriate information about the possible use of alternative means”<sup>26</sup>.

General administrative acts are usually published in official but general sources and only exceptionally are they communicated directly to those interested. In the case of such acts, the question is how to organize the administrative appeal that has a fixed time limit? Should the time limit run from the date of the publication or from the date when the decision has been harmful for the applicant? The second choice is the right one, because it accommodates well the principle of legitimate expectations. The Romanian law has no provisions regarding the exercise of administrative appeal in case of general acts, leaving the same rules that apply to individual acts to be applicable to general acts. This can be

<sup>18</sup> See, for example, The Romanian Supreme Court of Justice, Administrative Law Section, Decision no. 3441/2002, *Jurisprudenta Curtii Supreme de Justitie*, All beck, 2003, p.245.

<sup>19</sup> The Romanian Supreme Court of Justice, Administrative Law Section, Decision no. 2689/2002, *Jurisprudenta Curtii Supreme de Justitie*, All beck, 2003, p.234.

<sup>20</sup> Bucharest Court of Appeal, Administrative and Fiscal Law Section, decision no. 1401/2006, in G. Bogasiu, *Proceduraprealabila in contenciosuladministrativ, practicajudiciara*, Hamangiu, Bucharest, 2006, p.127.

<sup>21</sup> The Romanian Supreme Court of Justice, Administrative Law Section, Decision no. 1434/2000, *Jurisprudenta Curtii Supreme de Justitie*, All Beck, 2001, p.754

<sup>22</sup> Art. 2 of the Governmental Ordinance no.27/2003 on the procedure for solving petitions. See also Bucharest Court of appeals, Decision no.307/2006, in G. Bogasiu, *supra* 53, p.61.

<sup>23</sup> The Supreme Court of Justice, Administrative Law Section, decision no. 962/2000 and decision no. 40/1994, in *Jurisprudenta Curtii Supreme de Justitie*, 2000, p.767

<sup>24</sup> The Neamț County Court, decision no.11/1991, în V.I. Prisăcaru, *Contenciosuladministrativ*, All Beck 2003, p.495.

<sup>25</sup> G.Brabant, N.Questionaux, C.Wiener, *supra* 12, p.264 ; R. Chapus, *Droit du contentieuxadministratif*, 8<sup>e</sup> edition, Montchrestien, Paris, 1999,p.571 ; G. Peiser, *Droitadministratifgénéral,Droitadministratifgénéral*, 20<sup>e</sup> edition, Dalloz, 2000, p.121.

<sup>26</sup> Art.3 (2)(a) (ii), Council of Europe, *Recommendation Rec(2001)9*, op.cit. note ABC.

quite frustrating for claimants, who would be forced to complain about general acts in 30 days (or 6 months) from the date of publication, which is not acceptable for a number of reasons. In this context, the doctrine and the jurisprudence have concluded that it should be exercised anytime before going to court against the act. This solution is in line also with the fact that general decisions can be challenged anytime.

The administrative appeal has to be answered, according to Romanian law, in 30 days' time, which can be extended with 15 days in case the request is complex, but only after the claimant is informed about the extension<sup>27</sup>.

An interesting debate could be carried out regarding the duty to re-direct wrongly addressed administrative appeals. There are several options: the public authority rejects the appeal because it does not fall within its competence; the public authority rejects the appeal because it is not competent, but informs the claimant about the public body that has competence to deal with the complaint; the public authority re-directs a wrongly addressed appeal to the competent authority. The last one comes with two sub-options: (a) the re-directing duty applies only when the competent body is under its supervision/subordination, or (b) it applies in any cases.

The Romanian approach, to impose in any cases a duty to re-direct all petitions to the competent authority<sup>28</sup> is the most accommodating for petitioners, in our opinion. It demands a proper expertise from the public authority, while exempting the petitioner from browsing the public bodies in search for the competent one. The timeframe for re-directing the wrongfully addressed petitions is 5 days. The timeframe for answering the administrative appeal by the competent authority starts to run again after it is registered there.

In the case of a person aggrieved by the decision addressed to another person, the deadline is 30 days since the third party has learned about the existence of the decision. The jurisprudence of the courts has conflicted here with that of the Constitutional Court. Thus, the Highest Court<sup>29</sup> and Courts of appeals<sup>30</sup> have considered that third parties can lodge the administrative appeal within the 6 months from the issuance of the decision, while the Constitutional court has argued that such an interpretation is preventing third parties to access the courts<sup>31</sup>.

In Poland, one of the more significant and important issues related to the functioning of public administration bodies is the search for legal solutions guaranteeing efficient performance of such bodies. In this context, when analyzing the issue of time limits for filing appeals it needs to be emphasized that appeals are filed within 14 days after the decision in question is delivered to the party (and if the decision is announced orally – within fourteen days after such announcement) (Article 129, Clauses 1 and 2 of the APC). As a result, the time available for filing an appeal commences on the day of announcement or delivery of the decision to the party. In the Polish administrative procedure (both general and governed by the Tax Ordinance), misleading information regarding one's right to appeal (or the lack of such information) cannot be to the detriment of the party. In the opinion of the Supreme Administrative Court, the phrase "cannot be to the detriment of the

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<sup>27</sup> Art.7 of the Law no.554/2004 on judicial review interpreted in view of the art. 8-9 of the Governmental Ordinance no. 27/2002 on the procedure for answering to petitions.

<sup>28</sup> Art. 61 of the Governmental Ordinance no. 27/2002 on the procedure for answering to petitions.

<sup>29</sup> Highest Court of Cassation and Justice, Administrative and Fiscal Law Section, Decision no.146/2007, in G. V. Birsan, B. Georgescu, *Legea contenciosului administrative adnotata*, Hamangiu, Bucuresti, 2008, p.89.

<sup>30</sup> Bucharest Court of Appeals, decision no.1445/2006, in G. Bogasiu, *supra* 53, p.1.

<sup>31</sup> Constitutional court, decision no.797/2007, published in the Official Monitor no.751/6.11.2007.

party” means that a legal remedy taken advantage of in accordance with the content of such misleading information is indeed effective, as if it were filed within the statutory time limit<sup>32</sup>.

When discussing the question of the time for processing appeals it needs to be emphasized that in the Polish administrative procedures the legislator generally requires that appeals be processed without undue delay. This phrase should be understood as a general guideline requiring that all cases are to be handled in such a way so as to not only meet the statutory time limit, but also to process the appeal as quickly as possible, even before the statutory date. In administrative procedures regulated by the Administrative Procedure Code, appeals need to be processed within *one month* after the delivery of the appeal, whereas tax-related appeal procedures should be processed not later than 2 months after the appeal is delivered to the appeal body (3 months in cases where a trial has been held or where the party has applied for a trial). The above terms do not include time periods statutorily available for completing certain requirements (e.g. provision of missing information in the application), or periods for which administrative proceedings are suspended, as well as periods of delay caused by reasons attributable to the party or resulting from circumstances beyond the control of the appeal body.

An analysis of files of administrative courts (including decisions indicating formal defects) shows that in the practice of many administrative bodies (particularly those dealing with supervision of building investments and environmental protection) the statutory time limits are sometimes grossly exceeded, and proceedings take as much as several years. This may be seen as a breach of one of the fundamental principles of a democratic state, in accordance with which one has the right to have his/her case heard without undue delay in order to have one’s interests protected by a public body acting in accordance with applicable laws<sup>33</sup>. An analysis of judgments of the European Court of Human Rights<sup>34</sup> as regards lengthy court and administrative procedures allows one to conclude that when evaluating the duration of procedures from the perspective of breaching Article 6 of the convention, the ECHR frequently takes into account not only the court procedure, but also the preceding procedures handled by administrative bodies. In particular, this approach is used if:

- a) despite being obliged by the administrative court to issue a decision or take action within a prescribed time limit, the administrative body remained idle, and then the decision issued (or action taken) by the body has been complained about to the court<sup>35</sup>;
- b) administrative court has waived a decision of an administrative body, following which the said body issued another decision that has been complained about to the court<sup>36</sup>;

<sup>32</sup> decision of the Polish Supreme Administrative Court of June 29, III SA 2545/00, unpublished;

<sup>33</sup> A. Skoczylas, *Ocenaprzewlekłości postępowania sądowniczoadministracyjnego w świetleorzecznictwa ETPC i NSA (zagadnieniawybrane) (Assessment of Lengthiness of Court-Administrative Procedure in the Perspective of ECHR and Supreme Administrative Court Rulings (selected issues))*, *Zeszyty Naukowe Sądownictwa Administracyjnego* 2005, No. 2-3, pages 52 – 61. Cf. considerations of M. Wyrzykowski regarding one’s right to court in: *Zasadypodstawowepolskiejkonstytucji (Fundamental Principles of the Polish Constitution)*, W. Sokolewicz (ed.), Warszawa 1998, page 81.

<sup>34</sup> More on this issue: A. Skoczylas, *Ocenaprzewlekłości postępowania sądowniczoadministracyjnego w świetleorzecznictwa ETPC i NSA (zagadnieniawybrane) (Assessment of Lengthiness of Court-Administrative Procedure in the Perspective of ECHR and Supreme Administrative Court Rulings (selected issues))*, *Zeszyty Naukowe Sądownictwa Administracyjnego* 2005, No. 2-3, pages 52 – 61; cf. e.g.: ruling of the ECHR of June 15, 2004, complaint No. 77741/01, Piekara vs. Poland, LEX No. 122542; ruling of the ECHR of February 11, 2003, complaint No. 33870/96, Fuchs vs. Polsee; ruling of the ECHR of June 1, 2004, complaint No. 33777/96, Urbańczyk vs. Poland.

<sup>35</sup> Ruling of the ECHR of June 15, 2004, complaint No. 77741/01, Piekara vs. Poland, LEX No. 122542.



c) a considerable number of decisions issued in the same case (and then complained about to the court) implies – in the opinion of the ECHR – that the authorities failed to act with due diligence<sup>37</sup>.

The foregoing means that – when investigating the matter of exceeding reasonable time of procedure (Article 6, Section 1 of the Convention) – the ECHR considers not only the circumstances of the proceedings in the administrative court, but also the “*total duration of the procedure*”, commencing upon initiation of the administrative procedure<sup>38</sup>.

## 5. THE ADMINISTRATIVE APPEAL AND THE JUDICIAL REVIEW: CONDITIONALITY *VERSUS* ACCESS TO JUSTICE

Traditionally, in Romanian law, the exhaustion of administrative appeals before going to court was mandatory. Thus, since 1864, when a Council of State was established in Romania, the prior exhaustion of administrative remedies was mandatory before going to court. It became optional in 1925, and again mandatory from 1967 onwards. The post-communist Law on judicial review (1990) maintained the mandatory administrative appeal<sup>39</sup>.

Based on current legislation (Law no. 554/2004) the administrative appeal is mandatory for explicit administrative decisions, but there are no provisions for implicit or explicit refusal to act. Regarding the solution to exclude the appeal against the refusal to act, it was argued that in this case the petitioner should not be exposed again to a negative response from the public authority that refused once to accommodate its request.

The appeal is mandatory only for individuals and legal persons challenging administrative decisions, not for public authorities acting on public interest (the Prefect, The Public Prosecutors, the National Agency for Public Servants, the Ombudsman). It is also exempted in case of governmental ordinances<sup>40</sup>. In case of the Ombudsman, the exemption from administrative appeal is based on the fact that the institution already exercised a form of administrative appeal by launching an investigation, during which the parties are mediated.

The legal consequence of not exercising the mandatory administrative appeal is the inadmissibility of the court action<sup>41</sup>. That is, when the deadline for exercising the

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<sup>36</sup> „liczneprzekazania sprawy do ponownegoro zpatrzeni apowodowaly dalsze opoznienia (*numerous reconsiderations of the case resulted in further delays*)” – ruling of the ECHR of June 1, 2004, complaint No. 33777/96, Urbańczyk vs. Poland.

<sup>37</sup> cf. ruling of the ECHR of February 11, 2003, complaint No. 33870/96, Fuchs vs. Poland.

<sup>38</sup> Ruling of the ECHR of February 11, 2003, complaint No. 33870/96, Fuchs vs. Poland; . Skoczyła, Ocenaprzewlekłosci postepowaniasadowo administracyjnego w swietleorzecznictwa ETPC i NSA (zagadnieniawybrane) (*Assessment of Lengthiness of Court-Administrative Procedure in the Perspective of ECHR and Supreme Administrative Court Rulings (selected issues)*), ZeszytyNaukoweSadownictwaAdministracyjnego 2005, No. 2-3, pages 52 – 61.

<sup>39</sup> See, for details, the monograph dedicated to this subject: D.C. Dragos, *Recursuladministrativsi contenciosuladministrativ*, ALL Beck, 2001.

<sup>40</sup> Art. 7 par. 5 of the Law no. 554/2004 on judicial review.

<sup>41</sup> The Supreme Court of Justice, Adm Law Section, dec. no. 416/1995, in *Dreptul* no. 10/1997, p. 101-102; The Supreme Court of Justice, Adm Law Section, dec. no. 134/1991, in V. Bogdănescu, L. Pastor, *Probleme de drept din practica Curtii Supreme de Justitie*, Orizonturi, București, 1993, p. 645; Pitești Court of Appeal, decision no. 79/1998, in Ș. Crișu, E. D. Crișu, *Repertoriu de practica si literatura juridica, 1997-2000*, Editura Argessis, 2000, p. 247.

administrative appeal has expired. When the court action is lodged within the deadline for administrative appeal, the action will be dismissed as premature. The same solution applies when the administrative appeal was exercised, but the deadline for answering has not expired.

In Poland, the administrative appeal is a mandatory stage before going to court. In order to file a complaint with an administrative court one must exhaust all other means of appeal (if available to the complaining party), unless the complaint is filed by the prosecutor or the Ombudsman. If no means of appeal are provided for by applicable regulations, the appeal can be filed after requesting the issuing body to correct the decision if it breaches the law. The Act precisely specifies also the formal prerequisites for filing a complaint if no means of appeal are provided (in the light of the Act, means of appeal also include a request for rehearing, and an administrative complaint) and regulates the situation where a complaint must be preceded by requesting the issuing body in writing to correct the decision if it breaches the law (Article 52 of the Administrative Court Proceedings Law - ACPL.<sup>42</sup>).). The foregoing means that when acting before Polish administrative courts, the prosecutor and the Ombudsman enjoy certain process privileges. Neither of them needs to exhaust the so-called sequence of instances and they can complain to the administrative court directly against the decision issued in the first instance, which obviously cannot be done by an ordinary party to the proceedings (a citizen being the addressee of the decision in question would first have to appeal against it and only then – if the decision were maintained in the second instance – he/she could complain to the administrative court)<sup>43</sup>. Furthermore, as a general rule (Article 53, Clause 1 of the ACPL), complaints to administrative courts are filed within 30 days after the delivery of the decision to the complainant. However, both the prosecutor and the Ombudsman can make their complaints within six months after delivering a decision in an individual case, or after the date on which a law enters into force or after an act complained about is effected (the foregoing does not apply to complaints against local laws passed by local governments and by regional units of the central administration).

Another question that can be raised in the context of the scope of administrative appeal is whether the plaintiff can modify the scope of the review when reaching the court or the review should match fairly the scope of the administrative appeal? The Romanian courts have always looked for a sort of link between the administrative appeal and the judicial review, though not going very deep into their scope. Minimum requirements are held by the courts: the administrative appeal should regard the same decision that is contested in court, and third parties cannot benefit from administrative appeals exercised by the addressee of the act<sup>44</sup>.

In Poland, on the other hand, the scope of appeal in administrative procedures does not affect the scope of appeal in court procedures, as the latter is not based on the former. First instance administrative courts do not take over the case from the bodies handling it before, but they merely evaluate the legality of the item complained against.

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<sup>42</sup> Act of 30 August 2002 – Administrative Court Proceedings Law, Journal of Laws of 2002, No. 153, item 1270 (further herein referred to as the ACPL).

<sup>43</sup> R. Hauser, A. Skoczylas w: K. Celińska-Grzegorzczak, R. Hauser, W. Sawczyn, A. Skoczylas, *Postępowania administracyjne, sądowoadministracyjne i egzekucyjne (Administrative, Court-Administrative and Enforcement Procedures)*, Warszawa 2009, page 148.

<sup>44</sup> Bucharest Court of Appeals, decision no.1445/2006, in G. Bogasiu, *Proceduraprealabila in contenciosuladministrativ, practicajudiciara*, Hamangiu, Bucharest, 2006, p.1

In such evaluation, they are not limited either by the boundaries, or by the content of the complaint. Only the cassation appeal to the Supreme Administrative Court is a highly formalized means of appeal, where the appellant needs to state whether the decision is complained against in part or in whole and to specify the requested scope of intervention and provide a statement of grounds for cassation<sup>45</sup>.

## 6. THE SUSPENSIVE EFFECT OF THE ADMINISTRATIVE APPEAL

When the *suspensive effect* of the administrative appeals is discussed, the question is whether it should be left to the decision of the public authority, to the decision of the court or it should have *de jure* effects.

The Council of Europe's Committee of Ministers 2001 recommendations provide that "[national] regulations may provide that the use of some alternative means to litigation will in certain cases result in the suspension of the execution of an act, either automatically or following a decision by the competent authority"<sup>46</sup>.

In Romania, the suspension is granted by the court, in any cases. The request to suspend a decision can be filled at the same time with the administrative appeal, after lodging the administrative appeal, along with the court action or anytime during the court proceedings (art. 14 of the Law on judicial review).

In some of these cases, the suspensive effect could be linked to the fact that administrative appeal is followed or not in a reasonable time by a court action. Thus, in Romanian law, failure to lodge a court action within 60 days from the date when the suspension was granted ends the suspension and puts the decision back into force (art.14 of the judicial review law).

It is also important to consider the object of the decision challenged by administrative appeal, as the suspensive effect could be far more utile for negative (non-beneficial) decisions.

In Poland, as far as the suspensive effect of an appeal is concerned, it needs to be stressed that prior to the expiry of the term for filing the appeal the decision will not be enforced, and then it will be suspended if the appeal has been filed on time (Article 130, Clauses 1 and 2 of the APC). Within the meaning of Article 130, Clause 2 of the APC, the suspension of a decision means that the decision in question has no legal consequences. Therefore, appeals have a suspending effect in the Polish legal system.

There are, however, some exceptions to the above rule (so-called "relative suspending effect"). These provisions are not applied in the case of a decree *nisi* accompanied by an order of immediate enforceability, or if a decree *nisi* is immediately enforceable by virtue of generally applicable laws (e.g. a decision on temporary seizure of an animal maltreated by its owner or guardian, decisions of local (municipal) Head of the State Fire-Fighting Service on suspension of works, use of equipment, buildings or parts thereof, issued if any identified violations of fire-fighting regulations may cause a health hazard or a risk of fire).

Any other decision can be made immediately enforceable if so required for the purpose of protecting human health or life, or securing national property against grave losses, or due to any other public interests or exceptionally important interests of a party

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<sup>45</sup>Cf. A. Skoczylas, Gloss to the ruling of the Polish Supreme Administrative Court of May 10, 2005, FSK 2536/04, Orzecznictwo Sądów Polskich 2006, Volume 7-8, item 80a, page 379.

<sup>46</sup>Council of Europe, *Recommendation Rec(2001)*, *supra* 5.

(Article 108 of the APC). If a decision is made immediately enforceable (or if it is immediately enforceable by virtue of generally applicable laws), the enforcement procedure can be held simultaneously with the adjudication procedure<sup>47</sup>. It should also be noted that a decree *nisi* can be enforced before the lapse of the term for filing an appeal, if it fully satisfies the claims of all parties (Article 130, Clause 4 of the APC).

In this context it needs to be emphasized that filing a complaint to an administrative court does not result in suspending a decision (or a law or act). However, the deciding body may fully or partially suspend the decision all the same (whether *ex officio* or upon request of the complainant), unless the decision in question is statutorily immediately enforceable or applicable laws prohibit such voluntary suspension. The refusal to suspend a decision does not deprive the complainant of the right to seek such suspension in court. After the complaint is filed, the court may – upon request of the complainant – decide to fully or partially suspend the decision, law or act, particularly if enforcing involves the risk of causing significant damage or irreversible consequences (Article 61 of the ACPL). In particular cases – e.g. a complaint against a decision on issuing a building permit – administrative courts may decide to suspend the decision on condition that the complainant pays a security deposit corresponding to possible future claims of the investor (beneficiary of the decision) relating to such suspension.

## 7. THE DEVOLUTIVE EFFECT OF THE ADMINISTRATIVE APPEAL

In the comparative doctrine, there are debates whether the public authority can worsen the situation of the applicant in its own administrative appeal. In other words, whether or not the appeal should be open to a decision against the interests of the applicant (*reformatio in pejus*)?

The question is, therefore, whether the appeal should be dealt within *abound competence* manner by the public body, meaning that it is held to answer the claimant only within the limits of his requests, or whether the authority can consider itself notified for an *objective* analysis *de novo* of the decision, which implies the power to modify the decision in a way that may not to the advantage of the applicant?

As for the first assumption, it is obvious that the claimer does not want that an appeal initiated with a view to defend his rights to turn against him, making the situation worse. So an interdiction of the *reformatio in pejus* should serve the individuals seeking an easy dispute resolution. The argument for the second hypothesis is that the appeal only initiates the control and cannot establish its limits.

Romania has no legal prescriptions on this issue; so, theoretically, the *reformatio in pejus* is possible. Exceptions can be found in the special legislation. Thus, the Code of fiscal procedure<sup>48</sup> states clearly that by solving the contestation the fiscal organ cannot worsen the situation of the complainant (art.213par.3).

The appeal body can decide without restrictions *ultra petita*, that is to give the claimant more than requested for (for example, granting an increased amount of money than the appeal asks for, but to which the applicant is rightfully entitled).

In Poland, as well, an appeal is a relatively devolutive legal remedy, which means that in principle filing an appeal transfers the case to a higher instance institution (unless it is approved of by the issuing body). In the case of a decision issued in the first instance by a

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<sup>47</sup>Ruling of the Polish Supreme Administrative Court of March 30, 1999, III SA 5537/98, LEX No. 44836.

<sup>48</sup>Governmental Ordinance no.92/2003, published in the Official monitor no.24/12/2003.

minister or a local government court of appeal, the unsatisfied party may request the issuing body to reconsider the case (in other words, the party can exercise the so-called right of remonstrance – Article 127, Clauses 3 and 4 of the APC). Such request is not devolutive, which means that it does not transfer the case to a higher instance institution, but it requires the issuing body to reconsider it. The provisions on appeals apply accordingly to such procedures.

The appeal body can carry out an additional investigation in order to gather more evidence, or have such an investigation carried out by the body that issued the original decision. The right of the appeal body to investigate the merits of the case does not breach the principle of two instances. On the contrary, the said right guarantees that this principle is adhered to<sup>49</sup>. One may assume that the appeal body is responsible for determining whether or not to carry out an investigation of the entire case or a substantial portion thereof. If such an investigation is necessary for deciding on the case, and thus the criteria for issuing a cassation decision are met, then the competence of the appeal body will be limited to the right to waive the challenged decision. It needs to be remembered that by carrying out an investigation of the entire case (or a substantial portion thereof) the appeal body would violate the principle of two instances by depriving the party of the right to have the merits of the case investigated twice<sup>50</sup>.

However, *reformatio in peius* is disallowed in the general administrative procedure in Poland. Consequently, the appeal body cannot issue decisions to the detriment of the appellant (unless the challenged decision constitutes a gross violation of law or public interest). In other words, the appeal body cannot modify the content of the first instance decision in such a way that the decision becomes even more unfavorable to the appellant<sup>51</sup>. In the case of tax-related matters, the same issue is somewhat different. In this case the said prohibition is purely theoretical, because in practice it is thwarted by the so-called “supplementary tax assessment”. If the appeal body finds out that the amount of tax to be paid by the appellant is lower (or the amount of tax to be refunded is higher) than prescribed in tax regulations, or if the amount of the appellant’s losses is overrated, then it will refer the case back to the first instance body in order to have the tax reassessed by means of altering the original decision. The new decision will reflect the laws in effect on the date of accruing the tax obligation. One may file an appeal against such decision, which will be considered in conjunction with the appeal regarding the original decision (see Article 230 of the TO).

## 8. FINAL CONSIDERATIONS

The above considerations are a first attempt to grasp the different or concordant realities of the institution of administrative appeal in jurisdictions affected by the communist legacy, but also by the influence of the European law.

Poland has the second oldest Act of administrative procedure in Europe, and a huge experience in dealing with administrative matters. Romania is striving to adopt such

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<sup>49</sup>*Cf.* Ruling of the Polish Supreme Administrative Court of April 5, 2000, I SA/Lu 1817/98, LEX No. 43025 and A. Skoczylas, Gloss to the ruling of the Polish Supreme Administrative Court of October 11, 2000, I SA/Ld 1658-1669/98, OSP 2001, vol. 10, pages 523- 524.

<sup>50</sup>*cf.* views of B. Adamiak, Model dwuinstancyjnego postępowania podatkowego (*Model of a Two-Instance Tax Procedure*), PiP 1998, No. 12, pages 58-63.

<sup>51</sup>*Cf.* holistic analysis of these issues in the monograph by A. Skóra, *Reformatio in peius w postępowaniu administracyjnym (Reformatio in peius in Administrative Procedures)*, Gdańsk 2002.

an act for a long time now, following the German, Austrian, French and Polish experience with administrative codification. Actually, the Polish co-author of this study was expert consultant for the Romanian Ministry of Internal Affairs and Public Administration between 2006 and 2008 for the drafting of a Romanian Procedure Code, project still under consideration.

The administrative appeal seems to be regulated in similar manner in the two jurisdictions assessed, but difference still exist on the degree of formalization of the procedure.

The research will be continued with questions regarding the relation between the administrative appeal and judicial review, the importance of mediation in administrative procedure and the extent to which such ADR tools can be effective. Further on, the empirical research under way in the two jurisdictions will showcase the effectiveness of administrative appeals in solving administrative disputes, assessed mainly against the intervention of the courts.