

THE ADMINISTRATIVE ACT ISSUED BY A PERSON WITHOUT COMPETENCE

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ABSTRACT: *In order to be issued, administrative acts must come from persons with competence, which gives them the right to adopt or sign such documents.*

The issue under consideration in this article concerns both unilateral administrative acts and collective administrative acts.

The legal force of an administrative act is given by the competence conferred by law to the collective body entitled to adopt that document or to the civil servant to whom such competence is conferred by law.

In the case where either the collective body that will adopt the administrative act or the civil servant having such competence acts on the basis of a mandate that is limited in time, their competence shall be attributed only for the duration of that mandate. Any administrative act adopted, issued, signed by a collective body or by a public official outside the time covered by the aforementioned mandate, respectively after its expiry, is unlawful and therefore struck by absolute nullity.

Although resolving these issues does not pose any particular problems, in practice the courts have proposed contradictory solutions, which generated this study.

KEY WORDS: *administrative act, Competition Council, the decision of the constitutional court, the mandate of the president of the Competition Council*

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In this article we want to analyze the way in which the President of the Competition Council in this case exercised his powers after the expiration of the mandate by which he was appointed.

Thus, we mention that he was appointed, for a second term in this position, by Decree no. 301/5 March 2015 published in the Official Gazette of Romania no. 157 of 5 March 2015.

According to art. 15 para. 1 from Law no. 21/1996 of competition, republished, with subsequent amendments and additions, the Plenary of the Competition Council is a collegial body and consists of 7 members, as follows: a president, 2 vice-presidents and 4 competition advisors. The appointment of the members of the Plenary of the Competition Council is carried out by the President of Romania, upon the proposal of the Advisory Board of the Competition Council, with the approval of the Government and after hearing the candidates in the specialized committees of the Parliament. The rejection of a nomination can only be done on the condition of presenting the reasons on which it is

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based, and according to paragraph (2) of the same article, the duration of the mandate of the Plenary members of the Competition Council is 5 years, which can be renewed only once, regardless of the duration the previously exercised mandate.

As can be seen, having been appointed as President of the Competition Council on March 5, 2015, his mandate expired on March 5, 2020. However, the President of the Competition Council continued to exercise his duties as President of Competition Council.

It is true that art. 18 of Law no. 21/1996 of competition regulates the transitional situations related to the termination of the mandates of the Plenary members of the Competition Council.

Art. 18 of this law provides:

"(1) The terms of office of the members of the Competition Council begin from the date they take the oath and expire upon the completion of the terms provided for in art. 15 para. (2), calculated from this date.

(2) If, until the expiration of the current mandate, the president of the Competition Council appointed for the next mandate will not have taken the oath in compliance with the provisions of art. 17, the members of the Competition Council in practice will continue their activity until the oath is taken by the president of the Council, appointed for the next mandate under the leadership of the previous president.

(3) In the event that until the expiration of the term of office of a member of the Plenary of the Competition Council, under the conditions of art. 15 para. (9) lit. a), a successor is not appointed, the member of the Plenum whose mandate expires will continue his activity until the oath is taken by the one appointed for the next mandate."

However, art. 18 paragraph 3 of Law no. 21/1996, which gave the possibility to the President of the Competition Council to carry out his activity at the expiration of the 5-year mandate on the grounds that his successor was not appointed, was declared unconstitutional by the Constitutional Court.

By the decision of the Constitutional Court, according to its press release of January 26, 2021, in the post-promulgation control, with a majority of votes, the exception of unconstitutionality was admitted and it was found that the provisions of art. 18 paragraph (3) of the Competition Law no. 21/1996, and the legal provisions found to be unconstitutional have the following wording: "(3) In the situation where until the term of office of a member of the Plenary of the Competition Council expires, under the conditions of art. 15 para. (9) lit. a), a successor is not appointed, the member of the Plenum whose mandate expires will continue his activity until the oath is taken by the one appointed for the next mandate."

By declaring as unconstitutional art. 18 para. 3 of Law no. 21/1996, there is no longer the legal basis that would allow the President of the Competition Council to exercise his mandate after the date of its expiration, so that all documents issued by the President of the Competition Council by exercising the position after the expiration of the 5-year mandate are voidable.

As the Constitutional Court itself emphasized in its jurisprudence, by declaring a text of law as unconstitutional, it is considered that it never existed in the legal order, and the effects of the decision to admit the exception of unconstitutionality extend to all pending litigations courts and where those provisions would be applicable.

Therefore, considering the declaration as unconstitutional of art. 18 paragraph 3 of Law no. 21/1996, any Decision of the Competition Council, adopted between mandates is

illegal because the President of the Competition Council participated in the deliberation and signed this decision, during September 2020, although his mandate expired in March 2020.

Regarding the illegality of the decision issued by the Competition Council from the perspective of participation in the deliberation and signing of the decision by the President of the Competition Council - Mr. Bogdan Chirițoiu by referring to the finding of unconstitutionality of the provisions of art. 18 para. (3) from the Competition Law by Constitutional Court Decision no. 58/26.01.2021, showed that the term of office of the members of the Competition Council is regulated by art. 18 para. (1) of the Competition Law, according to which mandates start from the date of taking the oath and expire upon completion of the terms provided for in art. 15 para. (2) from the Competition Law. In this context, as a first observation, the claims regarding the termination of the mandate of the President of the Competition Council, respectively March 5, 2020, do not correspond to reality, the oath taking by him took place on March 24, 2015.

Regarding the provisions of art. 18 para. (3) of the Competition Law, the unconstitutionality of which is invoked, specifies that the legislator, in order not to affect the activity of the competition authority, understood to regulate this exceptional situation, in the sense that "in the situation where until the expiration of the mandate of a member of the Plenary of the Competition Council, under the conditions of art. 15 para. 9 lit. a), a successor is not appointed, the member of the Plenum whose mandate expires will continue his activity until the oath is taken by the one appointed for the next mandate".

According to European legislation and principles, as well as European jurisprudence, the member states have the obligation¹: (i) to take all the necessary measures to ensure compliance with the obligations resulting from the treaties and to refrain from adopting any measure that could endanger the achievement of the Union's objectives; (ii) to ensure that the rules it enacts do not affect the effective application of Articles 101 and 102 of the Treaty.²

The Competition Council, being the only public authority that supervises compliance with the law in the uniquely protected area, could carry out its activity through the deliberative forum, which is a collegial one, which artificially creates a systemic risk of impunity for acts that constitute violations of competition law.

Thus, according to art. 19 para. (1) of the Competition Law: "The Competition Council carries out its activity, deliberates and takes decisions in plenary or in committees. The Plenary of the Competition Council validly meets in the presence of the majority of the members in office, but not less than 3 of them, and adopts decisions with the vote of the majority of the members present", and according to paragraph (4) of the same article: "In applying this law, the Council The competition examines in plenary: a) the investigation reports, with any objections formulated to them, and decides on the measures to be taken (...)".³

Therefore, the decisions issued by the competition authority pursuant to art. 25 para. (1) lit. b) of the Competition Law are adopted by the Plenary of the Competition Council

¹ Jean Louis Clergerie, Annie Gruber, Patrick Rambaud, *L' Union européenne*, 11^e édition, Dalloz, 2016.

² Ioan Lazăr, *Dreptul Uniunii Europene în domeniul concurenței*, Editura Universul Juridic, București, 2016, p. 124 -127.

³ Manuela Niță, Gheorghe Gheorghiu, *Dreptul concurenței*, Ediția a III-a, revăzută și adăugită, Editura Universul Juridic, București, 2022, p. 112 -127.

as a collegial body, and not by the President of the Competition Council, in the deliberation process each of the members of the Plenary benefiting from a single vote.

The stage of adopting a decision can be divided, in the case of collegial bodies, into at least three phases: debate, deliberation and voting. The debate is the evaluation activity of the proposals (by each member of the decision-making body) submitted to the attention of the collegial body. The organizational form of the debate within the collegial bodies is the meeting, which represents a meeting of two or more people who together make up a body and whose meeting has a certain purpose. Deliberation, as a process of forming one's own beliefs, is completed by adopting a decision (each member making a decision, independently, without being influenced by the opinions of other members). Voting represents the operation through which the will of the collegial body is manifested in the sense of adopting the legal act.

The competition law includes provisions that establish both the quorum necessary for the deliberations of the collegial body to be valid, as well as the majority that must be met for the adoption of the act.⁴

Regarding the quorum, it is known that it represents the number of members who must be present for the adoption of the act, relative to the total number of members of the authority that adopts it, in the case of single-person bodies, when issuing the administrative act is under the competence of a single person, the problem the necessary quorum and majority is not required, this matter only concerns the collegial bodies.

In the case, the Decision of the Competition Council no. 55/2020 was adopted in the Plenary, with the participation of all 6 members of the Plenary who were exercising their mandate on the date of the deliberation in question (on 25.09.2020).

Therefore, the quorum conditions for the valid adoption of a sanctioning decision, as provided by art. 19 para. (1) of the Competition Law, assume "the presence of the majority of members in office, but not less than 3 of them", and these conditions would obviously have been met in the case even in the ad absurdum hypothesis in which one of the members of the Plenary would have voted without having a valid mandate according to the Law, so we appreciate that the Decision of the Competition Council no. 55/2020 was adopted in compliance with the legal norms in force and is not affected by a cause of nullity, as the plaintiff in the case erroneously claims.

It is of particular importance that the decision of the Competition Council is adopted by a collegial body (not by a one-person body), all members of the decision-making body benefiting, as I mentioned above, from one equal and freely expressed vote.

Also, any decision issued by the Competition Council is appropriated by the president's signature, which for the period following the expiration of the mandate for which he had been invested, was carried out illegally, assuming on behalf of the institution the entire motivation of the decision without having any quality from a legal point of view.

Thus, it is noted that through the decisive considerations of Decision no. 58/2021 issued by the Constitutional Court⁵, the constitutional court showed that:

⁴ Victor Alistar, Cristina Banciu, *Dreptul concurenței. Ghid practice. Jurisprudență națională și instrumente de aplicare*, Editura Hamangiu, București, 2013.

⁵ Ioan Muraru, Elena Simina Tănăsescu, *Constituția României. Comentariu pe articole*, Editura C.H. Beck, București, 2008.

"24. As such, the regulation of the public office appointment procedure belongs to the competence of the Parliament, which has a wide margin of appreciation in its configuration. Of course, this margin of appreciation is limited by the existing constitutional conditions that the legislator is obliged to respect. Therefore, art. 94 lit. c) from the Constitution, on the one hand, presupposes the existence of a normative framework regarding the appointment procedure in a public position, and, on the other hand, regulates the attribution of the President of Romania to appoint a public position with strict observance of the fulfillment of the requirements provided by the aforementioned normative framework, its act attesting the regularity of the appointment procedure, without having the meaning of its own discretionary power.

25. Considering the provisions of art. 15 para. (1) the second sentence of Law no. 21/1996, the Court cannot retain the alleged violation of the provisions of art. 94 lit. c) from the Constitution from the perspective indicated by the author of the exception of unconstitutionality, since the appointment of the members of the Competition Council is subject to a procedure expressly regulated by Law no. 21/1996, procedure initiated by the Consultative Board of this authority.

26. But the public authorities and institutions mentioned in Law no. 21/1996 must consider and take into account the principle of constitutional loyalty circumscribed by art. 1 paragraph (5) of the Constitution, in conjunction with the principle of good faith provided for in art. 57 of the Basic Law, and to submit all the necessary diligence to comply with the terms that determine the duration of the mandates of the members of the Competition Council, as well as to start the procedures regarding the appointment of new members, so that in the process of interpreting and applying the law, the principle of legality will be effective, according to which compliance with the Constitution, its supremacy and the laws is mandatory, which is the essence of the requirements of the rule of law.

27. Thus, regarding the provisions of art. 1 paragraph (3) the first sentence of the Constitution, which enshrines the principle of the rule of law, in its jurisprudence, for example, Decision no. 70 of April 18, 2000, published in the Official Gazette of Romania, Part I, no. 334 of July 19, 2000, the Court held that its requirements concern the major goals of state activity, prefigured in what is usually called "the rule of law", a phrase that implies the subordination of the state to the law, the provision of those means that allow the right to censor the political options and, in this framework, weigh the possible abusive, discretionary tendencies of the state structures. The rule of law ensures the supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the regime of separation of public powers, which must act within the limits of the law, namely within the limits of a law that expresses the general will. The rule of law enshrines a series of guarantees, including jurisdictional ones, which ensure respect for the rights and freedoms of citizens through the self-limitation of the state, respectively the inclusion of public authorities in the coordinates of the law (see also Decision no. 17 of January 21, 2015, published in the Official Gazette of Romania, Part I, No. 79 of January 30, 2015).

28. In this sense, in the analysis of the provisions of art. 18 para. (3) from Law no. 21/1996, which give the possibility to exercise the powers related to the mandate of a member of the Plenary of the Competition Council and after the expiration of its term, as a result of the fact that the authorities and institutions with powers in the respective procedure have not exercised their powers and have not appointed a successor, must

considering the provisions of art. 1 paragraph (3) and para. (5) of the Constitution, invoked in support of the exception of unconstitutionality. One of the conditions for achieving the fundamental objectives of the Romanian state, defined by these constitutional norms, is the good functioning of public authorities, respecting the principles of separation and balance of powers, without institutional blockages (in this sense, see also Decision no. 838 of 27 May 2009, published in the Official Gazette of Romania, Part I, no. 461 of July 3, 2009).

29. Regarding the number and duration of mandates, the Court notes that these are fixed mandates, for example the mandate of the President of Romania, which, according to art. 83 para. (1) and (2) of the Romanian Constitution, is exercised from the date of taking the oath until the newly elected President takes the oath, no person being able to perform this function for a maximum of two mandates, which can also be consecutive [art. 81 para. (4) of the Constitution], or the mandate of the members of the Constitutional Court regulated in art. 142 para. (2) of the Constitution, according to which the Constitutional Court is composed of nine judges, appointed for a 9-year term, which cannot be extended or renewed.

30. The Court notes that, for the proper functioning of public authorities and institutions, it is natural to have a rule regulating a transitional situation from one mandate to another, where the constitutional provisions establish this possibility (for example, art. 83 of the Basic Law), in depending on certain circumstances, until the oath is taken by the person appointed for the next mandate, precisely considering the fact that the exercise of state functions by professionals must be permanent and continuous, without creating distortions or syncope in the functioning of some state authorities or institutions, for the achievement of the general interests of society and for the observance of the principles underlying the rule of law, but without being able to legally resize the fixed mandates specifically provided for by the Constitution.

31. Regarding the resizing of some mandates, for example, by Decision no. 713 of December 4, 2014, published in the Official Gazette of Romania, Part I, no. 56 of January 23, 2015, the Court found the unconstitutionality of the provisions of art. III of Law no. 115/2012 for the amendment and completion of Law no. 192/2006 on mediation and the organization of the mediator profession, provisions that regulated the application of the amendments and additions brought by that law and the mandates of the mediation councils in force at the date of entry into force of the new law. Invoking its jurisprudence regarding the mandates of persons holding public positions, the Court held that it is applicable *mutatis mutandis* also regarding the profession of mediator, and the criticized provisions practically transform an eligible mandate, obtained following internal elections of mediators, in a mandate appointed regarding the period that exceeds the initial duration of the mandates, by extending them from 2 to 4 years and by depriving the mediators of the possibility to choose a new mediation council at the expiration of the 2 years originally provided for by law. Therefore, by resizing some mandates in progress, it was not only the increase of their duration, but also the modification of their legal nature, which contradicts the provisions of the Constitution.

32. Regarding the text of the law criticized in this case, the Court notes that the provisions of art. 18 para. (3) from the Competition Law no. 21/1996 is not limited to the regulation of a transitory situation related to the succession of mandates, i.e. a short period from the appointment to the taking of the oath, the date from which the exercise of

the mandate begins, but it creates the premises for the exercise of the powers and the continuation of the mandate as a member of Plenary of the Competition Council without limit/term. The possibility is practically left to the authorities and public institutions involved in the procedure for appointing the members of the Plenary of the Competition Council to remain passive and not to appoint a successor, since the law does not provide for procedures or a deadline prior to the expiration of the mandate until which he can be appointed the new member, respectively issues related to specific dates and terms that the authorities involved in the succession of mandates procedure must comply with, and also possible sanctions or the effects that would arise from the fact that the provisions of Law no. 21/1996 regarding the termination of membership of the Plenary of the Competition Council as a result of the expiration of the mandate [see, as a reference, art. 68 para. (1) and (2) from Law no. 47/1992 on the organization and functioning of the Constitutional Court, which establishes a procedure to be followed for the renewal of the composition of the constitutional court until the expiration of the duration of the current mandates]. Practically, the mode of regulation of the disputed norms converts a matter related to the temporary exercise of the powers related to the mandates into a genuine extension and continuation of them. In reality, through the game of legal norms combined with the actions of public authorities with competence in the field, there is a resizing of the mandates of the members of the Plenary of the Competition Council.

33. *The Court notes that, as was shown in the precedent, the rule of law, enshrined in art. 1 paragraph (3) of the Constitution, also implies the state's ability to provide citizens with continuous and high-quality public services, the state being obliged to create all the premises - and the legislative framework is one of them - for the exercise of its functions in accordance with the Constitution and its spirit. Or, the legislative solution that creates the premises for the exercise of certain powers by continuing the exercise of the duties related to a mandate as a member of the Plenary of the Competition Council, beyond the term of the term of office, respectively following the expiration of the mandate of each member of the Plenary of the Competition Council, as it is circumscribed according to the calculation of the terms in public law, and the inherent situations related to the succession of mandates as a result of some technical issues, related, for example, to the date of taking the oath, which must be carried out expeditiously through the diligence of the authorities involved in the appointment procedure, so that on the date fixed established by the act of investiture to carry out the appointment for the new mandates, does not correspond to the requirements of respecting the rule of law. Therefore, the criticized legal norm does not fall within the guarantees related to the rule of law regarding the organization of the fulfillment of the attributions, powers and obligations of public authorities in the coordinates of the law, being contrary to art. 1 paragraph (3) of the Basic Law, which has the consequence of violating the principle of legality provided by art. 1 paragraph (5), according to which, "In Romania, compliance with the Constitution, its supremacy and laws is mandatory".*

34. *Against this circumstance, taking into account the imperative rules contained in art. 15 para. (2) from Law no. 21/1996 regarding the duration of the mandate of the members of the Plenary of the Competition Council, as they were considered when formulating the criticisms by the author of the exception of unconstitutionality, mandate which is 5 years and which can be renewed only once, regardless of the duration of the mandate exercised previously, the Court finds that the defect of unconstitutionality*

established by this decision concerns any legislative solution contrary to the constitutional reference norms, the ordinary or delegated legislator not being able to adopt legal norms that come into collision with the requirements of the rule of law. Therefore, the exercise of the duties related to the membership of the Plenary of the Competition Council (president, vice-president, competition advisor) outside the framework established by the appointment documents and covered by this decision (5-year mandate, calculated according to the rules of public law) has no constitutional and legal support.”⁶

In conclusion, the court considers that the plaintiff's injury results from the administrative act adopted and issued illegally, according to the effects of CCR Decision no. 58/2021, since what causes an injury is the adoption and issuance of any Decision, in violation of the legal provisions.

The fact that later, on 18.06.2021, the mandate of the President of the Competition Council was renewed, or his position was reconfirmed, is not likely to cover the period in which the President of the Competition Council no longer legally held this position, and the documents signed by him are struck by absolute nullity, not being legal or emanating from a person who, at the time of issuing the administrative act, did not fulfill the condition of holding the respective position.

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⁶ Decizia nr. 58/2021 a Curții Constituționale a României: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ccr.ro/wp-content/uploads/2021/04/Decizie_58_2021.pdf