

# Objective contentious matters in Romania and their unexplainable vulnerabilities

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## **Abstract**

*The objective contentious matters should be a lethal weapon for the administrative acts challenged at the court specialised in this kind of issues, because, unlike the subjective contentious matters, they do not depend – or at least they should not depend – on the plaintiff's (which is, by definition, a public authority) proving a subjective right or a personal legitimate interest injured by the administrative act. Relieved from this burden, the plaintiff's task within an objective contentious matter should be easy: to come up with the proof that the case object contravenes a rightful rule with a superior legal force. In this case, the challenged act is annulled by the decision of the administrative contentious court and, as an expression of the public interest prioritising principle, it derives from the other one, which is more general, namely the principle of lawfulness. Nonetheless, at least three legal provisions of the Act no. 554/2004 – section 1, par. (3), section 3, par. (1) and section 28, par. (3) – highlight a few weaknesses of this type of contentious matters, either by conditioning them upon the fate of certain subjective contentious matters – which by definition are more fragile – or by placing the plaintiff, by virtue of the law, in a legal status inferior to the one that the plaintiff within a subjective contentious matter enjoys. And these weaknesses are surely worth being analysed, because so far neither the doctrine nor the case law seems to have at least noticed them.*

**Keywords:** *objective contentious matter, the Ombudsman, the Prefect, withdrawal of the case.*

**JEL Classification:** K41, K49, K23, K19.

## **1. The administrative contentious matters filed by the Ombudsman are „hanging on a thread”**

One of the most doubtful and, at least seemingly, irrational provisions of the law is set forth under section 1 par. (3): *“If the Ombudsman, after having performed a review, in line with the organic law regulating his remit, deems that the lawfulness of the act or the refusal of the administrative authority to perform its legal duties cannot be set aside except by a court of law, he can bring the matter before the competent administrative contentious matter court that has jurisdiction for the usual place of domicile of the plaintiff. The petitioner lawfully acquires the capacity of plaintiff and is to be summoned in such capacity. Unless the petitioner*

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*will make his own the case initiated by the Ombudsman during the first hearing in court, the administrative contentious court will cancel the application”.*

**A. Traditional concept: the Ombudsman files grievances, complaints, briefings, reports.** If one is to scrutinize the provisions under section 23-26 of Law 35/1997 on the organisation and operation of the institution of Ombudsman, one can notice that his sole role is *to insist* before public institutions, especially upon the request of persons that were aggrieved by different forms of activities of such authorities – either from explicit or implicit administrative acts, positive or negative – to reverse their decisions and thus redress the damage that, hypothetically, a citizen had sustained. In addition, in the event his claim is dismissed or there is no answer to his inquiries, the only weapon available to the Ombudsman is that of referring the matter to a different public authority: for instance, if local authorities violated the rights of certain persons, he will call for the intervention of the Prefect; if the Prefect or central authorities are the ones that violated fundamental rights, the Ombudsman will refer the matter to the Government; and unless the latter replies or takes the appropriate measures to redress the damage, he will take the matter before the Parliament. The word does not seem, in this particular case, a weapon powerful enough for the Ombudsman, and the Law 35/1997 provides no other efficient remedies available to him.

**B. A novelty: the Ombudsman–stakeholder in objective contentious matters.** In this context it is likely that Law no. 554/2004, enacted seven years after the law regulating the organisation and operation of the Ombudsman came into effect, acknowledged that this public authority is also a stakeholder in objective contentious matters, able to file such cases in the name of those that he defends. Nonetheless, unlike the Prefect and the National Agency of Public Servants, that regulated this contentious matter (and) their special laws, the Ombudsman can rely exclusively on the provisions of section 3(1) of Law 554/2004, from which it follows that such case is deprived, itself, of substance, it actually being dependant on the behaviour of a natural person, which is in turn vulnerable:

a) if the natural person aggrieved by such act declares that she does not make the procedural action its own, it will be cancelled;

b) if, on the contrary, the person declares that she makes the matter her own, taking also into account that, in principle, the Ombudsman acts as a defender for another, and also the meaning of the expression „to make its own<sup>2</sup>”, *the action should become one of the aggrieved natural person*, therefore transforming it into a subjective contentious matter, and the Ombudsman should be removed from the case.

Or, this solution, partly explicitly stipulated by section 1 par. (3) of the law, and partly inferred by way of interpretation in a rational way, it seems unacceptable if we think of the mission of the Ombudsman, that of defending the rights of

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<sup>2</sup> „to make his own” (DEX) – *to take over, to secure control over sth., to take sth. in.* Or in other terms, according to the commonest meaning of this verb, the one to whom the object is “taken over from” by another, obviously will forfeit it.

persons in difficulty. Or, how could we acknowledge that this public authority is, legally speaking, in an even more vulnerable situation than the one it defends?

a) first of all, *de lege lata*, in the legal text under scrutiny the verb “to make its own”, should be interpreted figuratively when referring to ideas: *to agree with*, therefore, after the aggrieved natural person „acquiesces to” the case filed on his behalf by the Ombudsman, the latter continues to act as plaintiff, alongside the aggrieved natural person. Otherwise, the plaintiff natural person will, most likely, ... be ordered to pay legal costs<sup>3</sup>! Because not only will he be deprived of the moral authority vested with the Ombudsman, but also of the know-how of the administrative apparatus that makes this institution operational. Or, as more often than not such natural persons are precisely those that could not afford a lawyer, the legal text thus interpreted contains... the recipe for a disaster! Not only that the odds for such an administrative matters case are that it be dismissed, but, moreover, in the given conditions, the Ombudsman could acquire a reputation of... revolt instigator against the authorities, instigator that, however, will fail to stand to the end by the one that he supported. Or, in the long run, such a reputation will sap, beyond any doubt, this public institution.

b) secondly, *de lege ferenda*, maybe one should renounce that a continuance of the Ombudsman’s case be conditional upon the agreement of the aggrieved person, which thus becomes a sort of “Achilles’ heel” in objective contentious matters. The public authorities will learn, undoubtedly, in time, to speculate this soft spot, putting pressure on a person, already in a vulnerable position, not to acquiesce to the action submitted by the Ombudsman<sup>4</sup>. That I precisely why the legal text should be revisited: if the Ombudsman is the one that files a petition requesting explanations, or seeks remedies to a human rights violation, if he is still

<sup>3</sup> See in this regard also Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 449-453; Cătălin-Silviu Săraru, *Legea contenciosului administrativ nr. 554/2004. Examen critic al Deciziilor Curții Constituționale 2004-2014*, C.H. Beck Publishing House, Bucharest, 2015, pp. 39-43.

<sup>4</sup> As indicated on another occasion (Ov. Podaru, *Organismul social interesat – un jolly joker al contenciosului administrativ -The interested social body – a jolly joker of the administrative contentious matter*, in „Revista Română de Jurisprudență”, issue no. 5/2016 pp.143-145), that the same situation applied in the case of the (apparent) objective contentious matter– actually a delegate,d subjective contentious matter, exerted by the associations and foundations set-up to defend certain human rights: normally, this kind of contentious matter should meet the same conditions as that in the matters exerted by the interested social body, because otherwise all the conditions and limits required by Law no. 554/2004 would be very easily circumvented (if an *educated* and *clever* person were to fail to qualify to exert in due time an administrative contentious matter, it would suffice to find another two persons and establish together an association and initiate a contentious matter, this time in the name of the newly formed legal person. It does not look normal. However, this logic should apply very carefully (if ever) in case of NGOs that defend vulnerable minorities, that are not concocting “schemes” (i.e., creating artificial conditions) in contentious matters, they should be purely and simply protected, both by the Ombudsman and by the associations/foundations that act in their name! Provided that, however, we should admit that special provisions are required, because a judge would find it very difficult to grant the claims of any such legal subject against the will of the aggrieved person under the contested act. But could in such a matter the judge be sure that the will of such a person is free?

the one who, in case of failure to address his request, raises the issue with upper administrative bodies, or even with the Parliament (in the case of the Government), all such steps being exerted **in his own name** (even though the aggrieved person is named in administrative acts and documents), the jurisdictional approach should be therefore framed along the same vein. Or, in the worst case, the court should be allowed to continue or not the procedure without the agreement from the aggrieved party, depending on the actual illegality, respectively the actual status of such natural person. Otherwise, the administrative contentious matter initiated by the Ombudsman will play a decorative role only.

## 2. On the contentious nature of normative administrative acts. The prefect and the citizen, face to face

**A. The bone of contention.** *“The prefect can directly challenge before the administrative court the acts issued by the local public administration authorities, if he deems them to be non-compliant; such court case shall be filed in the period set forth under section 11 par. (1), which shall begin on the day the act is notified to the prefect in the terms and conditions stipulated hereunder”*, tell us, unequivocally, the provisions of section 3(1) first sentence of Law no. 554/2004. And, considering that, according to section 49 of Law no. 215/2001 on local public administration, any acts issued by such authorities – either individual or normative – are also to be notified to the prefect; apparently the 6 month period should apply to any such acts.

However, on the other hand, according to section 11 (4) second sentence of Law no. 554/2004, *“the administrative acts having a normative character deemed non-compliant can be challenged at any time”*. And the uncertainties connected to the correct relationships between the two legal texts start here: should the distinguishing criterion be linked to the **plaintiff** (and then, if we refer to the aggrieved natural/legal persons the *rule* is to distinguish between normative acts, challengeable at any time, and the individual ones, challengeable only within the 6 month period, and if we refer to the prefect, who is sort of an *exception*, that of an absence of any distinction between the normative acts and the individual ones, either having to be challenged within the 6 month period) or, on the contrary, such criterion is linked to the **character of the act** (so that, in the case of individual acts we have to follow the 6 month period rule, applicable to the prefect, too, while, in case of normative acts, there is also a general exception, that of imprescriptibility of action?). From the standpoint of systematic interpretation, either of the two versions looks fine: the first emphasizes the provisions of section 3 (1), where the subject in the sentence is the **prefect** (and here we apply the above mentioned criterion), while the second focuses on the provisions of section 11(4) where the subject in the sentence is the **normative act**<sup>5</sup> (and the relevant consequence that ensues)<sup>6</sup>.

<sup>5</sup> Our argument would have been completely different, from the standpoint of a systematic interpretation of these legal texts, had the provisions under section 11 (4) been worded as follows:

**B. Resolving the dispute. A rational solution.** However, four compelling arguments should tip the scales towards the second version – **the prefect can challenge administrative normative acts at any time<sup>7</sup>, too:**

1. an additional observation linked to the toponymy of section 11 of Law no. 554/2004: paragraph (1), (2) and (2<sup>1</sup>) obviously refers to the subjective contentious matter having as object *individual administrative acts*; followed by paragraph (3) which states that “*In the cases filed by the Prefect, Ombudsman, Public Prosecutor’s Office or by the National Agency of Public Servants, the period runs from the date that the non-compliant act was acknowledged, with the provisions of paragraph (2) being applicable accordingly*”. Thus, not only that such a provision, addressing the legal status of the prefect (among other subjects in the objective contentious matter procedure), in the wake of regulations aimed at individual acts, leads us naturally to believe in this category only, but also makes an explicit reference to paragraph (2), therefore it cannot apply to normative acts, too. And immediately after follows the neutral wording of paragraph (4), according to which normative administrative acts can be challenged at any time, of course, as it is implied– by any of the previously indicated subjects of law, be they stakeholders in subjective or in objective contentious matters.

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“*Natural or legal persons that consider themselves aggrieved by normative acts can challenge such acts anytime*”. However, the current wording is neutral and, therefore, has a level of generality that, eventually, lies at the root of the controversy at stake.

<sup>6</sup> The legal doctrine in the subject, quite scarce, is itself diverging. For instance, an opinion (D.-C. Dragoș, *Legea contenciosului administrativ – comentată și adnotată*, Ed. CH Beck, Bucharest, 2009, p. 143) argues that, starting from the legal text in effect prior to the amendment of Law no. 554/2004 from 2007, the will of the legislator was to limit the prefect, after the amendment was enacted, to the 6 month period applicable to the normative administrative acts, too. Another opinion (I. Rîciu, *Procedura contenciosului administrativ*, Ed. Hamangiu, Bucharest, 2009, p. 138), acquiesced to the opposing argument: “*as normative administrative acts can be challenged at any time, according to section 11(4), therefore, such legal provision is also applicable to administrative acts having a normative character subject to the analyzed administrative oversight*”. It is true that if, continues the same author to wonder, *de lege ferenda*, would not be more appropriate to set a deadline in the case of normative acts, too, given the principle that governs the security of legal relations. However, *de lege lata*, the solution is unquestionable. On the other hand, case law is quasi-inexistent. There are some isolated solutions that considered, with a “flimsy” motivation, that the 6 month period is applicable to the prefect’s case regardless of the nature of the act, on the consideration that *ubi lex non distinguit, nec nos distinguere debemus* (Maramureș County Court, transcript from 5 March 2015, non-published). Conversely, even our Supreme Court, in a wording that lends itself to ambiguity, indicated that “*The fact that the prefect did not consider the act issued by the local public administration authority as non-compliant does not rule out the likelihood that any person that considers herself aggrieved in her legitimate rights and interests would challenge it [section 1 (1) of Law no. 554/2004] and, insofar as the administrative act has a normative character, court proceedings can be initiated anytime [section 11(4) final sentence of Law no. 554/2004]*” - Î.C.C.J., s.c.a.f., dec.civ. no. 3836 from 24 September 2010, at <https://legeaz.net/spete-contencios-inalta-curte-iccj-2010/decizia-3836-2010>., consulted on 10.05.2018.

<sup>7</sup> In the sense that the action in administrative litigation brought by the prefect intended to protect the public interest should not be subject to prescription, see also Cătălin-Silviu Săraaru, *op. cit. (Drept administrativ...)*, 2016, p. 461.

2. the argument on the substance should not be disregarded either: why should the prefect have a lower legal status than that of the simple citizen? *Is it because he is privileged in terms of act disclosure forms, the normative act being not only publically disclosed but also the special recipient thereof? It should not be that way!* Because, there are certainly private persons that know the content of the act even before its publication (and clear evidence could be provided in support of it) and, in spite of it, they are not constrained by a certain time limit to act. *Is this because, in defending a general interest (rule of law) he can weigh the legality of the act from the very moment of its notification, while, in the case of the private person, the latter could have no interest in acting from the outset, because, hypothetically, the provisions of the act would not be applicable to him?* This is an apparently compelling argument! However, at closer scrutiny, at least two strong counter-arguments challenge it: the **first** has to do with the public interest prioritising principle that must take precedence in administrative law in every situation; or, limiting the powers of the prefect will in time be tantamount to placing such principle on a subsequent level<sup>8</sup>. The **second**, a more subtle one, namely, in the case of normative acts, legality is a dynamic concept: a legally issued normative act will not necessarily remain the same until its explicit abrogation, as it can become subsequently illegal. We are thus speaking about a little explored concept in our legal system, that of occurred illegality<sup>9</sup>. It is therefore desirable to acknowledge the unlimited remit of the prefect to challenge the normative administrative act, even by virtue of this correctly interpreted legal text;

3. A third counter-argument is of a constitutional nature: if in the case of subjective contentious matters, article 52(2) of the Constitution clearly states that *“The conditions and limits for the exercise of this right are determined by organic law”*, article 123 (5) of the same fundamental law no longer mandates in any way the organic legislator to impose any limitation to this form of objective contentious

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<sup>8</sup> For instance, as long as prefects are appointed on political criteria (“by secondment”, extended every six months), it is likely that a given prefect and the issuer of the act belong to the same political party, therefore the refusal to challenge an administrative act should be based on other reasons than that – obviously – the act was duly issued. Therefore, the likelihood of having a real control on the normative act legality could come about only after the removal of the prefect. On the other hand, even though we would not speculate on the political games, it is possible that the material adverse consequences of a normative administrative act on society be visible only in the long run. It would be unusual, at that moment, and against the principle of the public interest prioritising principle, that the constitutional powers vested in the prefect would prevent him exerting his remit.

<sup>9</sup> It is true that, in principle, this situation should not occur but in extreme circumstances, because in the hypothesis of a normative act carrying greater legal force, the correct solution would be to tacitly abrogate the inferior normative act. However, judicial life is much more complex than one could imagine it in an office: it is very likely that, in certain hypothesis in which the overlapping of the regulatory matter is beyond discussion, the abrogation (animated by the *intention to abrogate*) not be beyond any discussion; a judge however, spotting the contradiction between the content of the act and the norm carrying greater legal force, could ascertain that nullity (which only partially cancels the effects of such act, that is, in relation to the future) would be the more appropriate solution of the specific situation.

matter, therefore even the 6 month period determined for individual acts might be declared unconstitutional<sup>10</sup>, let alone mentioning it for extension to the normative acts situation. This rationale has been accepted by the High Court of Justice when it delivered an injunction closely related to the constitutional remit of the prefect to exert supervisory control<sup>11</sup>, rationale that has been taken over for an older decision handed in by the Constitutional Court<sup>12</sup> the latter ruling that “*unlike the administrative contentious matter submitted by the citizen or by an aggrieved legal person, which by organic law can be subject to conditionalities and limitations, as stipulated under article 48 (2) of the Constitution, the prefect’s action is not subject, on a constitutional level, to any conditionality or limitation. Paragraph (4) of article 122 of the Constitution does not include any wording of the like: <<could challenge, in the conditions provided by the law, before>>, therefore the constitutional text makes no reference to the law. As a result, any provision in any law that allocates time limits for the Prefect to act is a provision contrary to the Constitution* [our highlight, Ov.P.], as it is the case of section 101 (2) of Law no. 69/1991 that stipulates that the <<Prefect shall make a decision on the legality of this act, within 15 days following the day the act was notified, that is to be made within 10 days of adoption >>. We will retain as unconstitutional, and in breach of article 122 (4) of the Constitution, only the reference to the 15 days period, and not that to the 10 day period. [...] **Time limits and the preliminary procedure set forth in the Law on administrative contentious matters are applicable only to the administrative contentious matters raised by the aggrieved persons, not to the action of the prefect as a result of his exerting the administrative oversight role**” [our highlight Ov.P.]. The fact that this decision of the Constitutional Court served as a (positive) departure point for the rationale used by the High Court of Justice that (in a different context) interpreted the prefect’s oversight restrictively (namely,

<sup>10</sup> In the case of individual acts we can build-up a contrary reasoning, starting from the provisions of article 20 of the Constitution: allow the prefect to challenge, without any time constraints, individual acts that create rights in favour of certain citizens, which could be a solution that is contrary to the legal relations security principle, that both the Strasbourg and Luxembourg Courts acknowledge in their case law. Therefore, in the light of this text contained by the fundamental law, with a supra-constitutional value, this principle should be applied with priority and, as a consequence, one could argue that, from this standpoint, the 6 month period required for challenging individual acts, is constitutional. Theory cannot however be applied to normative acts, purely and simply, because in the case of these acts the legal relations security principle is not applicable (at least from the traditional standpoint of the stability of law)! Therefore, since such normative acts can be challenged at any time by any person that considers herself aggrieved by its provisions, nobody could contest the stability of such legal relations. Or, a relative stability (solely with regard to the prefect) is unconceivable: it is either absolute (no legal subject cannot cut back on acquired rights), or its does not exist at all.

<sup>11</sup> This decision is fully accessible on the site of the High Court of Justice at <http://www.scj.ro/1093/Detalii-jurisprudenta?CustomQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=120675> (subsequently published in Official Gazette of Romania, Part I no. 501 from 08/07/2015).

<sup>12</sup> Constitutional Court, Decision no. 137 from 7 December 1994, published in Official Gazette of Romania, no. 23 from 2 February 1995.

limited to administrative acts, and not to all acts of local public administration, regardless of their nature) comes in support of reasoning:

a) on one hand, the High Court of Justice acquiesces to this idea in principle, that of the impossibility to limit or make conditional, by organic law, the oversight exerted by the prefect, since the Constitution did not mandate the legislator for such purposes;

b) on the other hand, the same Court resorts to a solution to limit the oversight of administrative acts **starting from the constitutional provision of article 123 (5)** that clearly provides that the prefect's action is filed with the administrative contentious matters court; or, it is therefore obvious, that *the meaning of the constitutional text itself* (and not of another text of organic law) is that of drawing this oversight red line. We are, therefore, in a different assumption, that in which the Constitution itself sets out self-imposed limits in the application of its own text.

4. Finally, we should ask ourselves also whether article 123 (5) should not be interpreted in the light of paragraph (3) according to which "*The remit of the prefect is determined by organic law*". Being a duty of the prefect, oversight couldn't it be regulated (therefore, implicitly, make it conditional upon or limited by) under the organic law? **The answer is an unfailing no:** the sole reasonable interpretation, considering the setting of the two paragraphs in the constitutional context, would be that *the duties of the prefect determined by organic law can also be limited by or made conditional upon the same organic law*. However, oversight is a constitutional level attribution, and after having setting it forth in paragraph (5) of our fundamental law did no longer explicitly allow the legislator to add on to this regulation any further limits or conditions. After all, to amend /add on to the Constitution is as serious as to explicitly deviate from its provisions. How would it be if an organic law text, regulating a type of oversight (prefect's action against *specific* acts of the local public administration), were to determine the fact that such a case in objective contentious matters would not automatically suspend the challenged act: could such text of law be considered as constitutional, benchmarked against article 123 (3) of the Constitution? That would be hardly conceivable.

### **3. On the odd limitation of the possibility of the stakeholder in an objective contentious matter to back out**

According to section 28 (3) of the law, "*Cases filed by public law persons and by any public authority, in defence of a public interest, and those filed against normative administrative acts cannot be withdrawn, save when such cases were filed also with the aim to defend the legitimate rights and interests that could benefit to natural or private law legal persons*".

**A. Grammatical ambiguities.** At a first glance, the rule, the **interdiction set out for public law person and public authorities to withdraw actions in objective contentious matters**, looks clear-cut. The grammatical ambiguities

make us call into question the extent of such interdiction from at least three vantage points:

1. *Does this rule also apply to subjective contentious matters?* If we look more carefully at the text, we will notice that the grammatical construction of the phrase leads to this conclusion: “*Cases (1) filed by public law persons and by any public authority, in defence of a public interest*” (it’s about assumptions that are exclusively related to subjective contentious matters, because the stakeholder is explicitly indicated, as well as its purpose), “*as well as (2) those filed against normative administrative acts*” (this time there is no longer any limitation referring to the plaintiff, set out by a natural construction such as “*...by the law subjects above mentioned...*”, we could therefore naturally assume that this second part of the text refers to any plaintiff, provided that the object of the action is a normative administrative act. It is very likely, however, that this was not the intention of our legislator, because it does not seem acceptable that a private person who, in view of preserving her subjective rights or private legitimate interests filed an administrative contentious matter, be prevented from withdrawing it only because, alternatively, that could anticipate and adversely affect a legitimate public interest or, more abstractly, lawfulness in general. On the other hand, this grammatical correct reasoning would totally contradict any **exception** to the rule, because *it is always the stakeholder in subjective contentious matters that files the case... also for the purpose of defending his legitimate rights and interests that he might enjoy*, therefore, in this situation, we could never be in the presence of a **rule** that would make a case impossible to be withdrawn. However, we couldn’t help but notice the unfortunate wording of the text employed by the legislator. And if that were the only one...

2. *Could there be cases in objective contentious matters that would have as object the cancellation of a normative administrative act but which, however, are not filed “in defence of a public interest”?* The question in itself looks nonsensical, however, the wording of the text requires us to raise it: if the answer were negative, it would mean that the second assumption of the text would be useless, which, on a first reading of it, it doesn’t look natural. But, unfortunately, this is the only logical conclusion. For instance, according to article 2 (1) r), „**public legitimate interest**” means, among others, “*the interest that refers to legal order and constitutional democracy*”, and from the definition of the administrative act - article 2 (1) c) of the law – it obviously follows that the normative act is issued “*for the purpose of setting-up the mechanisms for the enforcement of the law*”. Or, combining the two ideas, how could we reach the conclusion that the mechanisms for the enforcement of the law (an activity that by definition should be lawful), could be set outside the “legal order” of a state? Certainly – we can’t! And then we only need to conclude that when a public authority challenges in (objective) contentious matters a normative act deeming it unlawful (act that, consequently, failed to set-up the appropriate mechanisms for the enforcement of the law), its case pertains to the legal order and, therefore, is animated by a public interest. Consequently, we could not but conclude that the legislator used another

unfortunate wording, its sole benefit being, for the legal experts unfamiliar with the fundamental concepts of administrative law and contentious matters, the explicit reference to the normative administrative seems clear, therefore, useful.

3. *Are there two different situations of objective contentious matters, one exerted **exclusively** for the defence of a public interest and the other one, exerted **also** in defence of a private interest?* This second question is legitimate, also: by using the adverb „also”, the legislator, logically, suggests that the opposing category **also** exists: the objective contentious matter exerted “without” defending a private interest (or subjective right), therefore *exclusively for defending a legitimate public interest*. Actually, this interpretation, based on a sort of mathematical addition of two types of distinct aggrieved interests, is fallacious: any administrative act that affects the public interest, ultimately (that is, from a temporal perspective, therefore, likely) comes in the end to affect one or several legitimate private/individual subjective rights, because, otherwise, the challenged act (or, more exactly, the reason for its illegality), would be, actually, harmless, so that its cancellation would look like... devoid of interest! That is precisely why this separation of the two defended interests represents at the same time a communication error and an optical illusion: actually, there is always a harm done to the public interest as well as to one/several private interest(s), however, in certain situations, the private interest of one/several person(s) looks like requiring a much more obvious redress/protection than the public interest which, diffusely, lingers in the background. For instance, in urban planning and building terms, generally the regulations connected to building strength or sunlight requirements should be considered as being of public interest, abstractly speaking, however, in a real life situation, the future construction is likely to impact, in terms of strength and sunlight, only the neighbouring building<sup>13</sup>. Therefore, insofar as the owner of the latter building gives his agreement, the adverse impact on a hypothetical public does not look like deserving protection, and, if the potentially damaging act is challenged in contentious matter by the prefect, a renunciation to the case could look like, in certain conditions, as a reasonable solution.

**B. How should be this text correctly interpreted?** The highest risk of misinterpreting this legal text comes from its wrong grammatical comprehension,

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<sup>13</sup> It is worth noting that our earlier doctrine contend that there are also rules exclusively designed for the protection of a public/general interest, case in which no private person is entitled to raise a subjective contentious matter because the harm would be related to a mundane interest only: for instance, city aesthetics rules, mandatory setback requirements for broadening the streets, etc. Conversely, other rules also cover the subjective rights of neighbours (the obligation that a building comply with certain distances from existing buildings or that of having windows open only at regulated minimum distance, the obligations in terms of polluting buildings location, etc, situation when the general interest is doubled by a private one (see C.G. Rarincescu, *Contenciosul administrativ român*, 2<sup>nd</sup> edition, Ed. „Universala” Alcalay & Co., Bucharest, 1936, p. 231-234). Unfortunately, this extremely clear-cut distinction at theoretical level tends nowadays to be blurred because the courts seem almost always to identify the inconvenience caused to the neighbor by failing to comply with planning regulations with a private legitimate interest, based on the very idea of neighborhood, a failing that, according to art. 8(1<sup>1</sup>) of the law, “logically” results from the breach of the legitimate public interest in question. Maybe a rethinking of these notions would help.

as depicted above: *no renunciation would be available in the event of a subjective contentious matter related to the exclusive defence of a public interest, while, in the event such public interest were to be joined to a private one, the withdrawal of the case would be, on the contrary, allowed by the same legal text.* This interpretation is flawed in the first place in terms of logic, because in such a situation we find ourselves in the presence of a sort of seriously distorted principle in the sense that **he who can't less ... can more!** But actually the sole rational and sensible interpretation should be underpinned by the following theoretical elements<sup>14</sup>:

1. as we indicated above, the issue is that, although *in abstracto* the objective administrative matters case is aimed at protecting a public interest, *in concreto* the act adversely affects only one or several private legitimate interests, that certain natural/legal persons might have (for instance, different privacy aspects, ownership, but not life, public health or other of the same nature);

2. the individual concerned, in all likelihood themselves parties in the litigation (either as junior stakeholders in favour of the main stakeholder of the objective contentious matter action, or participants in their own name or plaintiffs in a subjective contentious matter that was joined to the objective contentious matter), or at least petitioners that started, through the petition they had submitted to the contesting authority, its case in contentious matter, abandon themselves the procedure or the legitimately claimed right/interest. Therefore, alternatively, an abandonment looks fraudulent: the stakeholder of the objective contentious matter case files it **mainly** in defence certain tangible private legitimate rights/interests (materialisation of more general public interest<sup>15</sup>), consequently, if the stakeholder of the latter insists on continuing the case, abandonment denotes inconsistency on the part of the contesting authority, a situation giving rise to suspicions with regard to its good faith, and implicitly to the lawful cause of the abandonment. On the contrary, only in the situation where the aggrieved parties were to show that they are no longer interested in continuing the procedure, abandonment could be a viable option;

3. finally, in this case no public interest deserving jurisdictional protection subsists any longer. That is precisely why, in the event of a litigation that presupposes harmful administrative acts against diverse social values that cannot be summed-up to simple interests (right to life, public health, environment, public safety, traffic, etc.) an abandonment should be considered as having no effect, because the situation is identical, from a legal standpoint, with that where the harm **exclusively** affects an abstract public interest (general state of legality).

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<sup>14</sup> Regarding the interpretation of art. 28 par. (3) of the Law no. 554/2004 of the administrative litigation, see also Cătălin-Silviu Săraru, *op. cit. (Legea contenciosului administrativ...)*, 2015, p. 358-360.

<sup>15</sup> In general, an administrative act *could harm us all*; however, it actually *harms* only some of us. For instance, if because of the issuance of an illegal administrative act an important medicine is lacking from the market, that *could affect us all* (and, therefore, *be of interest to*) us all, because one never knows which of us, suddenly, would need it; actually, at one point, its absence *affects* (and is, therefore, effectively of *interest*) to those who unfortunately really depend on that medicine.

In conclusion, the threefold deficient wording of the legislator betrays yet again a weakness of the objective contentious matter: namely, *because* (and, sometimes, even *in breach of*) **some private legitimate interests**, the public interest is at its turn endangered by a potential fraudulent abandonment of the grievance or for it being loosely contended, therefore, being deprived of the pre-eminence that characterise it in the administrative law. It is likely that, *de lege ferenda*, the legal text should be rephrased: “*Case in objective contentious administrative matters regulated by law cannot be withdrawn, save for when filed mainly in defence of legitimate rights and interests that could be available to private law natural or legal persons, at their request, and only in the case when the petitioners, at their turn, waived the legitimate right or interest that was harmed by the contested act, and such harms are the only current or potential negative consequences of the same administrative act*”.

A general conclusion?

In a rule of law state, objective contentious matters cases should be the most credible, for the mere fact that... they are not based on the personal interest of the plaintiff which, normally, should remain objective. It is precisely for that reason that any elements that prove vulnerable (whether they are or not intentionally set out by the legislator) should be removed, most and foremost, by the case law by way of interpretation. In the case of clear-cut provisions however (as in the case of the Ombudsman, first of all), the intervention of the legislator is required. Because it is in this way only that the law would ultimately prevail.

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