

## **Aspects pertaining to the legal regime of Presidential decrees in Romania**

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### **Abstract**

*The doctrinal debates on the legal regime of presidential decrees and the recent case-law of the Constitutional Court have determined the present approach for analysis of some aspects pertaining to the issues arising in relation to these acts, especially their legal features and nature and, from this perspective, the differentiations with regard to the challenging of presidential decrees – we refer, in this context, to the extension of the control carried out by courts. The conclusions of the study reveal the importance of addressing and establishing the relations between public authorities, inclusively with regard to the substantiation, issuance and implementation of presidential decrees, in relation to the principle of constitutional loyalty.*

**Keywords:** *presidential decree, administrative act, constitutional review, administrative litigation.*

**JEL Classification:** K23

### **1. The regulation and the legal features of presidential decrees**

According to Article 100 (1) of the Constitution, “*In the exercise of his powers, the President of Romania issues decrees that shall be published in the Official Gazette of Romania. Failure to publish any of the decrees causes such to be non-existent*”<sup>3</sup>.

Having interpreted the cited constitutional text and the provisions of Title III Chapter II of the Constitution - *the President of Romania*, with reference to Law no.554/2004 on Administrative Litigations, the conclusion is that presidential decrees are legal acts, namely administrative acts, unilateral manifestations of will, issued in order to produce legal effects, under public authority. The definition of

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<sup>3</sup> These constitutional provisions should be interpreted in conjunction with the other constitutional provisions, which establish the exercise of the powers of the President of Romania also through other acts: e.g. messages, statements, calls, letters; under this aspect, the doctrine distinguishes between political acts and legal acts of the President of Romania - see E. Albu, *Natura și regimul juridic al decretelor emise de președintele României* [Nature and legal regime of decrees issued by the President of Romania], in the „Curierul Judiciar” Magazine, no. 9/2006, p. 85

the administrative act is given in Article 2 (1) c) first sentence of Law no.554/2004 on Administrative Litigations<sup>4</sup>, which states that “*For the purpose of this law, the terms and phrases below shall have the following meanings: [...] c) administrative act - unilateral act of individual or normative nature issued by a public authority, in the exercise of its powers, for law enforcement organisation or effective law enforcement, which creates, modifies or extinguishes legal relationships; [...]*”.

Presidential decrees can be of both individual and normative nature. The case-law of the Constitutional Court<sup>5</sup> and most of the doctrine share this opinion, but there are views that deny the normative nature of presidential decrees.<sup>6</sup> Agreeing with the view expressed by the majority and confirmed by the case-law of the Constitutional Court, we believe that one cannot deny the normative nature of decrees setting out obligations for broad categories of legal subjects, such as decrees which establish a state of siege, state of emergency, those involving measures to repeal an aggression, or those concerning a consultative referendum<sup>7</sup>.

Presidential decrees cannot be secret. To that effect, constitutional provisions stipulate, under the sanction of non-existence of the act, publication of the decree in the Official Gazette. As of the date of publication the decree enters into force.

All decrees are binding and enforceable; the State authorities who are the recipients thereof are responsible for the implementation of those stated in the act.

Without insisting on these legal features, widely analysed in the doctrine of administrative law to which we have partly referred, we shall focus our analysis on issues that have aroused controversy in practice, determined also by the fact that neither the basic law nor the infraconstitutional law contain specific provisions thereto.

## **2. Countersignature by the Prime Minister of presidential decrees. Meaning and legal consequences**

Pursuant to the provisions of Article 100 (2) of the Constitution, “*the decrees issued by the President of Romania in the exercise of his powers provided under Article 91 paragraphs (1) and (2), Article 92 paragraphs (2) and (3), Article 93 paragraph (1), and Article 94 subparagraphs a), b) and d) shall be countersigned by the Prime Minister*”.

<sup>4</sup> published in the Official Gazette of Romania, Part I, no. 301 of 7 December 2004

<sup>5</sup> For example, Decision no. 459/2014, published in the Official Gazette of Romania, Part I, no. 712 of 30 September 2014

<sup>6</sup> For distinctions and opinions expressed in the doctrine in this regard, see M. Preda, B. Vasilescu, *Drept administrativ, Partea Specială [Administrative Law, Special Part]*, Lumina Lex Publishing House, Bucharest, 2006, p. 26 et seq.; V. Vedinaş, *Drept administrativ [Administrative Law]*, 5th Edition, Universul Juridic, Bucharest, 2009, p. 308 et seq.; R. N. Petrescu, *Drept administrativ [Administrative Law]*, Hamangiu, 2009, p. 70 et seq.

<sup>7</sup> To the same effect see S. Deaconu, *Constituția României, Comentariu pe articole [Constitution of Romania, Comments on Articles]*, coordinators E. S. Tănăsescu, I. Muraru, C. H. Beck, Bucharest, 2008, p. 847

It refers to the following powers of the President of Romania: conclusion of international treaties in the name and on behalf of Romania, accreditation and recall of diplomatic envoys of Romania abroad and approval of setting up, closing down or change in rank of Romanian diplomatic missions abroad, declaration of the partial or general mobilization of the Armed Forces, measures of repeal of armed aggression against the country, institution of the state of siege or the state of emergency in all the country or only in some administrative units, award of decorations and titles of honour, promotions to the ranks of marshal, general and admiral, granting of individual pardon. The sanction for the lack of countersignature of the decree is the incurable nullity thereof.

The doctrine pointed out in this regard that the countersignature act derives from the lack of responsibility of the President in relation to Parliament, unlike the Government who is politically responsible only to Parliament for its entire activity. In this way, through countersignature, Parliament exercises an indirect control over the President and the Prime Minister will be responsible also for the presidential decrees he countersigns<sup>8</sup>.

It is similarly stated in the case-law of the Constitutional Court; the Court, upon settlement of a case concerning a legal dispute of a constitutional nature between the President of Romania and the Prime-Minister, following the latter's refusal to countersign some decrees awarding decorations, examined the following issues:

**a) whether or not the Prime Minister can refuse to countersign a decree [issued in the respective case on the grounds of Article 94 a) of the Constitution];**

**b) if so, whether or not he must give reasons for his refusal.**

As concerns the first of the issues under analysis, the Court found that the purpose for which the constituent legislature introduced the obligation of countersignature of presidential decrees laid down in Article 100 (2) of the Constitution is given both by the need of review of the legality of the act of the President and by the need for a form of political responsibility in the sense that one of the public authorities involved in the procedure of issuance of the decree awarding decorations must assume responsibility before Parliament. As the President is not politically accountable to Parliament, this responsibility lies with the Prime Minister for the act of countersignature. Therefore, in view of the countersignature of the decree awarding decorations (i.e. the decree at issue in the case brought before the Court), the President of Romania and the Prime Minister, prior to the issuance of the decree, have the possibility to have a preliminary consultation, even an informal one. Thus, in terms of political accountability, Article 95 of the Constitution regarding the suspension from office may be applicable to the President of Romania, case in which the voters, and not the Parliament, can dismiss the President. As concerns the Prime Minister, Article 112

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<sup>8</sup> V. Vedinaş, *cited paper*, p. 310

on questions, interpellations and simple motions or Article 113 of the Constitution on motions of censure can become applicable, in which case the Government could be dismissed by Parliament. This constitutional mechanism enables, on the one hand, the plenary and direct manifestation of parliamentary control over the activity of the Prime Minister and, ultimately, over the activity of the Government. On the other hand, it ensures, in this way, also a balance between State powers, the executive, represented by the President and the Prime Minister, on the one hand, and the legislative, represented by Parliament, on the other hand, avoiding the possibility of abuse of power from the executive.

The Court concluded that the President of Romania has the power to issue the decree awarding decorations, while Prime Minister has the power to countersign it; legal acts of the President (decrees), as well as legal acts of the Prime Minister (countersignature) in addition to their legal component have a strong political significance; the political responsibility assumed by the Prime Minister for acts committed during the mandate covers also the countersigning of presidential decrees; none of the two subjects of law can compel the other to perform or to consent to the enforcement of acts that would affect either the political support of the electorate, or that of Parliament; the consensus should characterise the relationship between the two subjects of law when they must work together to issue a decree (signature/ countersignature); and, finally, the lack of countersignature of the Prime Minister leads to the inexistence of the decree awarding decorations. As a result, **the Prime Minister has the power to refuse to countersign a constitutional decree awarding decorations both for reasons of legality and for reasons related to opportunity.**

Regarding the second issue, namely the refusal to countersign the decree, the Court held that the issuance of the decree awarding decorations attests the existence of an agreement of will between the President of Romania and the Prime Minister, i.e. between the vertices of the executive power, as result of consultations held between the two public authorities. However, in all these cases, the award of decorations involves *a subjective element* on the part of the public authorities competent for this procedure. Thus, both the initiation of the procedure and the award itself of decorations are the result of the subjective assessments of these authorities who, for their conduct, are responsible, politically speaking, directly or indirectly, to the electorate or to Parliament, as the case may be. It follows a subjective assessments contest which ultimately could result in the issuance or non-issuance of the decree awarding the decoration, without the person proposed for decoration be aggrieved in any of his rights since he has only an expectation on the award of the decoration and not a right. Accordingly, the statement of grounds for the refusal to countersign the decree can neither be regarded as part of the refusal or as having a justified or unjustified nature and therefore it cannot be the subject of a judicial review carried out perchance by the Constitutional Court. Therefore, what produces legal effect is not the statement of grounds for the refusal or the justified nature of the statement of grounds for the refusal, but the refusal to countersign the decree. The statement of grounds would be nothing else but an

indication of the subjective reasons underlying the decision, without a legal purpose of this *technical action* as to generate a new competence for the President of Romania. **The Constitution does not provide either specifically or implicitly that the President of Romania could compel the Prime Minister to countersign a decree awarding a decoration in the event of an initial refusal on the part of the latter. It follows that the statement of grounds for refusal in itself has no legal consequence, so that the President of Romania does not have the eventual possibility, in case of a reasoned refusal, to take note of it, to not accept the reasons there given and, therefore, in these circumstances, to compel the Prime Minister, directly or indirectly, to countersign the decree awarding the decoration.** The Court also held that, given that neither the President nor the Prime Minister have initiated any consultation, and that the refusal to countersign the decree was not motivated, the initiator of the decree may, in turn, open a constitutional dialogue with the Prime Minister in order to clarify the reasons leading to the refusal to countersign the aforementioned decree and to reach a consensus, so as not to bring the case before the Constitutional Court, as the latter does not have the power to mediate such a consensus<sup>9</sup>.

### 3. Challenging presidential decrees

#### 3.1 The competent courts

Presidential decrees are covered, as a general rule, by the provisions of Article 126 (6) of the Constitution, according to which: “*Judicial review of public authorities’ administrative action shall be guaranteed via courts for administrative disputes, cases concerning relationships with Parliament or acts of military command being exempted. The courts hearing administrative disputes shall have jurisdiction to resolve applications filed by persons aggrieved by ordinances or, as the case may be, provisions in ordinances declared unconstitutional.*” Therefore, insofar, through the regulatory object, the decrees of the President do not fall within the scope of exempted acts, they can be challenged before administrative courts, under the provisions of Law no. 554/2004 on Administrative Litigations<sup>10</sup>.

Article 8 (1) of Law no. 554/2004 sets out in this regard that: “*Any person aggrieved in a legal right or a legitimate interest through an unilateral administrative act, dissatisfied with the response to the preliminary application or where he/she has not received a reply within the period specified in Article 2 (1) h*

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<sup>9</sup> See Decision 285 of 21 May 2014, published in Official Gazette of Romania, Part I, no. 478 of 28 June 2014; we consider that it is useful to mention also the conclusion expressed in the dissenting opinion to the decision: acknowledging that there is a legal dispute of a constitutional nature between the President of Romania and the Prime Minister, generated by the latter’s unmotivated refusal to countersign a decree issued by the President in exercising his power under Article 94 a) of the Constitution, it was held, in essence, that “in the application of Article 100 (2) of the Constitution, the Prime Minister of Romania, not having the right of veto, may refuse the President’s request to award decorations to certain persons, giving the reasons for such refusal”.

<sup>10</sup> published in the Official Gazette of Romania, Part I, no. 1154 of 7 December 2004

can bring the case before the competent administrative court, to request cancellation of all or part of the act, reparation of the damage caused, and possibly, compensation for moral damages. Such legal action before the administrative court may also be initiated by the person who feels aggrieved in one of his rights or legitimate interests due to the public authority's failure to respond to an application within the time limit or due to the unjustified refusal to respond to an application, as well as due to the refusal to perform a specific administrative action required for the exercise or protection of that right or legitimate interest."

Apart from the general competence of administrative courts and the circumstantiation required by Article 126 (6) of the Constitution, both the doctrine and the case-law have identified decrees of the President of Romania that could be subject to constitutional review, even if neither the Basic Law nor the organic law of the Constitutional Court expressly include them in the category of acts which may be subject to this review.

We refer to the decree establishing the object and the date of the referendum on which it was expressed the view that "it can be reviewed in terms of constitutionality by the Constitutional Court upon verifying the compliance with the procedural requirements for the organisation of the referendum"<sup>11</sup>.

Furthermore, the Constitutional Court, in its case-law, held that «pursuant to Article 146 i) of the Constitution, the Constitutional Court "sees to the observance of the procedure for the organisation and holding of a referendum, and confirms its returns". According to this constitutional provision, settlement of challenges addressed to the Constitutional Court on the observance of the procedure for the organisation and holding of the consultative national referendum involves, inter alia, also verification of the constitutionality of the normative acts issued in view of the organisation of the referendum or of those that establish procedural rules for the organisation and holding thereof, to the extent that settlement of challenges does not fall within the powers of electoral bureaus or courts of law.<sup>12</sup>». Therefore, the Court held that it was competent, under Article 146 a) of the Constitution, to resolve the challenge and thus to rule on the constitutionality of the decree setting the date and object of the referendum<sup>13</sup>.

We note that the possibility to carry out the constitutional review of this category of presidential decrees is determined by the very general powers of the Constitutional Court set forth in Article 146 a) of the Constitution in relation to the procedure for organisation and holding of the referendum. We recall in this respect also the reasons that underpinned the decision of the Constitutional Court upon examination, within the *a priori* review, of the Law on the organisation and holding of the referendum, i.e. that<sup>14</sup>, through its general wording, Article 146 i) of

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<sup>11</sup> S. Deaconu, in E. S. Tănăsescu, I. Muraru (coordinators), *cited paper*, p. 847

<sup>12</sup> Ruling no.1 of 15 October 2003, published in the Official Gazette of Romania, Part I, no. 728 of 17 October 2003

<sup>13</sup> Ruling no. 33 of 26 November 2009, published in Official Gazette of Romania, Part I, no. 918 of 29 December 2009

<sup>14</sup> Decision no. 70/1999, published in the Official Gazette of Romania, Part I, no. 221 of 19 May 1999

the Constitution, “recognizes the right of the Court to resolve constitutional disputes-related actions and, from this position, to settle challenges or notifications regarding potential deviations from referendum rules and procedures. [...] the scope of the right granted by the Constitution, namely «to see» to the observance of the procedures of organisation and holding of the referendum, also includes the Court’s possibility to act *ex officio* whenever it ascertains, by some direct means or based on the information acquired (whether from citizens, press, non-governmental organisations, etc.), any violation of the said rules and procedures. This possibility is intrinsically related to the exercise of the Court’s powers «to confirm» the results of the referendum”.

### 3.2 Purpose and scope of review of presidential decrees

Since the issues concerning the jurisdiction of courts and the scope of exempted presidential decrees were addressed in specialized doctrine and judicial practice, in what follows we shall refer to another issue raised in practice about the challenging of presidential decrees, namely the scope of review exercised by courts. In other words, presidential decrees subject to review by administrative courts can be censured by them in all respects or a distinction can be made as to the elements that can be submitted to their analysis and decision?

Indirectly, the Constitutional Court answered this question upon settlement of an exception of unconstitutionality of certain provisions of the Law no. 554/2004 on Administrative Litigations, in a case regarding a decree for appointment of a judge to the Constitutional Court.

On that occasion, the Court discussed the **dichotomous nature of the legal conditions that the person appointed must meet, i.e. objective conditions and subjective conditions. If the first category of conditions can be subject to verification by courts, in view of the objective nature thereof, the second category of conditions cannot be subject to such verification.** The Court held in this regard (referring both to the acts of the President for appointment to office and to those of Parliament) that “the decision of appointment to the public office belongs exclusively to the subjects provided by the Constitution and it involves a subjective assessment, based on information personally evaluated by each Deputy or Senator, who express a vote in the collective decision of each House of Parliament, or by the President of Romania, who expresses a personal choice within an individual decision. Once adopted these decisions, the choice of each decision-maker is assumed institutionally and politically, and the responsibility for the choice made is circumscribed to this framework”.

According to the Court, «a contrary interpretation would mean that, by analysing the subjective condition of “high professional eminence”, the courts vested with the power to carry out the judicial review of the decrees of the President, or the Constitutional Court, vested with the power to carry out the constitutional review of the resolutions of Parliament, would substitute themselves to the constitutional prerogatives of the President of Romania, the Senate or the

Chamber of Deputies, as appropriate, regarding the appointment of certain persons to public offices, insofar the decision of these authorities could be invalidated following a review based on equally subjective assessment by a court that would pronounce a judgment». In conclusion, courts cannot analyse and censor the option of the President of Romania by searching the reasons for which he makes use of his prerogative to appoint a judge to the Constitutional Court with regard to a person who is considered to meet the condition of high professional eminence, one of the conditions established by the Constitution; it can only verify and decide on the compliance with the objective conditions provided by law<sup>15</sup>. This legal reasoning substantiated the decision pronounced, i.e. that the provisions of Article 8 (1) in relation to Article 2 (1) c) of Law no. 554/2004 are constitutional insofar they are interpreted in the meaning that the decrees of the President on the appointment of judges to the Constitutional Court are excluded from judicial review in terms of verification of compliance with the condition of “*high professional eminence*”<sup>16</sup>.

The solution delivered by the Court and the reasons that underpinned it are consistent with those held in connection with the same legal issue, which was however analysed in relation to resolutions of the Parliament. Thus, through Decision no. 251 of 30 April 2014 relating to the challenge of unconstitutionality of the Romanian Parliament Resolution no. 14/2014 regarding the appointment of the chairman and of a non-executive member of the Board of the Financial Supervisory Authority [FSA]<sup>17</sup>, the Court held that in the case «it is alleged the violation of some specific provisions of the law that govern an objective condition, required to be fulfilled for appointment as a member of the FSA, i.e. the provisions of Article 9 (1) a2) of Government Emergency Ordinance no. 93/2012 on the establishment, organisation and operation of the FSA, as amended and supplemented, under which: “The FSA Board members must meet the following conditions: [...] have professional experience in the financial field, in credit institutions and/or non-bank financial institutions, of at least 9 years after the graduation referred to in subparagraph a1).”» The Court noted in this regard that, in setting forth the conditions that must be met by FSA Board members, Article 9 of Government Emergency Ordinance no. 93/2012 mentions professional experience in two separate texts, as follows: Article 9 (1) a) establishes that the FSA Board members must have “*appropriate professional training and experience in areas*

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<sup>15</sup> To the same effect, see Decision no. 8 of the Constitutional Court of Moldova dated 20 May 2013 on the constitutional review of certain resolutions of Parliament regarding the appointment and revocation of the Prosecutor General. The Court held that: “72. As concerns the argued non-compliance with the legal requirements of necessary experience, the Court held that whether or not the respective person meets the legal requirements is not an issue to be assessed by the Court as a question of law that may be subject to constitutional review. This issue is a matter of opportunity and may be subject to interpretation by the supreme legislative body, and not by the body of constitutional jurisdiction. As these are factual circumstances, they cannot be subject to review by the Court.”

<sup>16</sup> Decision no.459 of 16 September 2014, published in the Official Gazette of Romania, Part I, no. 712 of 30 September 2014

<sup>17</sup> published in the Official Gazette of Romania, Part I, no. 376 of 21 May 2014



where the FSA exercises its activity”, while Article 9 (1) a2) states that they must have “*professional experience in the financial field, in credit institutions and/or non-bank financial institutions, of at least 9 years after the graduation referred to in subparagraph a1).*” If the concept “*appropriate*” that circumstantiates the professional training and experience in the content of Article 9 (1) a) of Government Emergency Ordinance no. 93/2012 means an evaluation and assessment incumbent exclusively upon Parliament as authority in charge with the appointment of the FSA Board members, and not upon the constitutional court, the duration which circumstantiates professional experience, governed by the provisions of Article 9 (1) a2) represents an objective criterion - length of experience in the relevant fields, based on documented evidence, which can be verified by any interested person. To that effect is also Decision no. 389 of 2 July 2014 relating to the challenge of unconstitutionality of the Romanian Parliament Resolution no. 26/2014 regarding the appointment of the first vice-chairman, of an executive member, and of a non-executive member of the FSA Board<sup>18</sup>.

As concerns **the scope of the constitutional review in case of presidential decrees which may be subject to such review, it concerns the compatibility of the decree with the constitutional provisions.** Ruling on such a decree, the Court held that it “respects the imperative conditions imposed by the Constitution: Decree no. 1507 of 22 October 2009 for organisation of a national referendum was issued on the grounds of Article 90 and Article 100 of the Constitution, after consultation with Parliament; it establishes, according to Article 11 (2) of Law no. 3/2000 on the organisation and holding of the referendum, matters of national interest that are subject to referendum and the date of the referendum, according to Article 100 (1) the Basic Law; the decree was published in the Official Gazette of Romania, Part I, no. 714 of 22 October 2009 and was brought to public attention through press, radio and television.” As for the arguments put forward by the authors of the challenge in the sense of cancellation, as unlawful, of the presidential decree, motivated by the fact that it was issued “with abuse of power and misuse of power”, such could not be upheld by the Constitutional Court, as these arguments do not prove any disregard of the constitutional rules and principles envisaged by the Basic Law in terms of the powers set forth in Article 146 a) of the Constitution.”<sup>19</sup>

#### 4. Conclusions

The analysis reveals the clarification, by means of case-law, of some essential aspects of the legal regime of presidential decrees. It however lingers the question whether the current regulation of this legal system and the absence of specific provisions to clearly circumstantiate it are not likely to cause a risk of

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<sup>18</sup> published in the Official Gazette of Romania, Part I, no. 534 of 17 July 2014

<sup>19</sup> Decision no. 33 of 26 November 2009, published in Official Gazette of Romania, Part I, no. 918 of 29 December 2009

frequent institutional bottlenecks as result of the public authorities' discretionary and abusive use of their powers.

One solution, both for this case and for other cases where the Constitution does not specifically provide remedies, is the principle of constitutional loyalty, namely a fair conduct both on the part of the President of Romania, in terms of the assessment he has to make and which cannot be censored by other authorities and on the part of other authorities, with responsibilities in terms of countersigning and enforcement of the respective presidential decrees<sup>20</sup>.

Of course there are constitutional remedies, context in which an issue that can be addressed is the political accountability to the President of Romania for issuance of such decrees and the sanction consisting of the procedure for suspension from office and dismissal, under the terms of Article 95 of the Constitution.

Furthermore, we find that a constitutional and legal clarification of the legal regime of presidential decrees would be necessary in order to eliminate possible divergent interpretations, starting from the legal nature and the possibility of challenging them – the scope of decrees exempted from the review of administrative courts, and continuing with the legal effects of the countersignature and the mechanisms aimed at eliminating any institutional bottlenecks.

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<sup>20</sup> See, on the meaning of the principle of loyal behaviour of public authorities, Decision no. 1.257 of 7 October 2009, published in the Official Gazette of Romania, Part I, no. 758 of 6 November 2009; Decision no. 1.431 of 3 November 2010, published in the Official Gazette of Romania, Part I, no. 758 of 12 November 2010; Decision no. 51 of 25 January 2012, published in the Official Gazette of Romania, Part I, no. 90 of 3 February 2012, Decision no. 727 of 9 July 2012, published in the Official Gazette of Romania, Part I, no. 477 of 12 July 2012, or Decision no. 924 of 1 November 2012, published in the Official Gazette of Romania, Part I, no. 787 of 22 November 2012; Decision no. 972 of 21 November 2012, published in the Official Gazette of Romania, Part I, no. 800 of 28 November 2012 and Decision no. 449 of 6 November 2013, published in the Official Gazette of Romania, Part I, no. 784 of 14 December 2013.