

# NOTES ON THE REVIEW OF JUDGMENTS IN ADMINISTRATIVE LITIGATION COURTS\*

Ion Deleanu, Ph.D. \*\*)

Gheorghe Buta, Ph.D. \*\*\*)

## Abstract

*Review of judgments in civil proceedings is, together with the appeal for annulment, the chance for a final procedural possibility for a “remedy” legal solution so that, ultimately, a binding court decision is consistent with normative propositions incident to that legal dispute. Often, this extraordinary remedy is not, as commonly, a “reverential” one anymore, but is “aggressive”, based upon the urgent requirement of retrial as a consequence of “passing final and binding judgments in violation of the principle of supremacy of EU law, governed by Article 148 par. (2), in conjunction with Article 20 par. (2) of the Romanian Constitution, republished” as stated in Article 21 par. (2) of the Administrative Litigation Law no. 554/2004. Review mechanism, as put into operation, focuses on controversial or debatable issues, some unpublished. In this study, the authors note to identify and comment on some of the aforementioned.*

**Keywords:** *effective internal appeal; ECHR ruling; review*

1. Essentially, as governed by existing provisions of Article 322 et seq. under the Code of Civil Procedure, review is characterized by the following determining parts or constant and unavoidable attributes: it is an *extraordinary* remedy, feature substantially deriving from the fact that its object consists in final decisions on appeal or non-appealed decisions or decisions on appeal on account of judging on the merits, on the one hand, and on the other it can be referred to only in cases restrictedly provided by law; it is a *retraction* means of appeal, “reverential” in the sense that – save for a single case<sup>1)</sup> – petition for review shall be referred to the court which settled the case, requiring reconsideration of the judgment passed; it is a *common* remedy, being available to those who were themselves parties in the lawsuit or have been

---

\* Article translated from the Romanian language. It was published in “Dreptul” Magazine No. 4/2011, pp. 91-109.

\*\* ) Associate Professor – Faculty of Law, “Babeş-Bolyai” University, Cluj-Napoca.

\*\*\* ) Scientific Researcher, 1<sup>st</sup> degree – Legal Research Institute of the Romanian Academy.

<sup>1)</sup> In consideration of ground set forth under Article 322 Section 7 Code of Civil Procedure, *i.e.* for the existence of adverse final decision, passed by courts of the same or different resorts, in one and the same cause, between the same persons of the same quality, petition is referred to the higher level court compared to the one that rendered the first decision, and if one of the Courts of Appeal is the High Court of Cassation and Justice, inevitably, petition for review shall be heard by this court, so that the overall classification of review as a retraction means of appeal involves this note.

represented in the lawsuit; virtually, it is a *non-suspensive* remedy of *execution*, feature deriving from the extraordinary nature of review; review is justified by the fact that, as a rule<sup>2)</sup>, *involuntarily*<sup>3)</sup>, the court made an *error* in relation to the facts set down in the appealed decision, or in relation to the existing case on the judgment's passing date or to circumstances that have arisen subsequent to the ruling<sup>4)</sup>.

2. Review regulation in light of provisions set forth under Article 503 et seq. under the new Code of Civil Procedure, enacted by Law no. 134/2010, shall not deviate fundamentally from the current legislation. However, there may be seized, *prima facie*, some differences: in connection with the review object, it is no longer stated that it consists in "*final* decisions on appeal or non-appealed decisions", as well as "decisions passed by an appellate court on judging on the merits", but it is only mentioned that it consist in "decisions passed on the merits or raised on the merits"<sup>5)</sup>; However, for some reasons, as set forth under par. (2) of Article 503

---

<sup>2)</sup> Except, for instance, cases under Article 322 Section 4 Code of Civil Procedure.

<sup>3)</sup> We judge that when a "mistake" has been "voluntarily" committed by the court, which ensues from the very effort of the court to ground it, review is not permissible; the parties must pursue the appeal. In this respect, some approaches of an older ruling are indicative: "Errors of *ultra petita* or *extra petita* give way to the extraordinary means of appeal of the review only if they were committed unintentionally, because only in this way review can be justified, which stands for a means of appeal addressed by the party to the same court, inviting it to fix the error; should the alleged *ultra petita* or *extra petita* error committed not have been unintentional, but, furthermore, it is grounded, then the party can exclusively appeal to higher courts. But, should this distinction be not accepted, however, it is indisputable that the application for review must be rejected, appeal being the only one applicable in this case, when, under the alleged irregularity, the court has committed a breach of law". (Olt Court, Civil Section, Decision no. 233/1940, as cited Gr. C. Zotta, *Codul de procedură civilă adnotat (Annotated Code of Civil Procedure)*, Bucharest, 1941, no. 11, p. 231).

<sup>4)</sup> Findings are undoubtedly real compared with most grounds for review, but as regards some of these grounds, they raise errors committed by an incorrect assessment of the existing file case on the day the relevant decision was passed. For example, should the enacting terms encompass contrary provisions, should the court ruled on some issues not applied for or failed to rule on something applied for or was given more than applied for. Under these terms, taking over considerations set forth under a decision of the Constitutional Court is at least debatable. [Decision no. 353/2006 ("Official Gazette of Romania", Part I, no. 462 of May 29<sup>th</sup>, 2006).]

<sup>5)</sup> It appears that the legal wording does not excel in clarity and accessibility, precisely in a highly sensitive field, as is the practice of an extraordinary remedy. On our part, we judge that reconsidering the former re-wording, compared with renewed meaning given to the term "judging on the merits" and the term "final decision" can suggest that there may be subject to review any decision passed on the merits or raised on the merits, even if these are not "final" yet; but there may be also subject to review "final" decisions passed on the merits by law courts and courts of appeal, under provisions set forth under Article 492 par. (1) Code of Civil Procedure. [But this is not the case for filter panel decisions passed under the terms of Article 487 par. (6) and (8) Code of Civil Procedure, or for decisions of the High Court of Cassation and Justice panel, as provided by Article 487 par. (7) Code of Civil Procedure, since the resolution of the appeal does not concern "the merits" of the case, on all accounts, *de facto* and *de jure*, but "the lawfulness of the decision" exclusively. Conversely, following the quashing of detention, tribunals and courts of appeals "re-judge the case on the merits",

Code of Civil Procedure<sup>6)</sup>, there are subject to review also decisions not raised on the merits<sup>7)</sup>; ignoring some wording issues, we hereby note that the 9 grounds for review, as under current regulation, turned to 11 grounds, removing the first ground under current Article 322 Code of Civil Procedure<sup>8)</sup>, but legitimately conducting to severance of grounds 4 and 5 of the same Article in two separate assumptions, and adding a new ground, undoubtedly necessary under the new regulations, whereby, after the decision became final, the Constitutional Court ruled on the objection raised in that particular cause<sup>9)</sup>, “declaring”<sup>10)</sup> unconstitutional the provisions that

---

on all accounts, any evidence being admissible under the law.] Two other clarifications are necessary, however: with reference to Article 453 par. (1) Code of Civil Procedure, review shall not be exercised as long as the means of appeal is open; although the right of review is still open, by its reasons and purpose, review can be exercised, it being aimed at solving “the merits” of the case, not only “the unlawfulness of the decision” on account of express and limited grounds provided by law.

<sup>6)</sup> These grounds include: a judge, witness or expert, who took part in the trial, was unappealably convicted of an offence relating to the cause or if the decision was passed on account of a deed validated as false during or after the trial, when these circumstances influenced the judgment rendered in the case; a judge was indefeasibly disciplinary sanctioned for exercising its position in bad faith or gross negligence, whether those circumstances have influenced judgment passed in the case; the state rule or other public legal entities, minors and those placed under judicial interdiction or under guardianship were not defended at all or have been artfully defended by those charged with their defence; there are adverse final decisions, given by court of the same resort or different resorts in one and the same case, between the same persons, similarly qualified; the party having been hampered to appear in court and to notify the court thereof, under a circumstance beyond its control; the European Court of Human Rights found a violation of fundamental rights or freedoms “due” (*sic!*) to a court order, and serious consequences of such violations are still occurring; after the decision has become final, the Constitutional Court ruled on the objection raised in that case, declaring unconstitutional the provision that was subject to those objection.

<sup>7)</sup> It is a new provision, which is consistent with the opportunity and need to review, and with conventional imperatives on the right of access to fair justice and the right to an effective remedy.

<sup>8)</sup> “Should the enacting terms of the decision contain contrary provisions that can not be executed” – provides the relevant Article. Removing this ground for review, under the new legislation, would fall within the logic of the provisions of future Article 437 par. (1) Code of Civil Procedure, according to which, in such a case, the parties may request the court having passed the decision to remove the contrary provisions, “mandatory procedure” that can not be substituted by right of appeal or remedy, as stated under Article 439 in the new Code of Civil Procedure. (Admittedly, this Article does not relate to review, but, if removing contrary provisions is not to be performed by way of appeal or remedy, *a fortiori* it shall not be accomplished on account of requesting retraction of decision, either). On the other hand, under the purport of future Article 701 par. (2) Code of Civil Procedure, execution may be challenged, unless the procedure provided for in Article 437 Code of Civil Procedure has been exploited.

<sup>9)</sup> By enacting Law no. 177/2010 (“Official Gazette of Romania”, Part I, no. 672 of October 4<sup>th</sup>, 2010), law under which, practically, there has been advanced enforcement of future provisions in Article 503 par. (1) Section 11 Code of Civil Procedure and Article 504 par. (3) Code of Civil Procedure, right of review has already been instituted for the ground stated, considering that provisions of Article 29 par. (5) of Law no. 47/1992, relating to the suspension of proceedings pending the settlement of the plea of unconstitutionality, have been repealed.

<sup>10)</sup> The term is clearly inappropriate: the judge *ad quem* does not “rule” himself unconstitutionality of a legal text, but “ascertains” unconstitutionality, which pre-exists to the ruling of the contentious constitutional court. Article 147 par. (1) of the Constitution refers

were subject to the relevant objection; for some of the grounds for review, the deadline for the exercise of the petition for review has been reduced [sections 10 and 11 under future Article 505 par. (3) Code of Civil Procedure].

**3. Review paradoxes persist under both present and future regulations.**

According to its common meaning, the term “review” should signify the existence of extensive possibilities of application and imply comprehensive review of appealed decision. But, as the right of remedy and, usually, the right of appeal, fully devolutive, exist, cases in which errors in court orders could still be removed, by way of review, can only be restrictive and rigorously determined.

In terms of the institution of review as a whole, it is being portrayed as a heterogeneous or hybrid institution, paradoxical in at least the following matters: along with specific elements of retraction, there are also elements specific to reversal remedies; under legal grounds for review there are pursued sparse objectives, among which: in special circumstances, granting the right of defence; removing the negative consequences of errors of law, of crimes or force majeure events, affecting resolution; removing persistent and “serious consequences” of a ruling; deadlines for exercising this means of appeal are not only different, but they also run from different moments; jurisdiction for the petition for review is sometimes different, and especially a non-specific means of retraction, and should there be grounds that call for different jurisdictions, extension of competence of jurisdictions is not applicable; although, usually, this remedy is directed against decisions passed on the merits or raised on the merits, however, it could be directed sometimes against decisions lacking this feature; despite the fact that, fundamentally, this remedy aims at decisions having resolved the merits of the dispute, some of the grounds underpinning review are intended to remove formal errors in the appealed decision; ultimately, the consequences of review cover a wide range, from simple completion of appealed decision up to rendering a decision diametrically opposed to the one appealed to.

**4. Despite its rigorous junctures, reviewing is still inflaming, on account of novel situations and, in any case, subject to different interpretations.**

In our view, assumptions brought forward below “cover” this assertion. It is proven again that real legal life is much more prolific than imagined legislative solutions.

---

correctly to the “ascertainment” of unconstitutionality, not its “ruling”, which would exceed the “negative legislature” role of the Constitutional Court. [However, the legislature’s ignorance has been reaffirmed, repeating the same term both in provisions under Article II, Section 1 of Law no. 177/2010 and in provisions of future Article 503 par. (1) Section 11 Code of Civil Procedure].

5. Review of judgments in the matters of administrative litigation, under Article 21 par. (2) of Law no. 554/2004<sup>11)</sup>, carries forth notable features<sup>12)</sup>. Taking as reference points some of the rulings passed in this area, we hereby lay down some comments which might be useful, at least as theories for debate.

6. By decision no. 2615/2009 of the High Court of Cassation and Justice, the Administrative and Financial Litigation Department (unpublished)<sup>13)</sup>, there was granted the petition for review based on the provisions of Article 21 par. (2) of

---

<sup>11)</sup> For the purposes of Article 21 par. (2) of Law no. 554/2004: “In addition to grounds for review set forth under the Code of Civil Procedure, there stands also for a ground for review passing of final and binding decisions in breach of Community law principle of priority, subject to Article 148 par. (2), in conjunction with Article 20 par. (2) of the Romanian Constitution, republished. The petition for review is lodged within 15 days of service, which shall be performed, notwithstanding the rule enshrined in Article 17 par. (3), on strength of duly substantiated request filed by the interested party, within 15 days of delivery. The petition for review shall be settled urgently and particularly within 60 days after its lodging.

<sup>12)</sup> A transient theory for review, on the same subject of administrative litigation, was provided under Article III of Law no. 262/2007 amending and supplementing Law no. 554/2004 on administrative litigation. [Contradiction emerged between the Constitutional Court and the High Court of Cassation and Justice on the constitutionality of these provisions has been subject to a thorough research, bearing a conclusive and energetic title: Ș Beligrădeanu, *Flagrantă nelegalitate, în raport cu legea fundamentală, a refuzului Înaltei Curți de Casație și Justiție de a aplica o dispoziție înscrisă într-o lege în vigoare, sub cuvânt că aceasta „înfrânge dreptul la un proces echitabil” - deci este neconstituțională -, deși Curtea Constituțională constatare constituționalitatea acelei prevederi legale (Flagrant illegality, in relation to the fundamental law, of the refusal of the High Court of Cassation and Justice to enforce a provision under an effective law, alleging that it “defeats the right to a fair trial” - therefore it’s unconstitutional – although the Constitutional Court had already ascertained the constitutionality of the relevant legal provision, in “Dreptul” (the “Law”) no. 7 / 2010, p. 56 et seq. Indeed, as far as the plea of unconstitutionality is concerned, provided for in Article 146 Section (d) of the Constitution, considering that the Constitutional Court is the only authority competent to decide and, also, by virtue of Article 147 par. (4) of the Fundamental Law, its decisions are binding, willy-nilly, although some decisions are questionable, they require unconditionally compliance. Otherwise, the constitutional control system would collapse, lacking any sense or would have perhaps only a useless advisory one. From another argumentative perspective, partly questionable, see also: C. Ștefăniță, *Modul de procedare al instanțelor judecătorești confruntate cu o contradicție între o decizie a Curții Constituționale și o decizie pronunțată de Înalta Curte de Casație și Justiție, în Secții Unite, pentru soluționarea unui recurs în interesul legii (Methods of proceedings of courts faced with a conflict between a decision passed by the Constitutional Court and a decision passed by the High Court of Cassation and Justice, in Joint Sections, to resolve an appeal in the interest of the law) in “Dreptul” (“the Law”) no. 4 / 2010, p. 119 et seq. In relation to the reasoning of the latter opinion, we merely remark that the problem of implementing Article 20 in the Constitution is also a constitutional issue on which the Constitutional Court decides exclusively, not law courts.]**

<sup>13)</sup> We single out this decision not only because, to our knowledge, this is the first decision on the enforcement of aforementioned provisions, but also due to the thorough analysis this complex issue underwent and to the excellent overview of the general principles of EU law and, particularly, of establishing the right of defence. The enacting terms of the decision are based on a sober argument, broad, subtle and profound, according to the court it emanates from.

Law no. 554/2004 on administrative litigation<sup>14)</sup>, as subsequently amended and supplemented<sup>15)</sup>, considering that legal requirements are met for the introduction of this extraordinary remedy, since the appealed decision is a final and binding decision that was raised on the merits<sup>16)</sup>, under the petition for review being claimed the violation of the principle of supremacy of EU law<sup>17)</sup>, regulated by Article 148 par. (2), in conjunction with Article 20 par. (2) of the Romanian Constitution, republished<sup>18)</sup>.

---

<sup>14)</sup> The Constitutional Court held that: “By enshrining in the wording of Law no. 554/2004 on administrative litigation the right to request review of a decision passed in breach of this principle, the said constitutional provision was awarded efficiency, instituting a substantive way to ensure performance of obligations undertaken by the Romanian state under the Accession Treaty to the European Union, including in terms of the preservation of unity and stability of European regulatory policy”. (Decision no. 1609/2010, published in the Official Gazette of Romania, Part I, no. 70 of January 27<sup>th</sup>, 2010).

<sup>15)</sup> With regard to this regulation, see: A. Iorgovan, L. Vișan, A.S. Ciobanu, D.I. Pasăre, *Legea contenciosului administrativ (Administrative Litigation Law)*, Editura Universul Juridic (*Law Publishing House*), 2008, p. 338-346, G. Bogasiu, *Legea contenciosului administrativ, comentată și adnotată (Administrative Litigation Law, commented and annotated)*, Editura Universul Juridic, 2008, p. 312-323, E. Albu, *Dreptul contenciosului administrativ (Administrative Litigation Law)*, Editura Universul Juridic, 2008, p. 257-258, I. Rîciu, *Procedura contenciosului administrativ (Administrative Litigation Procedure)*, Editura Hamangiu (*Hamangiu Publishing House*), 2009, p. 383 -388; G.V. Bîrsan, B. Georgescu, *Legea contenciosului administrative (Administrative Litigation Law)*, no. 554/2004, Editura Hamangiu, 2008, p. 168-169.

<sup>16)</sup> In the wording of Decision no. 1609/2010 (*cited above*), the Constitutional Court held, *inter alia*, that, unlike the provisions set forth under the Code of Civil Procedure, wording of Article 21 par. (2) of the Administrative Litigation Law “is not very explicit in terms of any decisions that can be appealed to the extraordinary right of review on account of the new grounds for review described above. Thus, if Article 322 of the Code of Civil Procedure states that there are subject to review final decisions on appeal or non-appealed decisions or decisions passed by appellate courts, the first sentence of Article 21 par. (2) of the Administrative Litigation Law no. 554/2004 refers generically to “final and binding” decisions, without any particularization thereof. But since, according to Article 28 of Law no. 554/2004, the provisions contained therein complement the provisions under the Code of Civil Procedure, to the extent that these are not inconsistent with the particularities of power relations specific to administrative law, the Court notes that the judge and the interested parties dispose, however, of necessary reference points for classifying a court order in the category of rulings likely to be subject to review under the criticised purport, so that it can not retain infringement of right of free access to justice and enforcement of legal remedies, enshrined in Article 129 of the Constitution”.

<sup>17)</sup> In the same decision, the Constitutional Court also held that “the first sentence of Article 21 par. (2) of the Administrative Litigation Law no. 554/2004 employs a weak wording in terms of legal logic, stating that the new ground for review stands for “passing final and binding decisions in breach of the principle of supremacy of EU law.” In a strict grammatical and semantic interpretation, that wording could mean that qualifying a court order as final and binding would be the consequence of infringement of the principle of supremacy of EU law. In regulating this new case of review, no doubt that the legislature had not taken its stand upon such a premise, but the Court holds that, although it is not likely to conflict with any constitutional purport, the wording of this sentence is improvable.”

<sup>18)</sup> On strength of the aforementioned decision no. 1609/2010, in ruling on the constitutionality of Article 21 par. (2) of Law no. 554 / 2004, the constitutional litigation court ascertained, on the one hand, on the basis of new grounds which justify partial reconsideration of

Out of the decision recitals, we hereby bring into focus some of the genuine “contributions” of the court to the crystallization of interference reports between European (ex-EU) and national regulations, as well as to the rigorous determination of review hypothesis in question: if the court ruled on strength of a final decision on the relevant inapplicability of Community rules raised, the same issue can not be repeated under review, thus converting an extraordinary “retraction” remedy into a new “reversal” remedy of the binding decision, and, concurrently, ignoring the security of legal relations validated and on account of a court order entered in the heritage of *res judicata*; the idea of complementarity of conventional and Community (European) standards, and the requirement for both their compliance and enforcement in taking precedence over national standards; identification of general principles of EU law, derived also from the case law of the Court of Justice of the European Union; mentioning essential and immanent determinations of the right of defence, in any proceedings and all stages thereof; mentioning the requirement for implementing the principle of “equivalence” in national legislation in relation to the right of defence, as well as the requirement for complying with the principle of “effectiveness” and “proportionality”.

The purpose of this review being totally different, we no longer insist on the decision constituted as a “pretext” that we judge unobjectionable.

7. Hence, for the purposes of Article 21 par. (2) of Law no. 554/2004, there is another ground for review, which adds up to the ones provided for under the current and future civil procedure common law.

With subtle arguments, it was argued that this ground for review should therefore be broadened by analogy to any court orders assimilated to *res judicata*, if it has been violated the principle of supremacy of EU law. We deem that the impetus which supported an option as such – easily understandable and, virtually, creditable - should be “mitigated”, the merely transgression of provisions shown in civil matters would not only be intolerable<sup>19)</sup>, but it would neither be advisable, on account of two substantive and manifest grounds: a) The ground provided by Article 21 par. (2) of Law no. 554/2004, as laid down, unfortunately and without ignoring the ingenuity and good intentions of those who “inspired” the legislature

---

previous decisions in this matter, that the provisions of the second sentence of par. (2) thereof are unconstitutional, but, on the other hand, despite some “weak wordings in terms of legal logic, “not very explicit” draft, however, since it can lead to appropriate understanding of the first sentence, it rejected the plea of unconstitutionality of provisions thereof; furthermore, the Constitutional Court rejected the plea of unconstitutionality of the third sentence of the same paragraph and article, these provisions conveying the principle of celerity, “specific feature of all stages of trial conducted under the procedural rules established by Law no. 554/2004”. We shall revert to some of the recitals of this decision below, also in comparison with some of the findings of the Supreme Court in the implementation of the aforementioned provisions.

<sup>19)</sup> We can not ignore the fact that special regulations, by definition, are not susceptible of extrapolation by analogy.

is - in part - a legislative error. It doesn't stand for a genuine ground for "retraction" within the process of review, but a "reversal" one, inadmissible under the principle of *res judicata* and, consequently, under the principle of certainty and constancy derived from irrevocable judicial settlement of a legal dispute; b) the litigious ground ignores the mechanism of preliminary question or prejudicial matter referred to the Court of Justice of the European Union - as provided by Article 235 of the Treaty on European Union - and in consequence of such ignorance, it appears to be inconsistent with this mechanism, in terms of necessity and admissibility of review. Let us explain this away.

The fact that, under the circumstances of the relevant dispute, the court ignored, rejected or failed to allow parties to debate, by default, upon the priority of "Community" (European) standards in relation to national standards should be considered an "error of law", consisting in the case in the incorrect enforcement of substantive rules. This "error of law", which could have justified a petition for "reversing" the decision or that justified a relevant petition request can not be converted into a ground for "retraction" of the decision rendered, to debate for the first time or to reconsider before the court of review the supremacy of Community (European) standards.

**8.** The case under review provided by Article 21 par. (2) of Law no. 554/2004 and the case under review provided by Article 322 Section 9 Code of Civil Procedure [by Article 503 par. (a) Section 10 of the future code, respectively] – the European Court of Human Rights finding on the infringement of fundamental rights and freedoms – are comparable, but, in our opinion, only to come up with the conclusion that there are two assumptions for review essentially different: the first one - regulated by a special rule – relates only to final judgments passed in administrative litigation matters, the second one - regulated by a common rule – relates to any final decision rendered on the merits or raised on the merits; the first one substantiates on the violation of the "principle of supremacy of EU law" – more precisely and specifically on non implementation of EU standards, especially the "substantive" ones for the trial's settlement on the merits - the second one substantiates on the violation of "conventional procedural standards", especially those set forth under Article 6 par. (1) of the European Convention; as for the first assumption, the claimant alleges simply and solely non-prevalent implementation of a "Community" (European) rule in resolving the dispute on the merits, for the second assumption, the claimant calls down a decision of the European competent court, passed by this authority in his case, following an individual complaint against the Romanian state referred to the European court.

Marking out these few differences between the two assumptions - most relevant -, we hereby conclude – for our part, of course - that sometimes the second assumption is raised in support of the former one, erroneously. There is no other common element connecting them, but "review".

9. As aforementioned, we argue that, under provisions set forth in Article 21 par. (2) of Law no. 554/2004, review is not compatible with ex-EU (European) primary and derived standards concerning the preliminary question or prejudicial matter before the Court of Justice of the European Union. To reach the conclusion of inadmissibility of a similar ground for review - as required by the aforementioned standards (!) - we hereby refer to the following assumptions: if, on the interpretation or application of “Community” (European) standards, before the appeal, the party requested the referral to the Court of Justice of the European Union in order to obtain a preliminary ruling, and the court has refused or ignored the request, review could be appealed to for this reason, as well, based on Article 304 Section 9 Code of Civil Procedure [Article 482 par. (1) Section 8 of the future code, respectively]; if, in the same matter, the party requested the Appellate Court referral to the Court of Justice of the European Union, which grants the request or proceeds *ex officio* to refer to the European court, practically, there would be no ground for review, as, pending the preliminary ruling under Article 235 of the Treaty [Article 406 par. (1) Section 7 of the future code, respectively], the trial should be adjourned; should the Appellate Court refuse or ignore the party’s request to refer to the Court of Justice, it should be in position to file an appeal within the appeal, for this reason, avoiding thus further complications and ensuring the party’s right of access to justice, in this perspective also<sup>20)</sup>.

And yet, sometimes, a petition for review should be justified and, therefore, it would be granted, the introduction of a similar ground along with the other grounds provided under Article 503 par. (1) of the new Code of Civil Procedure<sup>21)</sup> being *de lege ferenda* imperative.

---

<sup>20)</sup> De lege ferenda for the aforementioned assumption, there should be regulated the possibility of an appeal within the appeal, otherwise, the party may dispose of no procedural remedy should it be prevented from getting a court order in compliance with Community (European) law standards, equally. If after such an appeal within the appeal the court passes however a final decision, contrary to the substantive rules of Community law, the only remedy – necessary in truth - is review, unfortunately not covered by the future code provisions.

<sup>21)</sup> It would thus baste an ace for some rules derived from the case law of the Court of Justice. Thus, the Court held that “under the Treaty provisions, national courts *are under the duty to review final judgments that are alleged to be rendered in violation of EU law, but this obligation is subordinated to the condition that the examining court shall rule, under regulations of its domestic legal system, the competent court to reconsider litigious decisions*” – s.n., *I.D.*; *Gh.B.* (Judgment of March 16<sup>th</sup>, 2006, Case C-34/2004 in “Recueil de la Jurisprudence de la Cour de Justice et du Tribunal de Première Instance”, 2006, p. 2585, par. 24.). Further references to this collection shall be made by the abbreviation “Rec.” Likewise, calling down the principle of cooperation, the Court held that it can be reverted to review of the decision in the case of incorrect interpretation of Community law, failing to establish preliminary referrals thereof (decision of the Court, the Grand Chamber of February 12<sup>th</sup>, 2008, Case C-2/2006, Rec. I, 2008, p. 411, par. 38.)

10. If, after the judgment passed in the case is ruled final - ignoring priority and immediate application of EU rules against national rules<sup>22)</sup> or by misinterpretation and misapplication of EU rules - the Court of Justice of the European Union passes a different decision - following a preliminary question of another Romanian court or another EU member state court -, the interested party must be entitled, within a reasonable and consistent term with the principle of legal certainty and constancy derived from a final decision to apply for and, possibly, to obtain review of litigious decision<sup>23)</sup>.

Thus only shall exigencies of current relations between European standards, including derived ones, and national standards be fully satisfied, in as far as: national courts are obliged themselves to provide full effect to EU standards, removing - whenever appropriate - the application of adverse regulations in

---

<sup>22)</sup> Such a scenario would result from the reading, with different punctuation marks (!), of a decision's grounds. See: decision no. 1921/2010 of Cluj Appellate Court, Commercial, Administrative and Financial Litigation Department (unpublished), commented by A.A. Irinel and Gh. Buta, in "Revista română de jurisprudență" ("Romanian Journal of Law") no. 3-4/2010, p. 63-65, 66-68 respectively. The wording of the decision commented, *inter alia*, goes: "The new ground for review introduced by way of aforementioned provisions is incident should under the binding decision *no analysis have been undertaken with reference to the internal standard compatibility with Community law and case law developed under it, or the analysis is incomplete*, in which case the reviewer must indicate which are the new arguments that would justify on its part grant of the extraordinary remedy and abolition of binding decision, in addition to the arguments already considered by the court. Previously mentioned recitals are justified by the fact that *arguments already considered can not be reintroduced by way of an extraordinary remedy, either*, because it violates the principle of *res judicata*. There may be considered only new arguments drawn from community standards, doctrine and jurisprudence developed under it, that might justify grant of an exceptional circumstances, such as of defeat of the principle of *res judicata* and that require a solution contrary to the one initially rendered by the court. Analysis of the petition for review shows that *all arguments called down by the reviewer in support of the appeal have previously been raised in the court of appeal and already considered by the latter*" (s.n. – I.D.; Gh.B).

<sup>23)</sup> In this respect, together with extensive case law referred to, see: decision of the Court of Justice (Grand Chamber) of February 12<sup>th</sup>, 2008, Case C-2/2006; decision of the Court of Justice (Grand Chamber) of July 18<sup>th</sup>, 2007, Case C-119/2005. The first of these decisions concluded: "1) Within proceedings deployed before an administrative body aiming to review a final administrative decision pursuant to a judgment passed by a court of last resort, *this decision being grounded on an incorrect interpretation of Community law, having regard to the case law of the Court subsequent to this decision, Community law does not require to have been raised by the principal within a means of appeal of national law which has been raised against the relevant decision*; 2) Community law sets no time limit for filing a petition for review of a final administrative decision. However, *Member States may set at their discretion reasonable delays for filing claims, in compliance with the Community principles of effectiveness and equivalence*". The second decision concluded: "*Community law precludes application of a provision of national law which seeks to enshrine the principle of res judicata, like Article 2909 of Italian Civil Code (Codice Civile), to the extent that its application prevents recovery of state aid granted in breach of Community law and its incompatibility with the common market was established by a final decision of the European Communities Commission*" (s.n. – I.D.; Gh.B.). For substantiation of these conclusions, we shall reaffirm some of the recitals of cited judgments.

national law<sup>24</sup>); referral of the question to the Court of Justice is based upon a

---

<sup>24</sup>) It preys on our mind, however, whether the court seized of the dispute must itself - of course, when appropriate - call down the existence of European (ex-EU) standards, substantial, incidental and pre-eminent, and its application in that issue as a priority, irrespective of the reasons rightfully put forward by a party, or a similar assumption remains dependent solely on the will of the party concerned. It appears that a decision of the Court of Justice urges for a negative answer, as regards the duty of the national court. (Judgment of June 7<sup>th</sup>, 2007 in Joined Cases C-222/2005 and C-225/2005, "Rec.", 2007, p. 6869, par. 34 et seq.). Within the meaning of some of the recitals of this ruling, "*neither the principle of equivalence, nor the principle of effectiveness agist the national court to plead ex officio a ground relating to the violation of EU rules - disregarded by the parties - when in domestic law the active role of judge is limited to pleading ex officio grounds of public policy strictly determined by the subject of the dispute, as it has been circumscribed by the parties*"- s.n., I.D.; Gh.B. The Court also stated that the justification for limiting national court jurisdiction is retrieved in the principle according to which the initiative of a trial devolves on the parties, the national court acting *ex officio* but in exceptional cases, with the view to protect public interest. However - holds the Court - from the perspective of the same principle of equivalence, "*if, under national law, courts undertake to raise own legal objections on account of internal regulations, which were not raised by the parties, they are bound to act in the same manner as regards Community rules, equally*" (s.n., I.D.; Gh.B). Interpretation of these parentheses should neither be parcelled, nor ignored any considerations of other European court rulings. On our part, we judge that the national court is bound, when necessary, to claim the existence, pre-eminence and priority of Community rules incident in that dispute, at least for the following reasons: in default of a court similar to the European Court of Human Rights, as regards the effectiveness of Community (European) rules, the national judge is, concurrently, judge with Community powers; compliance and enforcement of Community rules is an immanent prerequisite for the European legal framework; within the meaning of the provisions of Article 20 and Article 148 par. (2) of the Constitution, valorisation of Community rules within the national arena - with a mandatory, pre-eminent and priority character - is a constitutional duty that, first of all, judges may not deflect from, regardless of the procedural conduct of the parties; enforcement of substantive rules - *a fortiori* the European ones - with the view to settle the dispute is not - and can not be - at the discretion of the parties; the very establishment of a "remedy" by means of review, in case of violation of the principle of supremacy of EU law, involves the obligation of the judge to comply with this principle, preventively, so that the retraction remedy of own decision is not appealed to; if the judge *a quo* can address *ex officio* a preliminary question to the Court of Justice, there is no plausible ground as we may discern that he can not raise, within a trial whose settlement he has been vested with, the existence of an unquestionable European rule, liable to be enforced under that legal dispute. [As for this latter argument, we hereby bring into focus some of the Court's circumstantiations: "... The system set up under Article 234 EC to ensure a uniform interpretation of Community law in Member States *shall establish direct cooperation between the Court and national courts under proceedings independent of any initiative by the parties*" - s.n., I.D.; Gh.B. (Judgement of the Court of Justice, Grand Chamber of February 12<sup>th</sup>, 2008, Case C-2/2006, "Rec.", I, 2008, p. 411. On the same lines, see Judgment of March 27<sup>th</sup>, 1963 in Cases C -28/1962 and C-30/1962, "Rec.", I, p. 59, 76, Judgment of March 1<sup>st</sup>, 1973, in Case C-62/1972, "Rec.", I, p. 269, par. 4, Judgment of July 10<sup>th</sup>, 1997 in Case C-261/1995, "Rec.", I, p. 4025, par. 31); "*It can not be inferred that, in order to meet the third condition established by this decision, it was necessary for the parties to have raised before national courts the Community law issue in question; indeed, for this condition to be satisfied, it is sufficient either that the aforementioned Community law issue whose interpretation has proven incorrect in the light of subsequent decisions of the Court to have been sit on by the national court which ruled in the last instance, or*

dialogue between courts, whose release depends entirely on the national court in assessing the relevance and need for a preliminary ruling, although the party failed to raise in its dispute European standards or even if it would oppose referral to the European court<sup>25)</sup>; the fact that national courts – especially the appellate one – ignored or refused to comply with provisions set forth in Article 235 of the Treaty on European Union, in the form acquired under the Treaty of Lisbon, can not be attributed to the party in the relevant dispute, which would otherwise be required to bear the consequences of unlawful conduct committed by national courts; the preliminary ruling bears no constitutive value, but a declarative one, so that it shall be applicable from the effective date of rules read, and should this date forego the final settlement of the dispute by the national courts, efficiency and effectiveness of rules read can not be ignored; indeed, *res judicata* stands for the foundation of legal certainty and constancy, but the effects resulting from this authority may not exceed the limits of jurisdiction of national courts in relation to EU rules; Member States are therefore under the obligation to establish procedural remedies for cases in which, by their final decisions, the principle of supremacy of European standards is ignored or violated, the review possibility ranging among those remedies. In this regard, we judge the future regulation, enacted but not yet implemented, surprisingly and punishably defective, as well<sup>26)</sup>.

However, in order not to jeopardize *sine die* the imperative of *res judicata*, in respecting “the principle of equivalence” (regulation not less favourable than that applicable to similar matters in domestic law) and “the principle of effectiveness” (regulation not practically impossible or the exercise of rights conferred by Community law not excessively difficult), *review shall be determined by setting a subjective deadline and an objective deadline in which the party may request*

---

*could have been raised ex officio by the said court” – s.n., I.D.; Gh.B. (Judgment of February 12<sup>th</sup>, 2008, cited above par. 44); “In this regard, it should be noted that, although Community law does not require national courts to raise *ex officio* a plea alleging breach of Community provisions, when reviewing this ground would commit them to exceed the limits of dispute as filed by the parties, these courts are bound *ex officio* to call upon grounds *de jure* based upon a binding Community rule where, under national law, they are under the duty or may call them upon under a binding national rule of law” – s.n., I.D.; Gh.B. [Judgment of the Court of Justice of February 12<sup>th</sup>, 2008, cited above, par. 45. Similarly, the Court cited, for instance, Judgment of December 14<sup>th</sup>, 1995, Cases C-431/1993 and C-430/1993, “Rec.”, I, p. 705, par. 13, 14 and 22, and Judgment of October 24<sup>th</sup>, 1996, Case C-72/1995, “Rec.”, I, p. 5403, par. 57, 58 and 60.]*

<sup>25)</sup> Judgment of the Court’s Grand Chamber of February 12<sup>th</sup>, 2008, Case C-2/2006, “Rec.”, I, 2008, p. 411, par. 41.

<sup>26)</sup> We hereby note that Article 503 of the new Code of Civil Procedure, enacted by Law no. 134/2010, failed to provide among the grounds for review the assumption debated upon herein, either, perhaps, considering that the court must proceed *ex officio* to the identification and enforcement of European (ex-Community) law rules, where the circumstances of the dispute involve a community component, as well, or the mechanism of the preliminary question, referred to under Article 406 par. (1) Section 7 of this code, is sufficient. Without ignoring these possible explanations, we judge that, yet for the grounds shown, we assist at a legislative gap.

*retraction of final decision and rendering another one in its place, in compliance with European standards.*

11. Under Judgment no. 3525/2010 of the High Court of Cassation and Justice, the Administrative and Financial Litigation Department (unpublished), it was rejected the plea for delay of the petition for review, passed under the provisions of Article 21 par. (2) of Law no. 554/2004, as well as the petition for review itself.

Therefore deciding, the court stated, reasonably and absolutely compelling: “The cited legal provision *can not be interpreted in that it establishes an obligation for the party seeking to lodge a petition for review with the view to require notification of the decision within 15 days of its service, hence it runs out the 15 days deadline for carrying out the means of appeal*<sup>27)</sup>, but, on the contrary, provides the person who accounts himself as aggrieved party a procedural instrument by way of which he can shorten the overall time provided under Article 17 par. (3) of the same Law, should the same deem that such action is imperative to protect its legitimate rights or interests. *The date from which flows the deadline for lodging the petition for review is the date on which the judgement is being served, whether or not the party requested notification under the above terms.* As from the documents filed it does not appear that the decision or appeal would have been notified to the party, in order to be established with certainty *dies a quo*, the High Court will reject the plea for delay raised by the respondent” (s.n. – I.D.; Gh.B).

As to the ground for review cited, the court held the following: “The case for review provided by Article 21 par. (2) of Law no. 554/2004 was thought as a final internal remedy aimed to ensure pre-eminence of provisions under treaties constituting the European Union and other mandatory community regulations, in light of the principles and interpretations crystallized in the case law of the European Union jurisdiction. *The grounds for review are to be considered, however, within the framework of general regulation of this extraordinary retraction means of appeal, because Community law does not require a national jurisdiction to resume discussion on the merits of the dispute and dispose of enforcement of internal rules of procedure conferring res judicata to a ruling ...*<sup>28)</sup>. The High Court shall range arguments and examine them in terms of community rules and principles alleged to have been violated, considering the

---

<sup>27)</sup> The Constitutional Court, by way of Judgment no. 1609/2010 (cited above), ascertained, obviously substantiated, that under this issue as well, the purport “is poorly drafted, giving rise to confusions and uncertainties which may stand for real obstacles to the effective exercise of the right of access to justice.” Notwithstanding, we shall return with further considerations thenceforth.

<sup>28)</sup> On these lines, the Court cited ruling of the Court of Justice of European Communities of March 16<sup>th</sup>, 2006, in Case C-23/2004.

provisions of Article 326 par. (3) Code of Civil Procedure, under which, in this particular procedure, *debates are limited to the admissibility of review and the facts grounding it*” (s.n. – I.D.; Gh.B.)

Implicitly qualifying the nature and effects of EU directive, the Court held that “there is no question of direct applicability of Directive 2006/112/EC in internal administrative, financial and legal procedures, the aforementioned directive, amending Directive 77/388/EC, being implemented in national law by the Government Emergency Ordinance no. 106 / October 4<sup>th</sup>, 2007 amending and supplementing Law no. 571/2003 on the Fiscal Code, published in the “Official Gazette of Romania” no. 703 / October 18<sup>th</sup>, 2007. In turn, Directive 77/388/EC (the 6<sup>th</sup> Directive) was implemented earlier under Title VI – “Value Added Tax” in the Tax Code”. And further: “The principle of legal certainty requires that any act of the institutions that produce legal effects *to be clear, definite and made public to interested people*, so that they can know with certainty when the act in question was adopted and started to be effective. That requirement of legal certainty is rigorously imperative in case of an act that could have financial consequences, with the view to allow people concerned to know precisely the extent of the underlying obligations”<sup>29)</sup>.

As to the legal uncertainty generated by the alienation from previous constant case law in the matter, the High Court considers that the principle of legal certainty, inferred from the interpretation of Article 6 of the European Convention on Human Rights and Fundamental Freedoms set out in the preamble to the Convention as a fundamental element of the rule of law, as it ensues from the constitutional traditions common to the Member States, is a general principle of Union law [Article 6 par. (3) of the European Union Treaty, as amended under the Treaty of Lisbon]. “*The existence of discrepancies in case law was accepted in light of the European Convention on Human Rights and Fundamental Freedoms as inherent to any legal system characterized by a multiplicity of jurisdictions, being important to avoid a general climate of uncertainty and insecurity, reflected in serious discrepancies of case law that persist over time, especially on level with the supreme jurisdiction, in default of a mechanism to ensure consistency of legal practice*”<sup>30)</sup> (s.n. – I.D.; Gh.B.).

As no one, absolutely no one questions the primacy of European (ex-Community) law in relation to domestic law – not only as an inevitable consequence of the affiliation of the latter to a European legal order, which must be consistent and pre-eminent, but also as a direction of harmonization of national regulations within

---

<sup>29)</sup> Judgment of the Court of First Instance of January 22<sup>nd</sup>, 1997, in Case T-115/1994 (cited by the Court).

<sup>30)</sup> See also ECHR ruling of December 6<sup>th</sup>, 2007, Case *Beian v. Romania* (Official Gazette of Romania, Part I, no. 616 of August 21<sup>st</sup>, 2008), and the ruling of December 1<sup>st</sup>, 2005, in Case *Păduraru v. Romania* (Official Gazette of Romania, Part I, no. 514 of June 4<sup>th</sup>, 2006), both cited by the Court.

the climate of the European one, upon the principle of autonomy of procedural means and a reasonable margin of appreciation – we apprehend and raise on these lines, as well, the need to institutionalize preventive and / or sanctioning procedures for preventing or, as the case may be, removing inadmissible asynchronies between European and national law. From such a perspective, as a “transient” solution and within a “limited scope”, the ground for review under Article 21 par. (2) of Law no. 554/2004 should be accepted. This being the case, without reiterating comments already made on this ground for review, we shall focus on some other ideas entailed or suggested by the decision under debate.

The second sentence of Article 21 par. (2) of Law no. 554 / 2004 fails to excel in terms of transparency<sup>31)</sup>: “Petition for review is lodged within 15 days from its service which shall be made, notwithstanding the rule enshrined in Article 17 par. (3), upon duly substantiated request of the interested party, within 15 days of its delivery”.

First, it should be advisable to explain away the nature of the two deadlines of 15 days, and the 30-day deadline, respectively, which is referred to<sup>32)</sup>. We judge unquestionless that the first 15-day deadline – under which the petition for review may be lodged - is a procedural delay of “revocation”; the second 15-day deadline – the one under which, notwithstanding the common rule of “drafting and grounding” (!) judgments passed in administrative litigation, judgment passed would be “serviced” (!), appealable under review - can only stand for a “recommendation deadline” – therefore, under strictly procedural matters, it being useless – no other sanction, except for a possibly disciplinary one, resulting from breach of the said deadline; the common deadline of 30 days - according to Article 17 par. (3) of the Law – within which it should be acted for “drafting and grounding” judgment passed, despite the imperative wording of the text it sets, stands also for a “recommendation” deadline, going without any “procedural penalties” (!) in case of its breach. *Summa summarum*, regardless of qualification of

---

<sup>31)</sup> It also fails to excel in terms of coherence: Article 17 par. (3) of the Law, to which it refers, deals with “the drafting and grounding of the decision” (!), in any case, not with its “servicing” (!), but Article 21 par. (2) of the Law allows deviation not from the term “drafting and grounding”, but from the “servicing” one, for which the administrative litigation law does not stipulate a particular term. In this respect, the Constitutional Court, in admitting the plea of unconstitutionality of these provisions, also noted that “the purport undergoing criticism refers to another bill regulating a totally different problem than the one the legislature would have intended to clarify under the reference made; such a lack of legal certainty lets the interest party be unable to know precisely the term to be complied with so that his petition for review is not dismissed as belatedly introduced or, conversely, as premature ..., the intention of the legislature to accelerate, under this regulation, settlement of the petition for review embodied under the form of a confusing rule, as is erroneously referring to a purport not covering service of judgments, but regulates other stages relevant of the business carried out by judges, *i.e.* grounding and drafting of judgments”; “or, it is obvious that operation of servicing is not simultaneous to drafting and grounding, but, naturally, subsequent, the distinct lapse between these points failing to be set under any legal wording” (Judgment no. 1609/2010, cited above).

<sup>32)</sup> For the purposes of the following, see also: I. Rîciu, *op. cit.*, p. 402-405.

those deadlines, the indubitable conclusion is but one: the petition for review – under the penalty of lateness - must be lodged within 15 days of judgment’s “service”. In the same vein, though from another perspective, we hereby argue, unreservedly, that the request of the interested party to be notified about the decision within a shorter delay than the usual one can not be assimilated - otherwise to some exceptional circumstances and bearing strict interpretation – to cases of equipollence for exercising the remedy of review from the date of the said request.

**12.** The purport of Article 21 par. (2) of the Law is, unfortunately, both ambiguous and defective. As advisedly noted<sup>33)</sup>: it is not clear whether review may be appealed only in the cases of “final and binding” judgments passed in first instance or judgments passed on appeal, as well, subject to raising on the merits; the 15-day deadline flows, invariably, from the “service” of the disputed judgment, save the legal status of judgments decisions is different in terms of “service”, as it is about judgments, “final and binding” following the expiry of the deadline for appeal, or judgments that, fundamental in facts, are not serviced<sup>34)</sup>; there are not circumstantiated “good grounds” that can be cited so that the deadline for drafting and grounding the judgment is shortened and, most of all – most of all (!) –, it is not specified who judges these grounds, the procedural framework and possible consequences in case of their ignorance or wrong qualification<sup>35)</sup>. If only for these reasons, the litigious wording should have been referred to the “legal lab” for a new “processing”.

---

<sup>33)</sup> See: G. Bogasiu, *op. cit.*, p. 321-322.

<sup>34)</sup> As aforementioned in the said judgment, the Constitutional Court also noted that the wording “is not very explicit”; however, ultimately, by way of concession, it failed to rule unconstitutionality of these provisions.

<sup>35)</sup> With regard to these serious gaps in legislation, the Constitutional Court, by way of the same decision no. 1609/2010, was categorical, ruling unconstitutionality of relevant provisions relating to a “fully grounded” petition: “It is clear that the judge, following reception of the petition requiring notification of judgment, undertakes to assess it in order to rule on its “good grounds”, as set forth under the litigious wording. The viewpoint the judge is bound to issue should occur within a procedural framework which does not exist, the petition being submitted, logically, following delivery of a final and binding judgment (which, if not appealed by an extraordinary remedy, stands for the endpoint of trial) and preceding its possible sequels by means of settlement of the petition for review. In other words, it is about a stage outside any procedural framework, subsequent to the end of trial - after the exercise of ordinary remedies, and preceding its possible continuation - due to introduction of review. Or, the right to exercise this extraordinary remedy can be cancelled just by rejecting a similar petition, whose sole purpose is the urging of judgment’s service eligible for review. The fact that its analysis is being undertaken outside the trial itself, therefore, lacking the possibility of compliance with minimum procedural safeguards, is unacceptable under a rule of law, and constitutes a disregard of the right to a fair trial. Inaccuracy of wording creates uncertainty also as regards the competent judge to rule on the merits of the petition requesting service of judgment whose review is intended to be requested by the interested party, not being explicit whether this shall be reviewed by the same court that passed the judgment to be contested, or by another court. Drafting defect affects, from this perspective as well,

The statement in that review, as a retraction remedy, does not entail the duty of the court to “resume the merits of the dispute and remove enforcement of the internal rules of procedure conferring *res judicata* to a judgment”, should be at least “gradated”, in two respects: it goes without saying that review stands for a “retraction” remedy, though it does not exclude, but actually often involves re-judgment on the merits, should it be admitted, otherwise the review itself would be rendered meaningless; as already mentioned<sup>36)</sup>, *res judicata* may not stand for an insurmountable obstacle in re-judging the dispute – following grant of review – for the purposes of enforcing Community (European) rules, this authority connoting only *express and reasonable* conditions for removal<sup>37)</sup>.

The argument of the court, in terms of inevitability of discrepancies in case law – basically, as it goes, accepted by the European Court in Luxembourg, as well – must be taken with extreme reluctance, to which, as a matter of fact, even the European Court urges<sup>38)</sup> by way of phrases such as: “a general climate of uncertainty and insecurity”, “strong discrepancies”, “persistent discrepancies”, “lack of mechanisms to ensure consistency of jurisprudence”. In short or in other words, fundamental discrepancies, striking discrepancies, abnormal and repetitive ones can not be accepted or can not be judged inherent<sup>39)</sup>.

---

right of free access to justice by the impossibility of the interested party to be aware to which court should be referred the request for service of judgment. Likewise, the term “good grounded” is a misleading phrase, both for the party and the judge. Solidity becomes a feature that may be relativised, criteria of its evaluation being non-existent. Thus, the party can not fulfil its duty to ground the request as required under the litigious wording, due to the fact that it is not aware of the extent in which the grounds it would raise could be deemed sufficient to rule grounding as substantiated. Equally, the judge is forced to assess upon criteria he will determine but discretionarily and transiently, in default of legal statements according to which to decide on the solid grounds of the petition”. Constitutional Court’s opinions are relevant and cogent, thorough and irrepressible, sparing any other comments. [The Constitutional Court reconsiders, thus, its earlier opinion, because, indeed, it could only capture the fact that, although it apprehended that there were perceived “some gaps of legislative technique likely to have a bearing upon the terms of availability, predictability and clarity of the litigious legal rule, however, in light of this finding, without any ground to the purpose and anywhere near persuasive, it simply rejected the plea of unconstitutionality raised. (Judgment no. 675/2008, published in the Official Gazette of Romania, Part I, no. 474, June 27<sup>th</sup>, 2008.) For some resolutions that could be derived via interpretation, under the legislation at issue, see: I. Rîciu, *op.cit.*, no. 402.]

<sup>36)</sup> Judgment of the Court of Justice (Grand Chamber) of July 18<sup>th</sup>, 2007, in Case C-119/2005.

<sup>37)</sup> Judgment of March 16<sup>th</sup>, 2006, in Case C-34/2004, “Rec.”, I, 2006, p. 2585, par. 24; Judgment of the Court, the Grand Chamber, of February 12<sup>th</sup>, 2008, in Case C-2/2006, “Rec.”, I, 2008, p. 411, par. 38.

<sup>38)</sup> See: Judgment of December 1<sup>st</sup>, 2005, in Case *Păduraru v. Romania*, cited above, especially par. 98; Judgment of December 6<sup>th</sup>, 2007, in Case *Beian v. Romania*, cited above, especially par. 38.

<sup>39)</sup> Provisions of the new Code of Civil Procedure, enacted, but still unenforced, are considering just the establishment or improvement of some “procedural mechanisms” for ensuring consistency in legal practice, including referral to the Supreme Court for a preliminary ruling, as provided by Article 512 et seq. Code of Civil Procedure. Such procedures can be effective provided they are associated with professionalism and accountability of judges. Otherwise, they shall stand for a set piece, rhetorical pretexts.

13. In Decision no. 2683/2009 of the High Court of Cassation and Justice, the Administrative and Fiscal Litigation Department (unpublished) – a painstaking and convincing decision developed – with reference to Article 21 par. (2) of Law no. 554/2004, the Court stated: “The case for review established under the cited rule has been designed as a final internal remedy aiming to ensure pre-eminence of provisions under the treaties constituting the European Union and other mandatory regulations and shall be analyzed within the framework of general rules on the retraction extraordinary appeal procedure for review, because *EU law does not require a national jurisdiction to remove enforcement of domestic rules of procedure conferring res judicata to a judgment, even if thus would be repaired a breach of EU law committed under the relevant judgment* (Case *Rosmari Kapferer against Schlank & Schick GmbH*, C-23/2004, Judgment of March 16<sup>th</sup>, 2006)”<sup>40)</sup> (s.n. – *I.D. and Gh.B.*). Findings are correct, but in order not to lead to misunderstandings, it should be explained.

In our view, the court’s opinion – also “covered” by the judgment of the Court of Justice referred to – should not be interpreted in that, in terms of the principle of *res judicata*, review would not be granted to attain therefore enforcement of EU rules, but only in that, in this area and in this matter, the establishment of review gives particular expression to one of the principles of EU law: *the principle of subsidiarity*<sup>41)</sup>. It is the principle often mentioned as “procedural autonomy”. Establishment of review under provisions of Article 21 par. (2) of Law no. 554/2004 substantiates this perception.

## References

Albu, E. (2008). *Dreptul contenciosului administrativ (Administrative Litigation Law)*, Universul Juridic Publishing House, Bucharest

Beligrădeanu, Ș. (2010). *Flagrantă nelegalitate, în raport cu legea fundamentală, a refuzului Înaltei Curți de Casație și Justiție de a aplica o dispoziție înscrisă într-o lege în vigoare, sub cuvânt că aceasta „înfânge dreptul la un proces echitabil” – deci este neconstituțională –, deși Curtea Constituțională constatare constituționalitatea acelei prevederi legale* (Flagrant illegality, in relation to the fundamental law, of the refusal of the High Court of Cassation and Justice to enforce a provision under an effective law, alleging that it “defeats the right to a fair trial” – therefore it’s unconstitutional – although the Constitutional Court had already ascertained the constitutionality of the relevant legal provision, in *Dreptul (the Law)* no. 7/2010

Bîrsan, G. V.; Georgescu, B. (2008). *Legea contenciosului administrativ (Administrative Litigation Law)*, no. 554/2004, Hamangiu Publishing House, Bucharest

Bogasiu, G. (2008). *Legea contenciosului administrativ, comentată și annotată (Administrative Litigation Law, commented and annotated)*, Universul Juridic Publishing House, Bucharest

Iorgovan, A.; Vișan, L.; Ciobanu, A. S.; Pasăre, D. I. (2008). *Legea contenciosului administrativ (Administrative Litigation Law)*, Universul Juridic Publishing House, Bucharest

---

<sup>40)</sup> It is a clerical error, it is in fact Case C-234/2004, “Rec.”, I, 2006, p. 2585.

<sup>41)</sup> For that matter, the aforementioned decision recalls that, in accordance with the principle of cooperation, the national judicial authority must review a final judgment passed in breach of EU law, “provided that this authority has, under national law, the authority to reconsider” (par. 23-24).

Irinel, A. A.; Buta, Gh., in “Revista română de jurisprudență” (“*Romanian Journal of Law*”) no. 3-4/2010

Rîciu, I. (2009). *Procedura contenciosului administrativ (Administrative Litigation Procedure)*, Hamangiu Publishing House, Bucharest

Ștefăniță, C. (2010). *Modul de procedare al instanțelor judecătorești confruntate cu o contradicție între o decizie a Curții Constituționale și o decizie pronunțată de Înalta Curte de Casație și Justiție, în Secții Unite, pentru soluționarea unui recurs în interesul legii (Methods of proceedings of courts faced with a conflict between a decision passed by the Constitutional Court and a decision passed by the High Court of Cassation and Justice, in Joint Sections, to resolve an appeal in the interest of the law)* in *Dreptul (the Law)* no. 4 / 2010

Zotta, Gr. C. (1941). *Codul de procedură civilă adnotat (Annotated Code of Civil Procedure)*, Bucharest