The Control of the Legality of Administrative Activity through the Court of Justice of the European Union

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Abstract: According to the law of the European Union, in case one of the institutions of the Union or an organ, office or agency belonging to the Union *refrains from making a decision*, the member states and the other institutions of the Union are entitled to make a notification to the Court of Justice of the European Union. The Court has the competence to verify the legality of the legislative acts of the institutions, offices, organs or agencies of the Union that are meant to produce judicial effects towards third parties and is competent to pronounce itself, by preliminary decision regarding the *interpretation of the treaties*, namely *the validity and interpretation of acts* adopted by the institutions, offices, organs or agencies of the Union. Also, according to the primary treaties, any legal issues related to *the non- fulfillment of the treaty's provisions, non compliance with the community legislation, not executing the decisions of the Court of Justice or non compliance with the terms of an agreement between the EU and a third state,* as well as the legal aspects related to the *application of penalties* based on the regulations of the EU, *contractual and extra contractual liability* are subordinated to the control of the Unions' judicial instance.

Keywords: European Union; contractual liability; administrative institutions

1. Action for Declaration of Failure to Act

The illegal action established due to the violation of the provisions of the Union can be *performed by omission*. Thus, according to the Union's law[1] in case none on the EU institutions (European Parliament, European Council, European Commission or the Central European Bank)or an organ, office or agency of the Union abstains from issuing a decision, the member states and the other institutions of the Union have the right to seize the Court of Justice of the European Union, but only after they have undergone the *preliminary administrative procedure* or the *pre contentious procedure* as defined by the Court of Justice in the jurisprudence. Within two months, the solicitant has to address to the Court of Justice. Also, any private or judicial person can seize the Court according to the procedures mentioned above, for the omission caused by an institution, organ, office or agency of the Union to address an act, other than a recommendation or a notice.

[1] Article 265 in the Treaty on the European Union.

2. Appeal for Annulment of Administrative Acts at the Court of Justice of the European Union

The procedural frame on the exertion of the appeal for annulment is regulated by article 263 in TEU, respectively by the statute of some organs, offices or agencies of the European Union. Thus, the Court of Justice of the European Union has the competence to verify the legality of legislative acts, acts of the Council, the Commission or the Central European Bank, other than the recommendations and notices, as well as the acts of the European Parliament, European council, organs, offices or agencies of the Union, meant to produce judicial effects to third parties.

The holders of the action for annulment can be the member states, the European Parliament, the Council, the commission, the Court of Accounts, the Central European Bank, the Committee of Regions as well as and private and judicial person. It can not be admissible he action form annulment formulated by an infra state territorial entity. In this context, the Tribunal[1] decided that the judicial personality of a territorial collectivity of public law belonging to a member state has to be appreciated according to the internal law of that state, as the EU law cannot bring prejudice to the constitutional autonomy of the member states and establish the existence of its judicial personality.

The action based on the illegality of the act can have as object the grounds of *incompetence, violation of the fundamental procedure norms, treaty violation, aspects that regard their application* or for the cases of *power abuse*.

The private or judicial persons can address to the Court by an action targeting the acts directly and individually affecting them as well as against normative actions directly connected to the person and do not have execution measures. In case of organs, offices and agencies of the EU, by their constitutive acts, conditions and special procedures can be established in view of exerting the access to the Court of private and judicial persons against these acts.

In this context, the cause SPM/ Commission[2], the Tribunal held that a n action in annulment formulated by a private or judicial person cannot be admissible in the conditions in which they do not justify an interest in promoting the action. Thus, the action in annulment formulated against a regulation must contain an individual decision and the essential elements regarding the justification of the interest have to be connected to the exploitation of *an actual and born interest*.

The annulment of an act of the EU can be possible both for the entire act as well as for a part of it, for certain elements of its content. In case of the annulment in part, it is possible only if the elements whose annulment is solicited can be separated from the rest of the act. If by the annulment of a part of the document a part of the substance is modified, this condition of separation is not fulfilled.[3]

According to the definition offered by the Tribunal of First Instance[4] the abuse of power "implies that the institution that committed this abuse had the competence to adopt an act, but used this competence

[1] TPICE, Decision on April 30th 1998, *Vlaams Gewest/Comisia*, T-214/95, Rec., p. II-717, pct. 28; TPICE, Decision on December 15th 1999, *Freistaat Sachsen and others*, T-132/96 şi T-143/96, Rec., p. II-3663, pct. 81.

[2] Ordinance on January 12th 2007, *SPM/Commission in* Court of Justice of the European Communities, *Jurisprudence repertoire of the Court of Justice and Court of First Instance*, Part I, Ed. CURIA, Luxembourg, 2007, p. II-25, pct. 52

[3] CJCE, Decision on December 10th 2002, *Commission/Council*, C-29/99, Rec., p. I-11221, pct. 45, 46; CJCE, Decision on March 30th 2006, *Spain/ Council*, C-36/04, Rec., p. I-2981, pct. 13, 14.

[4] TPICE, Decision on November 15th 2007, *Hungary/Commission*, Cause T-310/06 in Curtea de Justiţie a Comunităţilor Europene, Court of Justice of the European Communities, *Jurisprudence repertoire of the Court of Justice and Court of First Instance*, Part I, Ed. CURIA, Luxembourg, 2007-11/12, p. II-4658, 4659, pct. 124. In this cause, the Tribunal annuls the

in view of reaching other results other than the ones invocated". The fact that an institution of the EU makes a *clear error or appreciation* or an *abuse of power* cannot determine the annulment for lack of competence.

In the jurisprudence of the Court of Justice of the EU[1] is has been held that a fundamental criteria of appreciation of violating the community law, of a serious gravity is the manifested non compliance with the limits imposed to the ***power of appreciation*** by the institution in cause. Thus, if the EU institution disposes by a quite reduced discretion, almost inexistent the sole "breach of the community law can be enough to prove the existence of a sufficiently serious breach". The condition is that the object of the illegal conduct is represented by a particular right. The invocation of an *abuse of power* is not connected by the cause with a right that belonged to an individual cannot be held.[2]

The acts issued by an institution of the EU, based on its discretionary power, have to be motivated meaning that they have to comprise, clearly and unambiguously those elements that lead to the reasoning based on which the decision was taken.[3] Only in this manner we can talk about the possibility of the Union's instance to verify if the institution has outrun its attribution by issuing a decision of that kind.

Regarding the right of an EU institution to modify an existent situation according to its *right of appreciation*, by adopting an act and respecting its legal competence[4] the Court has stated that no economic operator should prevail from *legitimate confidence* especially in a domain in which the legislative modifications are frequent.

Another basic condition for an action for annulment can be admissible imposes that the acts or at least the measures that are contested produce *judicial effects* towards third parties. In order to establish if a measure can be the object of such an action, the conditions of substance will be analyzed regarding the action and not only the ones regarding the form under which the action was adopted.[5] Thus, in the jurisprudence[6] it has been stated that not only the measures producing mandatory judicial effects, that affect the interests of the solicitant, so that his judicial status is clearly modified, are considered to be acts that can undergo a control of legality according to article 263 of the TEU. In case we are talking about an act or a decision adopted according a procedure that is susceptible of an action for annulment according to article 263, those acts have an intermediate character, whose objective is to elaborate and prepare the decision or the final measure.

At the same time, in order that an action for annulment introduced by a member state to be admissible it is necessary that the act of the EU institution in cause to follow the judicial effects and it is not necessary that this act to produce judicial effects towards the member state.[7] The period of time for

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Dispositions of the Regulation (EC) no. 1572/2006 of the Commission on October 18th 2006 amending Regulation (EC) no.824/2000 establishing procedures for taking over cereal by the intervention agencies and methods for analyzing and determining the quality of cereal, on the grounds that the Regulation is vitiated by a *clear error of appreciation.*

[1] CJCE, Decision on May 8th 2007, *Citymo/Commission*, Cause T-271/04, pag. II-1412, II-1413; CJCE, Decision on December 10th 2002, *Commission /Camar and Tico*, C-312/00 P, Rec., p. I – 11355, pct. 54; TPICE, Decision on July 12th 2001, *Comafrica and Dole Fresh Fruit Europe/Commission*, T-171/96, T-230/97, T-174/98, T-225/99, Rec., p. II-1975, pct. 134

[2] CJCE, Decision on July 4th July 2000, *Bergaderm and Goupil/Commission*, C-352/98 P, Rec., p. I-5291, pct.42.

[3] CJCE, Decision on 1st April 1993, *Diversinte and Iberlacta*, (C-260/91 şi C-261/91), Rec., p. I-1885, pct. 10.

[4] Decision of the Court on July 15th 1982, *Edeka*, 245/81, Rec., p. 2745, pct. 27.

[5] CJCE, Decision of 11th November 1981, *IBM/ Commission*, 60/81, Rec., p. 2639, pct. 9; CJCE, Decision on 28th November 1991, *Luxemburg/European Parliament*, C-213/88 şi C-39/89, Rec., p. I-5643, pct. 15.

[6] CJCE, Decision on 11th November 1981, *IBM/ Commission*, 60/81, Rec., p. 2639, pct. 9, 10.

[7] CJCE, Ordinnace on 27th November 2001, Portugal/Commission, C-208/99, Rec., p. I-9183; CJCE, Decision on 18th June 2002, Germany/ Commission, C-242/00, Rec., p. I-5603.

such an action to be introduced is two months from the date of notification of that act or, in lack of this, form the date the solicitant took knowledge of that act.

3. The Appeal in Interpretation

The law of the EU is applied directly in the national courts, replacing the national law and indirectly when it is used for the interpretation of the internal provisions.

According to article 267, al.1 in TEU, the Court of Justice of the EU is competent to pronounce itself, through a preliminary decision, regarding the *interpretation of the treaties*, respectively the *validity and interpretation of the acts* adopted by the institutions, organs, offices and agencies of the Union.

The manner of referral to the Court of Justice is deduced form the regulation[1] establishing the situations in which the member states are or not obliges to send the cause to the Court. If such an issue appears in an instance of a member state whose decisions are not subordinated to any means of appeal in the internal law or it is a cause pending in a national judicial instance regarding a person subordinated to a deprivation measure, this instance if obliged to seize the Court while in front of a national instance whose cause is not in final means of appeal, the court is not obliged to send the cause in order to receive a preliminary decision.

According to the principle of cooperation between the Court and the national instances, instituted by the treaties in article 4, al.3 in TEU, the Court held constantly that only the national instance, seized with the litigation, is competent to appreciate, according to the particularities of the case, if is necessary to send the cause to the Court of Justice so that the national instance can make a decision. If the national instance considers that it is necessary to make a preliminary decision, the court is able to state the questions upon which the Court is to decide. In order to be forced to make a decision, the questions addressed by the national instance have to aim at the Union's law.[2] In what concerns the way to finalize the preliminary procedure, this can take place through a decision of interpretation given by the Court or through the withdrawal of the preliminary action. The withdrawal of the preliminary action take place when the litigation on the role if the instances is solved due to a transaction between the parties by the abandon of the trial or due to a decision of the Court of Justice of the European Union in such a cause.

[1] Article. 267, alin. 2,3 and 4 on TEU.

[2] Decision on 15th December 1995, *Bosman*, C-415/93, Rec., p. I 4921, pct. 59; Decision on 13th March 2001, *Preussen Elektra*, C-379/98, Rec., p. I-2099, pct. 38.
For exmaple, in the cause Gysen, the Court was invested with the judgment of a preliminary request formulated based on article 267 din TEU, by the Tribunal for labor litigations in Brussels for the interpretation of Regulation (EEC, Euratom, CECA) no. 259/68 of the Council on February 29th 1968 for establishing the Statute of the public servants of the European Communities as well as the regime applicable to other agents of these communities and instituting special transitory measures applicable to public servants of the Commission. From the analysis of the cause resulted that according to the Belgian legislation, the child of a worker deploying an activity with an independent character and is beneficiary of an allowance paid to the former husband/ wife or to the other husband/wife by an organism form another member state than the one in which the individual works, the rank of the children of the worker are taken into consideration in order to guarantee the principle of non discrimination. The regulation has general and direct applicability reason for which the child conferring the right to allowance based on this Statute has to be assimilated to a child that confers the right to allowances according to the internal norms. Decision of the Court on February 14th 2008, C-449/06, Gysen, p. I-580.

4. The Full Jurisdiction Appeal

4.1. The State's Liability for Breaching the Law of the Union

In the primary treaties it has been stipulated that any *failure to fulfill the provisions of the treaty, failure to comply with the community legislation, failure to execute the decisions of the Court of Justice or failure to respect the conditions of an agreement between the EU with a third party* will attract serious sanctions for the member states, institutions of the EU, private or judicial persons.

Analyzing the legislation of the EU, we can notice that the principle of liability of the state for breaching the law of the EU has a total judicial force. Respecting the treaties has a character of law for the member states, being part of the internal law together with their ratification. The member states are obliged to take all the measure of internal law that are necessary to the application of the mandatory acts of the EU form a judicial point of view (article 291, al.1 of TEU).

The court cleared the significance of *failure to respect the obligations* provisioned in the treaties by a signatory state, indicating that the dispositions of the treaty have a character "of judicial order of international law in the benefit of which the member states have limited their sovereign rights" and the concepts of the direct effect "comes to finalize the ambitious economic and politic program defined by the treaties", in this context the Court recommending firm methods to apply the community regulations within the member states. (Craig & de Búrca, 2009, pp. 339-342)[1]

The illegal action of a member state can be manifested through *an act or an omission.*

Regarding the scope of the persons that have the right to address the Court when they are prejudiced by breaching the community legislation or the treaties, the opinions of a judge of the Court of Justice of the European Union are relevant, who asserted that "the treaty created a community not only made of states but also people and accordingly, not only the member states but also the people must be regarded as subject of community law.. the community reclaims general participation, with the consequence that the private persons are not obliged to tasks and obligations, but they have also prerogatives and rights that have to be protected by law..This is a political idea, inspired by a perception on the constitutional system of the community on which the decision Van Gend en Loos is based and that continues to inspire the entire doctrine that derives from it". (Craig & de Búrca, 2009, p. 342)

According to the Treaty of the European Union, the Commission, in case it notices that a member state breached the obligations that it has according to the treaty, it can issue a motivated notice after offering the state the possibility to present its observations. The referral of the Court of Justice of the European Union is made in case the state does not comply with the notice in due time established by the Commission (article 258 TEU).

The prior administrative appeal takes place through seizing of the Commission that issues a motivated notice to the state. Before this stage, the Commission invites the state to present its observations in written and orally on the litigation, ensuring the respect of the contradictory procedure.

For example, any member state that notices the non fulfillment of an obligation of the treaties by another member state, it is held to fulfill the *prior administrative appeal* before sizing the Court of Justice. The claimant state is not stopped form seizing the Court of Justice in case the Commission did not issue the notice within three months from introducing the request (article 259 in TEU).

[1] Cause 26/62 NV *Algemene Transporten Expeditie Onderneming van Gend en Loos c. Nederlandse Administratie der Belastingen*, 1963.

In what concerns the *failure to respect the community legislation,* in the jurisprudence it has been indicated that the respect of the *pre contentious procedure* represents an obligation provisioned in the Treaty, both to protect the right of the member state in cause as well as in order to "ensure that the pre contentious procedure will have as object a litigation that is clearly defined". For example, the letter for delay sent by the Commission to a member state that invokes the incorrect transposition of a directive represents a pre contentious procedure.[1]

Similarly, the procedure is applied in case *the member state did not take the measures imposed for the execution of the decision of the Court* through which the breaching of the obligations in the treaties by a member state was noticed. Thus, the Commission can seize the Court only after the fulfillment of the prior procedure in case the state accused of the failure to fulfill the obligations established in the treaties does not respect the execution of the decision of the Court of Justice and after it gave them the possibility to formulate the necessary observations. In this case, the Court will establish "the quantum of the forfeit sum or penalties with title of payment considered to be corresponding to the circumstances and the member state has to pay" (article 228 in TEU).

4.2. The Appeal against the Penalties Applied Based on the Union's Regulations

The competence to solve any litigation between the Union and the persons subordinated to the *Statute of European public servants* as well as any other issue regarding the legality of an act on these persons, falls upon the Court of Justice of the European Union (article 91 of the Statute).

For example, according to the *Statute of European public servants* the failure to fulfill, intended or by negligence, by a public servant or by a former public servant, of the obligations according to the Statute can determine the disciplinary liability (article 86 of the Statute). In the case in which towards such a person subordinated to the judicial regime established by the Statute any of the disciplinary measures provisioned din article 9, addendum IX is taken, regarding the *Disciplinary Procedure* that person has the right to contest it at the Court of Justice, after following the pre contentious procedure.

The prior administrative appeal is regulated in this case by article 90, al.2, addendum IX on the *Disciplinary Procedure* based on which any person subordinated to the present statute can formulate a complaint to an authority competent to make appointments against an act that brings prejudice to him or in case the authority should take a legal measure regarding him. The term of submitting a complaint is three months[2] and the authority is obliged to provide an answer within 4 months from submitting the complaint, by a motivated decision.

In case the answer coming from the institution is a decision of rejection, expressly or implicitly of the request, then the individual can address to the Court, after, through an administrative complaint, followed the pre contentious procedure at the institutions competent to make appointments. The lack of any answer after the three months has the value of an implicit decision of rejection of the request, reason for which the person in cause is entitled to address to the Court.

[1] Decision on April 10th 2008, C-442/06, *Commission/Italy*, p. I-2427, pct. 22.

[2] According to article 90, al.2 of the Statute, this term is calculated from the date of the publication of the act, in case of a measure with general character, respectively the date of communication of the decision to the recipient and the latest at the date the interested person took notice of the decision, in case of a measure with individual character. In case an act with individual character brings prejudice to another person than the recipient, the term is calculated from the date in which the recipient took notice of the decision, but no later than the publication date. Also, the term can be calculated at the date of expiry of the established term for offering an answer, when the complaint refers to a implicit decision of rejecting the request.

In case the complaint addressed to the authority competent to make appointments was introduced according to article 90, al.2, the public servant or agent in cause can introduce an action to the Court of Justice, but only in the cases involving a request of suspension of the execution of the contested act or adoption of measures with temporary feature, context in which the procedure will be suspended until the state at which the authority in cause will adopt a decision of explicit or implicit rejection, regarding the main request.

4.3. The Appeal for Extra Contractual Liability

The extra contractual liability comes to defend against the prejudice caused by the institutions of the Union of by its agents in the exercise of their functioning and the Union has to repair this prejudice "according to the general principles common to the judicial orders of the member states".[1] In extra contractual matters the regulations comprised in the *Regulation (EC) no.864/2007 of the European Parliament and Council on July 11th 2007 on the law applicable to non contractual obligations*[2] cannot be applied as they apply to not contractual obligations in civil and commercial matters that appear in case of a conflict of laws, in view of ensuring *a space of judicial security* at the level of the EU.

In case there is the *personal liability of the agents* involved, they are subordinated to the statute or the regime applicable to the position, respectively, the one at the level of the EU or at least the national level. For example, the Court of justice of the European Union is competent to make decisions on any litigation between the EU and its agents under the limits and the conditions established by the Statute of the public servants of the EU and according to the regime applicable to the other agents of the EU (article 270 of TEU).

This is confirmed by the jurisprudence of the Court[3] that indicates that any litigation that involves an illicit action make by a public servant or a temporary agent employed by an institution and that has as object the restoration of a prejudice is based on article 270 of TEU and the Statute and not on the provisions of article 268 and article 340 of TEU. Accordingly, we are not talking about an extra contractual liability in these cases. For example, we can talk about a administrative- patrimonial liability of the European public servant, based on article 22 of the Statute, in case an EU institution was prejudiced by the actions of a public servant under the conditions of the extra contractual liability.

On the other side, the institutions of the EU are not liable unless we are talking about an act of the public servants of the EU or its agents, fulfilled in their activity. Thus, there are cases in which certain official persons are not liable due to the regime of privileges and immunities enjoyed for the acts fulfilled in this position. If the EU institutions are not liable for the acts fulfilled by their agents, the national instances are the ones competent to solve any request personally directed to them. The national instances won't be able to decide upon the extra contractual liability of the EU. (Craig & de Búrca, 2009, pp. 737, 738)

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[1] Article 340, al. 2 din ***TEU*** **(**ex-article 288 TEC).

[2] This regulation does not apply to fiscal, customs and administrative matters or to cases involving the state liability for acts or omissions in exerting the state authority. Thus, the dispositions for the situations implying regulating the domain of jurisdiction are not applied, regarding *the complaints against the public servants acting on behalf of the state* and *liability for the acts issued by the public authorities, respectively the situations regarding the people appointed in positions of public dignity*.

[3] Decision on October 22nd 1975, *Meyer-Burckhardt/Commission*, 9/75, Rec., p. I-1171, pct. 7; Decision on October 7th 1987, *Schina/ Commission*, 401/85, Rec., p. 3911, pct. 9.

In the jurisprudence[1] on the contentious of actions for damages in the field of public service of the EU, it has been stated that the extra contractual liability of the EU implies the fulfillment of cumulative conditions. In the first place, there has to be an action or inaction by which to determine the illegality of the behavior of the institution, the second condition regards the determination of the prejudice, respectively establishing its real character which is the determination of a report of causality between the conduct of the institution and the prejudice caused.

For example, for granting compensatory interests to public servants that lost their chance to be recruited in an EU institution form the exclusive fault of this institution, the Tribunal held that they have to prove the real character of the prejudice certain and evaluable, respectively the existence of a causality connection between the guilt invoked and prejudice sustained.[2]

Once the tribunal notices that then prejudice caused by the loss of the chance to be recruited it is the only competent institution to evaluate the manner and the scope of the repair of this prejudice according to the limits provisioned in the content of the request.[3]

4.4. The Appeal for Contractual Liability

According to article 340 of TEU, *the contractual liability of the EU is governed by the law applicable to the specific contract.*

Interpreting this provision we notice that not the incomplete EU law in contractual matters is the one applicable. The terminology law applicable to the specific contract means that in contractual matters, under the conditions in which the regulations applicable are not stipulated within the treaties, they are determined by the other ways of involving the liability. The dispositions of the Regulation (EC) no. 593/2008 of the European Parliament and Council on June 17th 2008 on the law applicable to the contractual obligations (named ROMA I)[4] are not applied as they regulate the domain of contractual obligations in civil and commercial matters, these dispositions being meant to favor the compatibility of the norms on the conflict of laws and competence, applicable in the member states.

It is preferable that this competence is inserted in the content of the contractual norms, in this context the practice in the contractual domain of the European Commission being edifying. In the same direction was the practice of the Court of Justice that asserted that a contractual clause prevails always in front of the fact that the contract "would present a stronger connection with another country than the provisioned one" in its content. (Craig & de Búrca, 2009, p. 751)[5]

If we talk about the *contracts of employment of EU public servants* signed with the EU, they are public law contracts, thus they will be governed by the European administrative law and not by any system of national administrative law. In the case in which there is no such clause regulating the instance competent in solving the contractual issues, article 272 in TEU institutes the competence of the Court

[1] Decision on December 16th 1987, *Delauche/Commission*, C-111/86, Rec., p. 5345, pct. 30; Decision on June 1st 1994, *Commission,/Brazzeli Lualdi and others*, C-136/92 P, Rec., p. I-1981, pct. 42; Decision on 14th May 1998, *Council/de Nil and Impens*, C-259/96 P, Rec., p. I-2915, pct. 23

[2] Decision on June 1st 1994, *Commission/Brazzeli Lualdi and others*, C-136/92 P, Rec., p. I-1981, pct. 42; Decision of the Tribunal on December 12 1996, *Stott/Commission*, T-99/95, Rec., p.II-2227, pct. 72.

[3] Decision on June 1st 1994, *Commission/Brazzeli Lualdi and others*, C-136/92 P, Rec., p. 81.

[4] The present regulation is not applied for fiscal, custom or administrative matters and any law of the parties must not bring prejudice to the dispositions of the EU law, from which it cannot be derogated by convention.

[5] Cause 318/81, *Commission c. CODEMI*, 1985, ECR, 3693.

of Justice of the EU to decide based on a compromising clause comprised in contract of public law or private law concluded by the EU in its name.

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