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**The Review of Decisions Issued by the Administrative Court, as per Art. 21
Paragraph (2) in Law no. 554/2004. Admissibility Conditions**

Angelica Roșu ¹, Simona Gavrilă Petrina ²

¹*“Danubius” University of Galați, the Faculty of Law, rosuangelica@univ-danubius.ro*

²*“Dunărea de Jos” University of Galați, the Faculty of Judicial, Social and Political Sciences,
gavrilasimonapetrina@yahoo.com*

Abstract: By this paper, using the observation method, we proposed an identification of the admissibility conditions for the review claim based on the provisions of art. 21 paragraph (1) in Law no. 554/2004. On one side, we considered as necessary to elaborate this study as a consequence of the Romanian Constitutional Court decisions for solving the unconstitutionality pleas regarding this law provision, and on the other side we approached this subject considering the interpretable nature of the respective provision. From another point of view, we appreciated that a clarifying of “EU law preference principle breaching” formula content is required, the same being included in the provision mentioned above. Specifically, we tried to find out whether the respective formula can be taken as basis for a review claim based on the provisions of art. 21 paragraph (1) in Law no. 554/2004 in case a fundamental human rights breach is invoked, referring to Lisbon Treaty provisions. By this paper we showed the deficiencies of the enactment as it is in force (also signaling the deficiencies to be found in the modification proposal).

Keywords: decision; EU law; preference; fundamental rights

1. Introduction

The circumstance that many of the European states are members of the European Council or the European Union, and the last two are signatories of international commitments stipulating strictly established obligations, leads to the objective necessity of European integration.

This complex process develops on both norm and jurisdictional levels.

In this context, it is uncontested that member states of the European Union (EU) must use their administrative and jurisdictional capacities to comply with the norms issued and commitments undertaken.

Responding to the above exigency which implies the Romanian state responsibility in case of eluding obligations undertaken by the EU accession Treaty, the domestic legislator assumed the introduction of a national remedy in case of breaching the EU law preference principle when solving a case in the administrative matters.

2. Relevant Provisions. Present and Future

Art. 21 paragraph (2) in the Law of administrative claims¹ stipulates the possibility of addressing a review claim in case of breaching the EU law preference principle.

According to this article, “a ground for review, in addition to those provided in the Civil Procedure Code, can be a final and irrevocable decision sentenced by breaching the principle of community law preference, as ruled by art. 148 paragraph (2), substantiated with art. 20 paragraph (2) in the Constitution of Romania, as republished”.

We mention that the second tenet of this article, stipulating the period such a review claim can be done within, based on the said ground, was declared as unconstitutional by the Decision no. 1609/2010 of the Constitutional Court². Although the term up to which the law provisions should have been harmonized passed, the legislative proposal for modifying this enactment is still in debate of the Senate, being adopted by the Lower House, as the first house approached, on 19 April 2011.

Regarding this legislative route, we consider as necessary some preliminary remarks.

The first observes that first tenet, still in force, is also concerned in the modification law draft for art. 21 in Law no. 554/2004, although this article was stated as unconstitutional only partially, in what concern its second tenet respectively.

Thus, according to the Draft of Law adopted by the House of Representatives³, paragraph (2) of art. 21 in Law no. 554/2004 shall have the following content: „the breaching of the community law preference principle, as ruled by art. 148 paragraph (2), substantiated with art. 20 paragraph (2) in the Constitution of Romania, republished, by a decision remained final and irrevocable, can be a ground for review. The decision is to be notified to the interested party within 30 days since sentencing. The review claim shall be put within 15 days since notification and solved urgently and preferably within a period of maximum 60 days since registration”.

The legislator’s initiative to intervene in the whole text is a praiseworthy⁴, but we can still find that the form of the text, extensively criticized in the Romanian literature (Râciu, 2009), is yet far from the rigor a norm should have.

Thus, the replacing of European Community name with that of European Union, once the Lisbon Treaty⁵ was adopted, is ignored. Consequently, the community law collocation shall be used only when the jurisprudence of the European Union Court of Justice before this modification is referred.

At the same time, we may notice that the use of formula “the breach, by a decision remained final and irrevocable, of the community law preference principle...” would be more correct, the collocation proposed as earlier being questionable from the grammar point of view.

Thirdly, it is to be noticed that the second tenet of the text is not clear enough.

¹ Published in the Official Gazette of Romania, Part I, no. 1154 from 7 December 2004. This law was modified and completed repeatedly. By Law no. 262/2007, published in the Official Gazette of Romania, Part I, no. 510 from 30 July 2007, the stated article was introduced.

² Published in the Official Gazette of Romania, Part I, no. 70/27 January 2011.

³ To be referred http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=11737 .

⁴ However, we may notice that it is a consequence to fact that by Decision no. 1609/2010 the Constitutional Court observed specific deficiencies in the drawing up of the first tenet in the same paragraph.

⁵ The Lisbon Treaty for modifying the Treaty Regarding the European Union and the Treaty Establishing the European Community, signed in Lisbon, on 13 December 2007, published in the Official Journal of the European Union no. C 306 from 17 December 2007, came into force on 1 December 2009, upon its approval by all member states.

As irrevocable decisions are not to be notified, it comes out that the interested party must put a request for notification. The enactment shows that the decision is to be notified to the interested party within 30 days since sentencing, but it is not clear whether the party should demonstrate his interest for being notified about the decision within the 30 days, under the penalty of rejection of his claim for review as delayed, or such a request for being notified the decision can be made later without exposure to the risk of passing over the period when a claim for review can be addressed.

3. Admissibility Conditions for the Review Claim

Coming back to the admissibility conditions of such a claim, we considered two aspects.

On one side, there must be done an identification of the decisions that can be subjected to a review based on such a ground, and on the other side the content of the collocation “breach of the EU law preference principle” must be determined.

Regarding the first issue, we start from the context that art. 21 paragraph (2) first tenet in Law no. 554/2004, as it is in force presently (but also as proposed for modification) indicates that “final and irrevocable decisions” can be subjected to a review.

Regarding this collocation, there must be recalled that, being previously addressed with an unconstitutionality plea for the art. 21 paragraph (2) in the Law of administrative claims - grounded also on the lack of enactment formula precision in what regards the correlation with the norms in the Civil Procedure Code¹ - rejecting the plea², the Court noted that „no consonance can be required between the norms of Law no. 554/2004 for administrative claims and those of the Civil Procedure Code, as the author of the plea wishes, as far as, for the matter of review, the common law consists of the Civil Procedure Code, and **Law no. 554/2004 of administrative claims is an enactment with special features which, as per *specialia generalibus derogant* rule, derogates from the common law norms**”.

From such reasoning, we understand that final and irrevocable decisions, regardless their type, are considered as able to be subjected to a review.

The same point of view was adopted by the constitutional control court in 2009³, when it considered that no reasons exist for reconsidering its jurisprudence, noting that the mentioned decisions and **their reasoning** remain as valid.

One year later, although the rejection decision was maintained for the unconstitutionality plea regarding the first tenet of art. 21 paragraph (2) in Law no. 554/2004, when grounding Decision no. 1609/2010, the Court notices that „apart from the Civil Procedure Code provisions, the drawing up of this enactment is also not explicit enough in what concerns the decisions which can be appealed by the extraordinary way of the review based on the new review ground shown above. Thus, while art. 322 in the Civil Procedure Code specifies that decisions can be reviewed when they are final in the appeal court or not appealed or are given by a remedy court when recalling the subject matter, the first tenet

¹ As per article 322 paragraph (1) in the Civil Procedure Code, final decisions sentenced by the appeal court or non-appealed ones can be subjected to a review, together with the decisions sentenced by the remedy courts when recalling the subject matter.

² By the Decision no. 675 from 12 June 2008 of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 474 from 27 June 2008.

³ Constitutional Court Decision no. 679 from 5 May 2009, published in the Official Gazette of Romania, Part I, no. 411 from 16 June 2009, to be referred.

of paragraph (2) of art. 21 in Law 554/2004 for administrative claims generically refers to “final and irrevocable” decisions without giving any details.”

This time, the Constitutional Court considers that, “**considering the provisions of art. 28 in Law no. 554/2004, specifying that dispositions contained in the same are to be completed with the Civil Procedure Code provisions**, as far as the same are incompatible with the specificity of power relationships specific to administrative law, the judge and interested parties can use, however, the benchmarks necessary for classifying a court decision in the category of decisions susceptible to be reviewed according to the criticized enactment, so that it cannot be observed a breach of the right for free access to justice and exercising the remedy easy provided by the law”.

We may notice that, although the enactment was found as accordant to the constitutional provisions, this time the constitutional control court **reconsidered its grounding**. Thus, abandoning *specialia generalibus derogant* principle, the Court implicitly¹ considered that provisions of art. 322 in the Civil Procedure Code are applicable.

We appreciate that first considerations of the Court are closer to the text content subjected to the analysis.

Paragraph (2) of art. 21 in Law no. 554/2004 comprises a new ground for review, expressly indicates what decisions can be subjected to review (final and irrevocable decisions, without any discrimination), provides a special term for promulgating this remedy procedure, a specific term for solving such a claim, so that, **in the presence of the special derogates from the general principle**, at least for *lege lata*, provisions of art. 28 paragraph (1) in Law no. 554/2004², stipulating that “compatibility of applying the civil procedure norms with the specific of power relationships among the public authorities on one side and the persons prejudiced in their legitimate rights or interests on the other side shall be determined by the legal court” cannot be invoked.

The second issue circumscribing to aspects related to the review claim admissibility concerns the content of “EU law preference principle” collocation.

We mention that a thorough analysis of the content of this principle was not our goal, the only **question** we tried to answer was whether, in such a matter, in such an extraordinary remedy procedure, based on the provisions of art. 21 paragraph (2) in Law no. 554/2004, **breaches of the fundamental human rights can be claimed in front of the review court**.

At first view, the temptation is to answer unyieldingly negatively. This because, according to provisions of art. 322 item 9 in the Civil Procedure Code, „the review of a decision can be claimed when the European Court for Human Rights has found out a breach of the fundamental rights and freedoms caused by a court decision, and the negative consequences of such a decision continue to occur and no remedy can be achieved but only by reviewing the decision awarded”.

¹ We cannot take no notice of how the Constitutional Court overstepped its competences suggesting the above interpretation. The same competences were, in fact, invoked by the Court within the content of Decision no. 675/2008 where there is noted that: „by solving the unconstitutional pleas, the Court strives for an accordance of an enactment against the norms and the fundamental rights contained in the Constitution and the international judicial deeds Romania signed as a party and not against other legal provisions in other domestic enactments with lower juridical power”. We may notice that, although the Court finds out about its powerlessness in verifying some aspects concerning the law interpretation and enforcement (“regarding the unconstitutionality criticism on aspects concerning the law interpretation and enforcement and the lack of correlation in the domestic law regarding review matters, the Court notes that the unconstitutionality plea has an inadmissible feature as such matters do not fall within its competence, as they are assigned exclusively to the competent legal court and the legislator, respectively” – the same decision content to be referred), however the Court accomplishes an interpretation.

² Regarding the analysis of this enactment and the judicial practice revealing its enforcement see (Iorgovan, Vişan, Ciobanu, Pasăre, 2008, p. 368-386).

This review case is incident in the administrative claim matter too, as per the provisions of art. 28 paragraph (1) in Law no. 554/2004. Therefore, in the context of a fundamental human right breach, the interested party can use art. 322 item 9 in the Civil Procedure Code, provided this breach is found out by ECHR, also complying with the other conditions requested by the stated provisions.

A second argument justifying the negative answer to such a question could reside would be that protection of human rights has not been an original concern for the European Union. This context results from the main economic nature of the entire community construction¹, the recognized rights being closer to the general objectives and the community competences than to a concern for protecting the individual rights and freedoms (Renucci, 2009).

We may notice that, in the silence of the texts, the community jurisprudence progressively ensured an efficient protection of rights, the community judge making a preferential inspiration source out of the European Convention of Human Rights (Renucci, 2009).

For the studied issue, the provisions of the European Union Treaty, as amended by the Treaty of Lisbon, are of major importance.

According to article 6 in the European Union Treaty, „**The Union recognizes the rights, freedoms and principles stipulated in the Charter of Fundamental Rights of the European Union**² of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, **which shall have the same legal value as the Treaties**. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms³. Such accession shall not affect the Union's competences as defined in the Treaties.

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law⁴.

Moreover, as per article 2 in TEU „*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.*” These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

In doctrine, there were advisably revealed the difficulties residing in the dual nature of human rights protection in the European area⁵, such duality being sometimes baffling as the domestic norms must

¹ The constitutional treaties of the EU – The Treaty of the ECSC of 18 April 1951, The EC Treaty of 25 March 1957, The ECA Treaty (EURATOM) of 25 March 1957 – only recognize economic freedoms as the freedom of circulation of goods, capitals and persons and the free supply of services.

² Published in the Official Journal of the European Union C 83 of 30 March 2010.

³ We mention that accession of EU to the European Convention of the Human Rights has not yet occurred.

⁴ It is undisputable that the general principles of the Union law are a source of law for the EU.

⁵ For an extended study on this matter, O. Bulzan, *The European Court of Human Rights and the Court of Justice of the European Communities – between Conflict and Compromise*, article available on the website <http://studia.law.ubbcluj.ro/articol.php?articolId=240>, The author of the same notes that „duality Strasbourg-Luxembourg has generated in time an uncertainty on the competences of the two Courts whose coexistence did not led to convergence in

cohabit with standards established in two different directions, that is national actions must comply with both EU and conventional law.

4. Conclusions

Without getting into the details concerning this juridical context, we appreciate that in view of art. 21 paragraph (2) in Law no. 554/2004 provisions, **breaches of the fundamental rights can be invoked in a claim for review.**

EU law provisions to be invoked for preferential enforcement are quite the ones displayed above, art. 2 and 6, respectively, in the Treaty Regarding the European Union and those contained in the Charter of Fundamental Rights.

The conclusion results by itself, on one side, as the text discussed itself refers to the provisions of art. 20 paragraph (2) in the Constitution of Romania.

By the other side, as far as there are invoked breaches of the fundamental rights established by the Charter which has the same legal value as the treaties and also envisaging the new orientation of EU to an extended protection of the fundamental rights, we consider that the national judge will not be able to establish that a text contained in the Charter and guaranteeing a fundamental right is not a legal norm of the EU law and consequently refuse to make the preference principle effective.

The EU law offers an equivalent protection to the rights established in the Convention, only that their observance is ensured, apart from the general standards established by the Convention of Rome, taking also into account EU law principles and specificities which the national judge must consider too.

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jurisprudence, but to a kind of juridical insecurity generated by the cleavage on the national level in what regards the protection modalities for the fundamental rights and freedoms. Thus, the state has its protection ensured on two levels: by the European Convention of the Human Rights, signed in Rome on 4 November 1950, and, recently, by the Charter of Fundamental Rights of the European Union”.