

THE CONSTITUTIONAL PROTECTION OF THE SUPREME AUDIT INSTITUTION (ISA)

Abstract

The institutional bases of the external public audit from Romania were established in 1992, when was enacted the Law no. 94/1992, on the organization and functioning of the Court of Accounts (LOFCC). From that moment on, there were made several amendments (or attempts) to the law. Some of them were made through organic law, being also valid at present, but there have also been a couple of attempts to amend the regulatory framework in question by acts established by the executive power (decrees), resulting in cancelling their effects. Through the present paper, we accomplish, in fact, a judicial and economic approach of the circumstances concerning the respective attempts of institutionalization that have failed, taking into account the fact that according to the Article 73 (3), letter (i) of the Romanian Constitution, the organization and functioning of the Court of Accounts are regulated by organic law.

Keywords: the Court of Accounts, organizational/functional framework, competences, public audit/control, governmental decrees.

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PROTECȚIA CONSTITUȚIONALĂ A INSTITUȚIEI SUPREME DE AUDIT (ISA)

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Rezumat

Bazele instituționale ale auditului public extern din România au fost puse în anul 1992, când a fost adoptată Legea nr. 94/1992 privind organizarea și funcționarea Curții de Conturi (LOFCC). De la acel moment, au avut loc mai multe modificări (sau tentative de modificare) ale acesteia. Unele s-au făcut prin lege organică, fiind valide și în prezent, dar au existat și câteva încercări de modificare a cadrului normativ în discuție prin acte emise de puterea executivă (ordonanțe), soldate cu anularea efectelor acestora. Prin lucrarea de față realizăm de fapt o abordare juridico-economică a circumstanțelor privind respectivele tentative de legiferare care au eșuat, ținând cont de faptul că potrivit Art. 73 alin. (3) lit. I) din Constituția României, organizarea și funcționarea Curții de Conturi se reglementează prin lege organică.

Cuvinte cheie: Curtea de Conturi, cadru organizatoric/funcțional, competențe, audit/control public, ordonanțe guvernamentale.



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1. INTRODUCTION

The year 2013 comes to mark the leak of some round periods of time for the Court of Accounts institution, which since 1993 started to work effectively in Romania. Its institutional bases have been implemented as a matter of fact in 1992, when was enacted the Law no. 94/1992 on its organization and operation (LOFCC) (RP, 1992).

In a way, at that time we were dealing with a re-establishment, for that Romania had already a long tradition in this field, if we consider that on the 24th of January 1864 has been created a "High Court of Accounts", according to the French model (Bogdan, 1994; Saguna, 2012). As in the past, the mission of the institution consists in the exercise of the control function on the manner of formation, administration and use of the financial resources of the state and of the public sector (Bostan, 2000). The translation in modern terms: external public audit.

The constitutional basis, for this first stage after the re-establishment of the Court (as Supreme Audit Institution - ISA), can all be found in the Article 139 of the Fundamental Law (Constitution of 1991), according to which the Court of Accounts exercises the control on the manner of formation, administration and use of the financial resources of the state and of the public sector. Under the law, the Court shall also exercise judicial powers". At the same time, the organic rule applicable to the institution as such (LOFCC) provides that: "the Court of Accounts is the ultimate institution of financial control on the manner of formation, administration and use of the financial resources of the state and of the public sector".

Should be noted the sinuous path of this important institution of the state (Bogdan, 1994; Boulescu *et al.*, 2009), given by the significant changes of responsibilities, competences etc., which took place on a number of occasions, in the latter period of two decades, including reasons due to EU accession (Morariu, 2011). In essence, the evolution of the institution has known a transition from a "total" control, which was preventive and ulterior, when there were not excluded the missions on the private sector or on the privatisation transactions (up to the year 1999), to the modern audit – of regularity and performance, based on the analysis of risk areas. Also, as a result of revising the Constitution from 2003, the judicial powers have been directed towards the instance of common law (which also took over the financial magistrates - the judges and the prosecutors).

As far as we are concerned, as we have done it in other papers also (Bostan, 2010) by the present work, we want to briefly concentrate on several aspects derived from the classification of some regulatory approaches - concerning the institution of the Court of Accounts - as being non-constitutional,

with reference to the provisions of the Fundamental Law, in its both versions (from 1991 and 2003) which have operated in the reference period.

2. NON-CONSTITUTIONAL ATTEMPTS TO MODIFY THE INSTITUTIONAL FRAMEWORK APPLICABLE TO THE COURT OF ACCOUNTS

The various “incidents” having occurred in time in the process of regulating the activity of the Supreme Audit Institution in Romania, to which we refer here, relate to those attempts to modify the institutional framework applicable to the Court of Accounts, by normative acts enacted by the Executive. In the present case, we are talking about a series of emergency decrees issued by the Government of Romania, whose provisions - with a non-constitutional nature - aimed at various articles of LOFCC. The final rejection of such normative acts has occurred either at the level of the legislative forum, not approving them, either by declaring them as non-constitutional, by the Constitutional Court.

2.1. *Rejection by Parliament of the Emergency Decree (OUG) no. 78/2001*

The Emergency Decree (OUG) no. 78 from the 31st of May 2001 (GR, 2001a; RP, 2002) was aiming to allow the completion of the Art. 116 of LOFCC, the Executive wishing to create a legal basis for shortening the mandates of judges and financial prosecutors in other situations than those covered by the initial provisions of the law.

The motivation was based on some budgetary constraints concerning the possibility to sustain the wages funds of the Court of Accounts staff in 2001, which supposed the suppression of a number of 443 functions, some of which held by judges and financial prosecutors who have not been arrived at the end of their mandates (6 years, given on the basis of some Decrees issued by the Romanian President). Specifically, a number of 17 financial magistrates would have been repealed if the text of the Government Decree No. 78/2001 had been validated, Decree which specified that “The mandate of judge or, as the case may be, of financial prosecutor ceases in the event of reorganization as a result of the reduction, by the law, of the number of functions, as well as in the case of refusal to occupy another corresponding function of judge or of financial prosecutor, as a result of this reorganization”.

As regards the release from their function of the persons nominated, this is to be done by the “Romanian President, on the basis of a proposal from the Plenary Session of the Court of Accounts, enacted with the majority of votes of the present members”.

The fact that the 17 prosecutors and judges met the conditions for benefiting of pension rights was not relevant in the case presented. But the situation was stopped by the unique article comprised by the

Law No. 101 of 5 March 2002, which stipulates that "Is rejected the Emergency Decree of the Government no. 78 of 31 May 2001 for the purpose of supplementing the Article 116 of the Law No. 94/1992 on the organization and the functioning of the Court of Accounts" (RP, 2002a).

Obviously, it is about the fact that the Government has pursued with predilection the observance of the provisions in the Article 114, paragraph (4) of the Constitution, justifying the measure taken by the "emergency of applying the provisions of the Law for the state budget on the year 2001 (RP, 2001), but omitting the normative barriers existing in the amendment of the organic law through OG/OUNG. Omissions of same type we also encounter in the case of the Government Decree No. 101 of 27 June 2001 for the purpose of supplementing the Article 17 of LOFCC. By doing this, was "only" aimed to include in the scope of the control of the Supreme Audit Institution, as Certifying Body, "the use of funds made available for Romania by the European Union under the SAPARD Program and the concerned co-financing" (GR, 2001b), but in this case the single justification of the measure emergency was not sufficient.

This happened, though, let's remember, at that time we were talking about the major imperative of accessing financial instruments in the step of pre-accession of Romania to the Euro-Atlantic structures. Obviously, in this case also, by the unique article comprised by the Law no. 100 of 5 March 2002 is rejected the whole governmental procedure (RP, 2002b).

2.2. The declaration of some OUG as being non-constitutional following the referral of the Ombudsman

We have in view the Government Decree no. 43/2006 on the organization and functioning of the Court of Accounts (GR, 2006) and the Government Decree No. 94/2009 for the ensuement of the activity continuity of structures within the Government's working apparatus (GR, 2009). From the constitutional provisions (RP, 2003) of the Article 1, paragraph (4) relating to the principle of the separation and equability of legislative, executive and judicial powers within the constitutional democracy, the Article 115, paragraph (4) concerning the conditions in which the Government may enact emergency decrees, the Article 115, paragraph (6), the second sentence, it appears that the emergency decrees cannot affect the regime of the state's fundamental institutions.

2.2.1. The resolution of the non-constitutionality exception of the Government Decree no. 43/2006 on the organization and functioning of the Court of Accounts, exception raised directly by the Ombudsman, on the basis of the Article 146, paragraph (d), the second sentence of the Constitution.

Taking into consideration this framework, we can reveal some interesting aspects. First, let's say that by

this Government Decree, the Executive aimed to bring radical changes to the original provisions of LOFCC. Furthermore, the Article 76 specifies that “On the date of entry into force of this emergency decree is abolished the Law No. 94/1992 on the organization and functioning of the Court of Accounts (...), as well as any other contrary provisions” (GR, 2006). The text of the Decision No. 544 of 28 June 2006, issued by the Constitutional Court (CC, 2006), relating to the admission of the non-constitutionality exception of this Government Decree, retains that for motivating the exception concerned - by the Ombudsman - is maintained the fact that the normative decree criticized has been enacted in transgression of the Article 115 of the Constitution, relating “the legislative delegation. Is also maintained the fact that the legal nature of the Court of Accounts is of “fundamental institution of the state”, and this Decree affects its legal regime, which is contrary to Article 73, paragraph (3), comma (I) of the Constitution, according to which the organization and functioning of the Court of Accounts shall be regulated by organic law.

The author of the exception also invokes the transgression of the constitutional provisions of the Article 1 paragraph (4) which establishes the the principle of separation and equability of the state powers, within the constitutional democracy, and of paragraph (5) regarding the compulsoriness to comply with the Constitution and with the country laws, of the Article 61, paragraph (1) according to which “The Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country”, as well as of the Article 140, entitled “the Court of Accounts”. According to the Article 140, paragraph (1) of the Constitution, the Court of Accounts exercises the control on the manner of composition, administration and use of the financial resources of the state and of the public sector.

The same article of the Constitution regulates the relations between the Court of Accounts and the Parliament, the appointment and dismissal of the institution members, the duration of their mandate and their statute. Through its role, the Court of Accounts is part of the state’s fundamental institutions, its activity being indispensable to ensure the financial support for the functioning of all the state organs. The nature of the Court of Accounts as fundamental institution of the state is also underlined by its constitutional statute, as well as by the fact that its organization and functioning are regulated, according to the Article 73, paragraph (3), comma (i) of the Constitution, by organic law.

By examining in detail the non-constitutionality exception raised, the Constitutional Court establishes that the Government Decree no. 43/2006 on the organization and functioning of the Court of Accounts is non-constitutional, the decision being definitive and generally mandatory.

The definitive elements taken into account for the argumentation have been (CC, 2006):

- the regulation of the organization and functioning of the Court of Accounts through Government Decree contravenes to the provisions of the Article 115 paragraph (6) of the Constitution, according to which the emergency decrees "cannot affect the regime of the state's fundamental institutions";
- the enacting of the Government Decree analyzed also defies the provisions of the Article 61 paragraph (1) of the Constitution, according to which "The Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country", the provisions of the Article 73 paragraph (3) comma I), as well as the principle of *the separation of powers*, established by the Article 1 paragraph (4) of the Constitution;
- the regulation through the decrees constituted, according to the Article 115 of the Constitution, a responsibility exercised by the Government under the legislative delegation, and exceeding the limits of this delegation constitute "a non-allowed interference in the legislative competence of the Parliament".

As a result, on the basis of the Article 146 comma (d) and of the Article 147 paragraph (4) of the Constitution, as well as of the Article 1-3, of the Article 11 paragraph (1) comma A. d), of the Article 31 paragraph (4) and of the Articles 32 and 33 of the Law no. 47/1992, the Constitutional Court (during the public conference held on 28 June 2006) admitted the non-constitutionality exception mentioned above, noting that the Government Decree no. 43/2006 on the organization and functioning of the Court of Accounts is non-constitutional.

2.2.2. The resolution of the non-constitutionality exception of the Government Decree no. 94/2009 for ensuring the activity of structures within the Government's working apparatus, exception raised directly by the Ombudsman

This Government Decree (GR, 2009), inter alia, according to the author of the exception (CC, 2009), by the Article 6 paragraph (4) comma n), "interferes in the organization and functioning of a fundamental institution of the state - the Court of Accounts of Romania - and thus it overrules the provisions of the Article 115 paragraph (6) and of the Article 140 of the Constitution".

In concrete terms, the legal regulations indicated "were providing the responsibility of the Prime Minister's Control Body to propose measures for correcting the disorders and the infringements of the laws which have been remarked during the control activity, which he submits to the prime minister or, as the case may be, to the line ministries, and to transmit, when appropriate, intimations to the criminal

prosecution bodies or to the Court of Accounts, in order to establish the lesions and the criminal liability, if applicable" (CC, 2009).

According to the Ombudsman, in the conditions of maintaining the Government Decree which was censured, would be recognized the Government's right, by the prime minister's Control Body, to trace tasks and responsibilities for the Court of Accounts, establishing certain activities which it should carry on.

Besides this fact, the Article 7 paragraph (4) of the same Government Decree establishes the responsibilities of the Department for Fighting Frauds in the field of controlling the funds derived from the European financial support, "infringing the control role of the Court of Accounts, exercised through the Audit Authority, on the financial resources of community origin." It is concluded that "actually, the two structures from the Government's working apparatus – the Control Body and DLAF - become, through the effect of the Government Decree attacked, fundamental institutions and, for this, they *are added* to the Constitution".

With a terminative title, it was stated that the Government Decree which was censured "affects, on the one hand, the constitutional statute of the Court of Accounts, established by the Article 140 of the fundamental law - fundamental institution of the state, located exclusively under parliamentary control - and its legal regime established, in accordance with the Article 73 paragraph (3) comma (i) of the Constitution, by organic law (and which cannot be prejudiced by a Government Decree), as well as the relationships, on the other hand, between the two fundamental authorities of the state, which should be governed by the constitutional principle of the separation and equability of powers".

The nature of the Court of Accounts as fundamental institution of the state is also underlined by its constitutional statute, as well as by the fact that its organization and functioning, that is its legal regime, are regulated in accordance with the Article 73 paragraph (3) comma (i) of the Constitution, by organic law. Consequently, it is non-constitutional that through an emergency decree of the Government to be established, even indirectly, responsibilities of the Court of Accounts, since its legal regime, that is its organization and functioning, is exclusively regulated by organic law (CC, 2006).

The contradiction with the provisions of Article 140 of the Constitution is conclusively illustrated both the substance of the legal rules mentioned above, and their imperative nature, leading to the idea that the Court of Accounts itself, as the other public institutions "is in a relationship of subordination with the prime minister's Control Body". The normative act censured, instituting effectively responsibilities of the Control Body to direct and influence the activity of the Court of Accounts of Romania, institution the

constitutional regime of which is established by the Article 140 of the fundamental law, there was nothing to do but declare it non-constitutional.

Accordingly, the Constitutional Court (during the public meeting on 17 November 2009) admitted the non-constitutionality exception directly raised by the Ombudsman, noting that the Government Decree no. 94/2009 to ensure the continuity of the activity of structures within the Government's working apparatus is non-constitutional.

CONCLUSION

Today, the Court of Accounts of Romania manages to place at the disposal of various deciders in the state (the Parliament, the public authorities and institutions), but also at the disposal of taxpayers - complete and detailed reports on the use and management of budgets and public patrimonies. As it results from the ideas which we set forth, although the fact that on several occasions when amendments were meant to be brought to LOFCC, has been objected that there were elements of various kinds concerning the public interest, justifying that their regulation cannot be delayed, the constitutional control mechanism has efficiently intervened. Mainly, for the declaration as being non-constitutional, concerning some Government Decrees intended to regulate the organization and functioning of the Court of Accounts, it has been argued that they infringe the provisions of the Article 115 (6) of the Constitution, according to which the Government Decrees "cannot affect the regime of the state's fundamental institutions".

In our opinion, the fact that such undertakings - called here "collisions with the constitutional text" - have been repeated, should encourage the prudence, and in the current context in which are prepared new legislative texts concerning the Court of Accounts, the legislator should manifest an increased concern in their adequate elaboration. For this purpose, it is more than necessary to call upon the expertise of theoreticians and practitioners in the field introduced, given the institutional transformations what will follow, on the background of the amendments brought to the Constitution and of the imminence of reorganizing the national territory on regions.

What we deem important - in the event of passing from a county organization to a regional organization of the Chambers of Accounts - is that through the new incident rules should be kept the positive side of the quality accumulations so far, which, however, be supplemented with elements of good practice of similar advanced institutions.

But, certainly, all these remain conditioned by solving the delicate problem of the autonomy and of the financing of the Supreme Audit Institution.

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