THE QUASI-CONTENTIOUS APPEAL[1]

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Abstract

The present study tries to analyze the problematic of the quasi-contentious appeal in the context of the administrative jurisdiction in the positive Romanian law.

The special administrative jurisdictions are found in the regulations of Art. 24 para. (1) of the Romanian Constitution, "Special administrative jurisdictions are optional and free"; this allows those involved in the justice act to choose between the Court or the Judgment Court.

The special administrative jurisdiction in financial matter was initially present in the activity of the Romanian Court of Accounts which, however, lost these powers. Currently, according to the author's opinion, the National Council for Claims Settlement is a competent body in this matter; its activity is regulated by the Government Emergency Ordinance no. 34/2006

As we show in the present work we consider that the procedure to settle the litigation before the Council can be categorized as an administrative-jurisdictional; the body issues administrative-judicial acts to settle the dispute. Also, the appeal filed before the Council presents the characteristics of a quasi-contentious appeal, an appeal before a body having judicial powers.

Keywords*: quasi-contentious appeal, body with jurisdictional-administrative responsibilities, administrative jurisdiction, the National Council for Claims Settlement, public procurement, administrative contracts.*

> *Sometimes, the government's actions raise discontent, harm the interests, and cause complaints. They come especially from individuals who are in contact with the government (...). Accumulated discontent creates a political risk, causing media campaigns violence, street demonstrations, difficulties for the government, shifting votes, changing the majority in the parliament, a deallocation of the authority, and end up causing even*

[1] This paper is a modified and reviewed form of the study published in Romanian by the author in the journal of Public Law no. 1/2010, p. 63-78 under the title of *"The Quasi-Contentious Appeal in Financial Matter"*. E-mail: avocat_lazar@yahoo.com

revolutions (...). To avoid explosions, the government structures' system must be equipped with safety valves. Administrative appeal's institution must be accepted, it is necessary to establish the jurisdictions and contentious administrative systems should be organized.[1].

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I. Introductory aspects

Over time, there have been various attempts to transform and revitalize the judiciary, more or less successful, which led to the emergence of administrative institutions with judicial competence, that have tried to complement and enhance the work of the Courts. For example, in the period prior to the revolution of 1989, according to Law No. 59/1968[2] there were operating as bodies of public jurisdiction, the known Judgment Committees, considered by those times legal literature both as public influencing bodies[3] as well as a tribunal or Court[4]. Time has proven their usefulness, having as consequence the disappearance or loss of the judicial powers of others - the case of the Romanian Court of Accounts[5].

Until the amendments to the Romanian Constitution in 2003, the administrative Courts were usually binding; for settling disputes the litigants had the possibility to choose between a Court of common law and an administrative Court. This has resulted in criticism both in practice and in theory aimed precisely at the constitutionality of legal provisions introducing the compulsory nature of "administrative Courts".

The optional nature of special administrative Courts, stipulated by Art. 24 para. (1) of the Constitution republished - "*Special administrative Courts are optional and free*", allowed litigants to choose either to refer to a judicial administrative body or a Court of law.

The Constitutional Court held that the existence of prior administrative judicial procedures is supported also by the European Court of Human Rights case law by which, in relation to the enforcement of Art. 6, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, emphasized that: *„Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies (....) which do not satisfy*

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[1] I. Alexander, *Public Administration Treaty*, Universul Juridic Publishing House, Bucharest, 2008, p. 652-653.

[2] Published in the Official Gazette no. 169 of December 27, 1968.

[3] For a broad approach of the administrative courts prior to the events of 1989 see also Ş. Beligrădeanu, *Judges' commissions,* Scientific Publishing House, Bucharest, 1971; V. Prisăcaru, *Special courts* in the RSR, Academy Publishing House, Bucharest, 1974

[4] Ş. Beligrădeanu*, Judges' ...op.cit.,* p. 17.

[5] The Romanian Court of Accounts is the "Supreme institution for subsequent external financial control" (see M. Şt. Minea, E. Iordăchescu, A. M. Georceanu, *Right of public finances in Romania*, Accent Publishing House, Cluj Napoca, 2002, p. 371). Some authors of the legal literature considered it the only institution with administrative and jurisdictional powers in financial matters; however, it lost these powers after the 2003 constitutional revision. Following G.E.O. no. 117/2003, the Court of Accounts courts' judicial activity and staff were taken by the courts of law.

the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system"[1](Le Compte, Van Leuven and de Meyere v. Belgium)[2]. However, in our opinion, the question for special administrative jurisdictions includes: their usefulness in a legal system, to what extent their contribution in the achievement of justice brings benefits, under objective terms, and how it could provide the litigant with subjective motivation to use such a procedure[3].

A particular situation of administrative jurisdictions[4] is the special administrative jurisdiction in financial matters[5]. In the past, the Court of Accounts of Romania was the first administrative institution with jurisdiction in financial matters; it lost the said jurisdiction in 2003, following the revision of the Constitution. Today, we believe that the Romanian objective law establishes, through the Government Emergency Ordinance no. 34/2006[6] a body of administrative jurisdiction with powers which are also found in financial matters - the National Council for Claims Settlement.

As we know, the Government Emergency Ordinance No. 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts (hereinafter also referred to as the "Ordinance"), is a framework regulatory act on public procurement and is one of the urgent legislative measures through which Romania intends to transpose the EU rules on public procurement[7].

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[1] The European Court of Human Rights, ruling on the case *"Le Compte, Van Leuven and de Meyere v. Belgium"* (1981) noted that a Belgian physicians organization, established by law, is not a form of association to fall within Art. 11 of the Convention. Justification of the Decision stated that this organization has the nature of an institution governed by public law which by its legal nature and its own functions performs a public interest activity, revealing that in this way it fits into achieving goals of a general nature profitable also for those called to be part of this organization.

[2] C. L. Popescu *"Constitution Fraud brought by Law no. 174/2004 for approving the GO no. 92/2003 concerning the Fiscal Procedure Code, specifically characterizing tax procedure as Administrative procedure"* in "Judiciary Courier" no. 7-8 / 2004, p. 197.

[3] With regard to advantages of the administrative courts, see I. Lazăr, *Advantages of administrative courts in the administration of justice, with special regard to the mediation*, "Journal of Public Law" no. 1/2009, p. 57-67.

[4] For a comparative analysis between *common law jurisdictions* and *special administrative courts*, as well as a study of the latter, see C.E. Alexe, *The judge in civil proceedings: between playing an active role and arbitrary*, vol. I, C.H. Beck Publishing House, Bucharest, 2008, p. 109-119, V. Vedinaş, *Administrative Law*, IIIrd edition, Universul Juridic Publishing House, Bucharest, 2007, p. 129-131; D. A. Tofan, *Administrative Law,* vol. II., All. Beck Publishing House, Bucharest, 2004, p. 265-276; O. Puie, *Administrative contentious*. vol. I, Universul Juridic Publishing House, Bucharest, 2009, p. 311-347.

[5] See also I. Lazăr, *Administrative Jurisdictions in Financial Matters,* Universul Juridic Publishing House, Bucharest, 2011.

[6] Published in the Official Gazette of Romania, Part I, no. 418 of 15 May 2006, was approved with amendments by Law no. 337/2006 published as rectified in the Official Gazette of Romania, Part I, no. 622 of August 1, 2006.

[7]Government Emergency Ordinance no. 34/2006 transposes Directive no. 2004/18/EC on the coordination of procedures for the award of public works, supply and services, Directive no. Directive no. 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, published in the Official Journal of the European Union (OJEU) no. L134 of 30 April 2004, except Art. 41 (3), Art. 49 (3) - (5) and Art. 53 which are transposed by the Government decision, Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, published in the Official Journal of the European Communities (OJEC) no. L395 of

In the rush to proceed with the implementation of the Romanian legislation according to all directives within a single normative act is objectionable; this was noted in the literature, too[1]. Overall, due to its size, the Ordinance is brushy, sometimes blurred, with many references which makes the studying and deepening thereof very difficult. As a result, the author asks herself, opinion to which we concur, if it wouldn't have been normal that each Directive to be transposed separately into a normative act without merging them, as, in fact, each of them is published in one of the Official Journal of the European Union issues? Another aspect raised at that time was the fact that the Government Emergency Ordinance no. 34/2006 did not provide explicit indications about the public-private partnership agreement[2].

To conclude, it was emphasized that the Government Emergency Ordinance no. 34/2006 did nothing but increase the ambiguity in the public-private partnership contract, and on the other hand, although it states that it regulates the procedures the award of public works and services, it covers only some general references to this issue. Neither the Ordinance implementing rules contained in Government Decision no. 925/2006 did not provide with details on the concession of public works and services, but only on the public procurement contract. Thus, within the context of the Government Emergency Ordinance no. 34/2006, public-private partnership agreement was regarded as a variant of the concession agreement and as an administrative contract in terms of the legal nature[3].

Public-private partnership agreement is of particular importance in the administrative work of the European countries, due to the development of public-private institution, which gave rise to extensive regulation within their laws. Romanian lawmaker considered necessary to repeal the Government Ordinance no. 16/2002 on public-private partnership contracts[4] through Government Emergency Ordinance no. 34/2006 which, however, in its time did not contain provisions on this type of agreement or a definition of the public partnership agreement, as there was in previous legislation[5]. Subsequently, amendments

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30 December 1989, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, published in the Official Journal of the European Communities (OJEC) no. L76 of 23 March 1992, except articles 9 to 11 which are transposed by the Government decision. Directives no. 2004/18/EC and no. 2004/17/EC amended by Commission Regulation (EU) no. 1251/2011 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contract. Although subsequent amendments were made to the Government Emergency Ordinance no. 34/2006, the lawmaker did not update the application thresholds for complying with the requirements of Commission Regulation (EU) no. 1251/2011

[1] See R.N. Petrescu *"The Impact of enacting the Government Emergency Ordinance on the public-private partnership agreement",* the "Journal of Public Law" no. 1/2007, p. 97-99.

[2] With regard to public-private partnership agreement see: L. Chiriac, *De la nature juridique du contrat du parteneriat public-prive*, (D:/ICELM CD/default.htm); D.A. Tofan, *Administrative Law* vol. II, All Beck Publishing House, Bucharest, 2004, p. 172; D.A.Tofan, *Some considerations on the public-private partnership legislation*, in the "Journal of Public Law" no. 2/2004, p. 93.

[3] See R. N. Petrescu, *The Impact ... Op. cit.*, 2007, p 103. However, for proper study on administrative contracts see: C.S. Săraru, *Administrative contracts*. *Regulation. Doctrine. Case Law*, C.H. Bucharest, 2009; A.L. Nicu *Public institution in administrative law*, Universitaria Publishing House, Craiova, 2003, p. 253-261.

[4] Published in the Official Gazette of Romania, Part I, no. 94 of February 2, 2002.

[5] E.O. no. 16/2002 , in art 1^1 defined the public-private partnership agreement for works concession: "it is a agreement for the execution or, where appropriate, both the design and execution of one or more construction, as they are included in the official statistical classifications, or execution by any means of any

made by Law no. 279 of 2011[1] amending and supplementing Government Emergency Ordinance no. 34/2006 defined the concept of "public private partnership" as *"carrying out a joint project by two or more public entities, national and / or international"*. After about 4 years of the entry into force of the Government Emergency Ordinance no. 34/2006 the Romanian Parliament adopted Law no. 178/2010 of public-private partnership[2] whose purpose is to regulate the initiation and implementation of private funding public-private partnership projects for public works in various sectors[3]. The new law defines *public-private partnership agreement* (also called project agreement in the law wording) as - *the legal document that stipulates rights and obligations of both the public partner and investor throughout the entire public-private partnership, covering one or several stages of the public-private partnership project, for a definite term*[4].

As far as we are concerned, we believe it is beneficial to develop uniform procedures for administrative contracts, context which can remove from the Romanian administrative landscape the bureaucracy arbitrariness in the relationship between the administered and the authorities invested with the public power prerogatives. The situation can be significantly improved by the *emergence, within the Romanian legal scenery, of an administrative code and a code of administrative procedure*. As shown by Professor Ioan Alexandru[5], it is necessary to regulate - through an administrative and administrative procedure code - the rights and citizens in relationships with the government and the procedures to be followed in these cases.

II. The National Council for Claims Settlement - administrative-judicial body

In an attempt to define the concept of administrative jurisdiction, we have mentioned it as the *"work performed by an independent body with respect to the Courts and impartial in relation to the parties to the conflict, authorized by a special law to judge only certain disputes expressly provided by a special law, under adversarial conditions and the possibility of the parties to produce evidence before that body which ultimately issues an administrative-judicial document, that may be appealed against in Court"*[6].

1. As noted, the normative act on public procurement is the G.E.O. no. 34/2006 which, in chapter 9, regulates the organization and functioning of the National Council for Claims Settlement - hereinafter also referred to as the Council - the statute of its

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combination of such construction that meets the requirements of the contracting authority and which leads to the result intended to carry out, in itself, an economic and technical function. In return for works carried out, the contractor, as concessionaire, receives the right to exploit the result of the work in whole or in part; if necessary, a payment may be added to this right".

[1] Published in the Official Gazette of Romania, Part I, no. 872 of December 9, 2011.

[2] Published in the Official Gazette of Romania, Part I, no. 676 of December 5, 2010.

[3] For an analysis of the public-private partnership issue under the regulation of Law no. 178/2010 see O. Puie, *Public-private partnership*, Universul Juridic Publishing House, Bucharest, 2011.

[4] Art. 4 letter (g) of Law No. 178/2010.

[5] I. Alexandru *The government crisis,* All Beck Publishing House, Bucharest, 2001, p. 12.

[6] I. Lazăr, *Administrative Jurisdictions in Financial Matters,* Legal Universe Publishing House, Bucharest, 2011, pp. 62-63.

members, the appeal resolution procedure before the Council, measures and decisions it may take and the remedies at law against Council's decisions.

The National Council for Claims Settlement is a public authority operating with the Government's General Secretariat and having the following responsibilities:

- settlement of appeals filed in the course of the award procedure through specialized panels[1], established under the Council's rules of organization and operation approved pursuant to Art. 291[2];

- rule on the legality of the procedures and operations conducted by the contracting authority in awarding a public procurement contract, in accordance with the Ordinance;

According to Art. 255 of the Ordinance, "any *person who considers itself prejudiced*[3] *in connection to one of its rights*[4] *or a legitimate interest*[5] *by an act of the Contracting Authority, in violation with the legal provisions in public procurement matter, may request the cancellation of such act, the obligation of the Contracting authority to issue an act, the recognition of its claimed right or legitimate interest in administrative-jurisdictional matters, as provided by this Government Emergency Ordinance".*

As follows from the express provision of the law, the legal nature of the appeals resolution procedure is an administrative-jurisdictional one[6], issue arising from both the manifest intention of the law maker and of this procedure's extrinsic characteristics[1].

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[1] Art. 266 of the G.E.O. no. 34/2006.

[2] Art. 291 G.E.O. no. 34/2006 "The Council's Rules of organization and operation is approved by Government Decision at the President of the Council's proposal".

[3] For the purposes of Art. 255 para. (2) of Government Emergency Ordinance No. 34/2006, *"prejudiced person"* is any person who meets the all the following conditions: a) has or had a *legitimate interest* in connection with the concerned award procedure; b) has suffered, is suffering or likely to suffer *damage* as a result of an act of the contracting authority such as to produce legal effects or due to failure to resolve a request regarding that award procedure within the legal term.

[4] According to Art. 2 para. (1) letter (o) of Law No. 554/2004, a *"prejudiced right"* is - any right under the Constitution, the law or other normative act which is affected by an administrative act.

[5] Art. 2 para. (1) letters (p) and (r) of Law No. 554/2004 define the concepts of: *"private legitimate interest"* - the possibility to claim a certain behavior, considering the implementation of a future subjective and foreseeable right, envisioned, and *"legitimate public interest"* - interest targeting the rule of law and constitutional democracy, guaranteeing the fundamental rights, freedoms and duties of citizens, meeting the needs of the Community, and achieving the proficiency of public authorities;

[6] The legal literature - see C.L. Popescu, *Administrative courts under revised constitutional provisions* in the "Law" no. 5/2004, p. 88 - showed that two elements can be used, in order to check whether a procedure is judicial in character; these elements are in a close subsidiarity relationship. On the one hand, it is about the competences expressly provided by law either in the sense that the procedure is administrative and judicial in nature or in the sense that procedure is not judicial. Subsidiarily, under silence of the law, the legal nature of the procedure is determined in relation to the features of the body before whom it is conducted and the procedural specific elements. Thus, as a principle, we are facing jurisdiction and judicial proceedings when: the authority is established by law; the respective body and its members are independent and impartial - including not taking "the judge" (broadly) for the party; the authority is invested with full jurisdiction, in fact and in law; the body has power to decide, and not just to issue an opinion; procedure is fair and shows adversariality and publicity elements and reasonable time limit; the right to defense is observed; principle of *non reformatio in pejus* , force of res judicata after the completion of any remedies at law; the binding nature of the judicial act; and the possibility to perform the forced execution of the judicial act. Further, to be in the presence of a judicial administrative procedure - see I. Alexandru M. Cărăuşan, S. Bucur, *Administrative Law*, IInd ed. Lumina Lex Publishing House, Bucharest, 2003, p. 579: the trial procedure will take place in front of specialized tribunals only within central and local public administration authorities, not including other public authorities in this category.

Compared to the provisions provided for in Art. 257 para. (1) of the Ordinance enshrining the Council's capacity as an administrative-judicial body, are also noted other provisions within thereof which complete the legislature's will expressly mentioned in this regard, as follows:

- art 256 "*In order to settle disputes using the administrative-jurisdictional path*, the alleged prejudiced party is entitled to address the National Council for Claims Settlement..."

- Art. 257 para. (3) "In its duties, the Council is subject only to the law and the Council meetings are legally constituted in the presence of the majority of its members".

- Art. 257 para. (4) "In terms of its decisions, the Council is *independent and not subordinated* to the National Authority for Regulating and Monitoring Public Procurement".

- Art. 266 "The Council has jurisdiction to hear appeals filed in the course of the award procedure through specialized panels..."

- Art. 269 "The appeals settlement proceedings shall be conducted whilst observing the principles of legality, rapidity, adversariality and the right to defense".

Above regulations shall be also corroborated with doctrinal considerations concerning *jurisdiction and administrative activities* identifying the following as *features* thereof[2]:

a) proceedings shall be conducted according to a mandatory procedure imperatively provided by law. This procedure is similar to the proceedings for adopting Judgments;

b) judicial activity shall be based on adversariality, i.e. the ability of the parties to produce evidence directly before the body settling the appeal;

c) the body settling the that appeal is independent and impartial in respect to the parties in conflict. This condition is regarded as decisive for the judicial proceedings;

d) the judicial bodies entitled to settle appeals are a parallel judicial order, separate from that of the Courts.

e) Judgments delivered by the administrative Courts or tribunals are administrative and judicial documents (n.n.).

Regarding the above, we believe that features specific to administrative and judicial activities can be found in the Council's duties. We are considering that the Council judicial powers are expressly provided by law and the appeals settlement proceedings shall be conducted whilst observing the principles of legality, rapidity, adversariality and the right to defense before an independent and impartial body toward the parties in conflict and isolated from the Courts at the same time.

2. Council's work raises many controversies, the constitutionality of all the rules contained in Chapter 9 of Government Emergency Ordinance No.34/2006 being called into question. In this respect, it was argued that the establishment of the National Council for Claims Settlement and the jurisdiction conferred upon it by the Emergency Ordinance violate the constitutional principles of organization and functioning of the public

[1] M. I. Niculeasa, *Public procurement legislation*. *Comments and explanations*, C.H. Beck Publishing House, Bucharest, 2007, p. 433.

[2] *Ibidem,* p. 440.

administration in general, and the principle of local autonomy, in particular, concluding[1]: *for the first time in the Romanian legislation, "an administrative-judicial body" is invested with observing the exercise of administrative tutelage and hierarchical control in public procurement matter, regardless of the contracting authorities' nature and hierarchical level*[2].

In this context, we wish to emphasize the debates that took place in the Romanian doctrine due to a regulation deemed, over the time, incoherent and brushy by a number of authors. However, in order not to exceed the paper theme, we show that debates concerning the legality of the Council's judicial activity arise from the incomplete manner in which, over time, the legislator has regulated the activity of this institution, causing damage to key elements defining the judicial activity (activity that also includes the administrative and judicial proceedings), whether of the Courts or other bodies having jurisdiction, such as: lack of summoning the parties within mandatory administrative and judicial proceedings; the ambiguous wording of G.E.O. no. 34/2006, which can lead to arbitrariness in judicial activities[3]; the constitutionality of G.E.O. no. 34/2006 on the establishment of the Council and its jurisdiction conferred upon it by the law, violating the constitutional principles of organization and functioning of the public administration in general, and the principle of local autonomy, in particular[4].

As far as we are concerned, with regard to the manifest intention of the legislator and the intrinsic features of these proceedings we believe, even in the presence of doctrinal criticisms and observations, that the nature of special administrative jurisdiction of the National Council for Claims Settlement is undoubtedly required. Being subjected to judicial control, Council's jurisdiction activity is found in Art. 21 and 18 of the Romanian Constitution as republished[5]; the parties' right of appeal against decisions of this judicial body before the competent Courts is not restricted.

3. Public procurement[6], as we previously showed, exceeds 16% of the European Union GDP and is one of the main directions the public resources are channeled towards;

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[1] G. Coca, *Discussions regarding the National Council for Solving Appeals' capacity of being summoned as witness*, in "The Law" no. 10/2008, p. 91. *In this regard, the author of the thesis states: "to deal with a "special administrative jurisdiction" as the Council work is intended to be, the following conditions must be met: the administrative and judicial document must be issued by an administrative authority, i.e. a body of state administration or local government (so not just any public authority); the issuing authority should have powers to settle a dispute, therefore to be an administrative and judicial body; dispute should be settled by summoning the parties (which is not happening in our case), under the adversarial principle; the right to be assisted by a lawyer should be acknowledged to the parties (which is not happening in reality). Failure to meet any of these conditions shall lead to other legal realities that exceed the scope of the concept of special administrative jurisdiction (e.g. disciplinary commissions, etc ...)".*

[2] See I. Nicola, *Considerations on G.E.O. no. 34/2006 regarding the award of public procurement contracts, of public works contracts and of services contracts*, in "Journal of Public Law" no. 1/2007, p. 112-113.

[3] I. Nicola, *Considerations...op. cit*., p. 115.

[4] *Ibidem,* p. 112.

[5] As amended by the Law revising the Constitution of Romania published in the Official Gazette of Romania, Part I, no. 669 of 22 September 2003.

[6] For an analysis in public procurement matter in the Romanian law see: C. M. Cătană, *Public procurement,* Universul Juridic Publishing House, Bucharest, 2011.

this is why the National Authority for Regulating and Monitoring Public Procurement is subordinated to the Government. Council's jurisdiction - a body independent of NARMPP - as a form of administrative control in public procurement, where "public money" is practically spent, appears in the allocation and use of public financial resources necessary to ensure society's overall development and functioning.

Financial and public nature of the administrative control in public procurement matter can be also found in the provisions of G.E.O. no. 30/2006[1], designating the Ministry of Public Finance as a specialized body of the central government responsible for carrying out the *"test function"* procedures for the award of contracts subject to legislation on the award of public procurement contracts, of public works concession contracts and services concession contracts[2].

The objective of the test / check function carried out by the Ministry of Public Finance is to help ensure the compliance of the procedures developed for the award of public procurement contracts, public works and services concession contracts and also of the documents prepared under these procedures with legislation in the field. The Ministry powers to fulfill the test / control function are referred to in Art. 4 of G.E.O. no. 30/2006 and concern:

a) tracking the proceedings carried out in connection with the award of contracts;

b) analysis of documents prepared by the contracting authority to award contracts;

c) drafting activity reports for each award procedure of public procurement contracts, public works concession contracts and services concession contracts which was checked by appointed monitors;

d) issuing advisory opinions in the event of inconsistencies in the application of public procurement legislation.

Compared to the explicit provisions of G.E.O. no. 30/2006, *the test / check function* of the procedures carried out for the award of public procurement contracts shall be performed by observers appointed by the Ministry of Public Finance[3]. *The checking concerns public procurement stages subsequent to publication of the notice up to the contract award and signing thereof.* In extraordinary cases regulated by law allowing the conclusion of the contract without prior publication of a contract notice, checking concerns the stages of the procurement process since submission of the invitation to negotiate and up to contract award and signing thereof. So as one can see, *the test / control function does not concern the already concluded procurement contracts' performance manner.*

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[1] G.E.O. no. 30/2006 regarding *the test function* for procedural issues related to the award of public procurement contracts, of public works contracts and of services contracts. Published in the Official Gazette of Romania, Part I, no. 365 of 26 April 2006.

[2] See Art. 1 of G.E.O. no. 30/2006

[3] According to Art. 4 para. (2) of G.E.O. no. 30/2006, the activity of the Ministry of Finance concerning the compliance of the checking out function of the progress stages under the procedures for the award of public procurement contracts is exercised centrally by a specialized unincorporated body, i.e. "The unit for coordinating and checking public procurement", hereinafter UCVPP and, at the local level, through specialized bodies directly coordinated by UCVPP, at the general directorates of public finance level, called test procurement departments "CVAP". Civil servants within these structures are observers

Therefore, in the public procurement matter we can identify the existence of an *ex-ante public procurement administrative control* conducted by a central government's specialized body - the *Ministry of Public Finance (MFP)* - having legal personality, subordinated to the Government and carried out by observers appointed of this body's staff, and an *administrative and judicial control* performed by an independent body with administrative-judicial activity which is attached to the General Secretariat of the Government - *The National Council for Claims Settlement*. However, it should be noted that the two forms of control have, in terms of legal nature, *specialized control* features[1]; it is exercised by administrative bodies with specific control responsibilities.

Both forms of control, as evidenced by the above, concern issues targeting the procedure prior to the award or procurement contract conclusion. However, the *administrative control* performed by the PFM is subject to the value criteria set by GEO no. 30/2006, while the *administrative and judicial control* exercised by the Council can usually cover any public procurement procedure, the value aspect having no relevance.

In our opinion, the Ministry of Public Finance exercises an *administrative control* that takes the form of *preventive financial control* which verifies the legality and regularity of transactions on public funds in public procurement procedure, including the award and signing of the agreement.

Preventive financial control[2], as an attribute of the test function is performed by the Ministry of Public Finance through its specialized structures at central and local level which carry out the verification process for awarding contracts selectively, based on risk analysis.

Administrative and judicial control is performed by the National Council for Claims Settlement on the issues envisaged also by the *preventive financial control*, namely the legality of transactions conducted on public funds in public procurement procedure, including the award and signing of the public procurement contract. Consequently, the control carried out by the Council is an *administrative and judicial control* that checks the legality of how the proceedings shall be conducted before concluding the public procurement contracts.

In relation to the above, it is clear that the *dispute settlement proceedings before the Council can be categorized as administrative and judicial* - legislator's will prevails, despite the critical opinions expressed in the legal literature - *which takes place before a body having jurisdiction and issues administrative judicial documents throughout the case settlement proceedings*.

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[1] Depending on the legal nature and, respectively, the subordination of the specialized control bodies, "specialized control" can be: a) control exercised by State inspections within ministries, or State administration local bodies, b) control exercised by administrative bodies of a judicial nature throughout the administrative remedies at law procedures, as provided by law, c) control exercised by especially constituted bodies for control. See V. Vedinaş, *Administrative Law*, IIIrd edition, Universul Juridic Publishing House, Bucharest, 2007, p. 126-12; A. Iorgovan, *Administrative Law Treaty*, vol II., 4th edition, All. Beck Publishing House, Bucharest, 2005, p. 480.

[2] For an analysis of *preventive financial control*, see: E. Bălan, *Financial Law*, 3rd edition, All Beck Publishing House, Bucharest, 2004, p. 297-303; V. Tabără, *Public finance and financial control in local government*, C.H. Beck Publishing House, Bucharest, 2009, p. 187-193.

III. **Nature of the appeal vesting the National Council for Claims Settlement. Quasi-contentious appeal**

Quasi-contentious appeal, a concept which is to be further analyzed, has many similarities to the contentious appeal itself, making, as noted[1], the boundary between the two matters to be hard to find. In many cases it is difficult to know whether the authority which gives a decision has or has not the nature of a genuine Court.

Both for *prior administrative proceedings* and *quasi-contentious appeal* the application is sent to an authority that is not a genuine jurisdiction. While administrative appeal is referred to the authority issuing the appealed against document or the hierarchically superior body thereof and is settled subsequent to a procedure that does not require a complex approach, such as before the contentious Court, quasi-contentious appeal is usually addressed to specialized committees or bodies that may have both administrative and quasi-judicial functions, not showing however the powers of genuine Courts.

In Romanian positive law, after the enactment of Government Emergency Ordinance no. 34/2006, the legislator used a solution different to the one imposed by the former Government Emergency Ordinance no. 60/2001 on public procurement[2] which established administrative appeal as mandatory procedure prior to the proceedings before the Court, in the form of complaint submitted to the contracting authority.

The novelty brought by the legislator on the legality control for the documents considered to be illegal in public procurement matters, through Ordinance no. 34/2006, was the remedy at law before a specialized body, the National Council for Claims Settlement, with administrative-jurisdictional powers offered to the person considering himself/herself prejudiced by such document.

The question at issue concerns the nature of the complaint before the National Council for Claims Settlement; can it be regarded as quasi-contentious appeal or be seen as a simple administrative appeal?

In considering the issues addressed must be mentioned the following:

1. Administrative law science makes a clear delimitation of the term *civil matters appeal* in relation to the *appeal in administrative matters*.

Civil law appeals are viewed as an "extraordinary, common, reformer, non-devolutive and unsuspensive enforceable remedy at law, through which the parties or the Public Ministry call the higher competent Court to quash or to amend the lower Court's Judgment issued without right of appeal or on appeal, or the Judgments of other judicial bodies"[3].

Appeal, as an *administrative law concept,* was defined[4] in administrative literature as *"remedy at law or procedural way that creates the possibility to address the violation of subjective rights and legitimate interests due to damage caused by the state administration bodies"*.

[1] I. Alexandru, *Treaty… op. cit.*, p. 653.

[2] Published in the Official Gazette of Romania, Part I, no. 241 of 11 May 2001, was approved with amendments by Law no. 212/2002 and was repealed expressly by G.E.O. no. 34/2006.

[3] See S. Spinei, *Appeals in civil proceedings*, Hamangiu Publishing House, Bucharest, 2008, p. 12.

[4] A. Iorgovan, *Administrative Law Treaty*, vol. I, Nemira Publishing House, 1996, p. 386

Therefore, it is necessary to distinguish between the notions of appeal in civil matters compared to the significance the administrative law grants to this notion[1]. Appeal in matters of administrative law is different from the appeal in civil procedural law due to the delimitation of the control exercised by administrative bodies with or without judicial powers and the control exercised by the Courts.

In another train of thoughts, a judicial appeal before Court may invalidate the solutions delivered by an administrative body, both within the purely administrative procedure and the administrative-jurisdictional one.

2. As already pointed out in the literature[2], the phrases "prior administrative procedure", "prior claim", "prior administrative appeal", "prior claim", "prior administrative appeal" refer to the *ADMINISTRATIVE APPEAL* the individuals injured in respect with a right or legitimate interest are *required* to exercise before the issuing administrative authority or the hierarchical superior thereof before advancing proceedings before the administrative contentious Court.

JUDICIAL APPEAL relates to the application by which contentious administrative Courts are invested to settle a dispute.

We consider that the complaint brought under G.E.O. no. 34/2004 before the National Council for Claims Settlement is also an APPEA, in the sense of the administrative law doctrine; we will continue to analyze whether the conditions for QUASI-CONTENTIOUS APPEAL are met or not.

3. The term "quasi-contentious appeal" also involves an etymological an analysis of the three concepts composing thereof: "appeal", "quasi" and "contentious", as follows:

- "*appeal*" derives from the Latin "*recursus*" - remedy at law which calls a higher Court to review the legality and validity of a non-final Judgment, for cancellation and amendment thereof[3].

- "quasi" is derived from the Latin "quasi" which means: half, approximately, about almost[4];

- "contentious" is derived from the Latin "contedere" (to fight). In Romanian interwar administrative law, the word "contentious" began to be used to delimit *the judicial remedies at law (advanced against administrative documents and operations*) from the *ordinary administrative appeals (advanced before the issuing administrative body or the hierarchically superior thereof)*; this acceptation is also often used today.

The very phrase "quasi-contentious appeal" suggests that it is addressed to a Court, namely a genuine jurisdiction, but whose settlement by the administrative body invested

[1] The distinction confirms the argument that classifying one and the same legal reality in the light of the categories pertaining to a particular branch of law does not exclude but, on the contrary, allows a special classification within another branch of law. See A. Iorgovan, *Considerations on a university course* in S.C.J. no. 3/1985, p. 255-256.

[2] D.C. Dragoş, *Administrative appeals and administrative proceedings*, All Beck Publishing House, Bucharest, 2001, p. 4.

[3] *Explanatory Dictionary of the Romanian language,* Romanian Academy Publishing House, Bucharest, 1984, p. 788.

[4] *Idem*, p. 225.

by law with jurisdiction, as quasi-contentious Court, complies with certain forms of procedure specific to the dispute pending before a Court.

Thus, in the legal proceedings work there are: *judicial jurisdictions* and *administrative jurisdictions*. In both forms of jurisdiction, the way the case was referred to the judicial body takes the form of a remedy at law advanced before them. For **administrative jurisdiction**, the remedy at law takes the form of a *quasi-contentious appeal*, while for **judicial jurisdiction** the *appeal* is a *remedy at law which requires a higher Court to review the legality and solidity of a* non-final *Judgment*, for cancellation or amendment thereof. Also, if the appeal is referred to an administrative body (the authority issuing the document or the superior authority) without judicial powers, we are dealing with an administrative appeal.

Considering those above, we believe that the phrases: quasi-contentious appeal, administrative and judicial appeals, administrative and judicial complaint, administrative and judicial remedy at law, complaint lodged with an administrative-judicial body, concern the appeal - in the sense given by the administrative law doctrine - advanced by the person injured, in terms of a right or legitimate interest, by a public authority, a body invested by law with administrative-judicial powers.

It is noted, however, that *quasi-contentious appeal* is, in many cases, difficult to delimit compared with the administrative or judicial appeal, due to the fact that it presents joint elements characterizing both forms of control. Without exhaustively address the differences between the three forms of appeal, one can notice that *quasi-contentious appeal* before an administrative-judicial body is delimited in relation to the other two by features derived from the special regulation the legislator assigns to this procedure.

In terms of the analysis carried out in this paper, we notice that, for the *appeal referred to the National Council for Claims Settlement ("the claim"), the quasi-contentious appeal features are present.*

a. *The appeal referred to the National Council for Claims Settlement (C.N.S.C.) as quasi-contentious appeal before n administrative-judicial body* is different from the *administrative appeal as procedure prior to the referral to the contentious administrative Court*, as follows[1]:

- settling the administrative appeal lies with the body issuing the document or its hierarchically superior body, while in case of claim, the resolution lies with a Government body expressly established by law to exercise judicial activities.
- solution for the administrative appeal requires addressing both legal issues and those of opportunity, while controlling performed subsequent to the claim investigates only the legality of problems on Council's trial.
- acts settling administrative appeals are ordinary administrative acts which the issuing authority may cancel, while the acts resolving the claim are administrative judicial acts.

[1] To distinguish between work carried out by certain state administration bodies to settle hierarchical appeals and the administrative-judicial activities carried out by certain state administration bodies, see P. Stainov, *Special courts in the state administration*, Scientific Publishing House, Bucharest, 1961, p. 141-142; A. Iorgovan, *Administrative Law Treaty*, vol II., 4th edition, C.H. Beck Publishing House, Bucharest, 2005, p. 494.

- administrative appeal is a mandatory preliminary procedure prior to the referral to the contentious Court, while the appeal before an administrative and judicial body , C.N.S.C., is optional.

b. *The appeal (claim) referred to the National Council for Claims Settlement* is different from the judicial appeal referred to Courts, as follows:

- *quasi-contentious appeal* is referred to a State administration body invested with judicial powers, while *judicial appeal* is referred to the Court.

- Although the claim settlement proceedings before the Council reveal commonalities with the proceedings before the Court, the dispute in Court is a much broader procedure, involving longer settlement periods.

- *quasi-contentious appeal referred to the National Council for Claims Settlement* relates to matters falling within the competence of that body, strictly provided by special law while the appeal judicial covers a wide range of disputes.

It should be noted that both the decision issued by the National Council for Claims Settlement following the *quasi-contentious appeal* settlement and the *solution* given by the Court - the district Court the contracting authority is registered in - subsequent to the *judicial appeal* is subject of an appeal referred to the same Court[1] - *the Court of appeal's contentious administrative and fiscal matters section in whose jurisdiction the contracting authority is registered.*

Consequently, the Council's decision is a solution given after analyzing the merits of the dispute and the remedy at law against the decision *shall be settled in accordance with Art. 304[1] of the Code of Civil Procedure*[2] and G.E.O. no. 34/2006 before the Court. The Court Judgment following the settlement of the merits is likely to be appealed to a higher Court with jurisdiction to also judge the remedy at law against the Council's decision. Therefore, the remedy at law against the Council's decision or Judgment rendered following the Court's Judgment on the merits of the dispute is an appeal referred to the competent Courts of law. In other words, both cases have two levels of jurisdiction: *first*, subject to the claimant's option which will address the action brought before the Council or the Court of law and the *second* - Appeal - only to the Court where can be appealed against both the Council's decision and the Court sentence.

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[1] Art. 283 (1) of G.E.O. no. 34/2006: Competent court to settle the complaint against the decision of the Council is the court of appeal, the contentious administrative and fiscal matters section in whose jurisdiction the contracting authority is registered. Except complaints appealing fines, the National Council for Claims Settlement is not a party to the case.

[2] According to Art. 304[1] of the Code of Civil Procedure, the appeal against a decision which, by law, can not be subject to an appeal, shall not limited to the grounds for quashing referred to in Art. 304 of the Code of Civil Procedure; the court may hear the case in all respects.

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