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DREPT

ON CERTAIN LEGAL PROVISIONS FROM THE POINT OF VIEW OF THE DIVISION BETWEEN PUBLIC AND PRIVATE LAW[1]

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Abstract. *Romanian law maintains the distinction between the branch of public law and the branch of private law. This article addresses this distinction between the two and analyzes, through this distinction, certain recent provisions of the Civil Code, the Civil Procedure Code and laws that have to do with the domain of contentious administrative law. The definition of the public legal person shall be analyzed, along with the procedural norms that refer to this category of persons. We will present observations that have to do with establishing distinct competences for the solving of litigation stemming from the same legal document: the administrative contract, respectively the competence of courts specializing in contentious administrative cases when it comes to litigation concerning the conclusion or nullity of said contract, and the competence of civil courts of law when it comes to litigation concerning the execution of said contract.*

Keywords: *public law, private law, legal person, public authority, administrative contract.*

INTRODUCTION

The division between public law and private law has existed ever since Roman law. Public law regulated the affairs of the state (the Republic), while private law regulated the legal relationships between private persons. In the family of legal systems with a Roman heritage, the division between public and private law is seen as supreme, as any legal norm belongs to one or the other of the two semi-spheres **Error! Reference source not found.**. Jean Dabin believes that the existence of the state in itself was considered to be the very spring of the division

[1] This article was presented at the International University in Cheia, the 2018 edition, in the Romanian version.

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of legal relationships into public law and private law relationships **Error! Reference source not found.**.\Even if this division seems simple at first glance, it has prompted different explanations and interpretations, related as they were by their various authors to the evolution of the organization of society during various historical periods.

In modern and contemporary law (starting from the 19th century), the legal systems with a Roman-Germanic origin have recognized the division between public and private law. It is maybe in French law that this division has manifested and continues to manifest in the strongest manner. A key moment in this legal system is the Blanco ruling[2] from 1873. In this case, which led to the aforementioned ruling, the applicant requested that the state be obligated, pursuant to the provisions in the Civil Code, to pay for the damages caused to a person due to an action committed by a worker employed for public service. The court ruled that civil laws were not applicable in the case of legal relationships born from the action of a person who performs an activity for the benefit of public service, as the responsibility instated by the Civil Code is neither general, nor absolute, as there are special rules that vary according to the needs of the service and the need to reconcile state and private law.

Since public service is an activity performed or authorized by the state administration with a view to satisfy a general interest need, this makes the Blanco ruling important, because it establishes *the connection between public law and public power, namely those prerogatives that the state administration has at its disposal in order to impose its will before private persons for the protection of the general interest.* These conclusions have been enshrined in French law through the Terrier[3] (1903) and Thérond[4] (1919) rulings, which defined the criteria to identify public service: the object of the activity is the satisfaction of a general interest, and the applicable legal setting in this case is that of public (administrative) law.

When it comes to this legal setting of public law, on the level of principles, there is an acknowledgment of a certain power of discretion of the administration, as a bearer of public power. The administration fulfills its mission by making decisions mainly expressed through unilateral administrative documents. In many situations, there is a freedom to choose a solution that the administration deems to be most adequate, with the inexistence of the court of law's possibility to control said decision made by this competent authority or, in certain legal systems, a decreased possibility in certain situations in certain legal systems (which is how the case-law of the French Council of State developed, for example). As an effect of public power, unilateral administrative documents are obligatory and benefit from the presumption of legality (Fodor, 2017, pp. 174-221; 239-246).

[2] Tribunal des conflits – February 8, 1973, Blanco, Rec. Lebon.
[3] Conseil d'Etat, February 6, 1903, Terrier, no. 07496, Rec. Lebon.
[4] Conseil d'Etat, March 4, 1910, Thérond, no. 29373, Rec. Lebon.

INTERNATIONAL NOTIONS

Currently, the notions of public and private law can also be found on an international level. Here, however, when we speak of international public law, we are referring to the norms that mostly regulate the relations between states and less about those that regulate the relations between states and private entities, as international public law is the ensemble of principles and legal norms, written or not, created pursuant to the willful agreement of the states, regulating the relationships between them, as well as the relationships between them and other subjects of international law. When we speak of private international law, we are referring to the legal relations governed by private law with cross-border elements, as well as the specific methods of regulation. The specific trait of this branch consists in the fact that both the object and the method of regulation are fully subservient to the resolution of conflicts between laws and between jurisdictions. The existence of the cross-border elements, which brings into discussion the intervention of each state in what concerns the regulation of legal relations governed by private law from its jurisdiction, as well as the fact that the object of regulation of international private law consists of solutions given in the cases of conflicts between laws or between jurisdictions has led certain authors to consider that this is also a component of public law (Barraud, 2014, pp. 29-30).

The functions of the European Union have highlighted the existence of an area where public and private law superimpose. One of the goals of the Union is the single market based on fair competition (Câlea, Deceanu, Luțaş & Mihuț, pp. 1-4). The legislation of the Union contains regulations concerning the relations between states and private entities for the purpose of maintaing the free market. Consisting mainly in rules that have to do with production and trade, the regulations of the Union target the relations between state and private entity where the state, through its contracting authorities, represents a general interest, a reason for which it may impose its will, as with, for example, public supply contracts. Since we are talking about trade rules, there is a tendency to discuss them in a framework of private law rather than the framework of public law, as it is considered, in the case of public services of an industrial or commercial kind, that the state can act without public power prerogatives.[5]

[5] For this, see the regulations of Law no. 101/2006 on the remedies concerning the attribution of public supply contracts, sectoral agreements and contracts for the concession of works and for the concession of services, as well as for the organization and functioning of the National Council for the Settlement of Appeals, published in the Official Gazette of Romania, Part I, no. 393 of May 23, 2016. Art. 53 par. (1^1) provides that the lawsuits and applications that emerge from the execution of administrative contracts shall be settled in lower court, urgently and especially, by the civil court of common law that has jurisdiction over the headquarters of the contracting authority, while, according to par. (1) of the same article, the lawsuits and applications concerning the offering of compensation for any damages caused during the tender procedure, as well as damages that have to do with the annulment or nullity of the contracts shall be settled in lower court, urgently and especially, by the contentious administrative and tax section of the tribunal that has jurisdiction over the headquarters of the contracting authority, through panels specializing in public supply matters.

This is how the notion of public service has become diluted and the protection of the general interest pursued through the organization of said public service has diminished. An area was, thus, created where situations that are specific to public law interfere with the rules established for the relations between private entities. However, certain clarifications were outlined by the European Court of Justice.

In what concerns public service, French theory points to the protection of the public interest as its main characteristic. This aspect can be covered through the intervention of the state, namely through regulations that ensure the access of all private entities to a public service of an adequate standard. Such interventions have been carried out by states that apply this doctrine before the European Court of Justice. Through the Corbeau [C-320/91] and Commune d'Almelo [C-393/92] rulings, the European Court of Justice has underlined that equality and continuity (which are fundamental characteristics of public service in the French doctrine) are two of the pillars of general economic interest. Thus, the ECJ acknowledged the need to restrict the field of competition in order to allow the fulfillment of the general interest mission. At the same time, the concept of „universal service" was born, introduced by the European Commission in 1992. „Universal service" is described as a basic public service offered to all members of the community with accessible pricing and a standard level of quality. The notion of universal service does not overlap with the notion of public service defined in the French doctrine, as they are in a specific-to-general relationship. Ensuring a universal service can constitute one of the objectives of public service organized in a competitive system.

On the basis of this general framework, we have carried out a short analysis of our national regulations in order to see to what extent the distinction between public and private law is clear and has well-defined rules that are reflected in the adopted legislation.

THE PUBLIC SUPPLY CONTRACT

The regulation of the public supply contract is a reference point, given that it is concluded between a „contracting authority" and a private entity. The contracting authority is a body governed by public law. Moreover, in the case of „LitSpecMet" UAB v. „Vilniaus lokomotyvų remonto depas" UAB [C–567/15], the CJEU has shown that Article 1 paragraph (9) subparagraph 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended in Commission Regulation (EU) no. 1251/2011 of November 30, 2011, must be interpreted in the sense that a company which, on the one hand, is owned fully by a contracting authority whose activity is to fulfill general interest needs and which, on the other hand, carries out operations both for this contracting authority, as well as on the competitive market, must be qualified as a "body governed by public law" in the

sense given by the provision mentioned, as long as the activities of said company are necessary for said contracting authority to carry out its activity and as long as, in order to fulfill general interest needs, the aforementioned company is guided by criteria other than those that are economic in nature, an aspect that must be verified by the referring court. It is irrelevant, in this situation, that the value of the internal operations could represent less than 90% of the global turnover of the company or a non-essential part of it in the future. The Court states that, according to article 1 paragraph (9) second subparagraph letters (a)-(c) of the 2004/18 Directive, "body governed by public law" means any body which has, first of all, been *established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character*.

In this context, it is to be expected that the regulations concerning public supply contracts be created through legal norms related to public law, norms that should establish the superordinate position of the contracting authority in its relationship with the private entity.

Law no. 554/2004[6] on contentious administrative matters qualified the public supply contract as an administrative contract from the very start, which, according to the doctrine, confers the superordinate position specific to public law (in this case, administrative law) to the contracting authority. Unfortunately, our legislation, while it does recognize the notion of the administrative contract, has not established, under any form, the characteristics of this category of contracts. In order to align with the requirements set forth by the European Union in terms of free competition, an Emergency Ordinance, no. 34/2006[7], was passed in 2004. This ordinance qualified the public supply contract as an administrative contract, with the consequence of the settlement of litigation by the courts specializing in contentious administrative legal matters, and merely regulated the procedure of public procurement, without also regulating the aspects related to the execution of the contract or its termination. In time, the normative act was altered, through OUG (GEO) no. 76/2010[8], establishing that the lawsuits and applications concerning the execution, nullity, annulment, termination or denunciation in a unilateral manner of public supply contracts shall be settled in the lower courts by the commercial section of the tribunal that has jurisdiction over the contracting authority's headquarters. Assigning this competence automatically led to the notion that the rules by which the public supply contract is carried out or concluded are those that are related to private law, excluding here the public power prerogatives on the part of the contracting authority. Thus was created a type of contract which, during the phase of procedures that are preliminary to its conclusion, is administrative, but, during the phase of its execution or termination, is civil. Law no. 278/2010[9] for the

[6] Published in the Official Gazette of Romania, Part I, no. 1154 of December 7, 2004.
[7] Published in the Official Gazette of Romania, Part I, no. 418 of May 15, 2006.
[8] Published in the Official Gazette of Romania, Part I, no. 453 of July 2, 2010.
[9] Published in the Official Gazette of Romania, Part I, no. 898 of December 31, 2010.

approval of OUG no. 76/2010 amended letter f) of article 3 from Section 2 (Definitions) of OUG 34/2006, and it now reads: "public supply contract – the commercial contract that also includes sectoral agreements, as they are defined in art. 229 par. (2), by onerous title, concluded in writing between one or several contracting authorities, on the one hand, and one or several economic operators, on the other hand, whose object is the execution of works, the supply of products or the provision of services, for the purposes of this emergency ordinance" (Fodor, 2012). This was corrected through OUG no. 77/2012[10], which defined the public supply contract as a contract similar, according to the law, to the administrative document, after referring to the provisions of Law no. 554/2004 that assimilates the administrative contract to administrative documents.

Emergency Ordinance no. 34/2006 was abrogated when Law no. 98/2016[11] came into force. This new normative act contains provisions concerning the execution and termination of the contract and establishes that the public supply contract is administrative. Law no. 101/2016 establishes the procedure for the settlement of any disputes stemming from the public supply contract before the courts of justice specializing in contentious administrative matters. What is surprising here is that there are no provisions among the rules for the execution and termination of the contract which indicate that the contracting authority is invested with public power (provisions that are specific to administrative contracts, such as the contracting authority's right to unilaterally amend the contract where the public interest requires it, while keeping the financial balance, or the right to unilaterally cease the contract for the same reason, etc.; Iorgovan, 2002, pp. 111-113). It is provided for, however, that the lawsuits and applications that stem from the execution of administrative contracts are to be settled by the lower courts, urgently and especially, by the civil court of justice specializing in common law that has jurisdiction over the headquarters of the contracting authority, while the applications concerning the grant of compensation for any damages caused during the tender proceedings, as well as those concerning the annulment or nullity of the contracts, are to be settled by the lower courts, urgently and especially, by the contentious administrative and tax section of the tribunal that has jurisdiction over the headquarters of the contracting authority. Thus, this type of contract reverted back to being a document which is equally regulated by public law norms and private law norms, an administrative contract in terms of definition, termination procedure and annulment, while also a civil contract in terms of its execution, which is a mélange that will surely cause confusion when it comes to the specific rules of execution.

In a previous study (Fodor & Fodor, 2013, pp. 85-86), we referred to Canadian law, which, in the Civil Code of the province of Quebec, states that, in the case of concluded contracts, the public authorities have the same obligations as

[10] Published in the Official Gazette of Romania, Part I, no. 799 of November 28, 2012.
[11] Published in the Official Gazette of Romania, Part I, no. 390 of May 23, 2016.

private persons, but that public authorities have a superordinate position, ensured through exorbitant clauses. At the same time, there are numerous situations where the public authorities maintain a right to control and instruct the private co-contracting party during the execution phase of the contract. Any litigation related to the execution of the contract can be settled by the judicial authorities or through arbitration. Any litigation concerning the validity of the contract or matters related to the public interest (such as formalities for the obtainment of an authorization preliminary to the conclusion of the contract) are excluded from arbitration. Here we have an example where the lawmaker addressed the various aspects of the same contract by distinguishing between situations that have to do with the public interest and the legal relationships related to private law, indicating, for each, the specific applicable legal setting.

REGULATIONS IN THE CIVIL CODE AND THE CIVIL PROCEDURE CODE CONCERNING THE PUBLIC AUTHORITY AND THE LEGAL PERSON GOVERNED BY PUBLIC LAW

The Civil Code (Law no. 287/2009[12]) contains the following provisions that, in fact, address the branch of public law:

Art. 189: Categories of legal persons

Legal persons are governed by either public law or private law.

Art . 191: The legal person governed by public law

(1) Legal persons governed by public law are formed by law.

(2) By way of exception from the provisions of par. (1), in the cases specifically provided for by the law, legal persons governed by public law can be incorporated through acts created by the central or local public administration authorities or through other means provided for in the law.

Art. 192: The applicable legal setting

Legal persons who are legal formed are subject to the provisions applicable to the category of person that they are a part of, as well as to those that are contained in this code, if the law does not state otherwise.

These provisions highlight the existence of the distinction between private and public law. They also highlight the fact that, in public law, the decision-making power is awarded to the state through the lawmaking authority or the competent administrative authorities, in what concerns the formation and establishment of the status, competence, organization and functioning of the created legal persons.

[12] Published in the Official Gazette of Romania, Part I, no. 511 of July 24, 2009 and republished in the Official Gazette of Romania, Part I, no. 505 of July 15, 2011.

By referring to the fact that the legal provisions that the legal persons are subject to apply to the categories that the legal persons are a part of, the code has the legal setting of public and, respectively, private law in mind.

Art. 194, regulating the manner in which legal persons are formed, shows that the legal person can form:

a). through the articles of formation of the competent body, in the case of public authorities and institutions, territorial administrative divisions, as well as economic operators incorporated by the state or the territorial administrative divisions. In all cases, the articles of formation must expressly provide *whether the public authority or public institution is a legal person or not.*

Again, it is made clear that the legal persons that are incorporated *by the will of the competent state body* are subject to public law. Nominated among the legal persons incorporated by the will of the state bodies are: *public authorities, public institutions, territorial administrative divisions, as well as economic operators incorporated by the state or the territorial administrative divisions*.

When speaking of the notion of "economic operator," we can think of both legal subjects providing a public service of an industrial or commercial nature, as well as state or national companies which, in fact, are companies as described in Law no. 31/1990[13], having various objects of activity (for example, Compania Națională de Căi Ferate (the National Railroad Company) or Compania Națională a Uraniului (the National Uranium Company), Societatea Națională Plafar S.A. (the National Company of Plafar J.S.C.) or Societatea Națională a Sării (the National Salt Company)).

A first remark would be related to the requirement that the articles of formation must expressly provide whether the public authority or institution is a legal person or not. This means that *the lawmaker is referring to the formation of legal persons governed by public law while underlining the fact that some of them may not have a legal personality.*

The confusing drafting of the Civil Code stems from the fact that, in public law, there may be legal subjects with no legal personality, but with a special capacity of administrative law, which confers to them the possibility to express their will, which produces legal effects (through the issuance or conclusion of legal and, respectively, administrative acts), to participate in legal relationships and to have an active or passive procedural capacity during contentious administrative litigation. Examples in this sense are the local public administration authorities or various deconcentrated public services. These legal subjects are not, however, legal persons. The mention of public authorities in the Civil Code, where the capacity to participate in legal relationships is given by the existence of legal personality, is rendered in such a way that it produces confusion between the rules of public and private law.

[13] Published in the Official Gazette of Romania, Part I, no. 12 of January 19, 1990, republished a third time in the Official Gazette of Romania, Part I, no. 1066 of November 17, 2004.

We can then notice that, in the Civil Code, the criterion that qualifies a legal person as a legal person governed by public law is *the formation through the act of a state body, a lawmaking authority or a public authority.* Such a criterion is, however, false.

On the one hand, in what concerns the so-called "economic operators," these can be, as we have shown above, public services or companies. Public services can be performed both by administrative authorities and private entities that, due to their authorization by the state to take over the performance of a public service, also receive the public power necessary to meet all of the characteristics of public services, which we have described above. As a result, public services can also be carried out by a legal person governed by private law, for example legal persons governed by private law that have outsourced their public services consisting in the provision of utilities. If we do not acknowledge to these legal persons, formed through means recognized by the Civil Code as specific to the formation of legal persons governed by private law, their quality of "assimilated legal person governed by public law," as described in Law no. 554/2004, that means that we do not acknowledge the fact that the activity that they perform for the provision of public services must maintain the aspect of continuity and access to public services at reasonable standards. It is true that the Romanian legislation has not been mindful of the aspects that must protect the general interest when it regulated the manner in which utility providers function, but the legislation of other states (such as, for example, France) contains provisions that support these characteristics (Fodor, 2007).

In other situations, there are legal persons governed by private law that are formed by way of law. A case of this sort, of considerable notoriety, is that of the bar associations. Benefitting from the fact that, after 1990, bar associations, which are legal persons governed by private law, were regulated by law, various legal persons who, by defying the legal provisions, set the object of their activity as being specific to attorneys, appealed the legitimacy of bar associations. Being summoned to settle the claims of the bars which were legally formed against these legal persons breaching the legal provisions, the courts found that they were confronted with solving the following problem: did the bar associations which were members of the National Union of Bar Associations of Romania exist legally, given that they were not formed through one of the methods allowed by the law to legal persons governed by private law and did not appear in any public register?

Ruling no. 15/2015 given in the appeal stage in the interest of the law by the High Court of Cassation and Justice showed that the organization of the liberal profession of attorney was first carried out in Romania through „Law no. 1.709 of December 4, 1864 concerning the body of attorneys." There were a series of other normative acts that followed, which amended only the regulations concerning the exercise and organization of the profession of attorney, the last of which being Law

no. 51/1995[14]. The supreme court showed that, given the succession in time of the abovementioned normative acts, the forms of organization on a territorial level of the profession of attorney, regardless of their name, were never dissolved in Romania, as the legal operation carried out by the lawmaker was the transformation of the legal person, in the sense that, through the same normative act, the dissolution of the existing legal persons was provided for, along with the formation of other legal persons in their stead, as successors bearing the same rights and obligations as their predecessors, and the situation is the same in what concerns the forms of organization at a national level. It was concluded that the organization of the exercise *by law* of the profession of attorney, as is, otherwise, the case with any activity that represents an interest to society, is natural and necessary in order to establish competence, the manner and means through which the profession is exercised, as well as the boundaries that cannot be crossed without infringing on the rights of other persons or professional categories. The lawmaker has regulated, through special laws, all activities that contribute to the satisfaction of the public interest, organizing them by professional associations that receive a legal personality pursuant to these laws.

However, we reiterate our conclusions concerning the fact that bar associations are still legal persons governed by private law, despite the fact that they were formed through normative acts, respectively by law (Fodor, 2015). It is again obvious how false the criterion used by the Civil Code is for the grouping of legal subjects that are different from the natural person into legal persons governed by public law and legal persons governed by private law.

In the Civil Procedure Code (Law no. 134/2010)[15], we find the following provisions:

Art. 542: The object of arbitration

(1) The persons who have full capacity of exercise can agree to settle any litigation between them by way of arbitration, aside from litigation that concerns marital status, the capacity of persons, inheritance disputes, familial relationships, as well as the rights over which the parties have no power of decision.

(2) *The state and the public authorities* are entitled to conclude arbitration agreements only if they are authorized by law or by international conventions that Romania is a part of.

(3) *The legal persons governed by public law who also have economic activities among their objects of activity* are entitled to conclude arbitration agreements, if the law or their articles of formation or organization do not state otherwise.

[14] Published in the Official Gazette of Romania, Part I, no. 116 of June 9, 1995 and republished a second time in the Official Gazette of Romania, Part I, no. 247 of April 10, 2015.

[15] Published in the Official Gazette of Romania, Part I, no. 485 of July 15, 2010 and republished a third time in the Official Gazette of Romania, Part I, no. 440 of May 24, 2018.

We can see here, in another form, the same distinction between "public authorities" and "economic operators." In what concerns this division, from the perspective of what we have presented so far, in regards to the fact that economic activities can be public services or activities of another nature, and public services can also be provided by legal persons governed by private law, we have searched for the explanations of various authors and found the ones that show the fact that "Autonomous companies and state capital-funded commercial companies can resort to arbitration, as well, for the settlement of litigation between them, according to art. 51 par. (2) of Law no. 15/1990 on the re-organization of state economic units as autonomous and commercial companies". In what concerns state capital-funded commercial companies, Law no. 15/1990[16] indicates, in art. 16, that state economic units can be organized, with the exception of those that are incorporated as autonomous companies, *as joint stock companies or limited liability companies, under the conditions provided for in the law*; as such, as companies specific to legal persons governed by private law.

It has been stated that the abovementioned legal regulation gives form to certain older views found in the specialized literature. We believe that the solution could have been found without including, in the group of legal persons governed by public law, the legal subjects performing activities governed *par excellence* by the rules of private law and that are not invested with public power.

The fact that, in the case of a legal person performing „economic activities," the criterion by which it is decided whether they are part of the group of persons governed by private law or the group of persons governed by public law is not the manner in which it was formed comes across from the practice of the courts of justice. Thus, it was considered that the motion against a minister's order through which the director of a national company was discharged from his position is not within the competence of the courts of justice dealing with contentious administrative matters, because the order, even if it is, formally, an administrative act, was not issued in the capacity of public power. The court considered that the order was issued as a result of the ministry's capacity as bearer of the share capital of the national company, as its qualification had to take into consideration the specificities of the legal relationships in this case. As a result, the director concluded a labor agreement and an economic performance agreement with the national company. Then, *the activity performed by the national company was not related to the public interest, using only elements of infrastructure that belonged to the public domain on the basis of a concession agreement.* Due to the fact that the legal relationship brought before the court is based on the order issued by the ministry as a representative of the state, *as the majority shareholder in the performance contract as well, these being legal documents that the court of justice addressing contentious administrative issues is not competent to rule on, given that*

[16] Published in the Official Gazette of Romania, Part I, no. 98 of August 8, 1990.

these are not administrative acts issued by an authority, were not concluded on the basis of public power and do not contain clauses that are primarily governed by public law, only having a view toward the administration of an economic agent, organized as a commercial joint stock company, it is the tribunal that, essentially, has the competence to settle the case, according to art. 2 par. 1 letter a) of the Civil Procedure Code[17]. In a different case, the High Court of Cassation and Justice considered an order revoking a medic from his position as general director of a municipal hospital to be an administrative act, subject to the verification of the court of justice dealing with contentious administrative matters.[18] This time, it was taken into consideration that it is a public institution that is in question, as the revocation act was issued by a public power.

We consider that the aforementioned rulings correctly capture the specificities of the legal relations and the character of the legal acts that they were summoned to verify from the point of view of their legality, and, as such, the provisions found in the Civil Code and the Civil Procedure Code appear as erroneous, first of all due to the fact that they ignore the specificities of public law.

CONCLUSIONS

We hereby conclude that the correct inclusion of a legal subject in the category of subjects regulated by public or private law must be founded on the existence or non-existence of public power prerogatives in the activity performed by said subject. The concept of a legal person governed by public law and devoid of public power prerogatives does not make sense and cannot be regulated by public law provisions, as provide for in art. 192 of the Civil Code which establishes the legal setting applicable to legal persons.

On the other hand, as we have demonstrated before, in the domain of public law, there can be legal subjects invested with public power, whose activity produces legal effects pursuant to the special capacity governed by administrative law that they are legally granted, but who have no legal personality.

The analysis that we have carried out mainly in relation to the manner in which our current legislation reflects the distinction between public and private law leads us to the conclusion that the defining elements of the two branches of law are ignored, due to which a false criterion has been established to decide where certain legal subjects belong under the two categories related to the two branches of law which are the subject of this study, a false criterion that produces consequences, on the one hand, in what concerns the general interest that the subjects governed by public law must protect, and, on the other hand, creates notions that are devoid of

[17] H.C.C.J., Cont.adm. and tax section, Civil Ruling no. 2066 of April 18, 2007, http://www.scj.ro/SCA%20rezumate% 202007/SCA%20r%202066%202007.htm, accessed on 26.08.2012.

[18] H.C.C.J., Cont.adm. and tax section, Civil Ruling no. 312/2003, http://www.scj.ro/SCA%20 rezumate%202003/SCA%20r%20312 %202003.htm, accessed on 26.08.2012.

content, by including legal subjects that are not invested with public power in the category of legal persons governed by public law. Our opinions are supported both by the national legal practice, as well as the CJEU rulings, which we have invoked.

BIBLIOGRAPHY

Barraud, B. (2014). Droit public – droit privé: de la summa divisio à la ratio divisio? *Revue de la Recherche Juridique – Droit Prospectif*, 1101-1132. Retrieved August 17, 2018, from https://hal-amu.archives-ouvertes.fr/hal-01367507/document,

Boroi, G. a. (2013). *Codul de procedură civilă comentat*. Bucharest: Hamangiu.

Câlea, S., Deceanu, L., Luțaș, M., & Mihuț, I. (n.d.). *Economie europeană – note de curs*, FSEGA, Universitatea „Babeș-Bolyai" Cluj-Napoca. Retrieved October 17, 2018, from http://193.231.19.17/~mihaela.lutas/Materiale%20curs/CAP.7.%20%20%20%20 Politica -privind-concurenta.pdf

Fodor, E. (2007). Protejarea interesului general în contextul externalizării serviciului public. *Revista de drept public*, 2, 86-94.

Fodor, E. (2012). Despre unele contracte administrative prin prisma teoriei generale a dreptului. *Fiat Justitia*, 1, 20-36.

Fodor, E. (2015). A Good Defence – A combined effort of the State and the Attorney. *Juridical Current*, 63(4), 46-58.

Fodor, E. (2017). *Drept administrativ*, revised and completed edition. Cluj-Napoca: Albastra.

Fodor, E., & Fodor, G. (2013). Public Law and Private Law within Administrative Law. *Juridical Current*, 52(1), 78-86.

Iorgovan, A. (2002). *Tratat de drept administrativ*, 3rd edition. Bucharest: ALLBECK.

Iovănaș, I. (1977). *Dreptul administrativ și elemente ale științei administrației*. Bucharest: Editura didactică și pedagogică.

Rigaux, F. (2014, August). *Droit public et droit privé dans l'ordre juridique international*. Retrieved August 16, 2018, from http://www.sfdi.org/wp-content/uploads/2014/08/RIGAUXMelDABIN.pdf