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The Illusion of the Recovery of Damages found by the Court of Audits, between the Limit of the Legal Rule and the Good Faith of the Audited Entity

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Abstract: The current analysis originated from a question that frequently arose in practice. We can say with certainty that in 99% of cases, the prescription of the audited entity's right to recover the respective amounts intervenes. This is based on the attributions of the Romanian Court of Accounts, which notes the occurrence of damages in the patrimony of the audited entities and orders recovery measures. Additionally, the administrative documents issued by the audit institution are contested in administrative litigation, and the audited authorities lack any measures for the recovery of damages until the courts issue a definitive solution. Hence the challenge of solving these situations because, on the contrary, it can be determined that the recovery of these damages depends only on the good faith of the verified entities that can initiate damage recovery actions concurrently with the actions whose goal is to challenge the administrative documents issued by the Court of Accounts, in order to prevent the intervention of the statute of limitations sanction. To find inspiration for a potential *de lege ferenda proposal*, we will highlight the rules pertaining to the courts of accounts in other European states. Concurrently, in order to provide a comparative legal note to this study, we will illustrate the theoretical

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components with instances drawn from national and European jurisprudence (where applicable) as well as from other EU members.

Keywords: administrative documents; audit institution; Court of Audits; European jurisprudence

1. Introductory Aspects regarding the Status, Role and Powers of the Court of Accounts

According to the Romanian Constitution[1] and Law no. 94/1992[2], the Court of Accounts exercises control over the way of formation, administration and use of the financial resources of the state and the public sector, representing the supreme audit body of public money in Romania (Vedinaș, 2017, p. 30). The provisions of art. 21 para. (1) from Law no. 94/1992, provide that the audit institution "exercises the function of control over the way of formation, administration and use of the financial resources of the state and the public sector, providing the Parliament and, respectively, the administrative-territorial units with reports on their use and administration, in accordance with the principles of legality, regularity, economy, efficiency and effectiveness", and according to para. (2) "The Court of Accounts can exercise the performance audit on the management of the general consolidated budget, as well as any public funds". Thus, the two types of audits within the competence of the Court of Accounts are separated: the financial audit[3] and the performance audit[4].

The provision that raises (at least in our opinion) the most and sensitive problems in practice for the entity targeted by the audit of the Court of Accounts is the one from art. 33 para. (3) from the same normative act according to which "*In situations in which the existence of deviations from legality and regularity, which determined the occurrence of damages, is found, the management of the audited public entity is notified of this state of fact. Establishing the extent of the damage and arranging the*

[1] Art. 140 of the Constitution of Romania, amended and supplemented by the Law on revision of the Constitution of Romania no. 429/2003, published in the Official Monitor of Romania, Part I, no. 758 of October 29, 2003, republished by the Legislative Council, pursuant to art. 152 of the Constitution, updating the names and giving the texts a new numbering.
[2] Republished in the Official Monitor of Romania, Part I, no. 238 of April 3, 2014.
[3] Art. 2 letter c) of Law no. 94/1992 defines the financial audit as "the activity that monitors whether the financial statements are complete, real and in accordance with the laws and regulations in force, providing an opinion in this sense"
[4] Art. 2 lit. d) from Law no. 94/1992 defines the performance audit as "the independent evaluation of the way in which an entity, a program, an activity or an operation works from the point of view of efficiency, economy and effectiveness".

measures for its recovery become the obligation of the management of the audited entity".

From this text, two particularly important aspects emerge:

- *the existence of damages-generating deviations is ascertained by the auditors;*
- *ordering the measures to determine the extent of the damage and its recovery, is transferred as an obligation to the management of the entity*.

So the factual situation that we will consider is the following: the Court of Accounts issues administrative acts (we will analyze in the next section what these acts are currently, as a result of the issuance of a new Regulation by the Court of Accounts regarding the organization and conduct of the activity of audit) through which the existence of damages is ascertained (it currently produces a form of document known as a *recommendation*, which is binding in our view).

Closely related to this article is the provision of art. 64 of the same normative act according to which, *the non-recovery of damages, as a result of the failure of the entity's management to comply with the measures sent by the Court of Accounts*, constitutes an offense.

One thing that is crucial to keep in mind when reading this first section is that the audited entity, at least theoretically, has a duty to identify the responsible parties and obtain damages from them through the documents that are released as a consequence of the audit actions conducted by the Court of Accounts auditors.

2. Evolutionary Aspects regarding the Organization of Specific Activities of the Court of Accounts – the Old Regulation versus the New Regulation – The Lack of Correlation with the Primary Legislation

The Decision of the Plenum of the Court of Accounts no. 155 of May 29, 2014[1] for the approval of the *Regulation on the organization and conduct of activities specific to the Court of Accounts*, as well as the capitalization of the documents resulting from these activities (the old Regulation) provided, among others the following:

[1] Published in the Official Monitor no. 547 of July 24, 2014. Similar provisions were also found in the Regulation of November 4, 2010 regarding the organization and carrying out of specific activities of the Court of Accounts, as well as the capitalization of the documents resulting from these activities, approved by the Decision of the Plenary of the Court of Accounts no. 130/2010), published in the Official Monitor of Romania, Part I, no. 832/13 December 2010.

- point 187: "*A commission for solving appeals, established in compliance with point 213 provisions, will analyze potential appeals formulated by the head of the verified entity against some of the decision's measures or the deadlines for their fulfillment, as stated in the issued decision*", and subsequently, in points 204-219, the regulations govern the process for contesting the ruling that led to the interventions for the audited entity's management. The provisions of point 227 are also relevant, which stated that "*against the conclusion issued by the appeals resolution commission provided for in point 213, the head of the audited entity can notify the competent administrative court, within 15 calendar days from the date of confirmation of receipt of the conclusion, under the conditions of the administrative litigation law*".

Following a review of the aforementioned provisions, the following features emerge:

- following the conclusion of the control by the Court of Accounts, it issued an administrative act - decision, by which measures were ordered for the audited entity, in particular for the recovery of some damages found by the auditors;
- against it, the audited entity had the possibility of formulating an appeal which the Court of Accounts solved by means of a *conclusion*; until the resolution of the appeal, it was stipulated that the execution of the measures ordered by the decision is suspended;
- in the situation where the entity was not satisfied with the method of solving the appeal, it had the possibility to address the administrative litigation court with a request regarding the suspension of the execution/cancellation of the administrative acts.

The High Court of Cassation and Justice also held in a case that "*the administrative act that produces legal effects, being subject to the obligation of execution, in case the appeal against the decision issued by the County Chamber of Accounts is rejected or admitted, in part, is this decision itself, which establishes measures for the controlled entity, this being the act that meets the requirements to be considered as having the legal nature of an administrative act*"[1].

In conclusion, from the moment of resolution of the appeal in the administrative procedure by the commission of the Court of Accounts, the decision becomes enforceable and the audited entity is obliged to order measures to recover the damage. Obviously, the situation becomes more complicated if the verified entity obtains in the administrative litigation court the suspension of the execution of the

[1] Administrative-Contentious and Fiscal Section, Civil Decision no. 84/14 January 2014.

administrative acts issued by the Court of Accounts. In such a context, the obligation of the verified entity to carry out the measures is suspended again.

What happens to the damages retained by the auditors? In the next section will provide the answer.

Later, by the Decision of the Plenary Court of Accounts no. 629 of December 20, 2022[1], the new *Regulation on external public audit activity* was approved.

As a first absolute novelty, it will be noted from the first reading of this new Regulation that it no longer includes the traditional notions of the previous regulations, *decision* and *conclusion*, nor does it refer to the procedure for issuing and/or contesting any (administrative) act.

But the idea of a *recommendation* seems to have taken the place of the administrative act known as a *decision* in the earlier Regulation. *The recommendation* is defined in art. 1 letter m) as "*a solution presented to the audited entity by the Court of Accounts, as a result of the audit activity carried out, in relation to the specific aspects recorded in the audit report regarding the way to comply with the applicable financial reporting framework, the legal regulations applicable, of the principles of efficiency, economy and effectiveness, as well as of the best practices in the audited field, as the case may be*". Among the audit institution's rights is that of formulating "*recommendations for remedying deviations from the principles of legality, regularity, economy, efficiency and effectiveness*" - art. 2 letter d) and, correlatively, the audited entity has the right "*to formulate points of view, including objections, as the case may be, to the findings, conclusions and recommendations of the Court of Accounts* - art. 5 para. 1 letter d).

Regarding the obligations of the audited entities, they are provided for in art. 6 para. (1) letter f) - h) of the Regulation, in the sense that they have the obligation to carry out the recommendations of the Court of Accounts, to establish the extent of the damage and to take measures to recover it and to follow their implementation, according to the provisions of art. 33 para. (3) of the Law. Correlatively, to art. 37 stipulates that "*In the event that the audit report contains deviations that have determined the occurrence of damages, the management of the audited entity has the obligation to determine the extent of the damage and to arrange the measures for its recovery*" and "*In cases where the goal is to collect damages, in the management letter, in accordance with Article 64 of the Law, the Court of Accounts also specifys*

[1] Published in the Official Monitor no. 12 of January 5, 2023.

the repercussions of the entity's management's inaction". So, even if the recommendations ordered by the Court of Accounts are not carried out, this may constitute an offense, as provided by the provisions of art. 64 of Law no. 94/1992. Therefore, even if the recommendation is defined as an opinion, from the analysis of the legal provisions established by the regulation, its binding and enforceable feature is evident.

Upon analyzing the new rule, a complete shift from the previous one is evident. One might even call it a resettlement of the acts that resulted from the Court of Accounts' activities, but the legislator does not appear to have associated it with the fundamental ideas of administrative law.

Another new element compared to the previous regulation is the introduction of the notion of a letter to management, as provided for in art. 25, "*According to article 10 paragraph (1), the Court of Accounts creates an audit report and a letter to management for each audit mission that is successfully completed*".

Furthermore, art. 26 provides for the procedure to be followed at the stage of issuing the audit report:

a) the communication by the head of the specialized structure of the Court of Accounts of the draft of the audit report and of the letter to the management of the audited entity;

b) the transmission by the audited entity, within 15 calendar days of receiving the draft report, of a point of view that includes any objections to the findings recorded in it, including a plan of measures to implement the recommendations".

This leads to another innovative aspect: in addition to submitting any objections, the audited authority will also provide a plan for putting the Court of Accounts' recommendations into practice, which will be included in the *letter to the management*.

Paragraph (4) is also relevant which stipulates that "*During the audit period, an extract from the draft audit report and from the letter to management, containing the related findings, conclusions, and recommendations, is communicated to the persons with attributions in the field. These persons can submit a point of view that includes possible objections within 15 calendar days from the receipt of the mentioned documents".*

Next, art. 27 para. (3) refers to "*the entity's obligation to implement the recommendations".* In the same sense are the provisions of art. 35 para. (1) and (2)

which refer to "*The obligation to implement the recommendations rests with the head of the audited entity*", but also to the entity's obligation to communicate the state of implementation of the recommendations. So, if the recommendations are mandatory, then we would be tempted to conclude that they would have the legal nature of an administrative act.

However, it seems to be an obvious contradiction to the common meaning of the word "*recommendation*", which, according to the *Explanatory Dictionary of the Romanian language*, means *exhortation*, *advice, proposal*, but also to the definition provided by the Regulation, which mentions that a *recommendation* is *an opinion*. From every angle, the recommendations of the Court of Accounts auditors contradict all of these points and lack the enforcement that distinguishes an administrative act's legal status. However, as we have already noted, the same rule also mentions penalties in the event that the audited business fails to implement these recommendations.

An interesting point of view is found on the website of the Court of Accounts, in which it is expressly stated that "*the Court of Accounts will no longer issue decisions - the administrative documents containing the measures assigned to the management of the audited entity. The audit reports will include recommendations, which will be implemented according to the Plan of measures and approved by administrative acts, as follows:*

- *by decisions of the Plenary, in the case of credit orders at the central level, as well as at the level of the counties and municipalities where the county is located;*
- *by decisions of the directors of the accounting chambers, in the case of audit reports drawn up at the level of communes, cities and municipalities, other than county residences*"[1].

So, compared to the old Regulation, beyond the resettlement of the used concepts, it is also noticeable that there is no longer any provision regarding the suspension of the implementation of the recommendations and the acts (at least according to the indications on the Court's website) that are to be challenged in court are the decisions of the plenary session/decisions of the directors of the accounting chambers, as the case may be, their execution may be ordered by the competent court.

[1] https://www.curteadeconturi.ro/comunicate-de-presa/noul-regulament-privind-activitatea-de-audit-public-extern.

We believe that the "curiosity" of this new rule lies in the way the principles are applied and how they conflict with the basic institutions and general theory of administrative law.

In other words, what legal force do these recommendations have and how can the verified entity come under the threat of the offense provided for in art. 64 of Law no. 94/1992?

3. The Illusion of Recovering the Damages Found by the Court of Accounts - the Imminent Intervention of the Statute of Limitations

In the event that there were any lingering doubts about the possibility of recovering these damages, we think the odds have significantly diminished following the High Court of Cassation and Justice's announcement of Decision No. 19 of June 3, 2019[1].

Art. 8 of Decree no. 167/1958 (repealed by Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code) established: "*The prescription of the right to action to repair the damage caused by the illegal act begins to run from the date when the injured party knew or should have known both the damage and the person responsible for it*". In the same sense are the provisions of art. 2528 of the Civil Code, which regulates that: "(1) *The time limit for exercising the right to repair damages caused by an illegal act starts to run on the day the person who was harmed knew or should have known about the damage and the person who caused it.* (2) *The provisions of para. (1) applies, accordingly, also in the case of restitution action based on unjust enrichment, unpaid payment or business management*", applicable to prescriptions started after the entry into force of Law no. 134/2010 on the Civil Procedure Code, republished, with subsequent amendments and additions (Law no. 134/2010). From the perspective of the legal provisions enunciated, it is found, in para. (2) from art. 2528 of the Civil Code, that the provisions of para. (1) applies, accordingly, also in the case of the lawful legal act, respectively the restitution action based on unjust enrichment, unpaid payments or business management. Thus, the

[1] High Court of Cassation and Justice's decision no. 19 of June 3, 2019 regarding the interpretation and application of the provisions of art. 268 para. (1) letter c) from Law no. 53/2003 regarding the Labor Code, related to art. 8 and 12 of Decree no. 167/1958 and the provisions of art. 211 letter c) from the Social Dialogue Law no. 62/2011, respectively of art. 2526 of the Civil Code, in the sense of determining whether the control act of the Court of Accounts or of another body with control powers marks or not the moment from which the statute of limitations begins to run in the actions initiated by employers to recover the damage caused by employees, published in the Official Monitor, Part I no. 860 of October 24, 2019.

limitation period in the case of an action based on unjust enrichment begins to run from the moment when the one whose patrimony has decreased knew or should have known both the fact of the increase of another patrimony and the one who benefited from this increase.

Regarding the legal norms, the High Court of Cassation and Justice held that "*regardless of the findings of some control bodies regarding the due or unpaid feature of the salary rights paid by the employer, he had to know at the time of payment whether the monetary payment to the employees was in accordance with the provisions that regulated the payment of salaries, on which date the employer obviously knew the identity of the employees to whom he granted monetary rights*" and that, "*from the point of view of the expiration of the statute of limitations, the finding made and brought to the attention of the control body of the Court of Accounts or another body with control powers, which is a third party to the employment relationships that took place between the employer and employee and whose observations do not give rise to a substantial right, which the employer can take advantage of, but derives from the interpretation of his conduct, by reference to the obligations established in his task in terms of payroll and management of budgetary resources, under the conditions in which, in fact, the control body, if it assesses that the legal provisions have not been respected, proceeds to a legality control (...) the control carried out by the Court of Accounts or another body with control powers only detects deviations or irregularities regarding the application of the law , which generated the damage, based on the data made available (to the Court of Accounts or another body with control powers) by the institution subject to control"*

Therefore, compared to the approach embraced by the High Court of Cassation and Justice, there are minimal chances that the verified entity will be able to recover any damage, even more so as we can assume that the respective monetary rights were carried out in compliance with the principle of legality, the entity having this conviction, because otherwise we can end up in the realm of another branch of law.

Furthermore, the statute of limitations is unlikely to be broken if the audited company challenges the Court of Accounts' documents - only amongst the parties concerned, not against other parties from whom the loss is intended to be recovered.

In the context of the aforementioned, it is also customary for courts to routinely reject proceedings to collect damages brought by entities validated by the Court of

Accounts[1] as being time-barred, in accordance with the High Court of Cassation and Justice Decision no. 19/2019.

4. Conclusions

The broad conclusion - possibly the most significant - is to place greater weight on the good faith of the authorities, as confirmed by the Court of Accounts. We take into consideration the fact that, in theory or in extremely rare instances in practice, the audited entity should also begin internal efforts to recover damages once the Court of Accounts' documents are contested.

Therefore, the only feasible solution for the damage recovery measures to produce full effects is only an amendment to the primary legislation, in the sense of inserting special, derogatory provisions regarding the prescription of the material right to action of the verified entity to recover the contacted damages by the auditors of the Court of Accounts.

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[1] Bucharest Court, IV civil section, decision no. 2956/19.11.2021, High Court of Cassation and Justice, Civil Section II, Civil Decision no. 97/18.01.2024 (https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=215314#highlight=##%20Dezizie).

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