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RULES IN INVESTIGATION AND COLLECTING EVIDENCE BY THE COURT IN SOME EUROPEAN COUNTRIES

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Abstract: *The paper regards matters of procedure in legal administrative litigations, especially regarding the management of evidence in cases related to the environmental law, licensing for constructions and activities in public areas, the burden of proof, the role of the court of law, representation of the parties in the lawsuit, the juridical value of the documents issued by the public administration, the value of extrajudicial expertise presented by the parties, the distribution of law expenses. The points of view and explanations from the regulatory plans in the above mentioned states are included.*

Key words: *court, appeal, evidence, procedure, parties.*

1. Introduction

It is known that the collection of evidence is one of the most important parts of a lawsuit. Many of the European countries have similar rules of investigation and collecting evidence and in this study we highlight some of these similarities. To the question: ,,Is the ex officio investigation provided in your country?'' many of the European countries answered yes. For example, in Finland, an administrative appeal is regulated by the Administrative Judicial Procedure Act 586/1996 [1].

According to section 33 the court is responsible for reviewing the matter. According to the Romanian law, evidence does not benefit from a uniform regulation. The Civil Code and the Procedural Code contain dispositions on administration of evidence. The importance of establishing the truth in a cause is well known. In order to do that, the law sets different rulings concerning evidence. All evidence should respect some rules as: legality, veracity, relevance, conclusiveness. The law sets general rules on the suggestion, the approval and the administration of evidence. The first rule is that the evidence is suggested by the plaintiff in his complaint and by the defendant in his statement of defence. If the party means to make use of documentary evidence, it must submit in as many copies as there are parties.

With regard to the suggestion of the parties, the court shall give judgment after an examination of the conditions of

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admissibility. The court may not approve the administration of a piece of evidence unless the parties argue about them. The decision must be substantiated and if the sample is allowed, the court must show the facts that must be proved [2].

The Civil Procedure Code establishes a set of rules regarding evidence. Thus, samples should be administered prior to the hearing, evidence and contrary evidence is given if possible in the same session.

In environmental and mining cases, building, action and deviation permits (right to deviate from the provisions etc.) and licensing for landscape work an administrative appeal is applied. (Nature conservation Act 1096/1996, Mining Act 621/2011 and Land use and building Act 132/1999).

Since the municipality uses plans, building ordinances and soil extraction cases, a municipal appeal is applied. The court can only sustain or overrule the decision (appeal, Local Government Act) and is bound by the reasons that the plaintiff has presented. In soil extraction cases, the court can however make some minor amendments to the decision. AJPA is the main procedural law, which is applicable in municipal appeals, in the legal issues that the Local Government Act does not regulate.

Evidence in an administrative case is all found admissible by the court which hears the case and based on where the court finds, according to the procedure established by law, that there are circumstances which justify the claims and the assertions of the parties to the proceedings and other circumstances which are relevant for the fair settlement of the case or that there are no such circumstances. The above-mentioned factual data shall be established with the help of the following means: explanations of the parties to the proceedings and their representatives, the testimony of witnesses, explanations of specialists and opinion of experts, physical evidence, documents and other written, electronic, audio and visual evidence. The evidence shall be submitted by the parties to the proceedings and other participants in the proceedings. If necessary, the court may advise the people in question to submit additional evidence or upon the request of these people or on its own initiative, to compel the production of the required documents and demand that the officers give explanations. No evidence shall have for the court a pre-set value. The court shall assess the evidence according to their inner conviction based on the scrupulous, comprehensive and objective review of all the circumstances of the case, based on the law as well as the criteria of justice and equitability.

The court may obtain a statement from an administrative authority that reached the decision in a matter only if this is unnecessary. In order to obtain evidence, a statement may be requested also from an authority other than that referred to in subsection. A time limit shall be set for the issuing of the statement.

In case of the administrative appeal, the court has a more active role in obtaining factual information on its own initiative. The procedure is characterized by the principle of investigation as long as the principle of impartiality and equality of arms is not endangered. Whenever (and this is the most usual situation) the court has already received enough factual evidence from the parties to solve the case, it does not have to require more documents.

Also, the court relies on the documents issued by the authorities. We can say that this is a legal obligation. If the authority fails to provide the documents, the court may decide in their absence, on the basis of the available evidence. In practice, a

failure to provide files is extremely rare and usually detrimental for the defendant's case.

What we notice from the first moment is that the procedure in most of European countries is mainly written, presenting written evidence is quite informal and there are no rules in this regard. If the court is aware of the fact that a party may hold remarkable evidence, the court can demand to be presented.

Also, the parties can administrate evidence and present it to the court if they (the parties) have justified the relevance of the evidence to the matter and the court has accepted it as suitable. The parties are entitled to submit evidence in the time limit which has been provided by the court; however, in practice it often happens that the parties submit evidence to the Appellate Court and even to the Court of Cassation and Justice.

A participant in an administrative proceeding who submits documentary evidence or is petitioning for it to be required, shall state what facts relevant to the case may be confirmed by such evidence. The documentary evidence shall be submitted in original form or in the form of a copy certified in accordance with prescribed procedures. The copy may also be certified by a judge. If part of a written document or is sufficient to determine if the facts are of significance in the case, it may be submitted to the court. Original documents shall be submitted if the law or international agreements provide that the specific facts may only be proved by original documents. If a copy of documentary evidence or an extract has been submitted to a court, the court may, following the reasoned petition of a participant in the administrative proceeding or on its own initiative, require that the original be submitted if it is necessary for determining the facts of the case.

If the court is presented with copies of these documents, the court must make arrangements for the documents in original to be submitted. The court must evaluate the evidence in accordance with their own convictions and must be based on understanding and objectivity of all samples in accordance with judicial conscience based on laws of logic, scientific discoveries and principles of justice. No sample must have a default value. The court must give reasons why it preferred a given sample compared to another.

In Finland, the Administrative Code of Procedure presents three cases where the debate should not be conducted: if the application is rejected without considering the merits if the case is immediately rejected if a hearing is manifestly unnecessary, given the nature of the case or other reasons.

As for the collection of evidence, the court is not required to reach a separate decision, but normally the court rules on the applications of the parties no matter if the request leads to an action or not. However, if the evidence is submitted during the hearing, the court shall listen to the other party's opinion and afterwards decide if the evidence presented is to be added to the other. If the evidence is submitted outside the hearing, the court decides if it is to be added by itself. In Finland, the Administrative Code of Procedure presents three cases where the debate should not be conducted: if the application is rejected without considering the merits if the case is immediately rejected if a hearing is manifestly unnecessary, given the nature of the case or other reasons.

We can also talk about some rules of refusal or compliance for evidence requested. Firstly, the court does not accept evidence which is not relevant to the case, refusing requests during hearings

to add such evidence. Secondly, there are the same rules as for civil cases (unnecessary evidence may be refused, etc.).

In cases which request special knowledge in the area of science, art, technology and crafts, the court or the judge shall appoint an expert. Also, the parties may obtain an opinion from an individual expert on a matter requiring special expertise. If a party calls an expert not appointed by the court, the provisions on the hearing of witnesses shall apply. Of course, the court decides whether to appoint the expert or not.

The expertise shall be carried out by experts from the nearest specialized institution or by other specialists. Experts should be chosen by the court, bearing in mind the demands of the parties in administrative proceedings. More experts may be appointed when necessary. Experts cannot participate in carrying out an expertise if they are in cases of incompatibility under the law. Specialists, experts may not attend the hearing and be disqualified if he is directly or indirectly interested in the case or if there are circumstances that give reason to doubt their impartiality. The expert may not participate in the hearing whether he is a relative of the parties or other participants in the trial or judges from the Court or if he or his family has a direct or indirect interest in the case or if there are circumstances that give reason to doubt his impartiality, if he is subordinated in employment or otherwise, at least to one of the parties or other participants in the case, if he performed an audit, the material served as the basis for informing the court or if he proves incompetent.

As regards other means of evidence, in many of the European countries the audio and video recordings are allowed as evidence. In principle, an expert cannot perform an expertise if:

1. he has an interest in the case or was the attorney of one of the parties;
2. has family ties with any of the parties, the case is related to the his professional duties;
3. is not competent about the matter.

If the circumstances referred to in paragraphs 1 and 2 of this section are present, an expert has a duty to remove himself before the trial began.

They are considered factual evidence. It is important to ensure the respect of the right to privacy. The audio recordings must be made without violating any laws. Their admissibility is decided by the court in every case, considering all the circumstances (i.e. how the recording was made, what the means were, etc.). This evidence is a written document or other document or data carrier which is recorded by way of photography, video, audio, electronic or other data recording which contain information on relevant facts for the adjudication of a matter and can be submitted in a court session in a perceptible form.

Official and personal correspondence, decisions in other cases and opinions of people with specific expertise submitted to the court by participants in proceedings are also considered to be documents.

If a participant in the proceeding is able to prove that a submitted document has been falsified, the participant in the proceeding may challenge the authenticity of the document and request that the court refuse to consider the document as evidence.

Also, the mail or fax transmissions and the receipts are also treated as documentary evidence. According the Code of Civil Procedure, mail or fax transmissions, the receipts, official or personal correspondence is treated as documentary evidence. According to Art. 172 Code of Civil Procedure, "*when the party envisages that the other party has a*

document referring to the case, the court may order for it to be presented."

When we speak about the obligations of the court, we can remark that they are related to the most important principles of law. Firstly, we may speak about impartiality, equal treatment, equity, availability, formalism. According to Romanian law, debates are held in open court. This is the most important step in a process. The quality of justice depends in particular on achieving public debate and the adversarial principle. Discussions are intended to establish the facts in a legal framework. [2].

In this way, the court can be guided in the act of justice. In order to ensure the best defence of the parties it may provide for them an opportunity to obtain representation by an attorney .Also, if the complaint / petition does not meet the requirements of this Act, the court sets a deadline to remedy the deficiencies. Clues are not possible.

The right to conduct procedural actions shall expire on the period fixed by the court or by law to meet them. Complaints and documents submitted after the deadline are returned to the persons who have submitted them. In these cases, the court is not bound to give any clues to the public authorities, or to give a legal indication, if the appeal is manifestly unfounded or founded or if such an indication is prohibited. Also, the court may not advise the parties. However, the court, if it considers that the removal of the contested act will not have legal consequences for the applicant, may provide the opportunity to complete the application, for example, by adding another request to remove another related administrative act .

For example, the Lithuanian Law on Administrative Proceedings enables the participants in the proceedings to examine in the court the documents, other material of the case (including electronic data), and, with the leave of the court/the judge, make copies and transcripts at their own expense.

In practice, the authority of the Ministry of Defence refused to submit information containing data regarded as a State secret, on the grounds that the judge dealing with the case, did not have the permit (authorization) issued by the State Security Department in order to work with or access information, classified as "Top Secret", "Secret", "Confidential". The Constitutional Court has advocated that judges have the right to access classified information due to their position. Some judges have received such permit (authorization), because they applied for that, but there are judges who have not applied for the permit (authorization) and they don't have it.

Another practice the court has established is when one of the parties exceeds the time for filing an appeal. In case of exceeding the time limit for filing an appeal or failing to perform a certain procedure, it is essentially deprived of this right. However the appellant may be granted at his request restoration of the *status quo ante* for filing the appeal, provided it is recognised that not observing the time limit has been caused by a valid reason.

Under Romanian law, if one party exceeds the time limit to file the appeal, application for summons will be rejected as late. This penalty shall not intervene if the party proves that he was prevented by circumstances, against his will, to act in time. Some authors consider that these terms refer to a case of force majeure. According to art. 103 Code of Civil Procedure, 'failure to exercise any remedies in a timely manner, causes revocation, unless the law provides otherwise or the party proves that he/she

was prevented by circumstances beyond his/her will . In this case, the procedural document will be fulfilled within 15 days of the termination of prevention, at the same time there will be shown the reasons for prevention "[2].

All the procedural actions in the administrative proceedings must be performed within the time limits set by laws. Where the time limits have not been set by law, they shall be set by the court. The court may grant an extension of the time limits it has set.

We remarked that the court or the judge may, upon a motivated petition of the participants in the proceedings or upon his/its own initiative, apply interim measures. The court may advise the applicant to submit an additional request, e.g. to challenge additional administrative acts.

2. Conclusions

All that being said, we can see that the law of European countries have similar elements, and many European countries either provide an example of legislation or are open to adaptation. In such circumstances, we are happy to conclude that our country is part to those countries that respect human rights in proceedings before the court. Even if it is a small country, Romania is trying to align to the European standards. As outlined in our brief presentation, judicial investigation and administration of evidence are of particular importance and the role of the court is to exercise an active role for a valuable act of justice.

• Other specifications

The study on which the following article is based has been written with the help of a number of administrative judges from various European countries (members of AEAJ), namely Italy, Germany, Sweden, Finland, Estonia, Latvia, Lithuania, Ukraine, Bulgaria, Slovenia, Austria, Azerbaijan, Romania, Greece, and the Romanian responses have been based on the data offered by the administrative departments of the Courts of Appeal from Craiova and Brasov. The entire study has approximately 40 pages, to which 45 pages are added concerning the legislation which backs up the answers given by each country, the result of the academic and jurisprudence research being presented in extenso in the workshop organized between 4th and 5th of October 2012 in Rome by the European Association of the Administrative Judges. The Romanian speaker at the conference in Rome was Ph D lecturer Silviu Gabriel Barbu on behalf of the Romanian branch of AEAJ.

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