

## The Delegation in Public Law. Critical Considerations

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### Abstract

The article aims to analyze the legal status of the delegation in public law, as a way of exercising the duties by certain persons exercising public offices in the state, together with the exercise of these powers by even the holder. The purpose of the delegation is to release an official by certain official duties, to determine to share them with other owners, who may be deputies or employees. In practice, the delegation has turned into a way which seeks to escape liability, distorting its meaning and significance. Serious is that the legislature encourages such an approach. The purpose of the article is to draw attention on this negative phenomenon, in order to reduce its spread and consequences.

**Keywords:** delegation, responsibilities, competence, accountability, signature, document, public servant, public officials.

I. **Concepts.** The delegation of certain work duties to other persons than the respective public office holders is increasingly becoming a common practice. As a rule, **the right of signature** is delegated.

There are figures in our public life, particularly at central level, who have held key positions but who **have never signed any document that was issued, adopted or signed by the public authority they have managed or they are still managing** and that involves them by virtue of their status.

Underlying such a professional behavior is the precaution of not being involved in any kind of legal accountability attracted by the content of that act, by the proceedings in which it emerged, or by the way it is enforced. Obviously, criminal liability is primarily envisaged. The prospect of being involved in various legal situations determines them to delegate the right of signature to other persons from the respective public authority.

We find it necessary to address this issue because it reveals, in our opinion, **a distorted way of understanding the meaning of a public office.** The name “*public office*” represents an abstraction, a linguistic creation.

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It is actually reflected through its content, which evokes a set of tasks, activities that the holder must carry out, their specificity being that they are exercised in a regime of public power.

These tasks make up what the doctrine calls, in a form that we do not entirely agree, “*personal competence*”.

We disagree since, in our view, **the competence belongs solely to the public authority or institution**. Those holding various management or execution positions within the respective authority, exercise the powers that are associated to the position they occupy. But we accept that we can admit “*personal competence*” as a linguistic compromise that helps us explain what we seek. The tasks that make up this “*personal competence*” can be basically carried out either by the position holder, or by the person who is authorized by him to do so.

## II. Legal Regulation. Procedures

The manner in which the duties in question are transferred takes the form of a document which usually is the legal document through which the holder reflects their activity and which is stated in the regulation governing the respective public authority or institution.

*Exempli gratia*, the law on the organization and functioning of the government and the ministries[1] provides that the ministers and other heads of the specialized authorities of central administration, in exercising their attributions, issue *orders*<sup>2</sup>, whilst the legal acts of the prime minister are entitled *decisions*<sup>3</sup>.

The delegation of tasks is to be carried out, for ministers, by *order*, and for the head of the Government, by *decisions*.

Thus, the one being delegated one or more duties will effectively perform only those related to their position, whose exercise one kept for oneself, to which there can be added tasks that have been transferred by one’s hierarchical superiors or by other

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<sup>2</sup> According to Art. 46 paragraph (2) of Law no. 90/2001, “*In performing its duties, the minister issues orders and instructions, under the law.*”

<sup>3</sup> According to Art. 19 of Law no. 90/2001, (1) “*In carrying out its duties, the prime minister issues decisions, under the law.* (2) *The decisions of the prime minister are published in the Official Gazette of Romania, Part I. Not publishing them entails the nonexistence of those decisions.*”

entitled subjects having such a right. For example, a minister may be authorized by a *vice prime minister* or by the *prime minister*<sup>4</sup> to perform tasks that are assigned to them.

As for the official to whom they have delegated certain tasks, they, in their turn, will first perform the tasks specific to their job, then other *attributions* or *delegations* as they also called by the law, which **are delegated to them**.

It is assumed that **the rule** should primarily represent **the tasks specific to their position**, otherwise it becomes distorted the content of the internal structures specific to the public authority or institution concerned, and the activity as a whole is affected.

If we were to **define the delegation of responsibilities** in public law, this would mean, in our view, **the legal operation by which the public office holder transfers to a person who occupies a managerial or executive position in the public authority or institution they are part of, the right to exercise, on their behalf, duties which, according to the law and the legal acts governing the activity of that public authority or institution, returning to the one who transferred them**<sup>5</sup>.

In terms of **tasks that can be subject to delegation** there are two categories:

a) **Attributions that may be delegated, established by law or other legal act**. We further understand that, in this situation, the legislator, in the broad sense of the word, is the one to set the tasks that can be delegated.

b) **Attributions established by the one who will delegate**, that are left at the disposal of the respective person to decide which will be transferred to another person in their subordination.

Take the case of **the mayor**. Law no. 215/2001 regarding the organization and functioning of local public administration [2] provides that the Mayor may delegate some of its duties to the **public administrator, deputy mayor, secretary, or other person**

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<sup>4</sup> Regarding the position of vice Prime Minister as a member of the Government, as we have consistently argued in our papers, it represents a legal institution that we place **outside the constitutional frame**. (Verginia Vedinaș, *Administrative Law*, Universul Juridic, Bucharest, 2014, 8<sup>th</sup> ed., pp.372-373). We share and carry on the conception of our late professor Antonie Iorgovan, according to which the current Constitution, by art. 102 para. (3) creates *a government without a hierarchy*, in which its members have an equal legal status, except for the Prime Minister who leads the Government and coordinates its activity. But the Constitution binds him, by art. 107, to exercise the role of coordinator for the activity of the other members by following the duties held by each. For developments see Antonie Iorgovan–*Treaty of Administrative Law*, All Back, Bucharest, 2005, Ed. V, Vo. I, pp. 365-369.

<sup>5</sup> Etymologically, the word **delegation** comes from Latin and from the French “*deleguer*”. It means, according to DEX 2009, “to transmit to somebody the right to act as a representative of a person or an institution. To delegate someone, on a limited period of time, to execute, supervise or organize a work.”

**from its own specialized body** who has competences in the field. This rule was introduced by a relatively recent change[3] that targeted Law no. 215/2001 aiming at Article 65<sup>6</sup>. From the wording of Article 65, as revised in 2014, it results that there has expanded the scope of the subjects to whom the mayor may exercise the right to delegate the tasks. Accordingly, the same law was amended for Article 104 paragraph (7)<sup>7</sup> of Law no. 215/2001, governing the right of the county council president to delegate powers towards the vice presidents, the heads of functional departments, the specialized personnel and the managers of the public institutions and services of county interest. Analyzing the two laws, one wonders, rhetorically, of course, **what duties will the mayors and presidents of county councils exercise, if they can delegate them towards so many staff categories in their coordination or their subordination?**

Regarding **the public administrator**, the law expressly stipulates<sup>8</sup> that the Mayor may delegate towards it the duties referring to the quality of **main credit operator**.

Regarding other public office holders from the local public administration<sup>9</sup>, the law generally provides which duties may be delegated to any of them, the mayor deciding concretely on the specific tasks that they will delegate to each of those entitled to the delegation.

There may be situations where the legal act regulates, by principle, the right to delegate certain duties related to the respective function or office, having complete freedom to determine what tasks will be delegated to other officials or other staff members of that public institution or authority.

It may be the members of that official's office, the functional structure for those employed for a determined period of time, one coinciding with the official's mandate, based on the personal trust between the official and the members of its cabinet [4].

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<sup>6</sup> Article 65 of Law no. 215/2001 provides that *“The mayor may delegate duties that are conferred by law and other normative acts to the deputy mayor, the secretary of the administrative-territorial unit, the heads of the functional compartments or the personnel from the specialized body, as well as the managers of the public institutions and services of local interest, according to their competences in the respective fields.”*

<sup>7</sup> Article 104 para. (7) of Law no. 215/2001 provides that *“The chairman of the county council may delegate, by disposition, the duties stipulated in paragraph (6) to the deputies, the heads of the functional compartments or the personnel from the specialized body, as well as to the managers of the public institutions and services of county interest.”*

<sup>8</sup> In art 112 para. (4) of Law no. 215/2001 providing that *“The mayor may delegate to the public administrator, under the law, the quality of main credit”*.

<sup>9</sup> The deputy mayor has the status of a **local elected**, representing thus a local dignitary, while the secretary of the administrative territorial unit is a **management public official**.

Thus the following question arises: what would happen if the frame legal act did not provide the possibility, not even in principle, for an official or a clerk to delegate duties? And, in such a situation, the law did not provide to **whom** it may do so.

We appreciate that even in the absence of recognition by principle of such a possibility, one can use delegation. And we state this because **the exercise, by delegation, of the duties afferent to a function or public office in the state represents one of the ways in which a function or public office may be carried out.** It is **basically a way** of exercising a function, occurring in the silence of the legislature.

When they intend to ban the right to delegate, they do so expressly and usually the interdiction does not operate in a general way, but for certain express duties.

We thus understand that the **persons**, with the quality of being **deputies** and **replacements for an official or a dignitary**, are entitled to exert, on its behalf, the attributions conferred on the holder. *Problems* arise when **there are two or more deputies**, as for example in a city where there are two deputy mayors, or at county level where there are two vice presidents of the County Council. In such a situation, the mayor or, where appropriate, the county council president will nominate who of the two deputies or vice presidents will replace him or her during the time absent. In cases of force majeure, which prevented the holder to make such a designation, such as an accident, this will be done by a unipersonal or collegial body that has powers of decision in the respective public authority or institution. This may be the case, for example, of the **Local and County Council**, that may appoint **the deputy mayor or the vice president to replace the mayor or, respectively, the president of the county council**, of the prime minister or another head of the central administration, that may decide who will replace a minister or a secretary of state.

Another aspect that must be stated is that **the prerogative to delegate is a right, not an obligation**, meaning that **the public office holder can not be forced to delegate**. They can do it or not, and if they do not, they can not be sanctioned. We consider the impossibility of legal sanction, since in terms of ethics, politics, of social or political accountability, they may incur certain consequences. This is because **not delegating means assuming, by that holder, the personal capacity of carrying out**

**all its tasks afferent to the position held.** And when it proves that there was no such ability, judgement will be noticeably more severe.

Secondly, **not delegating may reveal the inability of that holder to work in collectivity, to share the performance of duties related to its function with other people who, by law, have the vocation to do so.** This can also reveal **bad faith in exercising an official public function, with fault-finding aspects, of ignorance and contempt of the role belonging to other categories of officials or dignitaries legally designated,** by appointment or election, in a certain public office, up to the lack of content. In this way, certain consequences can occur, including those with economic-financial aspects, affecting not only the proper functioning of a public entity.

Thus raises the question of how to justify, from an economic and financial perspective, the fact that **a certain person has occupied a certain position, yet lacked “the work object”.** Given that they were obviously remunerated for that position, who is then responsible for the amounts paid by way of salary, with no coverage in a specific activity? Because someone has to answer, do they not? In my experience gained at the Court of Auditors, I have met the incredible situation (I hope I find agreement on this) when an institution was established with a certain purpose, and **it mandated, i.e. it delegated its entire activity to another public entity with a related purpose,** otherwise collaborating with it in its mission, since its creation, having to perform certain duties regarding the organization of work, adoption of procedures, etc. Their argument was that this took place in other countries as well, that it was about the same documents that were prepared for each particular case and it would be pointless to work twice in a different manner. However, when two separate verifications are performed, by two distinct entities, it is only natural that the quality of the result for that activity to increase, for the risks of approving documents, of carrying out procedures that do not match reality to be reduced. And if we consider that the purpose is to provide some money to certain categories of beneficiaries of public money, I do declare, things become even more serious and grave.

All these assumptions imply and require an attitude of responsibility as to the manner in which an activity is exerted and the public money is being spent.

In our opinion, an official or dignitary does not act in a certain way because they want to. Particularly, they can not refuse to delegate some duties because the one who should be delegated is their political opponent, or it is repugnant, or has a personal enmity or rivalry, or simply do not want to do so. They do not possess a discretionary capacity and do not act as they please, without any hindrance. They do not act for personal interest, to satisfy duties, vanity or personal affairs. Their mission is to undergo public needs and take steps to resolve them.

Therefore, the right to benefit from delegating certain tasks equally binds the holder of a position or office to act with minimum responsibility, in complete good faith. Moreover, good faith is a principle of constitutional status by virtue of which any right and freedom must be exercised in **good faith**<sup>10</sup>, without affecting the rights and freedoms of others<sup>11</sup>.

To sum up, we consider that **the right to delegate** certain attributions **must be exercised so that it does not turn into abuse of law that empties the content of the public function or office in relations with its holder, nor it be suppressed from the professional conduct of such holder that arrogates, in a discretionary manner, the status of the sole person that can exercise, and exercises them effectively**. But it can not become, under any circumstances, the preserver of an attitude that eliminates the risk of any accountability, as in the hypothesis initiating the present discussion.

#### References:

- [1] Law no. 90/2001, published in the Official Gazette of Romania Issue 164 of April 2<sup>nd</sup> 2001
- [2] Republished in the Official Gazette of Romania Issue 123 of February 20<sup>th</sup> 2007
- [3] Law no. 20 of March 13<sup>th</sup> 2014, published in the Official Gazette Issue 191 of March 18<sup>th</sup> 2014.
- [4] GO no. 32/1968 published in the Official Gazette Issue 42 of January 30<sup>th</sup> 1998.

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<sup>10</sup> In Latin, *bona fides*. It represents a traditional principle of private law, which becomes, according to the constitutional text, a principle of the public law, as well, with the value of a fundamental duty, regulated in Chapter III of Title III of the Constitution.

<sup>11</sup> This principle is inscribed in Article 57 of the Constitution according to which “Romanian citizens, foreign citizens and stateless citizens have to exercise their constitutional rights and freedoms in good faith, without violating the rights and freedoms of others.”