THE CONCEPTUAL ELEMENTS OF LEGISLATIVE TECHNIQUE

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Abstract
The legal framework regulating the technique of drafting regulatory acts is supplemented by the acts establishing, organising and operating administrative authorities or bodies, which include provisions on the right to issue or adopt administrative acts of a regulatory or individual nature in the exercise of the powers conferred by law. Regulatory orders, instructions and other such acts of the heads of ministries and other bodies of the specialised central public administration or autonomous public administration authorities are issued only on the basis of and in execution of laws, decisions and ordinances of the Government. Thus, the legal framework of the technique of drafting administrative acts of a regulatory nature is supplemented by regulations issued by each authority and administrative body.
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The legal framework regulating the technique of drafting legislative acts

As is known, an administrative act must meet certain formal and substantive conditions in order to produce legal effects, and failure to meet some of these conditions [1] may result in the act being null and void or voidable.

In order to create a uniform framework for the preparation, drafting and adoption of legislative acts, including administrative acts, Law No. 24/2002 on the rules of legislative technique for the drafting of legislative acts was adopted. [2]

Article 3 para. (1) of the law establishes the scope of its application, specifying that: *"The norms of legislative technique are mandatory in the preparation of draft laws by the Government and legislative proposals belonging to deputies, senators or citizens; in the preparation and adaptation of Government ordinances and decisions, as well as in*

the preparation and adaptation of legislative acts of other authorities with such attributions".

That the rules referred to are not only applicable to the law-making process follows from para. (2) of the same Article 3, according to which *"The rules of legislative technique shall also be duly applied to the preparation and adoption of draft orders, instructions and legislative acts issued by the heads of specialised central public administration bodies, as well as to the preparation and adoption of legislative acts issued by local public administration authorities"*.

Thus, the legal framework of the technique of drafting administrative acts of a regulatory nature is supplemented by regulations issued by each authority and administrative body.

On the basis of the above provisions, the Government issued Decision No. 555/2001 approving the Regulation on the procedures for submitting draft legislative acts for adoption by the Government. This Regulation was in force until the adoption by the Government of Decision No. 50/2005 approving the Regulation on procedures at Government level for the preparation, approval and submission of draft legislative acts for adoption, which repeals the Regulation approved by Decision No. 555/2001. The Government also issued Decision No. 1,361/2006 on the content of the instruments for the submission of draft legislative acts for approval by the Government.

The legal framework regulating the technique of drafting regulatory acts [3] is supplemented by the acts establishing, organising and operating administrative authorities or bodies, which include provisions on the right to issue or adopt administrative acts of a regulatory or individual nature in the exercise of the powers conferred by law.

Drafting legislative acts

As mentioned above, the main legislative act that introduces techniques for the drafting of legislative acts in general into our legislation, is the updated Law No. 24/2000 on the rules of legislative technique for the drafting of legislative acts, republished.

For each draft legislative act, the explanatory memorandum must contain an express mention of its compatibility with the relevant Community regulations. [4]

The introduction of the impact assessment as a tool for presenting draft legislation is intended to estimate the economic and social costs and benefits. [5]

As stated in Article 32 of the law ”the explanatory documents must be drafted in an explicit, clear style, using the terminology of the draft legislative act they present and must refer to the final form of the draft legislative act”.

According to Article 32 para. (5) of the law ”explanatory memoranda to laws and explanatory notes to Government ordinances and decisions shall be published together with the legislative act in question in the Official Gazette of Romania, Part I, or shall be submitted on the Internet by the issuing authority”.

It should be noted that this provision has not been complied with since the publication of Law No. 24/2000 and until its republication in 2004, and is still not complied with. The publication of the explanatory documents on the internet does not cover this, as not everyone who wishes to know the reasons has access to the internet, which is why it is considered that the explanatory memorandum and the explanatory notes to the two categories of legislative acts, laws and ordinances or government decisions of greater legal force, should be published in the Official Gazette of Romania, together with the act they accompany.

Drafting of legislative acts

In order to ensure a logical sequence of the envisaged solutions and to achieve an internal harmony of the legislative act, art. 35 of the reference law recommends that ”the drafting of the text of the draft shall be preceded by the drawing up of a plan for grouping the ideas according to the connections and the natural relationship between them, within the general concept of regulation we consider that this rule is a recommendation, because in the case of control of the legality of legislative acts, the plan on the basis of which the draft of the respective act was drawn up will not be required, and the lack of this plan does not constitute a reason for the illegality of the act in question”.

Imposing care for the terminological consistency of the act in question, the law establishes, in art. 37, that ”in the legislative language, the same notions are expressed only by the same terms” and that in the event that a notion or a term is not established or may have different meanings ”its meaning in context shall be established by the legislative

act establishing them, within the general provisions or in an annex intended for the lexicon in question, and shall become binding for legislative acts in the same subject".

Structure of the legislative act

The structure of the legislative act is regulated in Chapter V of the Law which comprises two sections as follows:

- Section I - constituent parts of the legislative act;
- Section II - systematization of the contents of the legislative act.

Constitutive parts and systematization of the content of the legislative act

Article 40 of Law no. 24/2000, republished, establishes that: the legislative act has the following constituent parts:

a) the title of the legislative act; b) the introductory wording; c) the preamble; d) the enacting part; e) the mention concerning the transposition of Community rules; f) the wording certifying the authenticity of the act.

The content of a draft legislative act is systematised in the following order of presentation of ideas:

a) general provisions or general principles;

b) provisions concerning the substance of the regulation;

c) transitional provisions;

d) final provisions.

In the case of short regulations, the text may be drafted without marking the above elements separately in this order of presentation.

Within the above structure, the articles may be grouped into chapters, which in turn may be divided into sections and, where appropriate, into paragraphs. In codes and other large laws, chapters may be grouped in ascending order - into headings and, where appropriate, into parts, depending on the organic link between the regulations they contain.

Regulatory orders [6], instructions and other such acts of the heads of ministries and other bodies of the specialised central public administration or autonomous public administration authorities are issued only on the basis of and in execution of laws, decisions and ordinances of the Government. Therefore, the introductory wording of

these legislative acts shall contain all the legal bases provided for in Article 42 para. (4) of Law no. 24/2000, republished.

Orders, instructions and other such acts must be strictly limited to the framework established by the acts on the basis and in execution of which they have been issued and may not contain solutions that contravene their provisions. Orders and instructions shall be drawn up within the period prescribed by the superior act or, where appropriate, within such time as will enable them to be carried out.

With regard to the acts of the local public administration authorities, according to art. 80 of the Law on the rules of legislative technique for the drafting of legislative acts, they ”shall be adopted or issued for the regulation of activities of local interest, within the limits established by the Constitution and by law and only in the areas in which they have legal powers”.

Legislative technique issues - case study

A sensitive and delicate issue of legislative technique arose with regard to the Decentralisation Law, declared unconstitutional by the Constitutional Court on 10 January 2014. [7]

It states that ”The transfer of competences regulated by the law subject to constitutionality review does not comply, in terms of clarity, precision and predictability of the rule, with the general framework imposed by Framework Law No. 195/2006. According to art. 19-28 of that law, powers may be exclusive, shared and delegated. In order to make such a strict distinction between them, the law containing decentralisation measures must be clear, precise and predictable, so that the addressee of the rule can adapt its conduct according to its legislative hypothesis. However, the legislator has failed to meet these requirements”, the reasoning of the CCR states, detailing the areas with the most problems.

Therefore, in the chapter *Agriculture and rural development*, the CCR argues that although Title II of the law is entitled *Decentralisation measures in the field of agriculture and rural development*, the decentralisation measures operated in the field of rural development are unclear.

As a result of the reorganisation of the county and Bucharest municipal directorates for agriculture provided for in Article 1 of Title II of the contested law, decentralisation concerns only those directorates, not their original rural development component, which is now a structure within the Ministry of Agriculture and Rural Development.

The CCR maintains that, in the field of agriculture and rural development, on the one hand, it is not known exactly what the legal regime of the components to be decentralised is and why certain components are to be decentralised and others are not (the explanatory memorandum to the law does not contain any information in this regard), and, on the other hand, the control exercised by the central public administration, due to the generic wording of the text, is to cover not only the activity of the newly created structure but also that of certain local public administration authorities.

In the chapter Culture, the CCR states that the decentralisation law *confusingly* regulates the issue of the county and the municipality of Bucharest directorates for culture, the addressee of the rule not knowing whether the zonal commissions still exist, whether the new county commissions set up have powers at the county level or, although belonging to the county, have zonal powers.

In the field of tourism, the Decentralisation Law grants powers to approve tourist routes to both the National Tourism Authority and county councils, and this ”would amount to arbitrariness in the sense that the central and local authorities will act in competition”.

There are also ambiguities regarding the institutions that must authorise the operation of B&Bs, tourist accommodation and catering establishments located in administrative-territorial units and tourist resorts.

In addition, the question arises as to the competence of local councils to set up tourist information centres in localities with tourist activities (of national/local interest), whereas other regulations in force refer to national tourist information and promotion centres.

The CCR concludes that in this chapter of the law there are ”serious issues of legislative technique” and that natural or legal persons, local and central authorities cannot know ”objectively and rationally the conduct they must adopt in relation to the law's equivocal legislative hypothesis”.

In the chapter *Pre-university education*, the Decentralisation Law maintains only the National Children's Palace as a related unit of the Ministry of Education, while the other children's and pupils' palaces and clubs are excluded from this category, without, however, establishing their subordination to any public authority, but only the fact that they are financed by local public administration authorities. Their transfer to the local authorities is not explicitly regulated, but only follows by way of interpretation of the provisions of the National Education Law.

In the chapter Environment, the CCR points out that there are no clear rules on the transfer of tourist beaches to the administration of local authorities and it is unclear whether they are transferred from the public domain of the State to the public domain of the administrative-territorial units or only constitute a right of administration [8] in favour of local authorities.

In the field of Health, the CCR states that the Decentralisation Law introduces a regulation on the operation, in addition to the county and municipal public health directorates, of diagnostic and treatment centres and medical centres, as well as county centres for the maintenance and repair of medical equipment and pay clinics.

The Court points out that the law does not specify whether these units are organised under the county and municipal public health directorates, but *attached to* them.

Moreover, there is no authority competent to appoint the *heads* of public health directorates, the text only provides that they are appointed under the law, nor does it provide for the sanction applicable to the *heads* of public health directorates from the date of the conflict of interest/incompatibility.

In the field of Youth and Sport, the law does not provide for the subordination of student cultural centres and nothing is said about the ”Tei” Student Sports Cultural Complex.

With regard to the appointment of the heads of the county and of the municipality of Bucharest directorates for sport and youth, the CCR notes that the law does not indicate the holder of the right of appointment.

”The vague and incomplete nature of the regulation is such as to entail a violation of art. 1(5) of the Constitution concerning the quality of the law. Last but not least, the

Court notes the inadmissible negligence in the drafting of a legislative act with direct reference to the repetition in the same article of the law of a power of the county and of the municipality of Bucharest directorates for sport and youth", the reasoning states.

In chapter *Transport*, the law regulates the possibility of transferring free of charge from the private property of the State to the private property of the municipality of Bucharest, at the request of the local public authority, the stake that the Romanian State holds in Metrorex (a commercial company in which the State holds 100% of the shares through the Ministry of Transport).

In the opinion of the CCR, the transfer of the shares of this company to the private ownership of the municipality of Bucharest is not a decentralisation measure, but rather an act of disposal of the company's share capital

Conclusions

In conclusion, all the aspects presented, in conjunction with current and long-standing problems in Romanian case law, show that there must be continuous improvement of several aspects of legislative technique and the drafting of legislation in accordance with it.

Romania is in a continuous process of harmonising national legislation with Community regulations.

At the same time, it should be pointed out that there is a need for better communication and cooperation between the participants in the drafting of legislation and the specialists in legislative technique, who have often been ignored, with the consequences of rejecting these acts and declaring them unconstitutional. It can thus be said that it would even be worth considering setting up a postgraduate teaching subject to train more specialists in legislative technique, thus avoiding ambiguity in legal rules and attaching due importance to the principle of legal certainty as the absolute trust of the litigant in justice as the body responsible for applying the law and as a means of ensuring compliance with the law.

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[8] Decision no. 724 of April 13, 2017 issued by the Second Civil Section of the High Court of Cassation and Justice, having as its object a request to establish a legal situation.