LIMITS OF THE DISCRETIONARY POWER ESTABLISHED THROUGH ENFORCING THE EUROPEAN PRINCIPLE OF PROPORTIONALITY[1]

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Abstract

In the contemporary society, the constitutional and/or legal enshrinement of the discretionary power of the public authorities, including those from the public administration, is understandable, it is a true "given" that must have a legal recognition for them. This margin of appreciation, which gives these authorities the possibility to carry out, generically speaking, their activity in order to satisfy the public interest, must have some barriers imposed to limit their action solely to the boundaries imposed by the legislator. Always, as a true axiom, governors holding power will, at least, want to keep it within the limits held, if not even beyond the required legal "boundaries" imposed, in order to assign more prerogatives for themselves. However, in order to overcome this trend, it is also necessary to build a legal system of control, including judiciary, following which the actions of the authorities mentioned should be reframed into the legality matrix imposed by the legislator. The modalities, levers, limits set by the legislator in this respect consider various aspects, including principles, such as the principle of proportionality. This paper aims, by using the specific methods such as the comparative, grammatical, logical, systemic and teleological one, to capture not only the theoretical aspects regarding the discretionary power, the principle of proportionality, respectively the interconnections between them, but also the jurisprudential aspects regarding the limits set to the discretionary power by means of this principle, limits deriving from the judgments of the Court of Justice of the European Union.

Keywords: *the principle of proportionality, discretionary power, limits, case-law, the Court of Justice of the European Union.*

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1. Introduction

How much power would any public authority need, thus including one of the public administrations, in order to exercise its attributions? A question that might seem rhetorical no matter from whose perspective we look, because either it is about authority, or about the legislator who regulates its organization, functioning and, especially, competence, or about the citizen against it will exercise its attributions, the desired answer would be only one – as much as possible. But, in any democratic society based on the existence and the functioning of the rule of law, upon the applicability of the separation principle and the equilibrium of the powers within the state, the power recognized by the constitutional and legal regulation, or only the legal ones, as the case might be, is not and cannot be unlimited, cannot be total nor absolute at the discretion of any authority, including within the public administration. This power should be enough, but without being too much[4].

However, we could not recognize a discretionary power, an appreciation right which might allow these authorities to exercise, within the limits established by the legal regulations, their own competence. Or, because, as it was stated above, the tendency of any authority is to extend to the maximum the limits of this margin of appreciation, and even, why not, to infringe them, an attentive legislator to this kind of attempts will try to set limits, including by dedicated or referring to law principles. Or, “the discretion” of a public authority, especially of one within the public administration field, in exercising this appreciation margin must be translated by observing the proportionality

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[4] To see on this purpose Christopher Collier, James Lincoln Collier, *Decision in Philadelphia. The Constitutional Convention of 1787*, Random House, Reader's Digest Press, New York, 1986, p. 49, quoted in Dana Apostol Tofan, *Puterea discreționară și excesul de putere al autorităților publice,* All Beck Publishing House, Bucharest, 1999, p. 7.

principle, either in a natural manner, or imposed by decisions of different law court, from a national or/and a European level.

2. Short remarks regarding the discretionary power

If the legality has into view, generally speaking, the conformity with the law, involving that any manner of manifestation of the public authority, including of any from the public administration, must enclose within the limits set by the normative acts, the discretionary power involves, "on the merits, the freedom which was conferred by the law"[5] to it "in order to choose a solution or another"[6].

Thus, the discretionary power has as basis "the freedom margin at the free appreciation of an authority as for the fulfillment of the purpose indicated by the legislator to appeal to any manner of action within its competence limits" [7], when the administration needs to act observing the proportionality principle[8].

It is admitted in the doctrine[9] that "the problem of limitation and administration freedom is one the most controversial problems of the administrative law (*questio diabolica*). It is about the finding of the equilibrium between the two conflict purposes. On one hand, the administration must have a certain space of freedom in order to fulfill its tasks. On the other hand, the excessive freedom given to the administration may lead to the breach of the fundamental rights of a person".

Excepting the situations when the exceeding of any limit of this appreciation margin is obvious, having the opportunity to talk about a power excess[10], to set absolutely determined the limits of the margin is unrealistic, if not impossible. On the other hand, to identify relatively determined the limits of this appreciation margin is or, it should be, a complex process where the art and the technique of the legislator should involve usefully in order to limn these limits. It is certain that, however, we could support that "the exceeding of the discretionary power limits, with which the authority has the right to action, represents a power excess"[11].

But, not less true is the fact that "all the activities of the public administration are «theologically determined»[12], being able to talk about a veritable «purpose axiom»[13] by reason of the public administration must follow the specific objectives set by the public tasks"[14], and "each competence to act within the discretionary power was awarded by the legislator in order to fulfill specific objectives"[15], the authorities not having recognized the freedom to be able to decide, freely, the purpose of its actions. Thus, it is obvious that the limits of the appreciation right the public administration authorities benefit from are determined by the law and by the other normative acts which it must apply[16], every time it exercises its competences. In order to talk about a legal administrative act, between it and the act or the other normative acts hierarchically superior as

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[5]To see on this purpose, Dana Apostol Tofan, *quoted paper*, 1999, p. 54.
[6]*Ibidem*
[7]Dana Apostol Tofan, *quoted paper*, 1999, p. 22.
[8]To see on this purpose, Dana Apostol Tofan, *quoted paper*, 1999, p. 46.
[9] Jerzy Parchomiuk, *Abuse of Discretionary Powers in Administrative Law. Evolution of the Judicial Review Models: from "Administrative Morality" to the Principle of Proportionality*, "Časopis pro právnívědu a praxi", XXVI, 3/2018: 453–478; https://doi.org/10.5817/CPVP2018-3-4, p. 453 article available on-line at: https://journals.muni.cz/cpvp/article/viewFile/894 4/9263, last accessed: 03.11.2018.
[10]We understand by the power excess "exceeding the limits of the appreciation limits belonging to the public administration authorities, public authorities in general, in achieving the purpose set by the legislator" - Dana Apostol Tofan, *Drept administrativ*, vol. II, C. H. Beck Publishing House, Bucharest, 2017, p. 35.
[11]Dana Apostol Tofan, *quoted paper*, 1999, p. 50. In one opinion relatively contrary it is appreciated that "the breaching of the proportionality principle involves an excess of power in using the appreciation right by the authority, while the misuse of the prerogatives given, when the action of the administration is lacking any legal fundament and estranged by accomplishing a public interest, would not be identified with the excess of power, but with the abuse of power". See Emanuel Albu, *Carta Europeană a drepturilor fundamentale – dreptul la o bună administrație*, "Revista de drept comercial" no. 9/2007, p. 75-90, quoted in the paper Gabriela Bogasiu, *Legea contenciosului administrativ. Commented and annotated*, third edition, reviewed and completed, Universul Juridic Publishing House, Bucharest, 2015, p. 77-78.
[12]Jerzy Parchomiuk, *quoted paper*, p. 455.
[13]*Ibidem*
[14]*Ibidem*
[15]*Ibidem*
[16]See for this, Rodica Narcisa Petrescu, *Drept administrativ*, Hamagiu Publishing House, Bucharest, 2009, p. 337.

juridical force and based on which it was adopted or issued, it must be "a clear bound"[17] in order that the acts firstly mentioned are the ones which "give discretionary power"[18]. For instance, the distinction between the legal exercising of the discretionary power and its arbitrary exercising[19] is represented by the existence of this bound with legal connotation between the two act categories.

Analyzing the reasons which determine an authority of the public administration to abuse from the discretionary power which is recognized by the legal regulations, we will take into consideration the opportunity[20] of its actions, which "cannot be detached by legality"[21], being, in fact, "a dimension of it which creates an analysis objective frame[22] and which even allows "the analysis of the discretionary power, including by the law courts, preventing the arbitrary in exercising it"[23].

We appreciate that the inter-conditioning between the discretionary power and the proportionality principle cannot be ignored, not event neglected. For these reasons we consider that "the appreciation right does not equal the possibility to act abusively, arbitrary, without legal justification, outside any control, its exercising being subject to the proportionality principle, which imposes the observance of a reasonable equilibrium between the public interest which the authority has the obligation to represent and the private legitimate rights or obligations which may be trenched by the administration conduct"[24].

As a matter of fact, the law court appreciated that a legal consecration of the power excess offers a "normative consecration to the law court attribution to examine the public authorities conduct including from the perspective of the manner to exercise the discretionary power and enclosing it within the limits of the appreciation margin awarded by the law, answering to the necessity to maintain a reasonable equilibrium between the public interest and the subjective and private legitimate rights which might be trenched by the administrative acts "[25].

3. The principle of proportionality from doctrinaire perspective

In the context of the above mentioned, we appreciate as well[26] that the analysis of observing the proportionality in comparison to the discretionary power must have into view several elements, and that is: the actual situation which will determine the decision, the purpose which is focused on by solving this situation, the decision which will be taken in order to solve the actual situation, on the other hand not being ignored, but to a less extent, not even the reasons which determined the positive appreciation of the solution undertaking and the action for this.

Undertaking these steps, we will not gain only an estimation of the observance of proportionality principle, but of discretionary power limits which were used.

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[17] Fritz Morstein Marx, *Comparative Administrative Law: A note on review of discretion*, paper published in "University of Pennsylvania Law Review", 1939, p. 961, article available on-line at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=9051&context=penn_law_review, last accessed on: 03.11.2018.

[18] *Ibidem.*

[19] *Ibidem.*

[20] In the doctrine it is appreciated that the opportunity regards the moment in which the administrative act is adopted, the place and the concrete conditions in which it is due to apply an administrative act, the conformity with the law purpose, the means, duration, life quality and public interest. See, Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, All Beck Publishing House, Bucharest, 2005, p. 51.

[21] Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C. H. Beck Publishing House, Bucharest, 2016, p. 85.

[22] *Ibidem.*

[23] *Ibidem.* In this manner another author underlines that the "legality and the opportunity are conditions which base the validity of an administrative act, and the judge for administrative litigations has the competence to rule on the both aspects in litigations bought to the court attention", statement which is supported inclusively by the art. 2 para (1) letter n) from Law no. 554/2004 of administrative litigation, with subsequent modifications and completion, through which the power excess is defined as being "the exercising of the appreciation right of the public authorities by breaching the limits of the competence indicated by the law or by breaching the citizen rights and liberties". Verginia Vedinaș, *Tratat teoretic și practic de drept administrativ*, vol. II, Universul Juridic Publishing House, Bucharest, 2018, p. 49.

[24] ICCJ, Administrative – fiscal litigations section, decision no. 807 from 16 February 2012, quoted by Gabriela Bogasiu, *quoted paper*, p. 113.

[25] ICCJ, Administrative – fiscal litigations section, decision nr. 3165 from 21 June 2012, quoted by Gabriela Bogasiu, *quoted paper*, p. 114.

[26] To see for this, Dana Apostol Tofan, *quoted paper*, 1999, p. 46.

Thus, for the solving of some cases where the observance of the limits in exercising the discretionary power is questionable, the judge could not ignore the limits where the aspects connected to proportionality were taken into consideration.

Analyzing the principle of proportionality, its observance is imposed as a necessity in any democratic society, visible and analyzable necessity regarding the activity of public authorities, including the public administration, which must develop its activity gravitating around the public interest.

The satisfaction, the realization of the public interest must not be done, however, in any manner, as it is indicated above, and as it is pointed out in the doctrine when it is highlighted that this principle is "one of the most decisive elements of the human rights protection because it guarantees the balance between these rights and the public interest"[27]. More than this, the purpose of proportionality principles must take into consideration the realization, maintaining and the exercising, as the case might be, in a balanced manner, and the relevant interest, as well as the protection of the interested parties[28], situation in which we take into consideration not only the public interest, but the private interests as well.

A democratic society involves inclusively the law ruling, respectively the observance, protection and the guaranteeing of the rights and fundamental liberties, and the proportionality principles contributes to the insurance and application of the legal guarantees because, as it is indicated in the doctrine[29] the proportionality offers a structured reasoning for the management, application of the law and for the reaching the correct and equitable balance of the public and private interests.

In the German doctrine,[30] it is indicated that the proportionality principle may be applied in two different stages, the first having into view that necessity of the conformation of the legal basis of any complex administrative act with the proportionality principle, respectively the conformation of the administrative act itself with this principle if the legislator allowed the administration to exercise the discretionary power[31]. Practically the analysis of observing the proportionality principle must focus on the legal act on which the administration action is based on, as well as the administrative action itself[32].

In comparison to the accuracy of the regulations, solid and constant jurisprudence regarding the proportionality principle in the German law, in the French law, the doctrine[33] noticed the existence of some normative acts which refer to the idea of proportionality, the principle itself applying only in specific fields and identified, as well as we cannot talk about "the proportionality principle" or "the proportionality test" as being explicitly mentioned. In this context an approach in an elusive way of the proportionality control was noticed, although this principle is a known instrument, and implicitly recognized by its jurisprudence, by the State Council[34] but it is affected by "the lack of a systematic

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[27] Roberto Caranta and Anna Gerbrandy, *Introduction in Roberto Caranta, Anna Gerbrandy, Tradition and Change in European Administrative Law* (Europa Law Publishing, 2011), quoted in Sofia Ranchordás, Boudewijn de Waard, *Proportionality crossing borders. Why it is still difficult to recognize sparrows and cannons*, in *The judge and the proportionate use of discretion: A comparative study* S. Ranchordás, B. de Waardeds., 2016, p.10.

[28] Sofia Ranchordás, Boudewijn de Waard, *op. cit.*, 2016, p. 10.

[29] *Ibidem.*

[30] However, the German doctrinaires remarked the fact that the promoting and the valuing of the proportionality principle as a fundamental principle, as well as its implementation in the legal practice were considered as being two of the most relevant innovations of the German public law schools, even ones of the most remarkable. Rainer Wahl, *Der Grundsatz der Verhältnismäßgkeit: Ausgangslage und Gegenwartsproblematik* in D. Heckmann, R. P. Schenke, G. Sydow, *Vserfassungsstaatlichkeit im Festsebrift für Thomas Würtenberger zum 70*, Duncker & Humblot, 2013, quoted in *The judge and the proportionate use of discretion: A comparative study*, S. Ranchordás, B. de Waardeds., 2016, p.36.

[31] Nikolaus Marsch, Vanessa Tünsmeyer, *The principle of proportionality in German administrative law* in *The judge and the proportionate use of discretion: A comparative study,* S. Ranchordás, B. de Waardeds., 2016, p.33-34.

[32] *Idem*, p. 17.

[33] Yoan Sanchez, *Proportionality in French administrative law*, in *The judge and the proportionate use of discretion: A comparative study*, S. Ranchordás, B. de Waardeds., 2016, p.43.

[34] *Idem*, p. 44.

approach"[35]. However, the judge took into consideration the proportionality control, revealing a pragmatic approach, as well as its utility[36].

In the English system, the proportionality is a relatively new principle[37], applicable in specific fields, and which "competes" with the Wednesbury test of lack of reason, but may be regarded as a "contestant"[38] of this test because it offers a more argumentatively structured approach in guiding the decision making process of the judge, also the possibility of a more profound review.

On the other hand, the Dutch doctrine[39] remarks the necessity of making a distinction between the appreciation margin and the discretionary power, showing that anytime a normative act offers to the administration the possibility to choose, it exercises the discretionary power, named *beleisvrijbeid* (policy freedom), while if an administrative decision is appealed in the law court, the choice the administration made will be subject to a control which will restrict to its appreciation margin.

4. Limiting the discretionary power by applying the proportionality principle in the Court of Justice of the European Union case-law

At the European level, the proportionality principle was highlighted as being one of the rules of the European administrative law, based on the common legal principles of the member states, along with the legality principle of the administrative acts, legal security principles, legitimate presumption principle, equality of treatment principle and right of defense principle[40].

At present, it is well-known that the proportionality represents a basic principle in the European Union context, which may be used to censor the actions of the European Union on its whole, as well as the ones of the Member States[41].

Thus, in art. 5, para 4 in the Treaty regarding the European Union (consolidated version)[42] it is foreseen that: "Pursuant to the proportionality principle, the action of the Union, in context and form, does not exceed what is necessary in order to accomplish the treaties objectives. The Union institutions apply the proportionality principles according to the Protocol regarding the application of the subsidiarity and proportionality principles".

While applying the above dispositions, it is useful to mention that, according to art. 5 in the Protocol regarding the application of the subsidiarity and proportionality principles[43], „the projects of legislative acts are motivated according to the subsidiarity and proportionality principles. Any project of legislative act should comprise a detailed sheet which allows the evaluation of the conformity with the subsidiarity and proportionality principles. The sheet previously indicated should comprise elements that allow the evaluation of the financial impact of the project in discussion and, in the case of a directive, its implication evaluation on the regulations that are due to be applied by the member states, including on the regional legislation, as the case might be. The reasons which lead to the conclusion that an objective of the Union may be accomplished better at the level of the Union are based on the qualitative indicators and, every time it is possible, on quantitative indicators.The projects of legislative acts have into view the necessity to proceed so as any obligation, financial or administrative, which is assigned to the Union, national governments, regional or local authorities, economical operators and citizens, to be reduced as much as possible and proportional to the proposed objective".

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[35] *Ibidem.*
[36] *Ibidem.*
[37] A.C.L. Davies, J. R. Williams, *Proportionality in English law*, in *The judge and the proportionate use of discretion: A comparative study*, S. Ranchordás, B. de Waardeds., 2016, p.73.
[38] *Idem*, p. 83.
[39] Boudewijn de Waard, *Proportionality in Dutch administrative law*, in *The judge and the proportionate use of discretion: A comparative study*, S. Ranchordás, B. de Waardeds., 2016, p. 129.
[40] For this, see Corneliu Manda, *Europenizarea dreptului administrativ românesc*, in "Revista română de drept comunitar" nr.4/31 December 2006, article consulted in the database www.idrept.ro, last accessed on 21.06.2018. The authors refer to the Decision of the Court of Justice of the European Union form 12 July 1957, *case Algera.*
[41] Sofia Ranchordás, Boudewijn de Waard, *Proportionality crossing borders. Why it is still difficult to recognize sparrows and cannons*, in *The judge and the proportionate use of discretion: A comparative study*, S. Ranchordás, B. de Waardeds., 2016, p.9.
[42] JO C 202, 07.6.2016, p. 1-388.
[43] JO C 326, 26.10.2012, p. 206-209.

As it was indicated in the specialty literature[44], the application of this principle focuses on three fields and they are: the European action form, its nature and amplitude, respectively the establishing of the financial or administrative expenses. Regarding the European action form, the quoted author [45] indicates that it "must be simple regarding the two criteria: appropriate accomplishment of the objective of the respective measure and the necessity of an efficient execution", explaining thus that it would be preferable the directives than the regulations and the frame directives than the detailed measures. Referring to the nature and the amplitude of the European action, applying the proportionality principle, it is highlighted[46] that the measures adopted must not exceed what is necessary in order to fulfill the Treaties objectives, ascertaining in this manner an appreciation margin higher for the national authorities. Regarding the fiscal issue, the conclusion expressed in the doctrine[47] is that it is necessary that any financial expenses or administrative be minimum and proportional to the objective to be fulfilled.

At the same time, this principle of proportionality is regulated by the Fundamental Rights Charta of the European Union[48], indicating in art. 52 para 1 that "any restriction of the rights exercising recognized in this Charta must be provided by the law and must observe the substance of these rights and liberties. By observing the proportionality principle, there might be imposed restrains only in the event these are necessary and only if they effectively reply the objectives of general interests recognized by the Union and the necessity of protecting the others rights and liberties".

As a matter of fact, as it was ascertained[49], the majority of cases on the CJEU matter of hearing, which imply the problem of the applicability of proportionality principle in our analysis field, refers to measures which focus the common policies of the EU, one of the reasons for the appealing of them being that the measures in discussion breach the fundamental rights recognized by the EU right.

Regarding the source of inspiration of the Court of Luxemburg, referring to the application of the proportionality principle on the administrative level, this is the German law system[50], indicating that, during the years the Court of Justice of the European Union developed its own doctrine of proportionality, thing explicable by the difference of interests involved[51].

From the Court case-law[52] it is indicated that this principle implies as "means applied by a disposition of community law to be able to accomplish the legitimate objectives followed by the regulation in discussion and not to exceed what is necessary to fulfill them".

On a synthesis, we may indicate, as a matter of principle, that in the CJEU jurisprudence the proportionality control is divided on 3 stages which focus on the appropriate character of the adopted measure, its necessity and the proportionality in its strict sense. The doctrine[53] indicates that these three criteria were exposed in the *Omega Air Ltd.* Case (joined cases C-27/00 and C-122/00), where it is indicated that the applicability of the proportionality principle claims that the measures adopted

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[44]Marius Andreescu, *Proporționalitatea-principiu al dreptului Uniunii Europene*, „Curierul Judiciar" no.10/2010, p. 594.
[45]*Ibidem.*
[46]*Ibidem.*
[47]*Ibidem.*
[48]JO C 202, 7.6.2016, p. 389-405.
[49]Sofia Ranchordás, Boudewijn de Waard, *Proportionality crossing borders. Why it is still difficult to recognize sparrows and cannons*, in *The judge and the proportionate use of discretion: A comparative study*, S. Ranchordás, B. de Waardeds, 2016, p.9.
[50]This modern proportionality test, whose analysis implies several stages, is an innovation of the German Constitutional Court, which it used for more than a half of century in order to rule for cases which implied constitutional rights. Also, the Constitutional Court adapted the concept from the German administrative law, within the proportionality played its role in the juridical control of the administrative decisions, at the end of the 19th century. A key element in developing the judicial control of the proportionality was the establishing of the Supreme Administrative Court in Prussia, in 1875. In several years, this court used the proportionality principle as a significant constraint instrument of the discretionary power of the administration – for this, see Mathews Jud, *Proportionality Review in Administrative Law* in Comparative Administrative Law, 2nd ed., Susan Rose-Ackerman, Peter L. Lindseth& Blake Emerson, eds., Edward Elgar Publishing, 2017; Penn State Law Research Paper No. 25-2016, available in the database SSRN: https://ssrn.com/abstract=2836264, last accessed: 03.11.2018, p.5.
[51] Catherine Haguenau-Moizard, Yoan Sanchez, *The principle of proportionality in European law*, in *The judge and the proportionate use of discretion: A comparative study* Sofia Ranchordás, Boudewijn de Waard, 2016, p.152.
[52] For this see the the Court Judgment (Grand Chamber) from 8 June 2010, Vodafone Ltd and others against Secretary of State for Business, Enterprise and Regulatory Reform, C-58/08, ECLI:EU:C:2010:321, par. 51, decisions accessed on the Court portal: www.curia.europa.eu, last accessed: 03.11.2018.
[53] Catherine Haguenau-Moizard, Yoan Sanchez, *quoted paper*, p.153-154.

by the institutions of the Community do not exceed the limits of what is appropriate and necessary in order to answer the proposed objectives by the legislation in discussion, and where it is the possibility to opt between several measures appropriate to the focused purpose, the choice must lead to the one less onerous/the least restrictive, and the disadvantages caused must not be disproportional than the focused purpose.

Referring to the jurisdictional control of observing these conditions, we indicate that, in the European legislation favor, within the exercise of the competences which are granted, the Court of Justice recognizes a large power of appreciation in the fields where its actions involves choices of political, economic or social nature and where it must make appreciations and complex evaluations. It must be taken into account that, even in the presence of such an appreciation power, the legislator of the European Union "is obliged to base its choice on objective criteria and, within the appreciation of the constraints regarding different possible measures, it must examine if the objectives followed by the indicated measure are of such a nature to justify negative consequences, even considerable […]"[54].

On this thinking level, the Court of Luxembourg ruled[55] for the reason that "it is not a problem if a measure adopted in such a field was the only or the most adequate, only the obvious inappropriate character of it in comparison to the objective which the competent institutions follow being able to affect the legality of this measure". This formula resonates with the French standards which focus on the jurisdictional control of the excess of power (the manifest, obvious error - *erreur manifeste d'appréciation*)[56].

Developing this concept, the Romanian doctrine[57] talks about the so-called appreciation attached to legality,that is the *legality of the opportunity*, which involves the proportionality control, recognizing the judge the right to examine the appealed act under the aspect of the obvious disproportionality while appreciating the ruled measure.

Thus, the control performed by the European law court focuses on the checking of the fact situations indicated and on the absence of an obvious appreciation error. In this manner, for instance, even if the European jurisdictional body does not have the competence to substitute an economic appreciation performed by the Commission with its own appreciation, on the purpose of applying the background norms of a Regulation, this does not imply the fact that the European law court must restrain from controlling the legal qualification given by the Commission to some data of economic nature. That is why, the Court of Justice set[58] that it must not only check the material exactness of the invoked evidence elements, their credibility and coherence, but as well to control if these elements constitute all the pertinent data which must be taken into consideration in order to appreciate a complex situation and if they are of the nature to support the conclusions which are drawn from them.

In exercising this in-depth control in law, and in fact, it will be taken into account the fact that the legality of the act will be appreciated "according to the elements of fact or law existing on the date of adopting the act and, especially, cannot depend on retrospective considerations regarding its efficiency. When the legislator of the Union is determined to appreciate the effects for the future of a regulation which is due to adopt, although these effects cannot be foreseen with exactness, its appreciation cannot be censored unless it is proved as being obviously mistaken in comparison to the elements which it disposes of at the moment of adopting the regulation in discussion"[59].

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[54] For this, see the Court Judgment (5th chamber) from 17 October 2013, Herbert Schaible against Land Baden-Württemberg, C-101/12, ECLI:EU:C:2013:661, par.49, decision accessed on the Court portal: www.curia.europa.eu, last accessed: 03.11.2018.

[55]Court Decision (Grand Chamber) from 8 June 2010, Vodafone Ltd and others against Secretary of State for Business, Enterprise and Regulatory Reform, C-58/08, ECLI:EU:C:2010:321, par. 52, decision accessed on the Court portal: www.curia.europa.eu, last accessed: 03.11.2018.

[56]Joana Mendes, *Law, Public Interest and Interpretation: Prolegomena of a Normative Framework on Administrative Discretion in the EU* (December 16, 2014). Yale Law & Economics Research Paper No. 519, article available in the database SSRN: https://ssrn.com/abstract=2539068 or http://dx.doi.org/10.2139/ssrn.2539068, last accessed: 03.11.2018.

[57]Iulian Teodoroiu, Simona Maya Teodoroiu, *Legalitatea oportunității și principiul constitutional al proporționalității*, „Dreptul" no.7/1996, p.40-41.

[58] For this, see the Court Judgment (Grand Chamber) from 10 July 2008, Bertelsmann and Sony Corporation of America/Impala, C-413/06, ECLI:EU:C:2008:392, par.145, decision accessed on the Court portal: www.curia.europa.eu, last accessed: 03.11.2018.

[59]Court Judgment (8th Chamber) from 28 July 2011, Agrana Zucker GmbH, C-309/10, ECLI:EU:C:2011:531, par.45, decision accessed on the Court portal: www.curia.europa.eu, last accessed: 03.11.2018.

From here the importance of the motivation, respectively of a good foundation of the act, because the efficiency of the jurisdictional control imposes that, within the legality control of the reasons on which a European act is established on, the law court of the Union must assure that it is based on a factual basis sufficiently solid. This involves, in the Court's opinion[60], the checking of the fact invoked in exposing the reasons of the act, "so that the jurisdictional control does not limit to the appreciation of the abstract plausibility of the invoked reasons, but to refer to the aspect if those reasons – or at least one of them, considered as being sufficient itself for supporting the decision in discussion – are founded".

Regarding the appreciation that an act is affected by an abuse of power, at the level of the European Union, the Court of Justice stated that[61] this ascertaining may result only if there are "objective, pertinent and concordant indications that is was adopted, exclusively or at least determined, on other purposes than the ones invoked or for eluding a procedure specially provided by the treaty in order to reply the case circumstances".

As well, the Court of Justice admitted[62] that, regarding the jurisdictional control of the validity of the dispositions of a regulation, when it appreciates the proportionality of the means put in applications through these dispositions, the Union legislator, within exercising the competences assigned to it, is given a large power of appreciation in fields which imply from its side choices of political, economic and social nature, and where it must make complex appreciations. However, even in the presence of such an appreciation power, the Union legislator is obliged to:

- base its choice on objective criteria and, within the appreciation of the constraints concerning different possible measures, this must examine if the objectives followed by the indicated measure are of such nature to justify the negative consequences, even considerable, for certain business operators[63];

- have into view that its appreciation cannot be censored only if it is proved as being obviously mistaken in comparison to the elements it disposed of at the moment of adopting the regulation in discussion[64], not being able to consider retrospective aspects regarding its degree of deficiency. Thus, the Court highlighted the necessity of proving the obvious character of the mistaken appreciation by the institution at the moment of adopting the act;

- to comparatively evaluate the interests in discussion in order to set a correct balance[65].

5. Conclusions

"The fight to grab the political power, the fight between the social classes, or even the members of the same class organized in political parties, fill the whole political history of different people. The ones who succeed, understand to keep their power, organizing, modifying different institutions of public law, to assure the preservation of the power"[66].

Starting from this doctrinaire support we may notice that is the most difficult, in any democratic state, to keep the power by its right owner, and that is the people, as well as preserving the limits of exercising this power by the ones able to do this as it is established, firstly, by constitutional regulations. This does not mean that it might not be recognized a discretionary power of the public authorities, including the ones in the public administration, and also the fact that could not be limited by imposing the observance of some principles, such as the proportionality one, and in

[60] To see, for this, Court Judgment (Grand Chamber) from 18 July 2013, Commission and the others/Kadi, in joined cases C-584/10 P, C-593/10 P, C-595/10 P, ECLI:EU:C:2013:518, par.119, decision accessed on the Court portal: www.curia.europa.eu, last accessed: 03.11.2018.

[61] Court Judgment (Grand Chamber) from 4 December 2013, European Commission against the Europe Union Council, C-111/10, ECLI:EU:C:2013:785, par.80, decision accessed on the Court portal: www.curia.europa.eu, last accessed: 03.11.2018.

[62] Court Judgment (5th Chamber) from 17 October 2013, Herbert Schaible against Land Baden-Württemberg, C-101/12, ECLI:EU:C:2013:661, par.47, decision accessed on the Court portal: www.curia.europa.eu, last accessed: 03.11.2018.

[63] *Ibidem*, pct. 49.

[64] *Ibidem*, pct. 50.

[65] *Ibidem*, pct. 60 and pct. 68.

[66] Paul Negulescu, *Tratat de drept administrativ, vol. I. Principii generale*, 4th ed., Institutul de Arte Grafice "E. Marvan", Bucharest, 1934, p. 34.

case of breaching the imposed limits and, implicitly, affecting the legality principle – fundament of any rule of law, by regulating a jurisdictional control.

The proportionality in the administration actions may be appreciated, firstly, even by the administration which in exercising its own competences for the satisfaction of the public interest cannot damage the rights and the interests of the people, the jurisdiction control exercising when the action limits of the administration, including when it may enjoy the discretionary power, are exceeded. In order not to affect the proportionality principle, the administration must limit to those adequate actions and necessary to answer the objectives in the applicable legislation, not to breach the legality principle, to identify these measures of action as less expensive as possible and as less restrictive as possible and to apply them in order to fulfill the purpose, as well as to take care of the disadvantages determined by these action, not to be disproportionate in comparison to the focused purposed.

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