# Administrative Decision - Administrative Act and/or Voluntary Process. A View of the Acts Issued by the National Energy Regulatory Authority in the Process of Applying Sanctions to the Operator's Turnover

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***Abstract***

*The idea of this study arose from an issue that has provoked discussions in the recent practice of the administrative litigation court, but also among practitioners in the field of administrative law. Starting from the definition(s) provided by the Administrative Litigation Law no. 544/2004, but also the current benchmarks contained in the Administrative Code, we will make a comparative analysis of the administrative decision, as an administrative act that emanates from a single-person body (prime minister, head of a specialized body[3]) or as a volitional act resulting from the decision-making process of public administration authorities/ structures. This general analysis will represent the starting point for the case study we have proposed regarding the acts[4] issued/adopted by ANRE[5]. In such a context, starting from the provisions of the Energy and Natural Gas Law no. 123/2012[6] which introduced the procedure for sanctioning contraventions based on the offender's turnover, the issue of the legal nature of the act by which the amount of the fine is individualized (following the conduct of control or investigation actions) was raised. Obviously, this issue arose mainly due to the use of the (unfortunate) name of decision at the level of secondary legislation. And yet, what is the decision? Is it an administrative act, issued by a single-person body or a decision-making process of a collegial, multi-person body? Our analysis will take into account specific legislation, court case law, as well as cases of other authorities to which the legislator has granted the*

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[3] We will identify from the specific legislation such administrative acts.
[4] We will not call them administrative or preliminary operations at this time, saving these aspects for the study's conclusions.
[5] According to art. 1 of Government Emergency Ordinance no. 33/2007, regarding the organization and functioning of the National Energy Regulatory Authority, with subsequent amendments and additions, *ANRE is an autonomous administrative authority, with legal personality, under parliamentary control, fully financed from its own revenues, independent in decision-making, organizationally and functionally, having as its object of activity the development, approval and monitoring of the application of the set of mandatory regulations at national level necessary for the functioning of the electricity, thermal energy and natural gas sector and market in conditions of efficiency, competition, transparency and consumer protection.*
[6] Art. 95 paragraph (2): *In the case of contraventions for which sanctions are provided in relation to turnover, the establishment and individualization of sanctions will be carried out by the Regulatory Committee based on a procedure approved by the president of ANRE, within 60 days from the date of entry into force of this normative act.*

*possibility of applying contravention sanctions as a percentage of an operator's turnover. In order to give this study a note of comparative law, we will try to identify similar aspects or notable differences in the legislation of other European states in which the same sanctioning regime (percentage of the sanctioned operator's turnover) is provided. The study will conclude with a series of conclusions and even possible proposals de lege ferenda.*

***Keywords:*** *act decizional, consens, unipersonal, pluripersonal, energie, contravenție*

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## 1. General aspects

Public administration is represented by the set of state structures that apply laws and manage the general interests of society. Unlike the legislature, which develops general norms, and the judiciary, which interprets the law in specific cases, the administration executes. But the execution of the law does not mean only automatic application. It almost always involves a decision, that is, a choice between several possible solutions, depending on the context, legality and opportunity, or even more, an analysis and an entire volitional process. The activity of public authorities is reflected in the decisions they make, which take the form of administrative acts, which establish rights and obligations for the recipients, individuals or legal entities, in compliance with the principles set out in the Administrative Code[7]. Thus, the administrative decision is legally concretized in the form of an administrative act, the instrument through which the volitional process produces legal effects. This act is, in essence, a unilateral manifestation of the will of the public authority, issued on the basis of the law, but applicable to an

[7] Art. 6 Principle of legality; art. 7 Principle of equality; art. 8 Principle of transparency; art. 9. Principle of proportionality; art. 10. Principle of meeting the public interest, art. 11 Principle of impartiality; art. 12. Principle of continuity; art. 13 Principle of adaptability. Also see OECD (2023). *OECD Review of the Corporate Governance of State-Owned Enterprises in Romania*. *Corporate Governance* Report. Paris: OECD Publishing, https://doi.org/10.1787/fabf20a8-en.

individual situation. In many cases, however, the issuance of an administrative act is not limited to the mechanical application of the norm, but involves a volitional process: a substantive analysis of the context, the public interest and the possible consequences. In this area of assessment, the administration exercises its discretionary power, guided not only by legality, but also by opportunity, fairness and efficiency. Thus, the administrative decision becomes the result of a synthesis between the legal norm and the professional judgment of the authority – between law and will, between rule and adaptation.

In the table of contents ReNEUAL[8], in section B. Rules, Chapter 1, art. III-2 Definitions, we find the decision mentioned as being "*administrative action addressed to one or more individualized public or private persons, which has been adopted unilaterally by an EU authority or by an authority of a Member State, when Article III-1 (2) applies, adopted in order to settle one or more specific cases, with legally binding effect*". Also, in section C., Explanations, Chapter 1, art. III-2 Definitions, paragraph (5) the 4 main features of the decision are identified: it is adopted in the framework of an administrative action that excludes legislative and judicial acts; it is addressed to one or more persons, public or private; it is adopted unilaterally; the decision settles one or more specific cases, with legally binding legal effects[9]. So here we are talking about a decision in general, but in order to take the form of an administrative act, a series of conditions must be met.

The administrative act entails the production of legal effects, causing rights and obligations to arise, change or extinguish[10]. A series of definitions have been offered by the doctrine, thus the administrative act „*is a unilateral manifestation of legal will, based on and in the execution of the law, of an administrative authority, through which a new legal situation is formed, or a legal claim relating to a right recognized by law is refused, legal will subject to the administrative legal regime*"[11]; „*the main legal form of activity of public administration, which consists of a manifestation of express will, unilateral and subject to a regime of public power, as well as the legality control of the courts, which emanates from administrative authorities or from private persons authorized by them, through which correlative rights and obligations are born, modified or extinguished*"[12]; „*the administrative act is the main form of activity of public administration*" and „*it is imposed on legal subjects who are equally obliged to respect or execute*

[8] Herwig C.N. Hofmann, Jens-Peter Schneider, Jacquel Ziller, Dacian C. Dragoș (coord.), (2016), *The RenEUAL Code of Administrative Procedure of the EU*, Universul Juridic, Bucharest, p. 41.
[9] Idem, pp. 77-78.
[10] Alexandru Negoiță (1996), *Administrative Law,* Sylvi Publishing House Bucharest 1996, p. 133.
[11] Idem p.137.
[12] Verginia Vedinaș (coord.), (2022), *The commented administrative code. Explanations, jurisprudence, doctrine. Volume I – Art. 1-364*, Universul Juridic, Bucharest, p. 360.

*it*"[13], „*The administrative act represents a manifestation of will made for the purpose of creating, modifying or extinguishing legal relations, the realization of which is guaranteed by the coercive force of the state or ascertained by the coercive force of the state or ascertains legal situations regulated by law. The administrative act represents the main legal form of the activity of public administration structures*"[14]. Last but not least, we retain perhaps the most comprehensive definition of the administrative act as being „*in a broad sense, a unilateral manifestation of will, respectively an agreement of will, belonging, mainly, to a public administration authority, express or implicit, either to give rise to, modify or extinguish rights and obligations, or to satisfy a general interest, to provide a public service, to carry out a public work or to enhance a public good, in the exercise of public power, or to refuse or approve expressly or tacitly the requests of individuals relating to a right or a legitimate interest, under the legality control of the courts*"[15].

As noted in french literature, „*by its sole will, the competent administrative authority can in fact produce, for the benefit and especially to the detriment of those administered, a legal effect, modifying their situation without the need for their consent. Moreover, the decision thus taken is presumed legal, which authorizes the administration to proceed with its execution, even - at least in certain circumstances that the judge has specified - using coercion. This category includes, on the one hand, regulatory acts, that is, all measures of a general nature that emanate from an authority included in the executive power, on the other hand, individual acts, which specifically target a specific person. Administrative law establishes the rules relating to the creation of these acts (competence, forms, procedure), their validity and effect*"[16]. Beyond all these definitions offered by the doctrine, the administrative act represents the form of expression of the administration's decision, of an act of will and, last but not least, the effect of an entire adoption process.

Although we might have expected the legislator of the Administrative Code to provide a definition of the administrative act, as a form of expression of the administration's decision, however, we are still left with the references from the Administrative Litigation Law no. 554/2004, according to which the administrative act, susceptible to be annulled following the formulation of an adminis-

[13] Verginia Vedinaș (2009), *Administrative Law,* 5th revised and added edition, Universul Juridic, Bucharest p. 101.
[14] Gabriela Bogasiu (2022), *Administrative Litigation Law. Commented and Annotated*, 5th edn., revised and added, Universul Juridic Bucharest, p. 56.
[15] Emilia Lucia Cătană (2019), *The contentious issue of assimilated administrative acts*, 2nd edn., CH Beck, Bucharest, p. 18.
[16] Jean Rivero, "Le Droit Administratif", *Encyclopedia Universalis,* accessed on 4.05.2025, URL: https://www.universalis.fr/encyclopedie/administration-le-droit-administratif/.

trative litigation action, is defined as „*the unilateral act of an individual or normative nature issued by a public authority, in the regime of public power, in order to organize the execution of the law or the concrete execution of the law, which gives rise to, modifies or extinguishes legal relations*"[17]. This definition has been rightly criticized in the specialized literature[18], the author appreciating that the administrative act should be defined as „*a unilateral manifestation of will, issued with the aim of producing legal effects, under public power, through which the application of the law is organized or, as the case may be, carried out in concrete terms*"[19].

Despite all the criticisms brought to the definition in the Administrative Litigation Law, the draft Administrative Procedure Code[20] has taken them over identically in art. 3 paragraph (1): „*For the purposes of this code, the terms and expressions below have the following meanings:*

*a) administrative act – unilateral legal act that represents the manifestation of will of one or more public authorities, issued under the regime of public power, in order to organize the execution or the concrete execution of the law, for the purpose of creating, modifying or extinguishing legal relationships; manifestations of will originating from other public or private entities that carry out administrative activities as defined in letter h) of this paragraph are assimilated to administrative acts*"[21].

Although it mainly retains the same elements from the definition provided by the Administrative Litigation Law, it nevertheless brings two new elements: the mention that it is a legal act (although what other type of act could have had the same characteristics) and the fact that it represents the manifestation of will of one or more public authorities, such as a joint order issued by two ministries.

Although the legislator of the Administrative Code does not provide a definition of the administrative act, he nevertheless uses the notion of decision in several contexts. Thus, it is spoken about *the right to decide*[22]*, administrative*

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[17] Art. 2 paragraph (1) letter c) of Law no. 554/2004.

[18] Ovidiu Podaru (2022), *Administrative Law, vol. I, the administrative act. New landmarks for a different theory. Volume I. Notion*, 2nd revised and added ed., Ed. Hamangiu, Bucharest, pp. 2-3.

[19] Idem, p.1.

[20] https://www.mdlpa.ro/pages/proiectlegecodadministrati8v21112023, accessed on 4.05.2025.

[21] h) public authority – any state body or administrative-territorial unit, with or without legal personality, which acts under public power to satisfy a legitimate public interest.

[22] Art. 5: ş) exclusive competence - the powers expressly and restrictively established by law for the local public administration authorities, for the performance of which they have the right to decide and have the necessary resources and means; t) shared competence - the powers exercised according to the law by local public administration authorities, together with other public administration authorities, expressly and restrictively established, with the establishment of financial resources and the limits of the right to decide for each public authority.

*decision-making process*[23]*, making a decision*[24] all of this leading rather to the idea of decision-making, the process of deciding. The only express references to the decision as an administrative act are those referring to the fact that the Prime Minister issues decisions, which are administrative acts[25].

In conclusion, although we would be tempted to believe that the administrative decision is confused with the administrative act, as a manifestation of a unilateral will of the administration, however, there are differences not only in nuance, but also in legal effects between the administrative decision as a unilateral act, therefore an administrative act, and the decision as the result of the volitional process that is the prerogative of a pluripersonal body.

Thus, the administrative decision is not (always) limited to the mechanical application of a rule(s), but involves: an evaluation, an appreciation of the authority, therefore a discretion in choosing the solution (obviously, within the limits of the law). This is the dimension of the volitional process, in which a pluripersonal body participates, the decision reflecting an administrative will in forming the solution, adapted to the concrete circumstances.

In the next section we will analyze an atypical situation, in which, due to a misunderstanding of the concept of decision, the bizarre and illegal situation can arise in which two courts of different levels judge the same thing, at least one of them violating the exclusive jurisdiction of the other. What is the triggering element of this hypothesis? Confusing the administrative decision as a volitional process with the decision as an administrative act, which can be the subject of the legality analysis of the administrative court.

As emphasized in the specialized doctrine, „*administrative litigation is based on two fundamental institutions of administrative law*"[26] one of these being „*the administrative act which represents the starting point in the legality analysis carried out by the court*"[27], so that in the absence of the administrative act there can be no action in administrative litigation[28].

## 2. Applicable Legal Framework. Theoretical Aspects

The challenge regarding ANRE's decision to apply sanctions for contraventions in the energy sector is directed towards the combined approach of legal

[23] Art. 8 The principle of transparency.
[24] Art. 47^11 Single Registry of Transparency of Interests.
[25] Art. 29 Prime Minister's decisions.
[26] Cătălin-Silviu Săraru (2022), *Administrative litigation treaty*, Universul Juridic, Bucharest, p. 6.
[27] Ibid.
[28] For a comparative and international view see Yael R. Lifshitz (2024), "The (Shifting) Audience of Energy Law." *King's Law Journal* vol. 35 issue 2: 312–36. doi: 10.1080/09615768.2024.2380339; and Juan Du, and Xufeng Zhu (2023). "Regulatory Transparency and Citizen Support for Government Decisions: Evidence from Nuclear Power Acceptance in China." *Journal of Environmental Policy & Planning* vol. 25, issue 6: 766–80. doi:10.1080/1523908X.2023.2269381.

norms and discretionary assessment of aggravating or mitigating circumstances.

What triggered all this legal *dispute*? The emergence of the Emergency Government Ordinanceno. 143/2021 for the amendment and completion of the Electricity and Natural Gas Law no. 123/2012, as well as for the amendment of some normative acts[29], which were introduced into Law no. 123/2012 on electricity and natural gas[30], the provisions of art. 95 para. (2) and (3). According to them, in the case of contraventions in the electricity sector for which the sanction provided is related to the operator's turnover, its establishment and individualization will be carried out by the Regulatory Committee[31] of ANRE, based on a procedure approved by the president of ANRE[32]. Also, criteria were introduced according to which the individualization of this type of sanction will be carried out[33]. The situation is identical for contraventions in the natural gas sector, when the sanction is related to turnover[34].

Thus, by introducing paragraph (2) of art. 95, the Regulatory Committee was assigned two new powers by the primary legislator, namely the decision on the establishment and individualization of sanctions, and not the adoption of decisions as administrative acts.

It should be emphasized that when the primary legislator referred to *the decision* as an administrative act, he added the verb *to order* to the word *decision*. In this sense, art. 84 of the aforementioned normative act states that „*The President of the competent authority orders, by decision, the carrying out of investigations, (...) only in the areas in which ANRE has the power to investigate according to the law*".

Pursuant to art. 95 paragraph (2), the President of ANRE issued Order

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[29] Published in the Official Gazette no. 1259 of December 31, 2021.

[30] Published in the Official Gazette no. 485 of July 16, 2012.

[31] According to art. 4 para. (1) of Government Emergency Ordinance no. 33/2007, „*For the approval of regulations in the electricity, thermal energy and natural gas sectors, a regulatory committee shall be established consisting of 7 persons - 4 non-executive members and the ANRE management, consisting of the president and the 2 vice-presidents provided for in art. 3 para. (1). The appointment and dismissal of the members of the Regulatory Committee, as well as the president and the 2 vice-presidents, shall be made by the Parliament in a joint session of the two Chambers*".

[32] Paragraph (2): *In the case of contraventions for which sanctions are provided in relation to turnover, the establishment and individualization of sanctions will be carried out by the Regulatory Committee based on a procedure approved by the President of ANRE, within 60 days from the date of entry into force of this normative act.*

[33] Paragraph (3): *The individualization of sanctions for the contraventions provided for in paragraph (2) will be done depending on the gravity and duration of the act, the impact on the electricity market and the final customer, depending on the case, in compliance with the principles of effectiveness, proportionality and the deterrent effect of the sanction applied.*

[34] Art. 198 paragraph (2): *In the case of contraventions for which sanctions related to turnover are provided, the establishment and individualization of sanctions will be carried out by the ANRE Regulatory Committee, based on a procedure approved by order of the ANRE president, within 60 days from the entry into force of this emergency ordinance.*

no. 12/2022 for the approval of the Procedure regarding the establishment and individualization of contravention sanctions related to the turnover resulting from the control activity[35] and Order no. 13/2022 for the approval of the Procedure regarding the establishment and individualization of contravention sanctions related to turnover, by the Regulatory Committee of the National Energy Regulatory Authority, as a result of investigative actions[36].

Chapter II of the Procedure approved by Order no. 12/2022 is called *the Process of adopting the decision to establish and individualize the sanction*, so the very title of the chapter shows that the issuer of the administrative act[37] aimed to regulate the procedural rules to be considered by the ANRE Regulatory Committee[38] in the process of adopting the decision on the individualization of sanctions that will be applied to economic operators and natural persons who commit contraventions that fall under the provisions of Law no. 123/2012 for which the fine is established in relation to turnover. This individualization is based on an entire evaluation process by the pluripersonal, collegial body, the Regulatory Committee. At the same time, in the content of the Procedure approved by Order no. 13/2022 there is Chapter II entitled *Establishment of sanctions, adoption of decisions by the Regulatory Committee*, so again, the issuer of the administrative act refers to the process of adopting the decision, from which, in our opinion, it is obvious that it is a volitional process of the competent body (the Regulatory Committee), not an administrative act.

Importantly at this point, we mention the fact that the primary legislator established through Law no. 123/2012, since its initial form, that, according to art. 93 paragraph (3) the finding of contraventions and the application of sanctions are made by authorized representatives of ANRE, and the finding and sanctioning of contraventions of deviations from the regulations issued in the field of electricity is governed by the common law rules established by O.G. no. 2/2001 regarding the legal regime of contraventions[39], so that the sanction of the contravention fine is applied to the violator exclusively through a report of finding and sanctioning.

Returning to the provisions of the two procedures, it is noted that art. 5 paragraph (1) of the Procedure approved by Order no. 12/2022 provides that the collegial body, the Regulatory Committee, meets in session, in order to establish and individualize the contravention sanction by decision that is adopted by simple majority vote. It is true that further, in paragraph (3) the situation is regulated in which, following the analysis carried out, the Regulatory Committee reaches the

[35] Published in the Official Gazette no. 202 of March 1, 2022.
[36] Published in the Official Gazette no. 195 of February 28, 2022.
[37] Order issued by the president of an administrative authority, so it can only be an administrative, normative, secondary legislation act.
[38] Collegial body, according to art. 4 para. (1) from Government Emergency Ordinance no. 33/2007.
[39] According to art. 94 and art. 194 paragraph (1) of Law no. 123/2012.

conclusion that the application of a sanction to the turnover is not required, then it issues a decision to this effect. The wording is unfortunate, because the collegial body does not issue, but adopts an administrative act, however, looking into the legal depth of the legal norm, we can easily deduce that the issuer of the Procedure approved by Order no. 12/2022 referred to the decision as a process, not as an administrative act. Thus, following the analysis carried out by the Regulatory Committee, it decides on the amount of the contravention fine that the determining agent specifically applies to the contravener[40]. In this context, it can be concluded from this moment that, in the absence of the issuance of the sanctioning report by the ascertaining agent, the will of the Regulatory Committee does not produce any legal effect, and the mere designation of this will as a decision does not mean its materialization in an administrative act. Furthermore, the provision that generated the legal situation analyzed in this paper is the one according to which the decision of the Regulatory Committee can be contested within 30 days from the date of communication, at the Bucharest Court of Appeal[41]. In our opinion, this provision cannot produce any legal effect, as it is not capable of establishing the competence and the term within which an act can be contested, let alone conferring a certain legal nature to that act, namely an administrative act, especially since neither Law no. 123/2012 nor O.U.G. no. 33/2007 provide for the existence of any appeal against the act generically called decision. Our conclusion is also in accordance with the provisions of art. 126 para. (2) of the Constitution according to which „*The competence of the courts and the trial procedure are provided only by law*"[42].

At the same time, it should be noted that the content of the Emergency Ordinance no. 33/2007 defines the Regulatory Committee as a deliberative forum that adopts decisions by majority, respectively that the acts resulting from these decisions (acts of deliberation, not their materialization) are signed by the president of ANRE, even if he voted against[43]. It follows that the primary legislator did not confer on the Regulatory Committee the attribute of issuing administrative acts, which could eventually be called decisions and which must be signed by all its members, but only of debating, deliberating, and submitting to a vote

[40] Art. 8*: Based on the decision to establish and individualize the sanction, the ascertaining agent applies the sanction by concluding the finding and sanctioning report which is communicated to the violator within the term provided for in art. 7 paragraph (1), together with the decision of the Regulatory Committee, the control report and the report.*

[41] Art. 7 paragraph (2) of the procedure approved by Order no. 12/2022.

[42] These aspects were also retained in civil sentence no. 2141/19 December 2024.

[43] Art. 4 paragraph (8): Decisions shall be adopted by simple majority. In the event of an equal division of votes, the vote of the chairman or, in his absence, of the vice-chairman presiding over the meeting shall be decisive. (9) The decisions adopted are binding on all members; members who voted against may request that their separate opinion be recorded in the minutes of the respective meeting. The President or the Vice-President who chaired the meeting is obliged to sign the documents resulting from the decision adopted, even if he voted against.

the approval of draft administrative acts, which are subsequently materialized in orders or decisions issued by the ANRE president.

In order to understand the differences between decisions (in the sense of an agreement of will subsequently materialized in an act signed by the ANRE president) and decisions adopted by other central or local public administration authorities, we mention for example the Government Decision and the Local/County Council Decision, authorities to which the constitutional and primary legislators expressly conferred the attribute of adopting decisions that have the legal nature of an administrative act. All the more so since neither Law no. 123/2012 nor OUG no. 33/2007 do not establish the competence of the Regulatory Committee to issue decisions, it follows that ANRE, through secondary legislation, could not introduce such provisions either.

Regarding the Procedure regarding the individualization of sanctions applied to turnover as a result of investigative actions, approved by Order no. 13/2022, in its initial version, it generated a series of interpretations refuted by the practice of the courts that seems to have taken shape up to this point[44]. Although at this point the analysis is purely theoretical, the procedure in question has been modified in order to better correlate with primary legislation and to avoid future misinterpretations[45], however, it has legal relevance, from the perspective of the practice of the Bucharest Court of Appeal pronounced up to this point, even in the absence (yet) of a final decision of the High Court of Cassation and Justice. Unlike the Procedure specific to control activity, the one relating to the individualization of sanctions related to investigative activity is much more complex, and it is necessary to analyze its provisions in conjunction with art. 24 paragraph (3) of the Regulation for the organization and conduct of investigative activity in the energy field regarding the functioning of the wholesale energy market approved by Order of the President of ANRE no. 25/2017[46], according to which the decision to finalize the investigation is subject to the appeals provided for in the Administrative Litigation Law no. 554/2004. This article could have been applicable in the situation where the decision would have included some elements that could not have been taken over in the minutes, so that the decision would have become a genuine administrative act contestable separately in admin-

[44] Although there is no final decision of the High Court of Justice to date, we will analyze in the next section of this study the decisions rendered to date, obviously, in anticipation of the first decision to be rendered by the High Court of Justice.

[45] Order of the President of ANRE no. 78/22.10.2024 amending Order of the President of ANRE no. 25/2017 (published in the Official Gazette of Romania no. 1105 of November 5, 2024), the Procedure approved by Order of the President of ANRE no. 13/2022 being correlatively amended, by issuing Order of the President of ANRE no. 79/22.10.2024 (published in the Official Gazette of Romania no. 1103 of November 5, 2024).

[46] Published in the Official Gazette no. 260 of April 13, 2017.

istrative litigation. In this regard, we point out that, „*After receiving the investigation report in its final form, the President of ANRE may order, as the case may be, for each market participant investigated, by decision to finalize the investigation: a) approval of the investigation report in its final form; b) completion of the investigation; (...) e) suspension of the license; (...)*"[47], therefore, if the contested decision had also included the suspension of the license, for example, a suspension which, according to art. 9 para. (4) of Law no. 123/2012 and the subsequent regulation issued by ANRE[48], can only be ordered by decision issued by the president of ANRE, it clearly follows that the respective decision would have fulfilled the necessary quality of an administrative act within the meaning of the Administrative Litigation Law and could have been challenged separately, at the competent Court of Appeal.

The Order of the President of ANRE no. 13/2022 does not contain any mention of the appeal against the decision to complete the investigation, which would derogate from the common law regime of administrative litigation (in fact, it could not have been derogated from by an administrative act from the law). It is understood from this that the sanctioned person will follow the normal procedural paths provided for by Law no. 554/2004, according to the rules of competence provided for by this administrative act and in compliance with all the procedural stages prior to the notification to the administrative litigation court. Moreover, art. 9 para. (2) letter c) expressly refers to the conclusion of a report of finding and sanctioning contraventions so that, regardless of the situation, the final sanctioning act is truly the latter, being the only one that is likely to produce legal effects.

From the above, several clearly defined conclusions result.

If the investigation/control team finds solid evidence of a violation of the law, given that the sanctions provided are related to turnover, the team draws up a preliminary report, then a final investigation report, or a control report in the case of control actions, and the Regulatory Committee can only approve the final investigation report/control report, but cannot supplement, correct or reject it, as there is no legal provision in this regard, neither in primary nor secondary legislation. In this situation, the Committee approves the completion of the investigation, an aspect materialized in the decision of the ANRE president, as a closure of the investigation activity through the same type of act as the one that marks the beginning of the investigation, namely the decision of the president[49]; therefore, the approval of the investigation report in its final form and the approval of

[47] According to art. 23 paragraph (6) of the Regulation approved by Order no. 25/2017.

[48] Regulation for granting licenses and authorizations in the electricity sector approved by ANRE Order no. 12/2015 – art. 5 para. (2) let. h) and art. 31.

[49] According to art. 9 para. (4) of the Regulation, „*In the event that, following the preliminary analysis, it is found that there are grounds, the president of ANRE shall order, by decision, the carrying out of investigations by his own staff empowered in this regard.*"

the completion of the investigation represent pure procedural formalities on the part of the Committee and the President of ANRE, and do not in any way transfer the competence to establish and sanction the contravention from the ascertaining/investigating agents to the members of the collegial body. On the other hand, if, following the investigation, the investigation team establishes that there are no solid indications regarding the violation of the law, which would justify the imposition of measures or sanctions by ANRE, then no preliminary investigation report and final investigation report will be drawn up and, following the proposal of the investigation team, the investigation will be closed by decision of the President and the parties involved will be informed[50]. The situation is similar to the control actions, the Regulatory Committee not having any powers to intervene on the findings of the ascertaining agent. Thus, the finding and sanctioning of the contravention, as a real effect produced against the contravener, are made only through the minutes of finding and sanctioning the contravention, issued after the decision of the ANRE president, and not through the final investigation report or the control report, these being prior acts that are communicated together with the sanctioning act.

In agreement with what has been argued, are also the provisions of art. 60 of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market in electricity and amending Directive 2012/27/EU[51], according to which „*Member States shall ensure the existence of appropriate mechanisms at national level to guarantee that the party affected by a decision of the regulatory authority has the right to bring an appeal before an independent body*". The legal norm represents a procedural guarantee that establishes the obligation of Member States to create effective national mechanisms so that any person affected by a decision of the regulatory authority, as an act of will, regardless of the name of the administrative act that this decision wears. In other words, the fact that an act is called a decision does not automatically entail the possibility of challenging that act in the administrative court. What is important in relation to the provisions of the European legal act is the fact that the state, through national legal levers, must offer the person concerned the possibility of challenging the harmful administrative act, not all acts prior to its issuance, acts which, as a general rule, under the provisions of the administrative law, are subject to court analysis together with the contested administrative act. However, in the specific situation analyzed, being in the realm of contravention law, the court entrusted with resolving the contravention complaint is competent to rule, indirectly, on the criticisms brought to the decision regarding the individu-

[50] This conclusion emerges beyond doubt from the contents of paragraph (6) of art. 23 in conjunction with paragraph (9) of the same article of the Regulation.

[51] https://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX%3A32019L0944, accessed on 4. 05.2025.

alization of the sanction, this being the reason why it is communicated only together with the report by which the operator is sanctioned.

Along with the analysis of national legislation, we tried to identify similar legal provisions in other European countries. Following this analysis, which was difficult, especially due to the large number of existing normative acts, but also due to linguistic difficulties, with the exception of Bulgaria[52], which has a similar procedure, in the sense that there is both a sanctioning report and a decision prior to its issuance, in the other national legislations of European states[53] the sanction is applied by a decision, without being followed by another act applying the sanction separately.

### 3. Admissibility of the Inadmissibility of the Request Regarding the Annulment of the Decisions by Which the Sanction of the Contravention Fine Is Individualized at the ANRE Level. Jurisprudential Analysis

A preliminary discussion may also aim at identifying the competent administrative court that may be entrusted with resolving the case having as its object the request for the annulment of a decision on the individualization of the penalty to the turnover, starting from the general legal norm – art. 11 of Law no. 554/2004, by reporting to the provisions of the special legal norm – art. 5 paragraph (7) of OUG no. 33/2007. According to the latter legal provisions „*The orders and decisions issued by the president in the exercise of his or her powers may be appealed in administrative litigation at the Bucharest Court of Appeal, within 30 days from the date of their publication in the Official Gazette of Romania, Part I, respectively from the date on which they were notified to the interested parties*", but the legal norm must be interpreted in accordance with those stipulated in art. 5 in its entirety, according to its title – ANRE Regulations, respectively with paragraph (1) which provides that "*ANRE's orders, decisions or opinions regarding regulatory activity refer to:*

*a) granting/modifying/suspending/refusing or withdrawing licenses or authorizations;*

*b) approving regulated prices and tariffs and/or their calculation methodologies;*

*c) approving technical and commercial regulations for the safe and efficient functioning of the electricity, thermal energy and natural gas sectors;*

*d) approving/endorsing documents drawn up by regulated economic operators in accordance with the legal provisions in force;*

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[52] https://lex.bg/laws/ldoc/2135475623, accessed on 4.05.2025.

[53] For example, France (https://www.cre.fr/documents/decisions-du-cordis/cordis-20-janvier-2025-societes-danske-commodities-a/s-et-equinor-asa.html), Italy (https://www.arera.it/atti-e-provvedimenti/dettaglio/24/47-24), Spain (https://www.cnmc.es/expedientes/sncde01923), accessed on 4.05.2025.

*e) granting/modifying/suspending/refusing or withdrawing certificates/ authorizations to economic operators and individuals carrying out specific activities in the electricity and natural gas sectors;*

*f) approving other regulations, norms, studies, documentation provided for by the legislation for the electricity and thermal energy and natural gas sectors*."

It is easy to see that art. 5 refers only to the ANRE Regulations, namely to the types of orders and decisions issued by the ANRE President in the regulatory activity, or, it is obvious that the decision to establish and individualize the sanction related to turnover has nothing in common with the regulatory activity, as a result of which normative or individual administrative acts are born, susceptible to be contested in administrative litigation, based on the special, derogatory territorial competence, included in art. 5 paragraph (7) of OUG no. 33/2007.

Moreover, in the analyzed situation, obviously, the administrative litigation court could not analyze the criticisms of illegality without violating the norms of public order competence in Government Ordinance no. no. 2/2001[54] according to which a complaint may be filed against the report of the contravention and the application of the sanction within 15 days from the date of its delivery or communication, and the complaint shall be filed and resolved based on alternative jurisdiction at the court in whose jurisdiction the contravention was committed or at the court in whose territorial jurisdiction the contravention has its domicile or registered office. It is also provided that the only court exclusively competent to exercise control over the application and execution of the main and complementary contravention sanctions is the one entrusted with resolving the contravention complaint.

Based on these legal provisions, in recent practice the issue of the admissibility of administrative litigation actions has arisen in which the annulment of decisions was requested by which the sanction of the contravention fine was individualized to the turnover.

First of all, we consider the Decision of the Supreme Court of Justice no. 25 of November 6, 2017 to be relevant[55] which, in our opinion, the legal issue is similar to the cases we will analyze, a decision in which the supreme court held that „*the legal nature of the urban planning certificate is that of a preparatory act, its role being to prepare the legal issuance of the building permit. Not being an act capable of producing legal effects by itself, it was considered that the verification of the legality of the urban planning certificate can only be done within the framework of an action filed against the building permit, this representing the*

[54] Art. 31 paragraph (1), art. 32 paragraphs (1) and (2) and art. 34 paragraph (1).

[55] Regarding the interpretation and application of art. 6 paragraph (1) and art. 7 paragraph (1) of Law no. 50/1991 on the authorization of the execution of construction works, republished, with subsequent amendments and completions.

*administrative act itself, producing legal effects. This reasoning is no longer verified in the situation where the urban planning certificate contains a building ban or other limitations that make it impossible to obtain the building permit. It should be noted that the urban planning certificate is always a producer of certain legal effects, in the sense that obtaining it gives the beneficiary the right to demand a certain conduct from the competent authority in relation to the procedure for issuing the building permit. To the extent that the urban planning certificate is followed by the issuance of a building permit, these legal effects cannot be viewed independently, being limited to the procedure for issuing the administrative act and being absorbed, in their entirety, into the effects produced by the final act of the authority. From this perspective, the inadmissibility of the action formulated exclusively against an urban planning certificate, when it is likely to be followed by the issuance of a building permit, is fully justified*.

Returning to the analysis we have carried out, there are a number of cases in which the Bucharest Court of Appeal admitted the exception of inadmissibility invoked by the public authority issuing the decision, rejecting the action accordingly. Of these cases, only 3 decisions were drafted and published on the rejust.ro portal, the others being probably still in the drafting phase (being identified on the Bucharest Court of Appeal portal)[56].

Analyzing the three civil sentences drafted, in essence, the court held that the decision by which the sanction was individualized by reference to turnover lacked the character of an administrative act, given that „*following the issuance of the decision, the defendant issued a report establishing and sanctioning the contraventions (...). the decision does not represent a typical administrative act within the meaning of the provisions of art. 2 paragraph 1 letter c) of Law no. 554/2004 but represents an administrative operation preceding the contraventional engagement of the plaintiff for committing the contraventions indicated in the report, thus the legality of the decision is analyzed indirectly within the file having as its object the contraventional complaint*"[57]. At the same time, in the same sentence, the judge noted that „*the same litigious issue cannot be brought before two different courts, given that the applied contravention sanction is also contested, requesting the replacement of the fine with the warning sanction*". Moreover, the judge emphasized that „*the decision does not produce direct legal effects towards the operator, who is not even notified of this document, except with the issuance of the report of finding and sanctioning (...) and the provisions of art. 24 paragraph (3) of the Regulation would have been applicable in the situation where the decision would have produced other distinct legal effects, which would not have been taken over in the content of the report of finding*". In another decision, the same court held that „*the decision does not have the legal*

[56] Civil sentence no. 2062/13.12.2024, Civil sentence no. 483/25.03.2025.
[57] Civil judgment no. 7/14.01.2025.

*nature of an administrative act, given that the contested act does not meet the defining elements provided for by law, namely it is not a unilateral act issued by the public authority in order to organize the execution of the law or the concrete execution of the law, nor is it a legal act that gives rise to, modifies or extinguishes legal relationships, and the fact that at the end of the decision in question it was mentioned that it can be contested within 30 days at the Bucharest Court of Appeal does not confer on it the legal characteristics of an administrative act and does not open the way for its challenge in administrative litigation*"[58]. In his analysis, the judge started from the provisions of art. 126 paragraph (2) of the Romanian Constitution, according to which the jurisdiction of the courts and the trial procedure are provided for only by law. Therefore, in the absence of any special provision, derogating from the provisions of Law no. 554/2004, the jurisdiction and procedure for resolving administrative disputes relate exclusively to this general legal framework.

The judge further noted that "*the decision in question is only a preliminary or preparatory act for the issuance of the contravention report, not producing legal effects by itself and which cannot be contested separately through administrative litigation (...) the measures ordered by the decision do not become enforceable as a result of its issuance, but only on the basis of the contravention report concluded*"[59].

Last but not least, in a third decision, the Bucharest Court of Appeal[60] held that "*the decision does not represent a typical administrative act since it lacks the legal attitude to produce legal effects in the public power regime in terms of sanctioning the applicant for a misdemeanor*". The judge also concluded that the provisions of art. 34 paragraph (3) of the Regulation approved by ANRE Order no. 25/2017 were not applicable, since "*they would have been incidental only in the situation where the decision would have produced other distinct legal effects that would not have been taken over in the minutes, a situation in which the decision would have become a genuine administrative act, subject to direct judicial control*"[61]. It is important to note that, although there is no final decision of the High Court of Justice on this legal issue yet, the practice of the Bucharest Court of Appeal is constant. Obviously, after the resolution of the appeals by the supreme court, we will return with a continuation of this analysis.

## 4. Conclusions

From the analysis carried out, obviously awaiting a definitive solution from the Supreme Court, we nevertheless consider that we have managed,

[58] Civil judgment no. 2141/19.12.2024.
[59] Civil sentence no. 2141/19.12.2024.
[60] Civil judgment no. 1870/12.11.2024.
[61] Civil judgment no. 1870/12.11.2024.

through this study, to reflect on an important legal issue regarding the legal nature of the decision to individualize the contravention sanction in the event that the contravention fine is established as a percentage of the turnover and the delimitation between the typical administrative act and the preliminary administrative operation.

The question from which we started is the one according to which: *Is the decision to individualize the sanction an administrative act or a preliminary operation?*

From the identified case law, it can be concluded without exception that the court did not recognize the decision as an administrative act according to art. 2 para. (1) lett. c) of Law no. 554/2004 on administrative litigation. In this regard, it noted that the decision does not produce direct legal effects on the economic operator, it is part of the internal procedure for substantiating the sanction, which is ultimately embodied in the contravention report, the only act with direct and enforceable effect and, last but not least, there cannot be two parallel appeals for the same sanctioning content (decision and report).

Thus, due to both an unclear formulation perhaps in secondary legislation, but also a misunderstanding of the concept of decision, it can lead to an illegal situation in which two courts of different levels judge the same thing, at least one of them violating the exclusive competence of the other. In order to prevent such situations, it is obvious that we cannot confuse the decision of the administration as a volitional process with the decision as an administrative act. Finally, for better clarity of the legal norm, but also of the decision-making procedure that ends with the sanctioning of the operator with a fine related to the turnover, in our opinion, it would be appropriate to take over the model of most national legislations in European states, in the sense of sanctioning the operator by decision as an administrative act, without the need to issue a report of finding and sanctioning the contravention. Obviously, for this to be possible, it is necessary, and we formulate as a proposal de lege ferenda, to amend the specific primary legislation (Law no. 123/2012), correlative to the exemption from the application of Government Ordinance no. 2/2001 in the case of contraventions whose sanctioning is related to the operator's turnover.

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