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Subject-matter competence of courts concerning decisions of the Property Management Agency

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I. ABSTRACT

The present article calls the readers’ attention on a specific aspect of the Albanian legislation in force, the area of property law. More specifically the articles deals with the role of the Property Management Agency, as the public body legally qualified to regulate issues related to property, the amendments made to the law on property since 1993 to date, by focusing on the current law no. 133/2015 “on the treatment of property and finalization of the process of compensation of property”. Regardless of the amendments and the novelties this law brought in the process of property management, it nonetheless created a set of problems throughout the case law in relation to exercising the right to appeal against decisions of the Property Management Agency, which has subsequently triggered a conflict of competence between the administrative and civil courts.

KEY WORDS: Property Management Agency, the right of appeal, declaring lack of competence, decision on the merits, administrative acts.

ABBREVIATIONS:

APC	Administrative Procedure Code
ARCP	Agency on Restitution and Compensation of Property
CC	Constitutional Court compensation of property”
CPC	Civil Procedure Code
DCoM no. 221/2016	Decision of the Council of Ministers no. 221, dated 23.03.2016 “On the organization and functioning of the Property Management Agency”
DCoM no. 222/2016	Decision of the Council of Ministers no. 222, dated 23.03.2016 “On handling of requests for recognition and compensation of property”
ECtHR	European Court of Human Rights
Law no. 133/2015	Law no. 133, dated 05.12.2015 “On the treatment of property and finalization of the process of property compensation”

Law no. 49/2012	Law no. 49, dated 03.05.2012 "On the organization and functioning of administrative courts and adjudication of administrative disputes"
Law no. 7698/1993	Law no. 7698, dated 16.04.1993 "On restitution and compensation of property to former owners"
Law no. 9235/2004	Law no. 9235, dated 29.07.2004 "On the restitution and
LCRCP	Local Commissions on Restitution and Compensation of Property
PMA	Property Management Agency
SCRCP	State Committee on Restitution and Compensation of Property

II. BACKGROUND OF THE LEGISLATION ON THE RIGHT TO PROPERTY IN ALBANIA

The law on the right to property has undergone considerable amendments from 1993 to date. The background of amendments of the property law, shall be briefly described below:

i. Law No. 7698/1993 "On restitution and compensation of property to former owners"

Being the first law endorsed in the area of property rights, it recognized the right to property of former owners and their lawful heirs in relation to property which was unfairly taken by the state, expropriated or confiscated in compliance with legal acts, sublegal acts or court decisions issued after the 29th of November 1944[1]. Furthermore, this law foresaw the cases and conditions through which subjects to which the property right was recognized, could request its restitution in kind, compensation in kind or its respective value, in compliance with the requirements therein. The law tasked the Council of Ministers as the sole competent body, with the issuing of the necessary sublegal acts, taking of organizational measures on the implementation of this law[2], as well as defining additional detailed rules on the methods and deadlines for the compensations.

Establishment of SCRCP attached to the Council of Ministers was provided for in Article 25. Whenever former owners had not found remedy in this law, they could resort to SCRCP but however, this provision was too general and it failed to mention specifically the cases when the former owners could resort to SCRCP. On the other hand, this law did not foresee a deadline within which decisions of the SCRCP could be appealed, therefore entailing their non-enforcement[3].

[1] Article 1, of Law No. 7698/1993 "on restitution and compensation of property to former owners"
[2] Article 28, of law no. 7698/1993 "on restitution and compensation of property to former owners"
[3] Driza vs. Albania, Appeal No. 33771/02, Judgement of 13 november 2007

ii. Law No. 9235/2004 "On restitution and compensation of property"

Together with the abrogation of the previous law, the adoption of this law brought novelties in the area of property rights. By means of this law, subjects could now claim the settling of disputes on property rights which had emerged following expropriations, nationalizations or confiscations, and the restitution of property or its compensation[4]. Furthermore, the law established the procedures and competent administrative bodies for the restitution and compensation of property. LCRCPs were for the first time established in implementation of this law and performed their activity at the regional level, being responsible for making decisions on recognition or non-recognition of the property rights for expropriated subjects.

The SCRCP was also established in implementation of this law, composed of five members to be appointed and discharged by the Parliament, in compliance with the procedures provided therein[5]. Numerous competences[6] were conferred on SCRCP by means of which, it could among others take decisions on appeals against decisions of LCRCPs. The law supplied detailed provisions stating that the right to appeal against decisions of LCRCPs was to be exercised by resorting to the SCRCP, within the deadlines and manner stipulated in the APC[7].

iii. Law No. 9583, dated 17.07.2006, "On some amendments and addenda on Law *No. 9235, dated 29.07.2004 "On restitution and compensation of property*"

Law No. 9583, dated 17.07.2006, introduced several amendments to the Law No. 9235, dated 29.07.2004 "*On restitution and compensation of property*". This law, *inter alia*, provided for the establishment of ARCP, as a new body with the headquarters in Tirana and branch offices in every region, having the competence to admit, examine and decide on claims of subjects on the restitution or compensation of property[8]. Offices at the regional level would initially handle requests of the expropriated subjects for property situated within the territory of their region and would issue decisions on the recognition or non-recognition of the property right, whereas the central office in Tirana, would among others, examine the appeals against decisions of the ARCP office[9] at the regional level.

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[4]Article 1, of Law no. 9235, dated 29.07.2004 "on restitution and compensation of property"
[5]Article 15 of Law no. 9583, dated 17.07.2006 "on some amendments and addenda on the law no. 9235, dated 29.07.2004 "on restitution and compensation of property" as amended.
[6]Article 16 of law no. 9235, dated 29.07.2004 "on restitution and compensation of property": *"Komiteti Shtetëror për Kthimin dhe Kompensimin e Pronave ka këto kompetenca: a) shqyrton dhe merr vendim për ankesat ndaj vendimeve te komisioneve vendore te kthimit dhe kompensimit te pronave, me përjashtim te rastit te parashikuar ne nenin 19 te këtij ligji;……..gj) përcakton mënyrën e zëvendësimit te eksperteve ose anëtarëve te komisioneve vendorekur ata janë ne kushtet e pengesës ligjore për kryerjen e veprimtarisë*"
[7] Article 20, paragraph 1, of Law no. 9235, dated 29.07.2004 "on restitution and compensation of property"
[8] Article 15 of law no. 9583 dated 17.07.2006 "on some amendments and addenda on law no 9235 dated 29.07.2004 "on restitution and compensation of property" as amended.
[9] Article 16, point 1, of law no. 9583, dated 17.07.2006 "on some amendments and addenda in law no. 9235, dated 29.07.2004 "on restitution and compensation of property" as amended.

iv. Law No. 133/2015 "on treatment of property and finalization of the process of compensation of property"

Reckoning the chronology of amendments made to the laws on property issues and considering suggestions of the international jurisprudence through the pilot decision "*Manushaqe Puto and others v. Albania"* (a fact which is also highlighted in the explanatory report of the law), the need arose for improvement of the legislation on property management in Albania. In fact, ECtHR remarked that none of the Albanian laws which regulated property rights, did contain any provisions related to the enforcement of decisions of the Commission as well as that there were no legal provisions on the deadline for filing an appeal against such decisions with the domestic courts or another competent authority established by law[10]. Accordingly, the Albanian state had the obligation to undertake the necessary legal and institutional steps to definitely settle[11] the process of restitution and compensation of property.

Therefore, the adoption of Law no. 133/2015 "On treatment of property and finalization of the process of compensation of property" followed, it repealed the preceding law (law no. 9235/2004) and had as its objective to incorporate recommendations imposed by the ECtHR in relation to the restoration of the infringed property rights to all former owners. This law introduced novelties in the area of property law because it provided for:

- the methodology related to financial calculation, forms of compensation and assessment of property. As a result, the Property Compensation Fund was established and made available for compensation for the final compensation decisions[12]. Therefore, compensation decisions indicate a clearly determined economic and financial value, a fact which is useful for their enforcement;

- the establishment of PMA[13], as the sole competent body which admits, completes, examines and takes decisions on the requests of the expropriated subjects. The PMA is established in implementation of this law as subordinate to the Ministry of Justice and is managed by the General Director, who among others, represents the institution in relations with third parties, approves the Internal Regulation of PMA or performs any other tasks in compliance with this law and other sublegal acts in force[14];

[10]Manushqe Puto and others against the Republic of Albania, Appeals no. 604/07, 43628/07, 46684/07 and 34770/09, Judgement of 31 July 2012.
[11] Decision of the Constitutional Court No. 1, dated 16.01.2017, page no. 5
[12]Article 9, paragraph 1 of Law No 133/2015 "on the treatment of property and finalisation of the process of compensation of property".
[13] Article 26, of law no. 133/2015 "on the treatment of property and finalisation of the process of compensation of property".
[14] Point 6, of DCM no. 221/2016 "on the manner of organization and functioning of the Property Management Agency .

o the right of every interested party to exercise its right to appeal against decisions of PMA within 30 days, with the Civil Court of Appeal[15].

III. ROLE OF THE PROPERTY MANAGEMENT AGENCY

The Property Management Agency is the only body, established as a public legal person[16] competent to handle and regulate property issues. The essence of the PMA's activity is restitution and compensation of property, a considerably complex issue in Albania, which has continuously created problems that started to emerge since 1993 with the endorsement of the first law on the restitution and compensation of property[17]. The main objective of this body is the fulfilment of public interests and as a public law subject, it exercises state functions or some public administration functions in compliance with the legal or sublegal acts in force.

While exercising its public functions[18], the PMA expresses its will through the adoption of acts of an executive nature, which are mandatory for the subjects to which these decisions are addressed. As mentioned above, the main mission of the PMA is:

i. Examination of requests of the expropriated subjects; and
ii. Examination and assessment of requests for obtaining the recognised right for compensation[19].

Following examination of requests or documentation submitted by the subjects in compliance with the procedures contained in the DCM No. 222/2016 as well as in implementation of the Law No. 133/2015 and DCM No. 221/2016, the PMA is entitled to take a decision concerning the treatment, recognition or compensation of the property, which more often than not creates a confusion in the interested parties, defence counsels and even interpreters of the law (including the courts), who sometimes consider such decision as an administrative act (within the legal definition provided by the APC) and other times as a "*quasi*" judicial decision[20]. This controversy is also reflected in court decisions which often fail to determine correctly the legal nature of decisions taken by the PMA, by not being able to identify the type of dispute, whether it is civil or administrative, which is crucial and serves for the designation of the subject-matter competence[21] of the courts.

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[15] Article 29 of law no 133/2015 "on the treatment of property and finalisation of the process of compensation of property".
[16] Article 5, paragraph 1, of law no. 133/2015 "on the treatment of property and finalization of the process of compensation of property".
[17] Law no. 7698, dated 15.04.1993 "on ownership".
[18] Article 2, point 1, indent (a) of Law no. 44/2015 "Administrative Procedure Code".
[19] Point 1 of DCM no. 221/2016 "on the organization and functioning of the Property Management Agency".
[20] Decision of the Civil Chamber of High Court No. 642 dated 16.03.2017, page no. 6.
[21] Decision of the Civil Chamber of High Court No.58, dated 16.03.2017, page no. 5.

If we refer to article 8 of the Law no. 49/2012 "*On the organization and functioning of the Administrative Courts and the adjudication of administrative disputes*", which provides as follows: "*An administrative court does not examine disputes*: *a)related to normative subordinate legal acts that according to the Constitution, are in the competence of the Constitutional Court*; *b)**the examination of which, according to the legislation in force, is in the competence of another court***", it is noted that this provision stipulates that the administrative court lacks the competence to adjudicate all those disputes which despite being of an administrative nature, have been sent for competence to civil courts, upon a separate law. In these cases, such disputes shall be adjudicated by these courts. Considering that Law No. 133/2015 provides that appeals against PMA decisions as a *quasi* judicial body, shall be examined by the Civil Court of Appeal in implementation of the principle of article 8 of Law 49/2012 mentioned above, it results that decisions of the PMA cannot be examined by the Administrative Court. Nonetheless, as it will be explained below, the issue of competence is much more complex than this.

IV. RIGHT TO APPEAL AGAINST DECISIONS OF THE PROPERTY MANAGEMENT AGENCY

As mentioned above, the law in force on the treatment of property, Law No. 133/2015, recognizes the right of PMA, as the sole body competent for examining the requests of former owners, to issue decisions on the recognition or non-recognition of the property rights. In relation to appeals against the PMA decisions, article 29 of the Law No. 133/2015 stipulates that: *"The interested parties and the State Advocate Office have the right to file an appeal against the decision of the PMA on the recognition of the right, within 30 days from notification of such decision, to the Appeals Court, pursuant to the rules of the Code of Civil Procedures of the Republic of Albania."*

Pursuant to the interpretation of the legislator, the PMA decisions shall be considered "*quasi*" judicial, and in this case, the PMA plays the same role as courts of first instance and acts in the capacity of a *quasi* court, which jurisdiction is provided by law. Consequently, no public body enjoys the right to review such decisions and their appeal is deposited with and examined by a higher level court, notably the civil court of appeal. Therefore, although the right to appeal against a judicial decision before a higher court is recognized to anyone, in the case in question, when the PMA assumes the capacity of a *quasi* court and the appeal according to the legislation in force must be submitted to the Civil Court of Appeal, the question arises whether avoiding one instance of adjudication is in compliance with the constitutional standard of the right to have an effective appeal supported by the CC and ECtHR[22].

In its Decision No.1 of 16.01.2017, the Constitutional Court states as follows: *"the right of appeal foreseen by law no. 133/2015 meets the criteria of having a judicial review of the acts issued by administrative or quasi judicial bodies....the state is under no obligation to foresee*

[22]Decision of the Civil Chamber of High Court No. 358, dated 16.03.2017, page nr. 2.

more than one instance of appeal, for as long as appeals can be submitted in a court as stipulated by law, within the meaning of article 43 of the Constitution and article 13 of the ECHR."

Prior to the adoption of the new law no. 133/2015, by default, the right to appeal against decisions of the commissions for the restitution and compensation of property could be effectuated in the court of first instance[23], based on the general rules of CPC, a fact indicating that although the previous law did not contain any provision in relation to the appeal, practice showed that the subject-matter competence of the first instance civil courts on such cases, had already been determined. Whereas article 29 of the new law No. 133/2015 foresees that decisions may be appealed against only when the PMA recognises the subject's right to property, however the law fails to provide for the procedure on how will subjects act in cases when the PMA closes the administrative proceeding by not taking a decision on the merits. In these cases, the question arises: *in which court shall the legitimate subjects who need to exercise their right of appeal, resort to?*

Closing of the administrative proceedings by the PMA by means of a decision, when decided unilaterally by the PMA and without the participation of the subjects during the administrative proceedings (DCM no. 222/2016 does not foresee the participation of subjects), is at variance with the principles of administrative proceedings, because it violates several constitutional rights of the subjects such as the right to be heard, the right to defence or the right to submit claims prior to the PMA issuing its decision. Therefore, if we refer to the fair legal process, we may say that in such cases, the right to adversarial proceedings[24] of the appellant has been breached. This brings up the question whether the Civil Court of Appeal may exceed its competence for such cases and examine the adequacy of administrative proceedings (in cases when the PMA decision shall be appealed with the Civil Court of Appeal). For similar cases, the case law has been as follows:

The Civil Court of Appeal,[25] for those cases when the PMA has not issued a decision on the merits but has limited itself with the closing of the administrative proceedings, has stated that it lacks the subject-matter and functional competence for examining the case as a court of first instance. The Court deems that the PMA has the obligation to issue a decision on the merits in relation to recognition or non-recognition[26] of the property right, therefore the court holds that when the administrative proceedings is closed, there is no decision on the merits which according to the law may be appealed with the Civil Court of Appeal, but an administrative decision which may be appealed with the First Instance Administrative Court. The Civil Court of Appeal in its decision No. 189, dated 16.03.2017 holds that "*...the decision to close the*

[23] Decision of the Civil Chamber of High Court No. 369, dated 07.04.2017, page nr. 5.
[24] Decision of the Civil Chamber of High Court No. 358, dated 16.03.2017, page nr. 3.
[25] Decision of the Tirana Court of Appeal no. 189, dated 16.03.2017, page nr. 1.
[26] Article 33 of law no. 133/2015.

administrative proceedings, is an administrative act which is not foreseen by law no. 133/2015 and which in its essence expresses the failure to act of the administrative body". Furthermore, the Civil Court of Appeal[27] referring to article 7 of law 49/2012, foresees that the first instance administrative courts among others are competent for "*disputes which arise from individual administrative acts, normative sublegal acts and public administrative contracts issued during the exercising of administrative activities by the public body",* therefore defending its argument that cases with this subject-matter of adjudication must be handled by the administrative courts according to article 45 of the CPC.

The Administrative Courts of First Instance[28] have acted in a similar manner. Whenever the ATP does not issue a decision on the merits but closes the administrative proceeding, they declare lcak of competence under the justification that law no. 133/2015 explicitly stipulates that the ATP decisions may be appealed against with the Court of Appeal, as the competent court.

Whenever the Civil Court of Appeal and the First Instance Administrative Court consider at the same time and for the same case that they lack competence to adjudicate the dispute, they find themselves in front of a negative conflict of competences[29]. When confronted with such situation, the only legal means to be followed by the courts is submitting the dispute to the High Court, as provided for in Article 64 of the: "*The case, which is sent for consideration from a court to another one of the same level or by a higher court, should be accepted and reviewed by the court to which the case is sent.* ***Conflicts between the courts regarding competence are not permitted, but the court, without interrupting the trial of the case, has the right to present its position to the High Court which decides on the competence*** *according to the rules set forth in the second paragraph of Article 63 of this Code.*"

To illustrate the above, we may refer to a concrete case from the case law. Upon Decision No. 783 of 30.12.2016 the PMA decided to close the administrative proceeding with the argument that the technical-legal documentation deposited by the claimant was not complete and in line with the requirements of the law and sublegal acts in force[30]. The claimant filed a lawsuit with the First Instance Administrative Court, requesting the repeal of PMA Decision claiming that the decision to close the administrative proceedings could not be considered a decision on the merits according to the provisions of the law No. 133/2015. The First Instance Administrative Court, upon its Decision No 80-2017-2143, dated 16.05.2017, decided to declare lack of subject-matter competence and forwarded the case to the Civil Court of Appeal. On the other hand, the latter upon Decision No. 497 of 04.07.2017, decided to resort to the High Court on the conflict over the subject-matter competence between the two courts. To date, the examination by the High Court in relation to the subject-matter competence of those decisions of the PMA which are not

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[27] Decision of the Tirana Court of Appeal no. 497, datë 04.07.2017, page nr. 3
[28] Decision of the Administrative Court of First Instance no. 2143, dated 16.05.2017, page nr. 2
[29] "Administrative law, control on public administration", E. Dobjani; E. Puto; E. Toska; E. Dobjani, pageno. 117
[30] Decision of the Property Management Agency no. 783, dated 30.12.2016, pageno. 2

decisions on the merits (recognition or non-recognition) but decisions on the closing of the administrative proceedings, is pending.

V. CONCLUSIONS AND RECOMMENDATIONS

Referring to the explanatory report of the Law no.133/2015, it results that: *"...the draft law is proposed with the aim of protecting and guaranteeing human constitutional and fundamental rights and freedoms, as a way to mend the unfairness during the process of naturalization of private property during the communist regime…".*

Further, on the law establishes the PMA as the sole administrative body for the examination of requests of former owners, and it attributes to the PMA *quasi* judicial functions, considering that it has the obligation to issue decisions on the recognition or non-recognition of the property right. The PMA in this case exercises functions of the court of first instance, whereas the procedure of judicial appeal against decisions of this administrative body, foresees the means (Civil Court of Appeal) and the deadline for the appeal (30 days), by meeting in principle the constitutional standard of the right to appeal[31].

However, irrespective of the amendments introduced by the Law 133/2015 on the management of property issues, it still leaves room for different interpretations which create problems for:

i. former owners and their lawful heirs, in relation to exercising of the right to appeal for restoring infringed property rights;
ii. a conflict of competence between administrative and civil courts on issues illustrated above (closing of administrative proceedings);

The law grants to former owners and their lawful heirs the right to appeal only in the case when the PMA takes a decision on recognition or denial of the property right, however the law does not provide for the procedure to be followed when the dispositive part of the decision of the PMA states the closing of the administrative proceedings.

PMA is under the legal obligation to take a decision to overturn the claim or recognize the property right in compliance with the principle of lawfulness and the principle of transparency, provided for in the APC, as well as under the obligation to use the most effective practice for the protection of the lawful interest of subjects in the cases of closing of administrative proceedings, in compliance with the principle of active assistance. Referring to provisions of Law no.133/2015 the PMA may not close the administrative proceedings, but it rather has the obligation to continue examining the claims submitted by former owners or their lawful heirs and then issue a decision on the merits, containing the recognition or lack or recognition of the right to property, providing for restitution, and compensation of the property.

[31] Decision of the Constitutional Court no. 1, dated 16.01.2017, page no. 19

Referring to the provisions of Law no. 133/2015, even though decisions of the PMA are considered acts issued by an administrative body and as such need to be adjudicated by the first instance administrative court, the lawmaker has determined that the right to appeal against *quasi* judicial decisions of the agency, shall be dealt with only by the Civil Court of Appeal, as the competent court to examine judicial cases concerning property rights.

In principle, appealing against the decisions of PMA with the court of appeal may avoid lengthy proceedings on recognition of property as one of the main objectives of law no.133/2015. However, it carries numerous problems related to the right to appeal against non-merits decisions of the PMA which have caused a conflict of competence between the courts, and which still remain unsettled by the case-law of the higher judicial instances.

It is worth mentioning that the decisions on lack of competence of civil and administrative courts for the examination of non-merits decisions of ATP, are the consequence of a wrong assessment of the facts and of the law, and they do create harmful practice for the proper conduct of trials, as well as for the judicial economy in general[32].

Unification of the case law through a unifying decision of the high court shall ensure a fair balancing of powers between the administrative judiciary and the civil judiciary[33], which will serve to avoid in the future similar cases of subject-matter competence between administrative and civil courts.

[32] Decision of the Tirana Court of Appeal no. 497, dated 04.07.2017, page no. 2
[33] "Administrative law, control on public administration", E. Dobjani; E. Puto; E. Toska; E. Dobjani, page no. 118