The Role of the Public Administration and the Methods Used to Reduce the Effects of the Economic and Financial Crisis

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Abstract: The current worldwide economic crisis brought back into discussion a topic long debated in the legal scholarship, pertaining both to administrative law, as well as to corporate and financial law, namely the optimal relationship between the self-regulation of the corporate and financial sector and its regulation and auditing by the institutions of the public administration[4].

Keywords: crisis; public administration; employees

By their nature, rules pertaining to corporations, as well as banking and investment institutions are integrated into private law, since most of the relationships between their different agents (investors, clients, suppliers, employees) are mostly of a contractual nature.

Therefore, in most developed countries, the corporate and financial sector seems almost detached from public law, due partly to its tendency of self-regulation. The self-regulation of the corporate and financial sector is a reflection of the contractual freedom according to which the contracting parties enjoy full freedom in determining the terms which govern their relationship and which affect only the parties to the contract.

From this rather simplistic viewpoint, corporations, including, for purpose of this article, those which provide financial services, are regarded as closed entities able

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[4] Robert A. G. Monks and Nell Minow point out two essential mechanisms of coordination of corporate governance by the public system namely legislative, as well as auditing and evaluation functions of corporate governance by public institutions in Corporate Governance, 4th Edition, p. 20.

to create their „internal laws" through a „web of contracts" (Fama & Jensen, 1998). Furthermore, the regulation of the financial and banking sector can also be done through the voluntary delegation of certain legislative and audit functions of the public administration to a body comprising of the corporations or individuals which the particular rules are addressed to (Ogus, 1999, p. 590)[1].

From this point of view, numerous authors depict several characteristics considered to be the main arguments in favor of the self-regulation of the corporate and financial sector, as opposed to their regulation by the institutions of the public administration. Among those are the fast access to information by the members of the financial sector, the innovation potential to create new financial products with increased economic efficiency, the lack of bureaucracy and corruption. (Grajzl & Murrell, 2007, p. 520)

In an economic analysis regarding the optimal division of the regulatory activity between the public administration and the institutions of self-regulation, Peter Grajzl and Peter Murell showed that self-regulation is preferred where there is a lot of uncertainty, when there is a populist government, or when the divergences between the interests of the financial and banking sector and those of the consumers are relatively small. On the other hand, when there is increased certainty or when the society is polarized with respect to the particular areas which are to be regulated, as well as when the consumer lobby groups are strong, it is preferable for the regulatory activity to come from the institutions of the public administration (Grajzl & Murrell, 2007, p. 529).

Furthermore, the often political choice between self-regulation and regulation by the public administration depends largely on the legal tradition of the respective state. For example, many authors point out that countries with a civil law tradition have a stronger tendency to organize the activities of the financial and banking institutions through legislative acts of the public administration (Grajzl & Murrell, 2007, pp. 530-534)

On the other hand, the common law tradition offers greater flexibility to the judiciary, which, through their case-by case ruling, creates a certain set of principles and codes of conduct, which are easily adaptable and relatively easy to change in accordance with the transformations of the financial and banking market (Zweigert & Kötz, 1992, pp. 273-278).

[1] Available at http://encyclo.findlaw.com.

In spite of an impressive number of studies which suggest that the self-regulation of the financial and banking sector increases efficiency and the quality level of the services rendered, two very important aspects must be considered.

Firstly, it is important to bare in mind that self-regulation is not synonymous with the lack of regulation by the public administration. On the contrary, one of the premises of efficient self-regulation is the existence of regulations of the central public administration which define key objectives and which set rules and procedures of audit of the self-regulation institutions.

Secondly, self-regulation of the financial and banking sector may have strong deficiencies in protecting investors, employees and consumers in general, due to the discrepancy between the interests of the financial sector to increase profit while diminishing costs and the interest of the consumers to lower risks. In this regard, the public administration has a key role in monitoring the activity of the financial and banking institutions in order to ensure respect of the interest of consumers and the civil society at large. (Omarova, p. 703)

As it has been shown throughout history, the so-called „banking panics" bring back into discussion the devastating effects of systemic risks generated by the bankruptcy of some of the financial and banking institutions. Starting from the 20th century, also due to a major economic crisis, that of 1929, numerous American authors raised the attention regarding the fact that an optimal system of corporate and financial governance is one of the determinative factors of socio-economic development (Sapovadia, 2007, p. 679)[1].

In this context, public administration has the extremely important role to rebalance the interests of the financial sector against those of consumers. Since the legislative framework both in the European Union and the United States did not prove sufficient to prevent the recent world financial crisis, countries on both sides of the Atlantic have concentrated on a reform in the financial and banking sector.

In an analysis regarding the legislative measures post-crisis, Saule T. Omarova[2] (p. 679) shows four characteristics of both the EU and the US legislative reforms:

1. re-establishing the structure, functions and jurisdictional limits of the governmental agents who monitor the activity of the financial sector;

[1] Available at http://ssrn.com/abstract=1015325.
[2] Saule T. Omarova, 35 Brooklyn J. Int'l L. 665, p. 679.

2. regulating the financial products and activities which were not incorporated in the previous laws and regulations regarding the financial and banking sector;
3. increased monitoring of those financial institutions considered of „systemic importance”;
4. auditing of cross-border financial and banking transactions through increased co-operation between the national administrative authorities which are tasked with the regulation and auditing of the financial and banking institutions. Therefore, at the G-20 Summit in Seoul in 2010, the member states' governments established the Financial Stability Board tasked with monitoring global systemic risk generated by cross-border financial and banking activities.

Furthermore, in the Report of the Ninth Congress of the Committee of Experts on Public Administration of the Economic and Social Council of the United Nations, mention is made to the fact that a body of civil servants well trained and fairly compensated is indispensable for ensuring efficient management by the public institutions in periods of crisis[1].

Moreover, in the same report it is shown that in such periods of economic instability, the public administration must regain citizens' confidence in the public institutions, must rethink the role and functions of local and central administrative institutions, redefine public-private partnerships and establish the structures and mechanisms for participative democracy through which citizens can take part in innovative measures to overcome the crisis[2].

Such a reform in the public administration generated by the world economic crisis can be observed in the United States of America, through the creation of the Recovery, Accountability and Transparency Board. This Board has generated an intense public debate regarding the technological measures which can be implemented within the public institutions, which could facilitate the dialogue between the civil servants and the different interests groups among the civil society (consumers, employees, producers etc.) as well as experts from different fields, who could bring suggestions for different measures needed to overcome the crisis[3].

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[1] Committee of Experts on Public Administration, Report of the 9th session (19-23 April, 2010) E/C.16/2010/5, p. 8.

[2] *Ibidem*, pp. 8-10.

[3] For details, see: A Report by the National Academy of Public Administration for the Recovery, Accountability and Transparency Board, available at http://www.napawash.org/wp-content/uploads/2009/09-07.pdf.

On the other hand, the report of the Committee of Experts on Public Administration pointed out that in order to regain citizens' confidence in the public administration, it is important for the public institutions to implement management plans which would reflect an increased capacity of co-ordination and management. Particularly in periods of crisis, the measures taken by the public administration institutions must ensure citizens are properly informed of all developments through a transparent social and political dialogue.[1].

At the same time, two public institutions have an especially important role in post-crisis period: the national and regional audit institutions, which must monitor the allocation and spending of public funds by the public administration in periods of crisis and post-crisis, and the Ombudsman, who must monitor the activity of the public institutions in periods of crisis and ensure the respect of citizens' rights, especially the right to information[2].

Furthermore, in the report made public on the 27th of January 2011[3], the US Financial Crisis Inquiry Commission pointed out two main causes which generated the crisis, namely: 1) poor corporate governance and 2) the inefficiencies of the government regulations which should have ensured the safety and coherence of the financial system.

Although the demand for public services grows in periods of crisis, due to high unemployment and income decrease, resources and therefore the public administration's capacity to efficiently responde to public demand are also severely affected. Mention was therefore made that overcoming the crisis must procede with a „reform of the reformers"[4]. This expression alludes to the fact that public administration institutions cannot generate a reform in the financial and banking sector without themselves undergoing an internal reform in order to increase efficiency and public confidence, which it depends on in periods of economic instability[5].

[1] Ninth Session of the Committee of Experts on Public Administration, Note by the Secretariat – Challenges to and Opportunities for Public Administration in the Context of the Financial and Economic Crisis, E/C.16/2010/2, p. 9.

[2] *Ibidem*, p. 10.

[3] Final Report of the US National Commission on the Causes of the Financial and Economic Crisis in the United States, available at http://www.gpoaccess.gov/fcic/fcic.pd.

[4] Reform Beyond the Crisis, OECD, p. 8 (2009).

[5] Government at a Glance, OECD, p. 30 (2009).

In this sense, the OECD report from 2009 "Governance at a Glance" mentions two key aspects of governance which a solid public administration must be based on in order to prevent periods of economic crisis, namely 1) creating policies based on proof and impact studies; 2) ensuring integrity in the public sector; 3) efficient co-ordination of different policies and programs enacted at the different levels of central and local administration; 4) fiscal sustainability through the implementation of long term fiscal projects[1].

Furthermore, the OECD analysis regarding the factors which generated or increased the economic crisis points out the deficiencies in corporate governance, considering that the central public administration has an important role in maintaining an open, competitive and sustainable market and to prevent abuses, including economic crimes[2].

Taking into considerations these general observations regarding the way in which the public administration can and must respond to the demand for economic and financial recovery, it is interesting to observe, as follows, the financial reform initiatives in the EU and the US.

In the EU, the main direction of reform is the orientation to macro-prudential overseeing, starting from the conclusion of the European Commission that the interested parties, for example, the financial institutions, investors and consumers will not have the necessary confidence to participate in cross-border financial activity unless mechanisms will be established to take account for the interdependency between micro-prudential and macro-prudential risks[3].

According to the recommendations of the Larosiere group [4] and the suggestions of the European Commission[5], the main institutions which will commit to the EU's goal for macro-prudential overseeing are the European Systemic Risk Board and the European System of Financial Supervisors. The Systemic Risk Board is responsible for the „macro prudential oversight of the financial system within the

[1] Government at a Glance, OECD, p. 20-21 (2009).
[2] OECD Strategic Response to the Financial and Economic Crisis, Contributions to the Global Effort, available at http://www.oecd.org/dataoecd/33/57/42061463.pdf
[3] Proposal for a Regulation of the EU Parliament and of the Council on Community Macro-prudential Oversight of the Financial System and Establishing a European Systemic Board, COM (2009) 499 final, p. 3.
[4] The High-Level Group on Financial Supervision in the E.U., De Larosiere Report (Feb. 25, 2009).
[5] Proposal for a Regulation of the EU Parliament and of the Council on Community Macro-prudential Oversight of the Financial System and Establishing a European Systemic Board, COM (2009) 499 final, p. 3.

Community in order to prevent or mitigate systemic risks, to avoid episodes of widespread financial distress, contribute to smooth functioning of the Internal Market and ensure a sustainable contribution of the financial market to economic growth.[1]" It is interesting to observe that this committee does not have legal personality, but was instead conceived as a „reputation body, with a high level membership that should influence the actions of policy makers and supervisors by means of its moral authority"[2]. This type of governance is similar to the common law approach, based on recommendations, guidance and general principles, as opposed to the one based on laws and regulations.

In what the European System of Financial Supervisors is concerned, according to the legislative proposal of the European Commission, it consists of a network of national authorities of financial supervision, which are created through the transformation of the current European Supervisory Committees in a European Banking Authority, a European Securities and Markets Authority and a European Insurance and Occupational Pensions Authority[3].

Furthermore, considering the System of European Financial Supervisors as a starting point, Eric J. Pan (2010) suggested „*creating a model of international public administration, by establishing an international organization tasked with overseeing multinational financial institutions, which can ask the national supervising authorities to intervene, which can propose standards of monitoring of the financial institutions, can audit them and even apply sanctions*".

In the United States, the Financial Stability Oversight Council has similar attributions to those of the European Committee for Systemic Risks, namely a) identifying the risks for financial stability in the United States; b) promoting market discipline and transparency, mainly in order to avoid expectations from financial and non-financial institutions that they might be protected and bailed out by the state in case of loss of funds and c) finding solutions for the new systemic threats to financial stability. (Masera, 2010, p. 308)

Unlike the reform framework in the EU, where the new Board for Macro-prudential Oversight is an entity separated from those which ensure micro-prudential oversight, in the US the director of the Financial Stability Oversight Council is also the director of the Office of Financial Research which is aimed to

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[1] *Ibidem*, p. 2.
[2] *Ibidem*, p. 5.
[3] *Ibidem*.

identify those financial institutions of systemic importance and to bring them under the regulation of the Federal Reserves. (Masera, 2010, p. 308)

Probably the most important tendency which becomes apparent from a comparison of the financial reform in the EU and the EU is that of convergence of the principles which the reforms are based on and an impressive similarity of the administrative institutions which ensure the attainability of these principles on both sides of the Atlantic. Starting from the statistics which show the fact that the financial exposure of the banks and states of the EU are surprisingly interrelated to the banks and the government of the US (Masera, 2010, p. 323), the reform agendas from both parts of the world reflect an increased interest for co-operation and legislative and institutional harmonization. (Masera, 2010, pp. 334-335)

The need to diminish the effects of the world economic crisis seems to create a system of global governance in which either monitoring and regulation functions are delegated to international organizations, such as the International Monetary Fund, or a stronger operational and legislative convergence is intended.

In the attempt to re-stabilize the economy and to regain citizens' trust in state institutions, the public administration bears the important responsibility to replace its central position in the general framework of public governance[1]. This repositioning of the public administration in times of crisis depends on a crucial choice by the public administration institution, especially the government, between a long term and a short term strategy, as well as on the level of coordination of the public governance activities and the level of politicization of the decisions and measures for economic stability. (Peters, pp. 13-27)

Although the globalization process led to the creation of transnational institutions of public governance, the main tasks of the public administration at national and local level, such as increasing legality, justice, human rights protection and ensuring a democratic decision-making process, must not be neglected. (Kingsbury, 2005)

The international dimension of the financial crisis therefore led to the creation of international and intergovernmental institutions to regulate the economic and

[1] Second Regional Roundtable on Reassessing the Governance Reform Agenda After 20 Years of Transition and the Global Economic Crisis, Panel III: Improving the Machinery of Government, Demetrios Argyriades, Institutional Restructuring and Public Service Reform, p. 10, available at http://www.rcpar.org/mediaupload/events/2010RegionalForum/20101030_Argyriades_BackgroundArticle_ENG.pdf

financial sectors seen from the perspective of the multiple interdependencies between the economic and financial institutions of several states. Such an example is the Basel Committee of Banking Supervision which determines standards applicable to financial institutions of different countries, which are then adopted through national legislation. (Barr et al., pp. 15-16)

The activity of such transnational institutions tends to amplify with globalization and the economic integration of states in regional markets, such as the European Union. (Esty, 2006)

It is important to mention that a relatively uniform structure of co-operation between the public and the private sector, recognized and applied both in developed, as well as in developing states, is structured on the elements of the new economic theory on the public sector, which determined a new approach in the management of public resources, in terms of opening it to the market mechanisms, to ensure increased efficiency through transparency and responsibility. Important steps in this direction were made by reducing the field of action of mechanisms of public law and introducing mechanisms specific for the private sector, objective the attainment of which is significantly ensured by public-private partnerships (Raţiu, Gherghina, 2011, p. 21)

Furthermore, periods of economic instability forces the public administration institutions to an international co-operation which can generate an institutional and legislative framework outside the mechanisms of democratic control of different states[1].

Therefore, several authors raised awareness of the fact that the activity of international institutions, including those tasked with monitoring and regulating the economic and financial sector, must at their turn be regulated by a „global administrative law". This emerging area of law refers to the structures, mechanisms and normative standards applicable in the decision-making process of the intergovernmental institutions, the informal transnational regulation networks, the regulatory activity of the national governments when they are part of or constrained by an intergovernmental structure, as well as the transnational private institutions and the public-private hybrid institutions. (Kingsbury et al., 2005)

[1] For a debate regarding the democratic legitimacy framework of international organizations see (Grainne de Burca, 2008).

Moreover, in order to fight the economic and financial crisis, the EU, its member states, but also the US are engaging in ambitious plans to stabilize the financial sector and limiting the effects of the recession on citizens and the real economy. Investments in infrastructure projects represent an important method of ensuring the continuity of the economic activity during crisis and return to rapid and durable economic growth.

According to the Statement of the European Commission to the European Parliament, the Council, the Economic and Social Committee and the Regional Committee, public-private partnerships can become efficient methods to accomplish the infrastructure building projects, to deliver public services and innovation in the general context of economic reform. At the same time, public-private partnerships are interesting instruments for long term structural development of infrastructure and services, by uniting the advantages of both the public and the private sectors[1].

All over the world, the governments of both developed and underdeveloped states struggle with ensuring better and broader services, with limited budgets.

Internationally the public-private partnership is considered a legal arrangement through which the resources, the risks and the rewards inherent both to the public agency and the private company are combined, to ensure increased efficiency, better capital access and better compliance with labor and environmental regulations.

The public interest in ensured, in the framework of the partnership, by including in the contract provisions referring to the existence of a permanent oversight of the development of the project.

In this way, within the public-private partnership all parties involved are being rewarded: the public entity, the private company and the public at large. The economic viability of a project is being determined by the private partners through his/her capacity to generate resources able to ensure the financing and distribution of the invested capital as well as the risks involved.

The public-private partnerships have a long tradition in France, manifested through the collaboration between the authorities of the public and private sectors regarding public goods concession, especially public services. Starting from the 20th century,

[1] COM(2009) 615 final on "Mobilizing Private and Public Investment for Recovery and Long-term Structural Change: Developing Public Private Partnerships".

the concession was more and more used in situations in which the administrative authorities aimed for more efficient public services, without being forced to invest important sums from the budget (Apostol Tofan, 2010, p. 177)

The system of public-private partnership at the local level which is common today, was shaped at the beginning of the 1980s, in western Europe and the US, through cooperation between the local authorities and the private sector, for the implementation of projects to restructure the destroyed industrial areas.

Analyzing those models which discuss the reform of the public administration, including the social dimension of the public-private partnership, it has been pointed out that the French model views the public administration as a public service, whereas the American model stresses the concepts of efficiency and the market. (Puie, 2011, p. 26)

In Romania, the first structures of public-private partnerships were formed ad-hoc, as a result of the development of regional or national strategies (National Strategy for Durable Development – 1999, The Strategy for medium-term economic development - 2000). Furthermore, a new structural framework was put in place, such as the Tripartite Commission and the Economic and Social Council. These partnerships have slowly contributed to the development of a cooperation environment between the social and the political actors, even though the latter played and still play an important role in the process of legitimizing a political action, whereas the partnerships are less involved in the decision-making process or the policy monitoring.

Furthermore, several forms of public-private partnership between the state and local partners are also found for infrastructure projects, such as the project Vivendi (privatizing the water distribution) in Bucharest.

In the last few years, the local authorities in Romania started to develop partnerships with the private sector and the civil society in order to ensure investment in infrastructure and services of local interest. This new approach, which is actually integrated in a general European trend, reflects the advantages of a public-private partnership, namely: dividing the costs of an investment, the risks associated with its development and overcoming the lack of resources available to the local administration.

Conclusions

The Romanian legal scholarship pointed out that a public-private partnership presupposes two stages: the first concerns taking a political decision to engage in a partnership, and the second is the administrative procedure which implements the political decision. This second stage generated legislative activity which should have increased the forms of collaboration between the public and the private sector. (Apostol Tofan, 2004, p. 95)

The public-private partnership is aimed at the design, the financing, the construction, the rehabilitation, the reform, operation, maintenance, development and transfer of a public good or service[1].

An example[2] of a public-private partnership from Romania is the one in which the District Council Constanta is involved and which aims to build a Pilot-Center for EU services for handicapped people. Several other partnerships are being considered to perform side-functions, such as building of protected housing for handicapped people in the area.

Considering all the above, a strategic approach for regional development and the establishment of a network between the different levels of local development are needed for the promotion of public-private partnerships. The local/district/regional development cannot be supported only by a regular structure of the public administration. A modern flexible administration is needed for the management of regional development and investment mainly through public-private partnerships.

[1] Art. 1 of Law no. 178 of October 1, 2010 of public-private partnerships.
[2] Public-private partnership solution for better management of local communities in Romania. Practical Guide for County Councils, the Institute for Public Policy (IPP), Bucharest, 2004, p 43-53.

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