Law no.165/2013 on measures for the completion of the process of restitution, in kind or by equivalent, of immovable property improperly taken over by the Communist regime in Romania, subject again to constitutional scrutiny. Case-law developments

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1. Introductory considerations. The premises and objectives of Law no.165/2013[1].

Developed based on pre-existing reparation laws[2], Law no.165/2013 was enacted in order to remedy severe disfunctionalities in the application of the legal regulations whose original purpose was to correct historical injustices made under the Communist regime in Romania but subsequently proved to be insufficiently configured to respond to the concrete realities, i.e. the multitude and variety of situations that exist in practice. The magnitude and complexity of the process of restitution of real estate abusively taken over by the Romanian State since the establishment of the first communist government (6 March 1945) until 22 December 1989 — whose true dimension could be hardly anticipated by the legislator at the time of adoption thereof — have gone beyond the actual legal remedies envisaged.

Law no.165/2013 was aimed at providing solutions which give effect to the process of restitution of these properties, incorporating and implementing the recommendations made by the European Court of Human Rights on this issue in the pilot decision of 12 October 2010 in the Case of *Maria Atanasiu and Others v. Romania*.

Laying down the principle of restitution in kind, Law no. 165/2013 introduced a new legislative vision on the equivalent remedies that can be granted when the restitution in kind of the immovable property claimed is no longer possible. Thus, together with the compensation by equivalent properties by the entity entrusted with the application of Law no. 10/2001 and the measures laid down in the Land Law no. 18/1991 and Law no. 1/2000, the legislator introduced the measure consisting in granting compensation by means of points, one point equalling one leu. Pursuant to Article 24 of Law no.165/2013, those points established by the compensation decision issued in the name of the owner of the property right, of the former owner or or of his or her legal or testamentary successors, cannot be affected by capping measures. On the other hand, in cases where countervailing measures are granted to the assignees of the rights in dispute, a number of points are given and such are equal to the

[1] Published in the Official Gazette of Romania, Part I, no. 278 of 17 May 2913.

[2] I refer here to **Law no. 10/2001** on the legal regime of certain immovable property taken over in the period between 6 March 1945 and 22 December 1989, republished in the Official Gazette of Romania, Part I, no. 798 of 2 September 2005, the **Land Law no. 18/1991**, republished in the Official Gazette of Romania, Part I, no. 1 of 5 January 1998, **Law no. 1/2000** for the restoration of the ownership right over agricultural and forest lands, requested according to the provisions of the Land Fund Law no. 18/1991 and of Law no. 169/1997, published in the Official Gazette of Romania, Part I, no. 8 of 12 January 2000, **Law no. 247/2005** on property and justice reform and certain accompanying measures, published in Official Gazette of Romania, Part I, no. 653 of 22 July 2005, **Government Emergency Ordinance no.94/2000** concerning the return of immovable property belonging to religious denominations in Romania, republished in the Official Gazette of Romania, Part I, no. 797 of 1 September 2005, and **Government Emergency Ordinance no. 83/1999** on the restitution of immovable property belonging to the communities of citizens belonging to national minorities in Romania, republished in the Official Gazette of Romania, Part I, no. 797 of 1 September 2005.

sum of the price paid for the trading of the property right and 15 % of the difference up to the value of the property determined in accordance with the notarial scale valid at the date of entry into force of Law no.165/2013.

Another substantial change, with important practical consequences, was that Law no.165/2013 imposed strict procedures, conditions and deadlines on the administrative authorities involved in the handover process for the fulfilment of the operation falling within their responsibility, organising their activity in a clear and robust manner.

The way in which the legislator has understood to develop the set of rules aimed at speeding up the restitution process that began in 1991 has had a positive effect in many cases, but has also produced numerous grievances, precisely because of the difficulty of properly capturing and regulating all possible situations occurring in practice. Therefore, a number of criticisms have been made with regard to the provisions of this law. The Constitutional Court found the unconstitutionality of some of them, usually correcting by means of interpretative decisions the deviations from the constitutional rules and principles[3].

Four years after its entry into force, the provisions of Law no.165/2013 continue to be a frequent subject of the constitutional review by the Court, the Court being notified with many exceptions of unconstitutionality, covering a variety of regulatory assumptions, the consistency of which with the Basic Law and the principles arising from the case-law of the European Court of Human Rights was subjected to review by the Constitutional Court. On each occasion, the Constitutional Court conducts a procedural contextualisation of the case in order to be able to judge, in a sensible manner, according to the steps taken and the specificities of the case, by checking the applicability of appropriate provisions of the law and by examining them against the fundamental provisions cited as grounds for criticism.

The present study concerns the Constitutional Court's solutions expressed in recent decisions on some of the most important issues contained in Law no.165/2013[4].

2. The time-limits laid down in Law no.165/2013 for dealing with the requests formulated pursuant to Law no. 10/2001

Having regard to the timing of the institutional arrangements imposed by the restorative legislation, the process of restitution, in kind or equivalent, of the property abusively taken over during the period of the Communist regime in Romania, involves two stages, namely the lodging of the notification requiring the property to be returned in kind, culminating in the issuing of a decision/order of admission or rejection thereof by the holder (entity) of the respective property, on the one hand, and, on the other hand, for those immovable properties that cannot be returned in kind, the issuing of the

[3] For a comprehensive view of the case law of the Constitutional Court, since the adoption of Law no.165/2013 until 30 June 2015, see Irina Gulie, "Law no. 165/2013 on measures to finalize the process of restitution, in kind or by equivalent, of immovable property abusively acquired by the State under the Communist regime in Romania — landmarks in the case-law of the Constitutional Court", in the Constitutional Court Bulletin no.1/2015.

[4] The study refers to decisions of the Constitutional Court published in the Official Gazette of Romania, Part I, by 31 December 2017.

indemnity, followed, if appropriate, by the issuing of a payment title or conversion title by the Central Compensation Board/the National Committee for Real Estate Compensations[5].

Law no.165/2013 established new time limits to be observed by the entities that, under the law, have been granted powers within the process of restitution of immovable properties abusively taken over and of determination of remedial measures, for the fulfilment of their obligations arising from the law, their duration being imperatively established. Thus, Article 33 concerns the establishments - holders of the properties[6], which are to deal with requests made in accordance with Law no. 10/2001, registered and outstanding up to the date of entry into force of Law no.165/2013, by issuing a decision for admission or rejection, within 12 months — for those that still have to settle up to 2,500 applications, within 24 months — for those that have still have to settle between 2,500 applications and 5,000 applications, and within 36 months — for those that have still have to settle more than 5,000 applications. Moreover, Article 34 of Law no.165/2013 establishes that files registered with the Secretariat of the Central Compensation Board will be dealt with within 60 months of the date of entry into force of the Law, with the exception of land fund files, which will be dealt with within 36 months.

The Constitutional Court decided that these time limits extended under Law no.165/2013 for the benefit of competent entities for the purpose of relieving the latter's activity through the settlement of claims they were working on at the time of entering into force of the law, are not applicable also to applications in respect of which court proceedings had been brought with a view to their settlement either directly by the court or by requiring the entity to fulfil the outstanding obligation. I refer here to Decision no. 88 of 27 February 2014[7] in which the Court found that the provisions of the second sentence of Article 4 of Law no. 165/2013 are constitutional in so far as the time limits laid down in Article 33 of the same Law do not apply also to the cases in the matter of restitution of property abusively taken over and which were pending before the courts at the time of the entry into force of the law, and Decision no. 269 of 7 May 2014[8], in which the Court found that Article 34 (1) of Law no. 165/2013 is likely to infringe the equality of arms as a guarantee of the right to a fair trial, if read as meaning that the time limits laid down therein are also applicable to court proceedings pending at the date of entry into force of the law.

By contrast, with regard to the exceptions of unconstitutionality raised during proceedings initiated after the entry into force of Law no.165/2013, the Court ruled that they were unfounded. Thus, in the actual field of application of Law no.165/2013, represented in particular by the first sentence of Article 4, which lays down that its provisions shall apply to applications made and filed, within the statutory period, with the entities entrusted by the law, pending at the time of the entry into force of

[5] The National Committee for Real Estate Compensations was established by Article 17 (1) of Law no.165/2013, for the purpose to take over the powers of the Central Compensation Boar and to operate in accordance with Article 18 (3) of the same Law, until the completion of the restitution process.

[6] According to the Rules for unified implementation of Law no. 10/2001, approved by Government Decision no.250/2007, published in the Official Gazette of Romania, Part I, no. 227 of 3 April 2007, "*holder units"* are either entities which, on behalf of the State, exercise the right of public or private property over an asset subject to the law (ministry, town hall, Prefect's institution or any other public institution) or entities which registered have registered in their patrimony the asset subject to the law (public corporations, national corporations and companies with State capital or cooperative organisations).

[7] Published in the Official Gazette of Romania, Part I, no. 281 of 16 April 2014.

[8] Published in the Official Gazette of Romania, Part I, no. 513 of 9 July 2014.

that Law, the Court held that the new time limits did not conflict with the provisions of the Fundamental Law invoked in the reasoning of the exceptions of unconstitutionality, as follows:

2.1. On the time-limits laid down in Article 33 of Law no.165/2013

By *Decision no. 685 of 26 November 2014*, adjudicating on the exception of unconstitutionality referred to in the first sentence of Article 4 in relation to the provisions of **Article 33 of Law no. 165/2013**, the Court found that it was unfounded, with the result that the alleged infringement of Article 15 (2) of the Constitution could not be accepted, since the legal provisions in question did not have any effect for the past, but were only applicable as from the entry into force of Law no. 165/2013. In this respect, the Court held that, by Decision no. 88 of 27 February 2014, it took the view that their retroactive application was such as to break the procedural balance, resulting in the violation of the right to a fair trial as regards the equality of arms in the civil proceedings. The Court came to this conclusion on the basis of the observation that the entities entrusted by law were obliged, pursuant to Article 25 (1) of Law no. 10/2001, to resolve the notifications within 60 days of their registration. However, the legislator granted a new resolution deadline, in addition to the original one, to the competent authorities, to the effect that, in this new legislative context, those who considered themselves entitled, as applicants in actions brought to court as a result of the entity's failure to comply with the 60-day time limit, were put in a position to continue legal proceedings, triggered by the rules in force at the time the action was brought.

The difference compared to those apprehended at that occasion by the Constitutional Court was given by the time the court was seised to resolve the complaint against the unjustified refusal of the entity-holder of the immovable property to respond to the notification made by the author of the exception under Law no. 10/2001. Essential was the fact that the author of the exception promoted legal action after the legislator had given the competent authorities an additional term to complete the resolution of the remaining notifications. At the time of the introduction of the action, Law no. 165/2013 was already in force, so the author-applicant was aware — by virtue of the presumption of knowledge of the law — of the fact that the respective law was governing the legal relationships in question. As such, the court was to resolve the case on the basis of rules whose existence was known from the very beginning of the trial and were not adopted during trial and, as a result, such rules not liable to break the procedural balance between the parties by creating a more advantageous situation for only one of them.

The Court found that the application of a line of reasoning similar to that expressed in Decision no. 88 of 27 February 2014 also in respect of applications under examination at the entities holding the properties at the entry into force of Law no.165/2013 would deprive of content the entire regulation, removing from the its scope the overwhelming majority of situations in consideration of which the law was prepared and thereby ignoring the findings of the European Court of Human Rights in the pilot judgement of 12 October 2010 in the Case of Maria Atanasiu and Others v. Romania. The fact that Article 33 of Law no. 165/2013 establishes new deadlines within which the competent entities must deal with notifications is based on the rationale for which the law itself was designed, i.e. to create a mechanism to render effective the process of compensation of abusive measures of property takeover during the time of the Communist regime. By setting up the time limits at issue, it will also ensured the completion thereof, including by expressly regulating under the law the possibility of the person who considers to be entitled to act against the entity's unjustified refusal to respond to the notification, deduced from the

absence of a reply within that time limit. To this end, Law no. 165/2013 enshrined under Article 35 (2) what in the old procedural framework was recognised only on the basis of a decision by the High Court of Cassation and Justice following an appeal in the interest of the law (Decision no. XX of 19 March 2007[9], by which the supreme court ruled that the courts are competent to deal on the substance with not only the appeal brought against the decision/provision refusing the refund in kind of the property abusively taken over, but also the action of the entitled person in the event of an unjustified refusal by the holder-entity to reply to the interested party's notification).

2.2. On the time-limits laid down in Article 34 (1) of Law no.165/2013

As regards the second stage of the return process, covered by **Article 34 (1) of Law no. 165/2013**, which provides that files registered with the Secretariat of the Central Compensation Board will be settled within a period of 60 months from the date of entry into force of the Law, with the exception of land fund files, which will be dealt with within 36 months, the Court held[10] that the state of play of the actions introduced after the entry into force of Law no.165/2013 is a matter distinct from that envisaged in Decision no. 269 of 7 May 2014[11], in which it found that the quoted text was such as to infringe the equality of arms as a guarantee of the right to a fair trial, in so far as it was interpreted as meaning that the time limits laid down therein were applicable also to proceedings pending before the courts on the date of entry into force of the law.

Thus, by *Decision no. 376 of 26 May 2015*[12], the Court noted that Article 34 (1) of Law no. 165/2013 laid down a time limit within which the files which, at the date of entry into force of the law, were already registered with the Secretariat of the Central Compensation Board, had to be settled. In accordance with Law no. 247/2005, such a time limit did not exist, which led to particularly large delays in the issuing of compensation titles. Until the entry into force of Law no. 165/2013, the predominant solution in court practice was to force the Central Compensation Board to issue its decision "within a reasonable time", a concept which offered the party with some satisfaction, but which was nevertheless vague and uncertain, and remained at the disposal of the administrative authority, which could appreciate it in an arbitrary and discretionary manner. The Court has therefore held that regulation by Law no. 165/2013 of a fixed period of time, clearly and precisely determined, within which the National Committee for Real Estate Compensations [which, by virtue of Article 18 (3) of Law no. 165/2013 has taken over the powers of the Central Compensation Board] has to settle the files that have already been registered is such as to ensure a legal framework which is adequate to ensure the right of ownership recognised to the entitled persons. In view of these considerations, the exception of unconstitutionality of the provisions of Article 34 (1) of Law no. 165/2013 was dismissed as unfounded.

In the same sense, by *Decision no. 174 of 29 March 2016*[13], the Court held that, by virtue of Article 20 (1) of Law no. 247/2005, persons who considered themselves entitled under the law of remedies could address the administrative court following an unjustified refusal by the Central Compensation Board to issue the decision containing the compensation title, whereas the passage of a period of time subjectively considered by them as unreasonable was treated as an unjustified refusal able to to justify

[9] Published in the Official Gazette of Romania, Part I, no. 764 of 12 November 2007.
[10] By Decision no. 376 of 26 May 2015, published in the Official Gazette of Romania, Part I, no. 598 of 7 August 2015.
[11] Published in the Official Gazette of Romania, Part I, no. 513 of 09 July 2014.
[12] Published in the Official Gazette of Romania, Part I, no. 598 of 7 August 2015.
[13] Published in the Official Gazette of Romania, Part I, no. 374 of 16 May 2016.

a judicial approach. In that regulatory context, the failure to regulate a legal deadline for dealing with compensation files was creating the conditions for arbitrary behaviour by the competent administrative authority and the persons who considered themselves entitled were forced to act on a random basis, using an unspecific way of action, due the lack of certainty as regards settling the compensation files by the Central Compensation Board. As such, the establishment, by Article 34 (1) of Law no.165/2013, of a maximum time limit within which the National Committee for Real Estate Compensations should perform this task is a materialisation of the intention of the Romanian legislator to clarify the refund procedure by conferring a degree of foreseeability able to give an expression to the requirements of the right to a fair trial, settled within a reasonable time.

3. The appeal which the person who considers to be entitled may use pursuant to Article 35 (1) and (2) of Law no.165/2013

By *Decision no. 702 of 27 October 2015*[14], the Court ruled on the provisions of Article 35 (2) of Law no.165/2013, according to which, where the entity competent under the law does not issue the decision within the time limits laid down in Articles 33 and 34, the person who considers to be entitled may apply to the court in the 6 months following the expiry of those time limits. The criticism formulated in support of the exception of unconstitutionality on this subject was focused on the idea that open access to justice was restricted, as it was only allowed 6 months after the expiry of those time limits. In relation to this criticism, the Court observed that the interpretation in such a manner of the legal text criticised is erroneous. The 6-month period referred to in Article 35 (2) of Law no. 165/2013 constitutes the time limit within which the appeal may be lodged and shall start to run from the expiry of the time limits laid down by law for the settlement of files. In other words, this time frame does not add, in favour of the entity, to the period which has already passed pursuant to Article 33 or Article 34, granted by law to for the settlement of claims, but is the period within which the person entitled has the opportunity to apply to the court in the event of non-settlement of claims within the time limits laid down. Therefore, the person concerned can apply to the competent court not after a period of 6 months, which would be added to the one already passed under Articles 33 and 34 — as advocated by the author of the exception — but from the very first day after the expiry of the time limits laid down in those articles, and his/her right could be exercised at any time within this 6-month period as laid down in Article 35 (2) of Law no. 165/2013.

4. The court with jurisdiction to deal with the appeal provided for in Article 35 (1) and (2) of Law no.165/2013

4.1. The Court ruled on the court with jurisdiction to hear the appeal in question. Thus, in its *Decision no. 833 of 3 December 2015*[15], it noted that the provisions of Article 35 (1) of Law no.165/2013 constitute procedural rules relating to the body granted with jurisdiction to settle the appeal against decisions issued by entities competent under the law, jurisdiction which by law is granted to the civil section of the court in whose jurisdiction the entity has its head office. It follows that all decisions of invalidation or compensation by points issued by the National Committee for Real Estate Compensations, as well as its refusal to deal with claims under law on remedies as to properties, can

[14] Published in Official Gazette of Romania, Part I, no.66 of 29 January 2015.
[15] Published in Official Gazette of Romania, Part I, no.192 of 15 March 2016.

only be challenged before the civil section of the Bucharest General Court, thus establishing the exclusive jurisdiction of a single court on the resolution of these cases.

With regard to the criticism that this exclusive competence of the civil section of the Bucharest General Court would be likely to undermine free access to justice and the right to a fair trial, the Court found that such a rule is not unique within the Romanian legislative landscape[16]. In the present case, it is justified by the fact that the European Court of Human Rights, in its judgement in the Case of Maria Atanasiu and Others v. Romania, found that the complex legislative provisions in the area of restitution of immovable property taken over by the State abusively under the Communist regime and the changes that have been made to them over time have resulted in inconsistent judicial practice and have created general legal uncertainty as regards the interpretation of the basic notions relating to the rights of former owners, the State and third parties who acquired the nationalised immovable properties.

In light of these observations, the Constitutional Court held that, in addition to the desire for a better administration of justice, the regulation criticised by the Romanian legislator aimed also at achieving the objective of ensuring uniform interpretation and application of the law on restitution in kind or equivalent of the immovable properties claimed under the law of remedies, creating the premise of continued judicial practice by regulating an appropriate regulatory framework.

4.2. By another decision, *Decision no. 189 of 7 April 2016*[17], the Court responded to a criticism focused on the idea that the court competent to deal with appeals against decisions issued by entities vested under the law in the restitution process should be an administrative court and not a civil court, motivated by the fact that such actions are of an administrative nature. By analysing this argument, the Court observed that, prior to the entry into force of Law no. 165/2013, the decisions of the entity holding the property in question or, as the case may be, of the entity vested with the settlement of the notification, concerning the rejection of the notification, or of the claim for restitution in kind, could be appealed against by the person who was entitled before the civil section of the territorially competent court. However, in accordance with Article 19 (1) in conjunction with Article 20 (1) of Law no. 247/2005, the decisions adopted by the Central Compensation Board could be appealed against before the administrative and fiscal litigation section of the general court, under the terms of Law no. 554/2004 on administrative disputes. In the latter case, the administrative court had only the possibility, if it found the illegality of the decision, to compel, by virtue of Article 18 (1) of that law, the Central Compensation Board to issue a new decision containing the owed compensation title. By Law no. 262/2007, a new paragraph (6) was introduced in Article 18 of Law no. 554/2004, which gave the court the opportunity to establish, at the request of the party concerned, a deadline for the enforcement of the obligation established in the charge of the administrative authority. In practice, upon request, this time limit was

[16] Thus, for example, in accordance with Article 4 (4), Article 10 (2) and Article 11 (1) of Government Emergency Ordinance no. 24/2008 on access to one's own file and the unveiling of the Securitate, the action for establishing a capacity of employee or collaborator of the Securitate, or the appeal against the certificate referred to in Article 8 (b) and Article 9 of the Ordinance are lodged with the Administrative and Tax Litigation Section of the Bucharest Court of Appeal. Also, in accordance with Article 283 (11) of Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, contracts for the concession of public works and contracts for the concession of services, the court competent to deal with the complaint against the decision of the National Complaint Resolution Council concerning procedures for the award of services and/or works relating to the transport infrastructure of national interest, as defined by the legislation in force, is the Bucharest Court of Appeal, the Administrative and Tax Litigation Section.

[17] Published in the Official Gazette of Romania, Part I, no. 438 of 13 June 2016.

typically 30 days, but it was sometimes even longer. Therefore, the objective pursued by the person entitled, i.e. to obtain remedies, was reached much later, being often disregarded the time limits thus fixed.

In order to overcome this flawed, stagnant system leading to delays considered by the European Court of Human Rights to be contrary to the right to a fair trial due to the excessive length of proceedings, Law no. 165/2013 granted to the civil sections of the general court the power to handle appeals both against decisions of the entities holding the properties or vested by the law to settle the notifications, and against decisions of the National Committee for Real Estate Compensations. The decisive argument for the adoption of such a legislative solution was the full jurisdiction of a civil court. Pursuant to Article 35 (3) of Law no. 165/2013, the judge takes a decision on the existence and extent of the right to property and orders restitution in kind or, where appropriate, the granting of redressive measures in points.

In other words, the Romanian legislator has opted for the resolution of appeals by a civil court to the detriment of an administrative court in order to reduce the length of the procedure, where the court itself will rule on the capacity of person entitled and determine the type of damages due and whether such are to be granted in kind or equivalent. In the event that the power to resolve these appeals had been entrusted further to the administrative courts, there would have been no speeding up of the restitution process, contrary to what was stated by the European Court of Human Rights under the above-mentioned pilot judgement.

In the explanatory statement, it has been further argued that the provisions of Article 126 (6) of the Constitution are not taken into account, provisions according to which the judicial review of public authorities' administrative action shall be guaranteed via courts for administrative disputes. In this respect, the Court has held that the meaning of the constitutional provision cited is not to allow any act of a public authority to be removed from the possibility of being subject to the control of an independent and impartial court whose activity meets the requirements of a fair trial. By regulating such a guarantee, the constituent legislator has ensured the legality of any administrative act, giving expression to the requirements of the principle of separation and balance of powers, by establishing, at the level of the Basic Law, a mechanism to preserve the activity of public authorities within the limits of the law and to avoid or, where appropriate, remove possible abuses or errors in their activities. The Court held that, in this case, those laid down by Decision no. 267 of 7 May 2014[18] are applicable *mutatis mutandis*; in that decision, referring to the jurisdiction of any court to resolve the exceptions of illegality of the individual administrative acts invoked in the course of trial, irrespective of their nature, the Court held that the essential role of the provisions of Article 126 (6) of the Constitution was to guarantee judicial control over the administrative acts of public authorities, irrespective of the competent court. In that Decision, the Court stated that “the constituent’s purpose is not directed at the establishment of a specific court — specialised in administrative matters — to carry out judicial review, but the central idea of the text is the establishment of a separate, additional guarantee in relation to the possibility of the judicial authority to censor the administrative acts of the public authorities as an expression of the provisions of Article 52 of the Constitution, without any bearing on whether or not the court exercising that legality check is specialised or not in administrative matters. It is therefore essential to increase the guarantees of judicial control over the administrative acts of public authorities”.

[18] Published in Official Gazette of Romania, Part I, no.538 of 21 July 2014.

The Court further clarified that, in addition, the definition of administrative disputes established by Article 2 (1) (f) of Law no. 554/2004, consisting of the settlement by the administrative courts competent under the organic law of disputes in which at least one of the parties is a public authority, and the conflict arose either from the issuing or the signing, as the case may be, of an administrative act, within the meaning of this law, or of failure to settle within the legal deadline a claim or of the unjustified refusal to deal with an application relating to a right or to a legitimate interest. However, in cases falling within the scope of Article 35 (1) of Law no. 165/2013, although one party is indeed a public authority, it cannot be said that it falls strictly within the meaning of the notion of administrative dispute, since the dispute is due to a claim of a civil nature in which it is claimed a right of private property.

5. The capacity of the person who can lodge the appeal referred to in Article 35 (1) of Law no.165/2013

The constitutionality of the provisions of Article 35 (1) of Law no.165/2013 was also contested from a different point of view, i.e. that of the right holder to appeal to the court against the decision of the entity vested under the law. Thus, it has been criticised that the decisions issued by the National Committee can only be challenged by the person who is considered to be entitled, within the meaning of Article 3 (2) of Law no. 165/2013, and not by another person who justifies a legitimate interest, namely by the holder-entity itself, contrary to the right to pursue justice in defence of a legitimate interest, the right to a fair trial and an effective remedy.

By *Decision no. 10 of 17 January 2017*[19], the Court observed that the law does not confer on the entity entrusted with the settlement of the notification the legal standing to challenge before the court the decision of the National Committee for Real Estate Compensations for invalidation of its proposal to grant remedies in the equivalent and, implicitly, requiring the holder-unit to return in kind the property to the person entitled, a former owner or heir of the same. The Court noted that, in the operation of determination of the remedy, the entity vested under the law within the meaning of Article 3 (4) (a) and (b) of Law no. 165/2013 has an interest that the person entitled be awarded a compensation measure through points, since in this case its property will not be affected, directly or indirectly, by the remedy proposed.

However, the Court pointed out that the source of the right to compensation of the person entitled to claim is the immovable property taken abusively, compensation by equivalent being an exceptional measure deviating from the principle of the restitution in kind. In the case compensation through points, the State has chosen to assume responsibility for compensation in respect of the goods covered by the law; therefore, in the absence of such a mechanism, it would have become incumbent on the holding unit to return the good in kind or to grant a remedy by equivalent in whatever form. The loss of the property of the holding unit, following the decision of the National Committee for Real Estate Compensations invalidating the decision proposing countervailing measures, is due to the notification submitted, the holding unit being in an advantage in the assumptions that do not allow a refund in kind or equivalent remedies, in which case the compensation by points becomes applicable. The holding unit and the State form a unitary procedural body in the conception of the legislator. This regulatory reality, and is the result of a legal fiction which the legislator has created, is undoubtedly a rule of law in respect of the refund regulated by Law no. 165/2013, and its essential feature is that it cannot be proved

[19] Published in the Official Gazette of Romania, Part I, no. 329 of 8 May 2017.

contrary to such a rule by means of Article 21 of the Constitution. The mentioned legal rule requires, in an axiothic manner, that this body acts in a unitary manner by the act which takes effect in the legal circuit, that is to say, the decision of the entities entrusted under the law for the restitution in kind of immovable property, or the decision of the National Committee for Real Estate Compensations for invalidation or validation in whole or in part of the decisions issued by entities vested under the law which contain the proposed compensatory measures. The competence of the National Committee for Real Estate Compensations does not create a right of the holding unit to challenge the act, but to compete in the realisation of the act which produces legal effects and is enforceable also against the entitled person. The overturning of this legislative concept can lead to the emptying of content of the entire refund procedure, the latter being dissipated among the various more or less justified interests of the subjects participating and concurring to the achievement of the whole process.

The Court found, therefore, that since both the holding units and the National Committee for Real Estate Compensations are subject to a refund obligation, the alleged existence of a limitation on the free access to justice of one against the other cannot be accepted. Therefore, the legislator considered that, as part of the restitution process, there could be divergent legitimate interests between them; what is current and overriding is the legitimate interest of the person entitled to the return of the property in kind or by equivalent, which only the latter can challenge. Therefore, although the holding unit could invoke a factual interest in promoting an appeal against the invalidation decision of the National Committee for Real Estate Compensations, the Court held that this interest was not a legitimate one in order to be able to be used within the meaning of Article 21 (1) and (2) of the Constitution. The legitimacy of such interest lies solely with the person entitled, to whom in fact also the law recognises the right to challenge the act of the National Committee for Real Estate Compensations.

6. The refund/restoration of private property rights over land under the conditions of the Land Fund Law no.18/1991

6.1. Another issue which was examined by the Constitutional Court and sanctioned by an admission decision, following the finding of the restriction of the right to free access to justice, was an extension of the deadline for the settlement by the land fund committees of the requests for the restoration of property rights claimed under the Land Law no.18/1991, until the expiry of the new timeframe granted to them, where the persons concerned did not have the opportunity to challenge in court the inactivity of land fund committees.

Thus, by *Decision no.44 of 31 January 2017*[20], the Court ruled on the constitutionality of the provisions of Article 7 (1) and Article 11 (1) of Law no. 165/2013, according to which, pending the compilation of the centralised situation at local level, the issuance of the validation/invalidation decisions by the land fund county committees or, where appropriate, by the Bucharest Land Fund Committee, the issuance of the title deeds, the vesting in possession by the local land land committees, as well as any other administrative procedures in the field of the restitution of the land fund shall be suspended, and the local and county land fund committees and, where appropriate, the Bucharest Land Fund Committee, shall have the obligation to settle all restitution claims, to carry out all formalities for vesting into possession and to release the property titles by 1 January 2016. By virtue of these legal texts,

[20] Published in Official Gazette of Romania, Part I, no.211 of 28 March 2017.

the courts were forced to dismiss claims against the passivity of the entities mentioned as prematurely formulated.

In the construction of the rationale which led to the admission of the exception of unconstitutionality of the provisions of Article 7 (1) and Article 11 (1) of Law no. 165/2013, the Court first noted the evolution of legislative changes, bearing in mind that when Law no.165/2013 was promulgated, entering into force on 20 May 2016, the deadline laid down in Article 11 (1), by which the local and county land fund committees or, as the case may be, the Bucharest Land Fund Committee, had an obligation to settle all restitution claims, vest in possession and issue property titles, was 1 January 2016. That period was subsequently extended to 1 January 2017 by Government Emergency Ordinance no. 66/2015[21], and subsequently, by Government Emergency Ordinance no. 98/2016[22], it was again extended until 1 January 2018.

With regard to the original deadline of 1 January 2016, the Court ruled, by Decision no. 684 of 26 November 2014[23], noting that the legal provisions governing the same were constitutional, considering that it fixed the maximum date by which the local and county land fund committees or, as the case may be, the Bucharest Land Fund Committee, had to settle all restitution claims, vest in possession and issue the property titles. The Court held that, given that the Romanian legislator tried to render efficient the process of restitution of property abusively taken over, the establishment of a well-defined deadline is beneficial to this exercise. With regard to the duration of this period, the Court has held that the legislator assessed it in the light of the financial economic situation of the Romanian State, establishing a realistic duration adapted to the specific circumstances.

In view of the successive extensions of that deadline, the Court, by Decision no. 44 of 31 January 2017, found that those stated above by Decision no. 684 of 26 November 2014 are no longer applicable, declaring these legal provision as unconstitutional. If, in relation to the time of adoption of Law no.165/2013 and of its examination, in 2014, by the European Court of Human Rights, in its Judgment delivered in Case *Preda and Others v. Romania*, respectively, by the Constitutional Court, in the above mentioned decision, the initial duration of the administrative period referred to in Article 11 (1) of Law no.165/2013 was accepted by reference to the certainty (perceived at that time) of its exhaustion on 1 January 2016, the same considerations can no longer be valid in the current legislative context of successive extension of the deadline. Those arguments were made in light of the fact that, in the original wording, the legal provisions criticised set out a well-defined, clear and single deadline, i.e. 1 January 2016, and the European Court of Human Rights had unequivocally expressed the possibility of reconsidering its view after expiry of these administrative deadlines, these provisions being only valid if they were complied with in that form (1 January 2016).

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[21] Government Emergency Ordinance no. 66/2015 extending the deadlines provided for in Articles 11 (1), 20 (5) and 27 (1) of Law no. 165/2013, published in the Official Gazette of Romania, Part I, no. 986 of 31 December 2015.

[22] Government Emergency Ordinance no. 98/2016 extending some time limits, the establishment of new deadlines, concerning certain measures for the completion of the activities covered by the agreements concluded under the Loan Agreement between Romania and the International Bank for Reconstruction and Development to finance the Judicial Reform Project, signed at Bucharest on 27 January 2006, ratified by Law no. 205/2006, as well as amending and supplementing certain legislative acts, published in the Official Gazette of Romania, Part I, no. 1030 of 21 December 2016.

[23] Published in the Official Gazette of Romania, Part I, no. 109 of 11 February 2015.

In this context, the Constitutional Court found that the impugned legal provisions do not take account of the recommendations of the European Court of Human Rights concerning the regulation of an effective mechanism, both at the administrative and judicial stage, for dealing with requests for restitution and/or compensation. At the same time, the Constitutional Court held that the provisions of Article 11 (1) of Law no. 165/2013 do not meet the requirement of foreseeability of the law, as a component of the constitutionality of the rule in respect of its quality. As a result, interested persons cannot accurately foresee the exhaustion of the period within which they are obliged to wait for an administrative resolution of their claims, being prevented from effectively addressing the court in defence of their property rights, with the Government intervening on grounds of urgency, by way of an emergency ordinance, to extend it successively.

In considering the requirement of legitimacy of the purpose of the measure adopted, the Court observed that the stated purpose for extension was, in itself, a legitimate one, aimed at the completion of the administrative procedures for the inventory of available land and the centralisation thereof, in order to ensure that all requests for restoration of property rights are dealt with as fairly as possible. The Government has adopted these legislative acts to grant additional time to the administrative entity to fulfil its legal obligations. The Court noted that the Executive has acted on the basis of the practical possibility of the competent administrative authority to perform its tasks in a timely manner, covering in reality, through two legislative acts, its lack of efficiency compared to previously expected results. In these circumstances, the Court observed a roll-over of relations between the delegated legislature and the legal subject of the rule adopted by a Government act, in the sense that the addressee of the rule was the one who, through his conduct, led the legislature to legislate in a certain way, which is unacceptable.

In addition, following the same reasoning underlying the issuing of the legislative acts for extension, the Government could have adopted a new Emergency Ordinance to the same end of the extension of the administrative deadline, if the competent State entities will not have used up the stage of administrative handling of claims for the restoration of property rights, on the same grounds as in previous years. In addition, in the absence of any regulatory sanction for failure to comply with administrative deadlines, the effectiveness of the administrative handling of claims mechanism is affected. As such, the persons concerned are unable to invoke the passivity and lack of due diligence of the administrative entity.

With regard to keeping the right balance between the general interests of society and the private one, and of the proportionality between the aim and the measures taken, the Court found that the only legal subject favoured by the measures adopted was the State, represented in the present case by the local and county land fund committees.

Moreover, the Court observed that the deadline, extended until 1 January 2018, was prohibitive, preventing, in substance, the exercise of the right of effective access to the court and thereby affecting the possibility of the realisation of the alleged property right, since any court action directed against administrative entities — the competent local and/or county committee — on the grounds of failure to issue a validation/invalidation decision, was rejected as inadmissible.

Finally, as to the reasonableness of the term, the Court pointed out that it could no longer be upheld given its successive extension, by legislative intervention of the Government through emergency

ordinances. The period of almost 2 years initially provided by the impugned law for the exhaustion of the administrative phase falls within the concept of a reasonable period of time, but its extension for another 2 years does not. The application of this new deadline results, in the end, in a period of more than 4 years required only for carrying out administrative inventories of and centralisation operations, prior to the issue of title deeds and the vesting in possession of entitled persons. A possible judicial phase, contesting the decisions of the entities entrusted by the law and of final determination by courts of the alleged rights, followed by the proceedings before the National Committee for Real Estate Compensations — in a situation where restitution in kind is not possible — the operations to calculate the compensation awarded mainly in points, as well as to transform them in money, as essentially provided for in Law no. 165/2013, paint a complex and, especially, lengthy mechanism, moving away from the purpose of the law and from the recommendations of the European Court of Human Rights.

6.2. Still in relation to the duties of the County Land Fund Committees and the Bucharest Land Fund Committee, the Court rules, by *Decision no. 671 of 24 October 2017*[24] on the provisions of Article 21 (4) of Law no. 165/2013, according to which the committees concerned may propose to the National Committee for Real Estate Compensations the settlement of applications for restitution by granting compensatory measures only after the exhaustion of the areas of agricultural land used for the restitution in kind, identified at local level.

The Court upheld the exception of unconstitutionality, noting that there was a question of efficiency and compliance with the binding force of court decisions recognising complainants' capacity as entitled persons and holders of the right to obtain the restoration of the property rights by granting compensation for agricultural land abusively taken over during the Communist period by the Romanian State and, at the same time, establishing that the local committees entrusted with the enforcement of Law no. 18/1991 have the obligation to submit the files containing proposals for compensation to the National Authority for the Restitution of Property.

In considering the rulings stated in its case law on the effects of judgmentsi[25] , the Court has stressed that the judgment, which has the force of res judicata, meets the need for legal certainty, the parties having the obligation to comply with the mandatory effects of the judicial act, without the possibility of questioning what has already been established by means of court proceedings. Its enforceability must be respected by both citizens and public authorities, so that the legislator is not permitted to amend or abolish a judgement, by a legislative act, without thereby violating the principle of separation of powers. The Court has also stressed that an authority, other than a court of law, is not able to censure in any case a final and irrevocable court ruling that has obtained the force of res judicata[26].

As such, the Court found that the provisions of Article 21 (4) of Law no. 165/2013 permanently create the grounds for an inability to carry out those ordered by a final and irrevocable court ruling,

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[24] Published in the Official Gazette of Romania, Part I, no. 1015 of 21 December 2017.

[25] See, for example, Decision no. 333 of 3 December 2002, published in the Official Gazette of Romania, Part I, no. 95 of 17 February 2003, Decision no. 972 of 21 November 2012, published in Official Gazette of Romania, Part I, no. 800 of 28 November 2012, or Decision no. 460 of 13 November 2013, published in Official Gazette of Romania, Part I, no. 762 of 9 December 2013.

[26] Decision no. 972 of 21 November 2012, published in the Official Gazette of Romania, Part I, no.800 of 28 November 2012.

contrary to Article 1 (4) of the Constitution concerning the principle of separation of powers. This is because by applying the legal text in question, the mandatory provisions of a court order may be ignored on the grounds that the areas of agricultural land used for the refund have not been exhausted, in conjunction with the fact that, in accordance with the second sentence of Article 12 (3) of Law no. 165/2013, the former owner or his/her heirs may refuse the land from the reserve if the local land fund committee or from the municipal land, proposed for the refund. Thus, the realisation of the right established by the judgement is subject to an undefined delay, becoming illusory as a result of the fact that, as long as there is at least an area of agricultural land for restitution, but not returned, the county land fund committee will not be able to propose to the National Commission the resolution of requests for compensatory measures.

The contested act blocks the execution of court decisions whereby local land fund committees have been obliged to make proposals for the granting of compensation, making the implementation conditional upon the exhaustion of the area of agricultural land aimed for restitution in kind, identified at local level. However, this time is uncertain, depending on the randomness and uncontrollable nature of the option of other holders of the right to property over agricultural land, who may refuse land from other sites proposed for the restitution by local land fund committees from its own reserve or from municipal land.

Consequently , the Court held that the provisions of Article 21 (4) of Law no. 165/2013 introduce a conditionality on the enforcement of judgements given prior to the entry into force of Law no. 165/2013. However, by a law subsequent to a final/irrevocable court ruling, no obstacle in its execution can be introduced; possibly, rules of procedure concerning its enforcement can be established, but such cannot be prejudicial to its binding force.

Therefore, the Court found that the fulfilment of the requirement laid down in the text of the law criticised, according to which the county land fund committees and the Bucharest Land Fund Committee will be able to propose to the National Committee the settlement of claims for restitution by granting compensatory measures only after the exhaustion of the areas of agricultural land aimed at restitution in kind, identified at local level, is constitutional to the extent that it does not apply to definitive/irrevocable court decisions whereby the courts ordered the granting of pecuniary remedies.

7. Conclusions

Since the entry into force of Law no.165/2013 until 31 December 2017, the Constitutional Court rendered 226 decisions on various provisions contained in Law no.165/2013. The variety of constitutionality criticisms brought especially by persons who consider themselves entitled to restitution in kind of property abusively taken over by the Romanian State under the Communist regime or to compensatory measures by equivalent, if such properties can no longer be refunded in kind, is the result of the complexity of the process of remedying historical injustices which began in 1991, the completion of which the Romanian State sought to speed up by Law no.165/2013. Property Privations, carried out between 6 March 1945 and 22 December 1898, through unlawful nationalisation or takeover, whereby the immovable properties belonging to natural or legal persons entered into property of the Romanian State, created a systemic problem in the Romanian society which, after moving to a democratic regime, the new legislative vision intended to correct, by producing a series of regulations designed to satisfy the interests of the property owners whose properties had been taken over or of their heirs. The

duration of this process for an unexpectedly long period rendered necessary the adoption of Law no.165/2013 whose stated purpose was to speed up the process, making procedures more efficient and eliminating failures that led to delays in the settlement of claims. With all the imperfections found in the course of its application, Law no.165/2013 is the legislative instrument that facilitates the resolution of this problem with reverberations on a significant segment of the society, and the Constitutional Court, exercising the constitutional review of the provisions therein, has contributed substantially to improving the normative content of the law in question, sanctioning the unconstitutionality defects found and providing interpretations that bring its provisions in line with the provisions of the Constitution and with those of the Convention for the Protection of Human Rights and Fundamental Freedoms.