

## ***The Role and Importance of Exercising Administrative Guardianship***

***Oana GROSU, Florentina NEAMȚU***  
***George Bacovia University, Bacău, ROMANIA***  
*oana.grosu@ugb.ro*  
*florentina.neamtu@ugb.ro*

**Abstract:** *According to the Romanian Constitution, the Government is the authority of the central public administration that leads controls and coordinates the activity of all central or local public administration authorities in Romania. As a representative of the Government in the territory, the Prefect is the guarantor of respect for law and public order at the local level, a quality that allows him to take the necessary measures to meet the objectives of the Government Program, in accordance with its powers and responsibilities maintaining the climate of social peace, constantly communicating with all institutional and social levels, to collaborate with local public administration authorities to determine territorial development priorities. The activity of the prefect is based on a series of principles such as: legality, impartiality and objectivity, transparency and free access to information of public interest, efficiency, responsibility, professionalism and orientation to the citizen. Guardianship is a limit imposed on local administrative authorities in order to safeguard legality and protect the public interest. According to the first form of guardianship, the administrative jurisdiction for the acts of local public administration authorities, the prefect has the main task of verifying the legality of administrative acts of the county council, local council, county council president or mayor, being also recognized the right to challenge before the court of administrative contentious acts that it considers illegal.*

**Keywords:** *administrative guardianship, administrative acts of local public authorities, administrative litigation, preliminary procedure*

### **Introduction**

Being a limit imposed on local administrative authorities, in order to safeguard the legality and defend the public interest, guardianship is one of the most important responsibilities associated with the highest state civil service, manifested at the local level. The role and importance of administrative guardianship lies not only in the activities undertaken to ensure the legality of the effects produced by the implementation of administrative acts issued by public administration authorities, but also in the ability to coordinate and guide their initiators, by facilitating knowledge and interpretation correctness of normative acts.

The administrative acts of the local public administration authorities communicated to the Prefect for the verification of legality are legal acts issued in public power regime, in order to organize the law enforcement process, which give rise to, modify or extinguish legal relations in various fields, such as: social protection and social benefits, civil service and civil servant, tax, local taxes and duties, public property and private property of the state or territorial administrative unit, authorization of construction works, urban planning and spatial planning, housing, execution of works of interest public services, public services, public procurement etc. [1]

Through administrative acts subject to legality verification carried out by the prefect through the specialized structure, the local public administration authorities exercise their powers conferred by law, solving, ex officio or upon request, as appropriate, local interest issues of members of local authorities, in compliance the principles of decentralization, local autonomy, deconcentrate public services, eligibility of local public administration authorities, legality and consultation of citizens.

In the process of verifying the legality of administrative acts issued by local public administration authorities, the existence of supporting and preparatory documents is pursued, an aspect that supports, strengthens, substantiates and proves the legality of the ordered administrative measure.

### **1. Stages of the Activity of Verifying the Legality of Administrative Acts**

In accordance with the legislation in force, the specialized structures of the prefect's institution perform attributions regarding the application and observance of the Constitution, laws and other normative acts, verification of the legality of administrative acts adopted or issued by local public administration authorities and administrative litigation, implementation of policies of European integration and of the plan of measures for European integration and intensification of external relations, the good organization and development of the activity for emergency situations, as well as for the preparation and execution of non-military defense measures.

Regarding the verification of the legality of the administrative acts adopted or issued by the local public administration authorities and the administrative litigation, the specialized structure within the prefect's institution:

- a) keeps records of administrative acts adopted or issued by local public administration authorities and sent to the prefect in order to verify the legality, ensures their preservation, as well as the records of actions and files pending before the courts;
- b) examines under the aspect of legality, within the terms provided by law, the administrative acts adopted or issued by the local public administration authorities;
- c) verifies the legality of the contracts concluded by the local public administration authorities, assimilated according to the law of administrative acts, as a result of the notification of the prefect by the persons who consider themselves injured in a legitimate right or interest;
- d) proposes to the prefect the notification, as the case may be, of the issuing authorities, in order to reanalyze the act considered illegal, or of the administrative contentious court, with the corresponding motivation;
- e) draws up the documentation, formulates the action for notifying the courts and supports before them the formulated action, as well as the means of appeal, when it is the case;
- f) elaborates reports and presents information to the prefect regarding the verified documents;
- g) approves the orders of the prefect from the point of view of legality;
- h) draws up the documentation and represents the prefect and the institution of the prefect before the courts of any degree, as well as other public authorities or institutions;
- i) acts in order to fulfill, in accordance with the law, the attributions incumbent on the prefect in the field of organizing and conducting local, parliamentary and presidential elections, as well as the national or local referendum;
- j) performs, in accordance with the law, the verifications and draws up the necessary documentation regarding the legal dissolution of some local or county councils, respectively of the General Council of the Municipality of Bucharest, the legal suspension of some mandates of councilor or mayor or the termination of the right of some mandates of mayor, respectively at the premature termination of the mandate of the president of the county council or of the president of the General Council of the Municipality of Bucharest, as the case may be;
- k) performs, in accordance with the law, verifications regarding the measures taken by the mayor or by the president of the county council, respectively by the president of the General Council of Bucharest, in their capacity as state representatives in the administrative-territorial unit, including at the public administration authorities local authorities, and propose to the prefect, if necessary, the notification of the competent bodies;
- l) carries out guidance actions regarding the manner of exercising by the mayors the attributions delegated and executed by them on behalf of the state; [3]

At the level of Bacău County, the specialized structure within the technical apparatus of the Prefect's Institution, through which administrative guardianship is ensured, is the Department for Verification of the Legality of Documents, Administrative Litigation and the application of normative acts within the Legal Service. In addition to checking the legality of administrative acts adopted or issued by the County Council, the Local Council or the president of the County Council and the mayor, the activity of administrative litigation and application of normative acts, officials in this department also ensure the representation of the prefect before the courts, the legal assistance of the other compartments in the elaboration of some documents that produce legal effects and approves, from the point of view of legality, the orders of the prefect, the contracts and the protocols concluded with third parties.

In order to fulfill their attributions, the civil servants within the specialized structure go through the following stages:

- 1) registration and distribution of administrative acts of the local public administration authorities communicated to the prefect in order to verify the legality;
- 2) performing the verification of the legality of the administrative acts, the analysis phase;
- 3) confirmation of the exercise of the legality verification on the administrative acts;
- 4) carrying out the contentious procedure, in the situation when an administrative act is considered illegal.

The first stage involves the registration of administrative acts submitted to the Institution of the prefect by the secretary of the administrative-territorial unit, within the communication term, respectively within 10 working days from the date of adoption / issuance, as provided in art.197 of O.U.G. no. 57/2019 on the Administrative Code, and their distribution by resolution to the legal advisers whose duties include the task of registering, analyzing, verifying them in terms of legality, corresponding to the allocations established by Prefect's Order. After taking over, each legal advisor will ensure the record of the administrative acts that were assigned to him, by completing the register of evidence of the administrative acts, in relation to their typology, respectively, decisions or dispositions.

The second stage involves, in the first phase, a preliminary verification of the competence of the prefect to carry out the control of administrative guardianship, reported to Decision no. 11/2015 of the High Court of Cassation and Justice, published in M.O. no. 501 / 08.07.2015, Decision no. 26/2016 of the High Court of Cassation and Justice, published in M.O. no. 996 of 12 December 2016 and the Decision of the Constitutional Court no. 747/2015, published in M.O. no. 922 / 11.12.2015. In this regard, it is examined whether the verification of legality does not exceed the prefect's right of administrative guardianship over certain categories of acts of local public administration authorities (e.g. civil or labor legal relations, concluded in legal relations belonging to other branches of law than administrative litigation). Thus, the assessment of the necessity and opportunity of adopting and issuing administrative acts belongs exclusively to the deliberative and executive authorities and cannot be subject to verification by other authorities, according to art. 240 paragraph (2) of GEO no. 57/2019.

The activity of verifying the legality of the administrative acts adopted or issued by the local public administration authorities considers that, in the process of elaboration and drafting of the administrative acts, two categories of legality conditions are observed, provided by the normative acts in force: background.

The substantive conditions shall be deemed to be met if:

- the act issued / adopted by the local public administration authority is an administrative act - as it is defined in art. 2 paragraph (1) lit. c) of Law no. 554/2004, since only in this case will it be possible to verify its legality and it will be possible to carry out the preliminary procedure, respectively challenged before the administrative contentious court by the prefect, in case he considers the act illegal; otherwise, if the act is one of civil law, commercial law or labor law, it may not be subject to verification of the legality of the prefect or censored in court by administrative litigation, but only before the courts with jurisdiction in those materials;
- the competence of the local public administration authority to issue or adopt the administrative act is confirmed by reporting its object, to the applicable legal provisions in the matter which confer to the local public administration authority the competence to regulate in one way or another (art. 129, art. 155 , Article 173, Article 191 of GEO No. 57/2019);
- the observance of the norms of procedural law / of substantive law that establish in charge of the local public administration authorities a certain conduct, norms whose observance is obligatory (for example, the observance of the rules applicable in case of convening a local council meeting - ordinary, extraordinary meeting, immediately, resulting in urgency, force majeure or maximum urgency for convening these meetings);
- verifies the existence of the legal basis and the legal basis in the preamble of the administrative act and the conformity of the act with the higher level normative acts in whose

execution it was issued or adopted and with those issued or adopted by the authorities / Institutions of the European Union (art. 80- 82 of Law No. 24/2000 on the norms of legislative technique for the elaboration of normative acts, republished, with subsequent amendments and completions, article 148 paragraph (2) of the Romanian Constitution), from which to result a sufficient and appropriate motivation in law ;

- the existence of compliant, binding and prior opinions and / or advisory opinions expressly provided for by the legislation incidental to the regulated situation is verified.

- it is verified if the procedure for ensuring the decisional transparency within the local public administration authorities has been fulfilled, in case of normative administrative acts, respectively if the legal condition of the entry into force (bringing to the public/communication to the interested person) of the administrative acts is observed . Thus, it will be verified if there is the announcement regarding the elaboration of a draft normative act, as well as if it was brought to the public's notice, at least 30 days before the submission for analysis, approval and adoption by the public authorities, (Law no. 52 / 2003 on decisional transparency in public administration);

- the observance of the fundamental freedoms established by the Treaty on Romania's accession to the European Union, ratified by Law no. 157/2005.

The fulfillment of the formal conditions presupposes that:

- the administrative documents are in written form, certified in accordance with the original, contain all the information necessary to identify the name of the document, the issuing authority, the addressee of the document, the measure adopted, the time limit and conditions under which the order is issued, the authority's seal or stamp, the serial number (chronological number), the date of issue or adoption, the signature of the person who adopts or issues the administrative act, as well as of the one who countersigns for its legality;
- the term of communication to the prefect of the administrative acts was observed (art. 197-200 of GEO no. 57/2019), as follows: within 10 working days from the date of adoption, respectively of the issuance of the administrative acts;
- the minutes of the meeting in which the decisions of the local councils / county council were adopted were communicated, in the form approved in their next ordinary meeting, according to art. 138 paragraph (15) of GEO no. 57/2019;
- the existence of preliminary documents (with the number and date of registration), respectively: the draft decision prepared by the initiator, the approval report as a presentation and motivation tool, signed by the initiator, the report of the relevant department of the mayor's specialized apparatus and the opinions of specialized commissions of the local council (under the conditions of art. 136 of GEO no. 57/2019), the afferent documentation, depending on the object of the adopted decision, where appropriate (ex: property deeds, expertise reports, evaluation reports, feasibility studies etc.);
- the existence of the motivation report, in the case of the dispositions issued by the mayors or by the president of the county council.

Confirmation of the exercise of legality verification on administrative acts implies the application on each verified administrative act of a stamp containing the words: "VERIFIED FOR LEGALITY", name and surname of the responsible legal adviser, date and signature and drafting of a report containing the observations and conclusions of the adviser the conformity of the verified administrative act, which shall be signed in handwriting by him and by the head of the legal service. After approval, in case of request made by the issuers of administrative documents, based on the report, an address will be drawn up to the public authority issuing the document communicating the result of the legality check, and the report is archived together with the administrative documents to the institution of the prefect

The legal term for verifying the legality is of maximum 6 months from the date of communication of the administrative act to the prefect, as it is stipulated in art. 3, paragraph (1) and in conjunction with art. 11 paragraph (1) of the Law no. 554/2004 of the administrative contentious, with its subsequent modifications and completions.

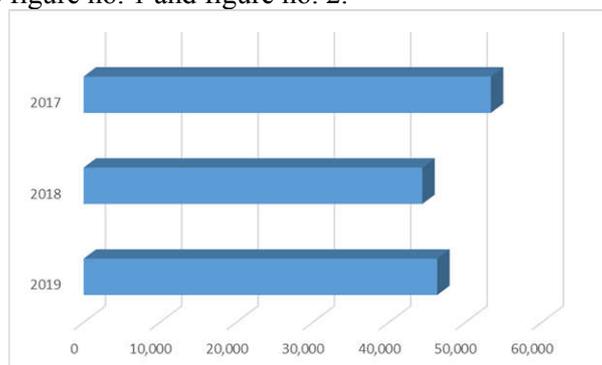
The prefect performs, within the limits of legal competencies, the activity related to the administrative, executive power, to verify the legality of administrative acts and, according to art. 122 paragraph (4) of the Romanian Constitution may challenge (is not obliged), before the administrative contentious court, an act of the county council, of the local one of the president of the county council or of the mayor, if he considers the act illegal. The contested act is suspended by law.

Provisions and judgments considered illegal can be appealed directly to the administrative court, the prior procedure not being mandatory in the case of the action brought by the prefect. In institutional practice, however, it was found that most local public authorities amend or revoke illegal administrative acts, as a result of the warning received from the prefect. The administrative contentious court will be appealed in case the existence of administrative acts considered illegal would create a foreseeable, serious disturbance of the functioning of a public authority, a public service or would cause a material and foreseeable damage to the issuing administrative-territorial unit.

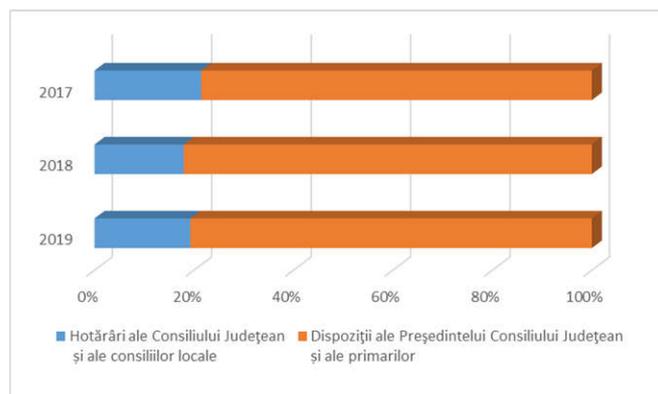
If it is found that the administrative act is illegal, the person performing the legality check will formulate the prior complaint requesting the issuing authority, with the necessary motivation, to re-analyze the act considered illegal, in order to amend or revoke it. The preliminary complaint is signed by the person who formulated it, by the head of the legal service, is endorsed by the sub-prefect and is approved by the prefect. The preliminary complaint is formulated at the latest before the fulfillment of the term of 6 months from the date of the official communication to the prefect, provided by art. 3 paragraphs (1) and in conjunction with art 11 paragraph (1) of Law no. 554/2004 of the administrative contentious, with the subsequent modifications and completions. The term of 6 months represents a limitation period. Each person who has performed the legality check will keep in the Register of records of administrative acts, the record of previous complaints made against administrative acts considered illegal. Preliminary complaints shall be annexed to and filed with the administrative acts against which they have been made.

## **2. Exercising Administrative Guardianship at the Level of Bacău County in the Period 2017 – 2019**

The exercise of administrative guardianship at the level of Bacău County consisted in completing the previously mentioned stages, by the legal advisers within the specialized structure, for the administrative acts adopted / issued by 93 administrative-territorial units and the County Council. Thus, in the period 2017-2019, a number of 144,033 administrative documents were submitted to the Institution of the Prefect of Bacău County in order to verify the legality, of which 28,336 decisions of the County Council and local councils and 115,697 provisions of the President of the County Council and mayors, according to figure no. 1 and figure no. 2.



**Figure no. 1 The evolution of the administrative acts submitted to the Institution of the Prefect of Bacău County to verify legality**



**Figure no. 2 The structure of the documents of the administrative documents subject to the verification of legality between 2017 and 2019**

Legend:

blue color – decisions of the County Council and local councils

orange color - provisions of the President of the County Council and mayors

Regarding the degree of load, as volume of activity per legal advisor, we mention the fact that it varies depending on the number of ATUs distributed, each legal advisor having on average about 15 issuing units.

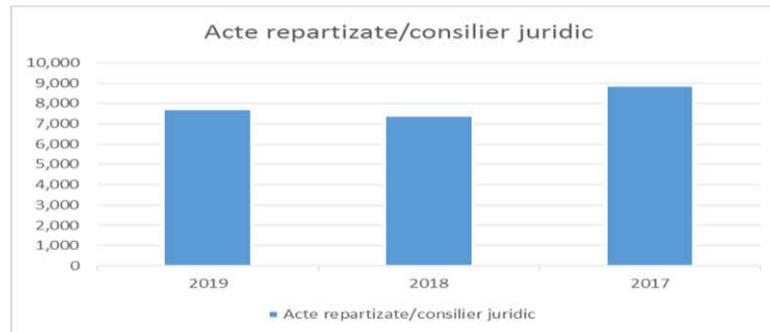
Analyzed at the level of 2017, the activity of the specialized structure was presented according to the following table.

**Table no. 1 The activity of the specialized structure**

Legal advisers	Decisions no.	Checked/day	Disposals no.	Checked/day	Total doc SJ	Checked SJ/day
1	1724	8	7928	36	9652	44
2	1616	7	9574	44	11190	51
3	1242	6	8562	39	9804	45
4	1240	6	7996	36	9236	42
5	1610	7	8690	40	10300	47
6	449	2	2178	10	2627	12
<b>Total SJ</b>	<b>7881</b>	<b>36</b>	<b>44928</b>	<b>204</b>	<b>52809</b>	<b>240</b>

Out of all the administrative acts verified during 2017, a number of 49 acts were considered illegal, respectively 24 decisions adopted by local councils and 25 provisions issued by the mayors of administrative-territorial units, administrative acts for which documentation was requested and sent preliminary procedures for their reanalysis. From the administrative acts considered illegal, 13 decisions and 14 dispositions were revoked, and on the role of the administrative contentious court of the Bacău Tribunal there were 18 cases pending.

After a unitary distribution, we can say that, in the period 2017-2019, each of the six legal advisers checked from the point of view of legality, annually, a number of over 7,000 administrative acts.



**Figure no. 3** The evolution of the assigned acts per legal advisor between 2017 and 2019

### Conclusions

Considered as a current activity of the Prefect's Institution, the verification of the legality of administrative acts seems seemingly simple, being procedural and very carefully regulated, but from the point of view of the multitude of fields of applicability of administrative acts issued / adopted by local public administration authorities by their implementation, things get complicated.

An essential factor in certifying the legality of administrative acts is the attention, training and experience of legal advisers who, in completing all procedural steps, from registration to issuance of the report or legality notice, verify, interpret and pursue in order to complete omissions or unjustified invocations of incomplete or repealed normative acts.

Therefore, we consider the administrative guardianship as the most important attribute conferred to the prefect, in the exercise of which he is the guarantor of the observance of the Constitution and the laws.

### References

- [1] Operational procedure regarding the verification of the legality of the administrative acts issued / adopted by the local public administration authorities from Bacău County, approved by the Order of the Prefect no. 378 of 08.10.2019
- [2] Law no. 554/2004 of the administrative contentious, with the subsequent modifications and completions
- [3] Decision no. 460 of April 5, 2006 for the application of some provisions of Law no. 340/2004 regarding the prefect and the institution of the prefect, section I, art. 6, point 1
- [4] GEO no. 57/2019 regarding the Administrative Code
- [5] Activity reports of the Institution of the Prefect of Bacău County (<https://bc.prefectura.mai.gov.ro/despre-noi/rapoarte-si-studii/>)