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THE OBJECT OF THE ACTION IN ADMINISTRATIVE LITIGATION IN THE LIGHT OF LAW NO.212 FROM 25TH JULY 2018

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Abstract: *Exercising control regarding the legality and opportunity on the administrative act by the court is circumscribed to the object of the action in administrative litigation and is guaranteed by the Constitution and regulated by the special law, Law no.554 /2004. Along with the amendments to the notion of administrative act, through the assimilation of administrative contracts, controversies have appeared in the doctrine regarding the competence of the administrative litigation courts regarding the execution of the administrative contracts, clarified by the adoption of Law no.212 / 25.07.2018 .*

Key words: *administrative contract, administrative act, litigation, competence, public interest, prior complaint*

1. Introduction

The control regarding legality exercised by the courts on the administrative acts of the public authorities, a principle of the rule of law and constitutional guarantee (art.126 paragraph 6 of the Romanian Constitution) is also defined by the doctrine in relation to the activity of the public administration.

Professor Constantin G. Rarincescu (1936, p. 105) defined the administrative litigation, framing it in the field of public law, as "the *total of the disputes between individuals and the Public Administration on the occasion of the organization and functioning of the public services and in which rules, principles and legal situations are presented to the case. " .By primarily reporting to the body carrying out the control of legality, the court, professor Antonie Iorgovan (1996, p.381) defined the administrative litigations: " either in a material sense, evoking the totality of disputes between the administration and individuals (no matter who solved the litigation, a judicial body or an administrative body) or in a strict sense, evoking the litigations settled only by the courts ".*

2. The Regulatory Settlement of the Subject-Matter of the Action in Administrative Litigation

Depending on the object deduced from the trial, referring to the provisions of Article 2 paragraph 1 letter c) and letter c1) (reworded by art.I. points 1 and 2 of Law no.212 /

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2018) and Article 2, paragraph 2, in conjunction with Article 8, amended in July 2018, the administrative litigations are of four types:

a) litigations regarding the typical unilateral administrative acts, typical;
b) litigations regarding the atypical unilateral administrative acts (according to art. 2 paragraph 2 of Law no.554 / 2004);
c) litigations whose lawful object are the assimilated administrative acts, namely the administrative contracts, including those on the legality of the negotiation and the conclusion of the administrative contract;
d) the litigations concerning the administrative-fiscal acts;

A special type of action in administrative litigation is the one that deals with the government ordinances or a provision of an ordinance, which violates the legitimate rights or interests of the individuals, according to art. 9 of the Law of administrative litigations. Thus, in the first form of the Administrative Litigation Law , the formulation of an action in order to defend a right or a legitimate interest affected by an ordinance or provision of an ordinance was conditional on the wording in the litigation and the constitutional challenge regarding the text of the normative-administrative act in question.The solution of the courts for not formulating the constitutional challenge with regard to the text of the ordinance together with the administrative litigation is the dismissal of the actions in administrative litigation because, on the one hand, the government ordinances are not administrative acts of authority issued by the executive authority for the enforcement of the law, they are themselves a normative act, on the other hand, according to Article 146 letter d of the Constitution, the ordinances are subject only to the constitutional control exercised by the Constitutional Court (see also the decision of the Court of Appeal Craiova no. 293 / 31.10.2008).

From the wording of Article 9 of the Law: "The person aggrieved in his right or in a legitimate interest through ordinances or provisions of ordinances " it did not result concretely, until the amendment brought by Law no. 100 / 09.05.2008, if the object of the main action in administrative litigation could even be the contestation of the provision in the normative-administrative act, but the courts and before the amendment brought by the Law no. 100/2008 rejected the actions in administrative litigation, which mainly challenged the ordinances of the government or provisions of them, taking into account the fact that according to Article 2, paragraph 1, letter a of the law, the damage of the subjective rights or legitimate interests had to occur through the effect of an administrative act issued under the normative-administrative act.

The current wording of Article 9 of the Law provides for the special procedure whereby the action is brought before the administrative litigation court together with the constitutional challenge of the normative-administrative act, only in so far as the main object in the litigation is not finding the unconstitutionality of the act or provision concerned, the latter being expressly regulated by Law No 100/2008. The application of this conditionality is found in the case-law both in the Decision of the Timişoara Court of Appeal no.161/17.06.2008 and in the Decision of the High Court of Cassation and Justice no.1629 of March 28, 2014.

The subsequent character of the constitutional challenge in relation to the main petitioner of the administrative litigation which must concern an administrative act also

results from the third sentence of the second thesis in Article 9 of the Law in the sense that the administrative litigation is dismissed as inadmissible if the constitutional challenge in relation to the text of the Ordinance is rejected.

Such an action in litigation concerning the damage of a right or a legitimate interest by the effect of a normative-administrative act may also be introduced after the constitutional challenge of an ordinance by settling an exception in a case of another nature, provided that the litigation is commenced within one year from the date of publication of the Constitutional Court's decision on ascertaining the constitutional challenge in the Official Gazette (art. 9 paragraph 4 of the Administrative Litigation Law as amended by the Law no.262 / 19.07.2007).

Analyzing chronologically the text of art. 8 of the Law no.554 / 2004 from the adoption of the law on December 2, 2004 until the amendments brought in July 2018 (Law no.212 /2018), we notice an evolution regarding both the extension of the scope of the action in the administrative litigations as well as the nature of the claims relating to the administrative contracts, as assimilated administrative acts.

2.1. The Amendment to Article 8 of the Administrative Litigation Law by Law no.262 / 2007

In accordance with the definition of administrative litigations of art. 2, paragraph 1, point f), the final thesis of the law of the administrative litigation and in order to complement article 2 paragraph 2 of the law, the text of art. 8 extending the subject of actions in administrative litigation and damage caused by a public authority by refusing to carry out an administrative operation necessary for the exercise or protection of a legitimate right/interest. In this respect, a controversy between doctrine and case-law on tax litigation was settled if, following the issue of an administratively contested tax decision and the lack of response from the tax authority' to the administrative appeal against the debt claim, the courts rejected the actions against the tax act without addressing the substance of the case, although the previous procedure stipulated by the tax code of procedure at that time had been initiated - art.205 of the Government Ordinance no.92/2003 corroborated with the provisions of art.7 of the Law no.554/ 2004, if the administrative appeal procedure had not been finalized and an administrative decision on the complaint was issued. The reason for these solutions arose from the fact that the object of the action in administrative litigation is the administrative act, in this case the decision to settle the contestation by the fiscal body, for which the courts compelled the tax body to finalize the administrative investigation and issue the decision to settle the contestation by omitting thus the relationship between the tax procedure code and the administrative litigations law (Niculeasa, 2011).

Thus, in accordance with the provisions of Article 2, paragraph 1, letter f) of the Law no.554 / 2004 (regarding the definition of the administrative litigations) and related to the provisions of art.126 paragraph 6 and art.52 paragraph 1 of the Romanian Constitution, and the Constitutional Court ruled by Decision no.137 / 1994 (decision issued in relation to the Law of administrative litigations no.29 / 1990 in force at that time, but stipulating that Law no.554/2004 also states that the action in the administrative litigations court is also formulated if the administrative authority did not settle the complaint against the administrative act - Article 5 of Law no. 29/1990 similar

to Article 8 of Law no.554/2004) that: " *The administrative litigation institution comprises the set of rules of direct action to be exercises by the damaged parties before a competent court of law against an administrative act deemed unlawful or, as the case may be, against the refusal of a public authority to resolve a request within the time limit set by law.In this way, the administrative litigation institution appears as a guarantee of citizens' rights and freedoms against possible abuses of the public authorities. "*

Considering the relation between the public and the private interest in relation to the individual damage that can be justified by a natural or legal person in relation to the acts / actions that directly concern it, Law no. 262/2007 provided for in Article 8 paragraph 1 of the Administrative Litigation Law that if the subject of the action in administrative litigation concerns an act infringing a publicly legitimate interest, the courts will not be able to provide for the reparation of the damage caused to the applicant and any moral damages, even if the private legitimate interest derives from the public one. Thus, in order to guarantee the applicant a certain constraint of the administrative authority with the purpose of repairing / protecting the public legitimate interest, the legislature provided for the possibility that, together with the annulment of the act issued or the obligation of the authority to issue an act, penalties for delay or fines are to be ordered by the court, according to Article 24 paragraph 2 of Law no.554 / 2004, by means of these sanctions, an indirect general reparation being ensured for all the subjects that might claim that public legitimate interest.

Concerning the actions in administrative litigation regarding the administrative contracts, Law no. 262/2007 has detailed the nature of the claims that may be invoked by the courts of law regarding the execution of an administrative contract, these being referrals to these courts and litigations regarding the *conclusion, modification, interpretation, execution and termination of the administrative contract* , according to art.8 paragraph 2 law modified by art.I point 12 of the Law no. 262/2007, observing the priority of the public interest in relation to the contractual freedom by means of which the private interests of the contracting parties are protected.

In accordance with the amendment to art. 8 of the law and as if in antithesis with the provision completed by the introduction of paragraph 12 art.8, the Law no. 262/2007 supplemented the object of the action in administrative litigation regarding the ordinances of the government, as it is regulated by Article 9 in the law, by introducing a new paragraph in Article 9 of the Law in the sense that in actions based on and in accordance with the procedure laid down in Article 9 paragraph 1 - paragraph 4, the applicants contesting the individual administrative act issued under the Ordinance found to be unconstitutional will be able to request the court, subsequent to the petitions regarding the annulment of the act or to oblige the authority to issue an act, namely the obligation to carry out a certain administrative operation in accordance with the new legal situation after the unconstitutionality of the contested order has been declared, and offering individual legal remedies indirectly caused by the existence and the application of the contested ordinance.

The solution thus introduced by paragraph 5 of Article 9 of Law No.554 / 2204 on the granting of material and even moral damages by the administrative litigation court following a disputed order being declared unconstitutional in connection with the

administrative act or the administrative operation not performed is justified by the fact that, although the ordinance in question regulated a publicly legitimate interest, by the contested administrative act, namely by notifying the non-execution of an administrative operation, the injured party reports and will prove the individual damage suffered through the effect of the administrative act in question, respectively by the refusal of the authority to carry out a specific administrative operation to protect a legitimate private interest.

2.2. The Amendment to Article 8 of the Administrative Litigation Law by Law no.212/ 2018

Having applied the principle of the courts' active role (Article 22 of the Civil Procedure Code - Law no. 134/2010), in this case of the administrative litigation courts, as well as in accordance with the principle of the separation of the procedural stages in the litigations brought by the administrative courts - the administrative phase governed by the common law, respectively the fiscal procedure code in the case of the administrative-tax acts, and the judicial phase governed by the law of administrative contentious, the completion brought by Law no.212 / 2018 in paragraph 1, article 8 of the Law no.554 / 2004 regarding the extension of the grounds from the application in the administrative litigation court with the grounds of the administrative complaint / the preliminary complaint appear as natural and long time invoked by practitioners.

Another salutary amendment brought by Law no.212 / 2018 in the case of disputes concerning administrative contracts, both in terms of the application of the urgency principle for the settlement of litigation disputes, as well as of substantive law considerations regarding the principle of contractual liability is the clarification provided by paragraph 2 art.8 of the administrative litigation law, by restricting the competence of the court of law to the actions related to the conclusion of an administrative contract, including in relation to the pre-concluding phases, because at this stage, abuses by the public authority that initiated the procedure of concluding the administrative contract may occur, that is to say, actions seeking the annulment of an administrative contract on the grounds of defects occurring at the time of the conclusion of the contract.

Thus, the legislator expressly determines the disputes arising from the execution of the administrative contracts (art. I point 9 of the Law no.212 / 2018) in the competence of the civil courts of common law, thus referring to the modifications made in paragraph 2, article 8 of the Law no.554 / 2004 by art. I point 12 of the Law no.262 / 2007.

An argument for this solution established by Law no.212 / 2018 by amending the second sentence of Article 8 of the Law, is that the disputes arising from the execution of the administrative contracts are based on the administrative contract itself, the administrative litigation court not being thus invested according to art. 1 paragraph 1 of the Law no.554 / 2004 on aspects regarding the legality in relation to the administrative contract assimilated to the administrative act .

Thus, the civil court of common law is invested with a genuine action regarding contractual liability, as it is currently defined in Article 1350 of the Civil Code, obliging the party who has not fulfilled / failed to fulfill its contractual obligations by reference to the provisions of an act legally concluded and recognized by the parties through the commencement of its execution.

At the same time, it will also be taken into consideration by the civil court of common law invested in accordance with Article 8, paragraph 2, final sentence of Law no.554 / 2004 that the freedom of contract is subordinated to the principle of public interest priority, because the purpose of concluding the administrative contract is to indirectly serve the public interest of the community.

3. Conclusions

Depending on the main object of the administrative litigation, by reference to paragraph 1 of Article 8 of the Law, the solution of the courts following the admission of the litigation will be:

a) The cancellation of the unilateral administrative act itself, in whole or in part, as a result of finding its unlawfulness and repairing the damage caused by the execution of the administrative act, eventually also moral damages;
b) Finding the unjustified refusal to issue an administrative act or the inaction of the public authority raised by petition regarding the issuance of an administrative act by a natural or legal person regarding a subjective right or legitimate interest, compelling the public authority to issue the requested administrative act, respectively issuing another act to eliminate the unlawful effects caused by the initial administrative act, or obliging the public authority to carry out a particular administrative operation.

In the case of the administrative contracts, as amended by Law no.212 / 2018, in case of admission of the court action, the court shall order: **a)** compelling the public authorities or legal entities concerned to conclude an administrative contract, including by solving the steps leading to the conclusion of an administrative contract, in which case an administrative operation necessary for the conclusion of the contract may also be ordered; **or b)** the cancellation of an administrative contract concluded by / with a public authority, as the defect leading to the cancellation occurred at the time of conclusion of the contract.

As of August 2, 2018, the interested parties, including the public authorities, in promoting an action to change an administrative contract due to a factual situation after its conclusion in the course of its execution, as well as an action regarding the execution of the administrative contract (referring to the inappropriate execution or the non-execution of the contractual obligations assumed), including the request for the termination of the contract due to the total or partial non-observance of the contractual obligations shall be the competence of the civil law courts of common law.

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