

## DISPUTES ABOUT THE RESOLUTION OF THE EXCEPTION OF ILLEGALITY IN THE APPEAL

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**Abstract:** *The exception of illegality is a procedural means of verifying the legality of an administrative act. The settlement of the plea of illegality is subject to procedural conditions of admissibility. One of the conditions is that an exception be invoked before the court that settles the substance of the dispute. A decision on interpretation was issued by the High Court of Cassation and Justice, considering that the exception can be invoked in the appeal. We consider that, even after the interpretative decision of the High Court of Cassation and Justice, elements of non-unitary judicial practice may arise in particular as regards the conditions under which the exception may be considered on the merits.*

**Key words:** *administrative act, exception of illegality, appeal, the merits of the dispute*

### 1. Introduction

The exception of illegality is one of the forms of exercising the judicial control over administrative acts, which aims to remove an illegal administrative act applicable in a dispute before the courts, regardless of the object of the dispute and the stage of the trial.

In our paper, we set out to focus exclusively on the issues of the admissibility of the plea of illegality and on the procedure for examining the plea of illegality on the merits, in the appeal. We will bring to your attention an issue that, from our point of view, has not been fully clarified in the Decision no. 36/2016 pronounced by the High Court of Cassation and Justice - Panel for resolving legal issues and aforementioned decision, nor in the legislation: it is about the procedure for resolving the exception of illegality on the merits, when it is invoked before the appellate court. It is important to clarify this aspect, in light of the specifics of the appeal and of the solutions that can be pronounced in the appeal.

We remind you that the procedure for solving the exception of illegality was modified by article 51 point 1 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure. The Code of Civil Procedure entered into force on February

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15, 2013. Therefore, the procedure regulated by article 4 of Law no. 554/2004 in the form amended by Law no. 76/2012 applies only to the exceptions of illegality invoked in the main proceedings started after February 15, 2013. This form of law is also subject to our attention.

According to article 4 (1) of Law no. 554/2004 of the administrative contentious, in the form after February 15, 2013, "The legality of an individual administrative act, regardless of the date of its issuance, may be investigated at any time in a trial, by way of exception, *ex officio* or at the request of the interested party".

According to article 4 (2) of the law, "The court invested with the merits of the dispute and before which the exception of illegality was invoked, finding that the resolution of the dispute on the merits depends on the individual administrative act, is competent to rule on the exception, either by a interlocutory judgment during the process, or by the decision to be given in the case. If the court rules on the exception of illegality by interlocutory decision, it may be challenged together with the merits".

In practice, the courts verify the following conditions regarding the admissibility of the exception of illegality:

- the exception must concern an individual administrative act, as defined in article 2 (1) (c) the first thesis of Law no. 554/2004;
- the contested administrative act with the exception of illegality must not be exempted from judicial control in administrative litigation;
- the resolution of the dispute in the main proceedings must depend on the resolution of the plea of illegality.

## **2. What does it Mean, in the Practice of the Courts, Prior to Decision no. 36/2016 of The High Court of Cassation and Justice, that the Exception of Illegality Can Be Invoked "At Any Time in A Trial" and Before the "Court Invested With the Merits of The Dispute"?**

According to article 4 (1) and (2) of Law no. 554/2004, the exception of illegality can be invoked at any time in a trial, by the parties, by the prosecutor or by the court *ex officio*.

In the practice of the courts, in particular, the phrase "anytime in a trial", as well as the phrase "the court invested with the merits of the litigation", from article 4 of Law no. 554/2004 raised problems of interpretation. In other words: does Law no. 554/2004 allow the invocation of an exception of illegality directly in the appeal?

Prior to Decision no. 36/2016, the courts expressed three opinions.

According to one opinion, the exception of illegality can be invoked both in the trial on the merits and in appeals. The plea of illegality can be raised directly in the appeal, because it does not trigger a new dispute, but it is only a procedural incident.

According to another view, the plea of illegality cannot be raised directly in the appeal, since the plea is a means of defense. According to article 494 and article 478 (2) of the Code of Civil Procedure, the parties may not use in their appeals other means of defense than those invoked before the court of first instance.

The third opinion is in conjunction with the second opinion. According to the third opinion, the plea of illegality can be raised in the appeal if only a new trial on the merits of the dispute is reached as a result of the admission of the appeal.

### **3. What is the Situation in the Practice of the Courts after the Decision no. 36/2016 of the High Court of Cassation and Justice?**

The Decision no. 36/2016 is an interpretative decision and it is binding on the courts. According to this decision, the High Court of Cassation and Justice ruled that article 4 of Law no. 554/2004 allows the invocation of the exception of illegality of an individual administrative act, directly in the appeal.

According to article 483 (3) of the Code of Civil Procedure, the court of appeal examines the conformity of the contested decision with the applicable rules of law. According to article 496 of the Code of Civil Procedure, the court may admit the appeal, may reject it, may annul it or may find its obsolescence.

According to article 498 (1) of the Code of Civil Procedure, when the appeal is admitted, the decision of the court of first instance is quashed and, as a rule, the court of appeal is the one that will re-judge the dispute on the merits.

According to article 20 (3) of Law no. 554/2004, in case of admitting the appeal, the court will quash the decision and will re-judge the dispute on the merits. The dispute will be sent for retrial to the first instance when the first instance court has not judged the merits of the dispute.

We note that, both according to the general rules of the appeal procedure, established in the Code of Civil Procedure, and according to the special norms regarding the appeal, from Law no. 554/2004, the re-judge of the dispute on the merits is made only in case the appeal is upheld. Then, we ask ourselves whether according to Decision no. 36/2016, the appellate court must consider on the merits an exception of illegality, even when the court dismissed the appeal.

According to paragraph 41 of Decision no. 36/2016, the High Court of Cassation and Justice considers that a court of appeal could also be a court invested with the merits of the dispute, since it has the possibility to re-judge the dispute on the merits. Therefore, the High Court of Cassation and Justice considers admissible the exception of illegality invoked directly in the appeal since, theoretically, an appellate court can retrial the merits of the dispute. According to that paragraph, it appears that a mere theoretical possibility for the appellate court to re-judge any dispute on the merits rises to the possibility of invoking the plea of illegality directly in the appeal.

In paragraph 49 of the same Decision, it appears that the High Court of Cassation and Justice is considering, on the contrary, the appellate court which effectively re-judges the dispute on the merits when it quashes the judgment of the court of first instance. It follows that, according to that paragraph of the decision, the plea of illegality will be considered on the merits only if the appeal is upheld, the judgment of the court of first instance is quashed and the dispute is remitted on the merits by the appellate court. Of course, in the case of the retrial of the dispute by the first instance, the situation is

simple because the court of first instance is the one that will resolve for the first time the exception of illegality, together with de main dispute.

One question remains: following the Decision no. 36/2016, is the analysis on the merits of the exception of illegality in the appeal mandatory, regardless of the solution on the merits of the appeal?

The answer must be nuanced.

When resolving an exception of illegality, the court judges the dispute in fact and in law: the court administers evidence, establishes the factual situation and applies the law to the factual situation. Therefore, in the procedure of solving the exception of illegality, the court before which the exception was invoked, makes a judicial investigation in the same way as a court of first instance.

The resolution of an appeal involves only an analysis in law and not in fact of the case. Only in the case of retrial of the merits of the dispute following the admission of the appeal, the retrial is made in fact and in law, but within the limits established by the court of appeal. This means that the retrial must take place in accordance with the instructions given by the appellate court in the decision of cassation.

Then, how could an objection of illegality be considered on the merits in an appeal dismissed as unfounded? We consider that the High Court of Cassation and Justice did not have the opportunity to clarify this issue as the court which requested the interpretation did not ask a very precise question.

A case - by - case analysis should be made in order to determine the conditions under which an appellate court may, on the merits, resolve a plea of illegality raised for the first time before it.

The court must verify whether the grounds of appeal involve a substantive analysis of the legal relationship in the main proceedings. For example, if the appeal relies exclusively on grounds relating to non-compliance with the trial procedure before the first instance (for example, incorrect composition of the court, breach of the rules of procedure, etc.), the appellate court does not adjudicate the merits of the case. If the appeal is admitted, the decision will be quashed and the dispute will be sent for retrial to the first instance. In this case, the retrial of the main proceedings at first instance is done together with the exception of illegality.

As we said, if the appellate court only makes an analysis of the legality of the contested sentence. This also happens if the first instance has violated or misapplied the rules of substantive law. In this case, the substantive analysis of the exception of illegality would make the appellate court also analyze the situation that generated the issuance of the individual administrative act. This also means an analysis in fact. This analysis would have to be carried out even before ruling on the merits of the appeal.

It means that the appellate court, when examining an exception of illegality, automatically becomes a court of first instance, although it did not quash the decision of the court of first instance. Therefore, the appeal would be diverted from its purpose, that of exclusive control of legality. Such an interpretation seems to interfere with the will of the civil procedural legislator and, therefore, seems to be unconstitutional. It must be remembered that a decision interpreting the law cannot change an option of the legislator as it would violate the principle of the separation of powers.

As for the jurisprudence of the Constitutional Court, we did not identify decisions on the specific issue under discussion. We mention the Decision no. 1682/2009, which is also mentioned by the High Court of Cassation and Justice in its decision. In the decision no. 1682/2009, the constitutional court rejected as inadmissible the exception of unconstitutionality of the provisions of article 4 (1) the third thesis of Law no. 554/2004. The decision takes into account an older form of article 4, which provided that the administrative contentious court was the one that resolved the exception of illegality, and not any court, as is currently the case.

The analyzed Decision no. 1682/2009 rejects the exception of unconstitutionality as inadmissible as it concerns legislative omissions, outside the competence of the Constitutional Court. The decision draws attention by its considerations about the fairness of the procedure of the exception of illegality.

According to the Decision no. 1682/2009, if an exception of illegality is raised for the first time in the appeal, the interested party has the possibility to file a direct action in court, and the main dispute will be suspended. We consider that by "direct action", the Constitutional Court refers to the action for annulment of the act, which the interested party can introduce after the adverse party invoked the exception of illegality of the respective direct act in the appeal. The court of constitutional contentious also refers to the time limits allowed for the exercise of the direct action. This indicates that the Constitutional Court considered the action for annulment, and not the exception of illegality, the latter being able to be invoked at any time.

The High Court of Cassation and Justice identifies a symmetry between the procedure of the exception of illegality analyzed by the Constitutional Court and its current regulation. However, as we have shown, the Constitutional Court did not analyze the issue of constitutionality on its merits, but presented some possible alternative solutions: promoting a direct action when an exception of illegality is invoked directly in the appeal.

In paragraph 56 of its decision, the High Court of Cassation and Justice concludes that the appellate court will first rule on the plea of illegality of the individual administrative act, after which it will resolve the merits of the dispute.

We ask ourselves whether the resolution of the exception of illegality is made before the resolution of the appeal. Or first the appeal is resolved and in case the sentence is quashed, the exception of illegality is analyzed and then the merits of the case. We note that the High Court of Cassation and Justice mentioned the "merits of the dispute" and not the merits of the appeal. This entitles us to consider that the High Court of Cassation and Justice took into account the situation in which the appeal is allowed.

We consider that it would be useful for the courts to refer again to the High Court of Cassation and Justice for further clarifications regarding the procedure for resolving on the merits the exception of illegality, in the appeal.

It would also be necessary for the questions referred to the High Court of Cassation and Justice to be sufficiently precise in order to obtain a clear and useful interpretation for the courts.

#### 4. Conclusions

In the field of the control of an individual administrative act, the exception of illegality is a useful tool. To this end, a clear and accessible interpretation of the procedural provisions in administrative litigation, including the substantive analysis of the plea of illegality directly in the appeal, is desirable.

This mechanism of interpretation can be triggered by the courts before the High Court of Cassation and Justice for binding decisions in the interpretation of the law. For a useful interpretation, it is necessary for the courts to ask clear and sufficiently comprehensive questions.

For a clearer regulation of the procedure of exception of illegality we would appreciate an intervention of the legislator. The legislator may provide a legal definition of the phrase "the court invested with the merits of the dispute". In order to ensure fairness of procedure and access to redress, the legislator should limit the invocation of the plea of illegality to the trial at first instance. This would mean that the litigants would have the same appeal against the judgment on the plea of illegality as in the main dispute in which the plea was raised.

The fairness of the procedure would imply the right to an appeal against the solution on the exception of illegality. In the direct action in annulment of the act, the appeal is admissible. It is clear that the procedural differences between the two (direct action vs. exception of illegality) are justified, but we believe that with regard to appeals, regulatory differences may raise issues of fairness of the procedure.

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