RECENT ADMINISTRATIVE CHANGES OF THE ADMINISTRATIVE LITIGATIONS LAW NO. 554/2004

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Abstract

The common law instances or the administrative instantces competence over the litigations that have administrative contracts as object have been the subject of many doctrinary disputes but not only, the legislation being inconsistant over more than 25 years, from 1990-now.

The recent modification of the administrative litigation law no. 554/2004 shed light over many aspects regarding the litigations that have administrative acts considered illegal as objects but also over the instance's competence to solve litigations regarding administrative contracts. The increase of the limit that determines the material competence of the administrative and fiscal litigation from tribunals and Courts of Appeal to solve administrative litigations from 1.000.000 to 3.000.000 lei but also the elimination of the filtre procedure for the recourse that the High Court of Cassation and Justice has competence over are only some of the legislative modifications that we are going to present in the curent study.

The current study's object is, on one hand to inventory the most important legislative modifications brought to administrative litigation and, on the other hand to confirm the fact that the legislator has taken into account the doctrine and jurisprudence to modify the legislation, being a well known fact that the administrative law domain was many years in the situation in which the law was left behind the society's evolution, not having a codification, like there is in civil or criminal law.

Keywords: *the administrative litigation Law no. 554/2004, administrative contracts, article 52 from the Constitution, the recourses filtering procedure, competence.*

1. Introduction

The public authorities administrative acts are subject to some formal regulations that flows from their character as acts of power, essentially these being acts of authority. The legality of the administrative acts but also their opportunity are two aspects that have made the object of administrative litigations and the national jurisprudence is rich under this aspect. Law no. 212/2018 for the modification and completion of Law no. 554/2004 of the administrative litigation and other normative acts[1] has managed to bring those essential modifications taken from the evolution of the society in administrative litigation matter, with the extraordinary contribution of the jurisprudence created in the last years.

The constitutional ground for the administrative litigation is article 52 from the Constitution entitled *the right of the plaintiff of a public authority.* Line (2) of article 52 expressely states: "the conditions and limits of exercising this right are esteablished by organic law". In our case, the organic law that the legislator of Law no. 554/2004 of the administrative litigation[2] refers to. The jurisprudence of both the Constitutional Court but also the European Human Rights Court has admitted the possibility of some limitations brought through law to exercising the free access to justice[3]. "The existance of the judicial constant does not preclude the process of law's change, of its permanent evolution[4]", the doctrine states. On the other hand, the national legislator is also forced to always keep in mind that the legislation armonization with the communitary acquis[5] but also with the tendences that come out of the social evolution. In this regard we share the oppinion according to which: "Any state has its right legislated, in accordance to its own socio-political exigences, with the traditions and values that it proclaims[6]". Also, yet again it is confirmed the affirmation according to

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[1] Law no. 212/2018 for the modification and completion of Law no. 554/2004 of the administrative litigation and other normative acts, published in the Official Gazette no. 658, July 30th 2018.

[2] Law no. 554/2004 of the administrative litigation, published in the Official Gazette no. 1154 from December 7th 2004 with the subsequent modifications and completions.

[3] Tudorel Toader, *Romania's Constitution reflected in constitutional jurisprudence*, Hamangiu Publishing House, Bucharest, 2011, p.52.

[4] Laura Cristiana Spătaru Negură, *European Union Law – a new judicial typology*, Hamangiu Publishing House, Bucharest, 2016, p. 47.

[5] "The (UE) communitary acquis – or the (union) communitary acquire represents the totality of judicial norms that regulate the activity of the European Communities (European Union), of their institutions, the (European Union) communitary policies. The (EU) acquis includes, thus, the institutive and subsequent Treaties, the adopted legislation by the (EU) communitary institutions throughout the time (regulations, directives, decisions, recommendations and advice), the CJUE jurisprudence, adopted declarations and resolutions in EU, the common actions, the adopted positions and acts in PESC and the cooperation in the justice domain and internal affairs and the international accords to which the EU is part of" (Augustin Fuerea, *The European Union Book*, 6th edition, reseen and added, Universul Juridic Publishing House, Bucharest, 2016, pp. 37-38).

[6] Elena Anghel, *Constant aspects of law*, in CKS-eBook proceeding, 2011, Pro Universitaria Publishing House, Bucharest, 2011, pp. 594

which: "the obligativity of right's rules is assured, when needed, by the coercitive states's force[7]".

Thus, in the current study, our attention is focused only on the legislative modifications brought to administrative litigation, which we choose to present selectively. The methods we used are comparative method, deductive method and more.

2. Content

Law no. 212/2018 for the modification and completion of the administrative litigation Law no. 554/2004 and other normative acts that we choose to present selectively in the following pages, brings important clarifications over the competence, both material and territorial, of the administrative litigation instances but also the litigations that have administrative contracts as object but not only.

2.1. About the competence

Article 10 of the administrative litigation Law no. 554/2004 was modified from many points of view, regarding the competent instance to solve the administrative and fiscal litigation: both the territorial but also the material competence.

New aspects about the material competence

The legislative modifications regard, on one hand the *limit* that establishes the instances competence from tribunals to Courts of Appeal, administrative and fiscal litigations sections, and on the other hand it fixates the *competence for litigations referring to non-refundable finance from the European Union.*

The doctrine showed[8]: "the material competence for the substance of the matter is regulated by the law based on two criteria: the emitting public authority of the illegal act positioning in the system of the public administration (central/local authorities); the value of the toll, tax, contribution, custom debt that is the object of the contested administrative act. Thus, there are two types of competence, depending on the object of the administrative act. So, if the object of the administrative act is not toll, tax, contribution or custom debt, the competence is established after the position of the emitting organ, the amount of the asked compensation being irrelevant[9] ".

About the *limit, the value criteria*, it is increased from 1.000.000 to 3.000.000 lei.

Thus, line (1) from article 10 has the following wording: "The litigations regarding the administrative acts emmited or closed by local or country public authority, but also those that regard taxes and tolls, contributions, custom debts, and their accessories up to 3.000.000 lei are solved in their substance by the administrative fiscal tribunals, and those regarding the administrative acts emitted or closed by the central public authorities and those that regard taxes and tolls, contributions, custom debts and their accessories bigger that 3.000.000 lei are solved in their substance by the administrative and fiscal litigation sections of the Courts of Appeal administrative and fiscal sections, if by organic law it is not mentioned otherwise".

A new modification regards the competence for the *litigations that refer to the non-refundable finance from the European Union* in the sense that the exclusive competence of the Court of Appeal for these litigations has been eliminated, thus article 10 line (1^1) states: "the demands regarding administrative acts that have as an object the non-refundable financing from the European Union are solved according to the ammount criteria, and the demands that have as an object administrative acts that cannot be evaluated in money are solved according to the autority's rank, according to the rules mentioned in line (1)". By 2018 article 10 line (1^1) stated: "all the demands regarding the administrative acts emitted by the central public authorities that have as an object amounts representing non-refundable financing from the European Union, no matter the amount, are solved in their substance by the administrative and fiscal litigation sections of the Courts of Appeal".

This legislative modification also has many aspects: it eliminates the exclusive competence of the Court of Appeal for such litigations; the expression " in its substance " vanishes; it imposes the two criteria , the value and the rank of authority one and for this type of litigations regarding the administrative acts that have as an object amounts representing the non-refundable financing from the European Union.

New aspects regarding the territorial competence

Article 10 line (3) from the administrative litigation Law no. 54/2004 has two thesis:

Thesis 1 – "the plaintiff natural or legal person of private law adresses solely to the instance from its domicile or its headquarters ".

Thesis 2 – "the plaintiff public auhtority, public institution or assimilated addressed solely to the instance from the domicile or the headquarters of the plaintiff". Prior to this modification, the territorial competence was alternative in the sense that article 10 line (3) had the following wording: "the plaintiff can address the instance at his domicile or the one at the defendant domicile". Which means that the option of choosing the instance belonged to the plaintiff. Nowadays, on one hand the possibility of choosing between two instances is eliminated and on the other hand it delimitates the plaintiff natural person from the plaintiff public auhtority.

Also new, there is a new line (4) to article 10 that has the following wording: "the territorial competence of solving a cause will also be respected when the

[7] Roxana Mariana Popescu, *Introduction in European Union Law*, Universul Juridic Publishing House, Bucharest, 2011, p.12

[8] Gabriela Bogasiu, *The administrative litigation Law. Commented and adnotated, 3rd edition revised and added*, Universul Juridic Publishing House, Bucharest, 2015, p.314.

[9] The High Court of Cassation and Justice, administrative and fiscal sections, dec., no. 3090 from June 15th 2007, republished in Gabriela Bogasiu, *op. cit.*, p.314.

action will be introduced in the plaintiff's name by any person of public or private law, regardless of its quality in the litigation". This new line regards the administrative law in which the action is introduced in the name of the plaintiff by the People's Lawyer, prefect, the Public Ministry, the National Agency for Public Functionaries etc.

2.2. Regarding the filtre procedure for the recourse

With a different occasion we showed that: "the entry into force of the new civil procedure Code in February 2013[10] meant for the administrative litigations, as novelty, the applicability of a new filtering procedure of the recourses, for the recourses that enter into the competence of the High Court of Cassation and Justice". Studies about the recourse in the administrative litigations have been written into the national doctrine, but, in our oppinion, the most ample material is a study published in the Public Law Magazine[11] because this annalyzes the recourse not only in theory but also in practice, jurisprudential, the author being a High Court of Cassation and Justice, administrative and fiscal section judge.

Doctrine shows that: "although there has been another attemp of introducing the recourse filtre procedure through EGO no. 58/2003 regarding the modification and completion of the civil procedure Code[12] it was abrogated through Law no. 195/2004 regarding the EGO no. 58/2003[13] and through the New civil procedure Code it was reintroduced for the recourses that are in the competence of the High Court of Cassation and Justice[14] ". We critized on that occasion the recourses filtering procedure: "in our oppinion, nowadays, the filtering procedure applicabile to the recourses in the administrative litigations matter practically signifies an abolishion of the double degree of jurisdiction[15]". We concluded at that moment that: "having in mind what we showed in the current study, we consider that in reality there is no need for the filtering bench to analyse the admisibility in principle of the recourse to the High Court of Cassation and Justice but that all the elements analysed by the filtering bench can be very well brought into discussion at the first term with the parts present[16]".

And, in another oppinion, it was stated: "about the filtering procedure of the recourses (...), at least the activity of the administrative and fiscal litigations Section in this regard was burdned by the requirements of article XVII from Law no.2/2013, especially until the apparition of Law no. 138/2014, but also having into consideration the volume of activity, in the works being the litigations solved by the Old civil procedure Code but also those solved by the New civil procedure Code and the accute lack of personnel (judges, magistrates, assistants and clerks)[17]".

Thus, during 2018 through Law no. 212/2018 the administrative litigation Law no. 554/2004 was modified that, through other modifications, eliminated the filtering procedure. This means that what we anticipated was confirmed by the judicial practice that being: the inutility of this procedure but also the burden for the administrative and fscal Law from the High Court of Cassasion and Justice. Concretely, article 20, line 2, 2nd thesis of the administrative litigation Law no. 554/2004 was modified: "the recourse suspends the excutioning and is judge urgently. The procedure forseen at article 493 from the civil procedure Code is not applied in the administrative litigation matter[18] ".

2.3. Regarding the administrative contracts

2.3.1. About the term the action should be introduced, the mentions about the verbal process of finalizing the conciliation procedure

Thus line (1) letter e) is abrogated; it had the following wording: "the date of the verbal process of finalizing the conciliation procedure, in the case of the administrative contracts ".

2.3.2. Any mentioning of the conciliation is thus eliminated,

such as the content of article 7 about the first complaint

- The introductive part is eliminated and letter b) of line (6) is modified: the first complaint in the case of the actions that have as object administrative contracts have to be made in a 6 month term that have to flow (...).

2.3.3. The problem of the litigations competence that have as objects administrative contracts, delimitating:

- Litigations that show up in the first phases of the closing of the administrative contracts, legal litigations or the anullment of the administrative contracts.
- Litigations that flow from the executing administrative contracts.

[10] Law no. 134/2010 regarding the civil procedure Code, republished in the Official Gazette no. 247/2015 (with the latest modification through EGO no. 1/2016 for the modification of Law no. 134/2010 regarding the civil procedure Code, but also some connex normative acts, published in the Official Gazette no. 85/2016); law no. 76/2012 for the applicability of Law no. 134/2010 regarding the civil procedure Code, published in the Official Gazette no.365/2012, apud Elena Emilia Stefan, *Considerations on the recourse in the administrative litigation matter* in RDP no. 1/2016, p.79.

[11] See also Eugenia Marin, *Specific aspects regarding the recourse solutioning by the High Court of Cassation and Justice in the administrative litigation matter*, RDP no. 4/2015, p. 48-80.

[12] Published in the Official Gazette no. 460 from June 28th 2003, *apud* Eugenia Marin, *op. cit.*, p. 73.

[13] Published in the Official Gazette no. 470 from May 26th 2004, apud Eugenia Marin, *op. cit.*, p.73.

[14] Eugenia Marin, *op.cit.*, p.73.

[15] Elena Emilia Ștefan, *op.cit.*, p.79.

[16] *Ibidem*, p.86.

[17] Eugenia Marin, *op.cit.*, p.76.

[18] We would like to remind you that the article 493 from the civil procedure Code is entitled *the filtering procedure for the recourses.*

Thus, for the first category of litigations, thesis 1 of article 8, line (2): " *the administrative litigation instance* is competent to solve the litigations that show up in the first steps of the closing of the administrative contracts and any litigations tied to the closing of the administrative contract, including the litigations that have as an object the anullment of an administrative contract". For the second cathegry of litigations – 2nd thesis of article 8, line (2): "the litigations that flow from the executing the administrative contracts are in the *solving competence of the civil instances of common rights* ".

2.3.4. For some "b", it also fixates the competence either of the common law instance or of the administrative litigation instance, delimitating the moments:

- Litigations that flow from the formalities before the closing of the contract, those regarding the nullity of the contract etc.
- Litigations that flow from the execution of the contract.

It is about Law no. 101/2016 regarding the remedies and the attack ways in matter of attributting the public aquisition contracts, of sectorial contracts and of concession contracts of works and service, and also for organisation and functioning of the National Counsel of Solutioning of the Contestations[19].

Thus, line (1) of article 53 from Law no. 101/2016 (...) is modified: " the processes and the requests regarding the accordance of the damages for the repairment of the prejudices caused in the attribution procedure, and those regarding the anullment or nulity of the contracts are solved in first instance, urgently, by the administrative and fiscal litigation section of the tribunal in the circumscription where the contractant authority has its headquarter, through benches specialised in public aquisitions".

Line (1^1) is introduced: "the processes an demands that flow from the execution of the administrative contracts are solved in first instance, urgently, by the civil instance of common law in the circumscription in which the contractant authority has its headquarter ".

Line (1^2) is introduced: "the actions mentioned at line (1) and (1^1) can also be introduced in the instances of the place where the contract has been closed, if in such a place there is a functioning unit that belongs to the contractant authority ".

2.4. Other legislative modifications regarding the first procedure

Article 7 of the administrative litigation Law respectively:

"Before we address the administrative litigation competent instance, the person that thinks it was wronged in one of its rights or in a legitimate interest through an individual administrative act that is addressed to the person, it must ask the emitting public authority or the higher ranked authority, if it exists, in a 30 day term from the communication of the act, the revocation in whole or in part. For strong motiffs, the plaintiff, recepient of the act can introduce the prior complaint, in case of the individual administrative acts and more than 30 days but not later than 6 months from the emmitting date. The 6 months term is a prescription term ".

About the damaged third party, "it can introduce the prior complaint in 30 day term from the moment the damaged person knows, in any way, about the content of the act. For strong motiffs the prior complaint can be formulated over the 30 day term but not later than 6 months from the date that it knows, in any way about its content (...)". Thus, for the damaged third party, the term flows from the date he knows.

3. Conclusions

The administrative litigation Law no. 554/2004 has passed through recent legislative modifications, surprised by us, selectively in the current study. The most important regard the competence, both material and territorial of administrative and fiscal litigation but also the elimination of the filtering procedure for the recourses that are in the High Court of Cassation and Justice competence.

The most pregnant conclusion that we have reached at the end of our analysis is that law is dynamic and not static. The social reality and the society's evolution forces the law to always be updated and even more in the administrative law domain, in which the administrative authorities, daily, are put in situations to make decissions. In the same order of thoughts the doctrine says: "No state has a legislation that is effective for all the times[20] ".

We consider that we have accomplished the objective of our study by surprising the legislation in regards of the administrative litigation, but the legislative modifications the are left unmentionned will be the object of another study that we intend on writing, also using the relevant jurisprudence.

[19] Law no. 101/2016 regarding the remedies and the attack ways in matter of attributting the public aquisition contracts, of sectorial contracts and of concession contracts of works and service, and also for organisation and functioning of the National Counsel of Solutioning of the Contestations, published in the Official Gazette no. 393 from May 23rd 2016 with modifications and completions.

[20] Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, in CKS-eBook 2014proceedings, Pro Universitaria Publishing House, Bucharest, 2014, p. 354.

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