# CONSIDERATIONS UPON ASSIMILATED ADMINISTRATIVE ACTS

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**Abstract**
*Although the classic administrative courts know as object the acts against classic administrative acts, it should not be lost sight of the assimilated administrative acts, which also may be subject to acts in this litigation. Taking in consideration this category of acts, this study will examine the documents falling into this category and the impact that such acts have on public authorities. Given the significant increase of administrative cases that have as object assimilated administrative acts and the way the public authorities acts with power abuse, violating the rights of citizens, the importance of the juridical control over assimilated acts can not be denied any more.*

***Keywords****: administrative acts, assimilated administrative acts, unjustified refusal, Administrative Court Law.*

## 1. Introduction

This study intends to draw attention upon the administrative court act subject to assimilated administrative acts, as a species of administrative acts. If as regards the administrative court acts aiming at administrative acts we find a lot of information on the theoretical level, but also at the jurisprudential level, acts subject to assimilated administrative acts are less approached and analyzed by the doctrine, for which reason we consider as appropriate a study on this subject. Because, why should we not admit it, the government inaction in responding to citizens must be penalized in the same way as the illegally issued document, both being dimensions of violating the principles of administrative acts legal regime, as well as of legality and opportunity.

## 2. Theoretical and practical considerations on assimilated administrative acts

In the specific language of the administrative court, when we talk about assimilated acts, we originally consider the unjustified refusal to settle a claim, which would represent an explicit expression, with abuse of power, of the will not to solve the request of a person; it is assimilated to the unjustified refusal and non-enforcement of the administrative act issued as a result of the favorable resolution of the request or, where appropriate, of the prior complaint [art. 2, paragraph 1, letter i) of Law no.554/2004 of the administrative court]. As non-settlement of an application within the legal deadline, it is part of the assimilated administrative acts, a result of assimilating an administrative deed, by the consequences produced to an administrative act due to the effects of injury to a subjective right or legitimate interest. In the theory, these two forms of assimilated administrative act are also treated by the phrase administrative silence and lateness.

## 3. Special mentions on Law no. 554/2004, as amended, regarding the concept of administrative act

In our legal literature, discussions on administrative act are old and varied, beginning with issues of terminology and ending with content elements of the applicable legal regime. For example, in an essay substantiated by Prof. Tudor Draganu, in his monograph of 1970[1], the concept of

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[1] T. Drăganu, *Administrative acts and assimilated deeds subject to judicial review, according to Law no.1/1967*, (Dacia Publishing House, Cluj-Napoca, 1970).

administrative act is to be used to evoke the express manifestation of will in order to produce legal effects, while refusing to settle, i.e. unjustified refusal, as well as the administration silence would have only the meaning "***assimilated deeds to administrative acts***". Other theorists, opinion to which has also been rallied one of the authors of this paper (Prof. Antonie Iorgovan), prefers to speak of typical administrative acts and atypical administrative acts, the essays being attested by the regulations issued in recent years[2]), which, according to Western models[3], assimilates the public administration silence with tacit approval.

In this context, we mention that ***French administrative law stipulates***[4], in principle, that ***silence of administration is equivalent to a refusal***: at the expiry of a two months period[5], the silence of administration notified by a request silence is assimilated with the issuance of a default refusal decision, against which it is possible to promote an appeal for abuse of power[6]. That period of two months - a common- law term - may be also replaced with other terms. Moreover, in a certain number of situations, silence is assimilated to a default acceptance decision[7].

French Constitutional Council estimated that the rule of administrative silence, which amounts to a tacit rejection, is a general principle of law, while the Government Council has refused such quality[8].

Compared to these legislative realities, the new Administrative Court Law in our country gives a ***broad definition*** to the notion of an administrative act, introducing in its scope, along with the specific unilateral manifestation of will (***typical administrative act***) and silence, which is the unjustified refusal (***atypical administrative acts***) .

Moreover, the commented law assimilates, as regards the legal nature of the dispute, administrative acts and certain ***administrative contracts***, expressly mentioned, being a matter of contracts signed by public authorities dealing with the evaluation of public assets, the execution of public works, provision of public services, public procurement.

In addition, Art. 2, 1st paragraph, letter c) of Law no. 554/2004, as amended, states that by special laws may also be provided other administrative contracts subject to the administrative courts jurisdiction.

## 4. The notion of unjustified refusal and the concept of power abuse.

In our legal literature it has been often used the concept of "unjustified refusal", but it has not been outlined a clear definition of it. Since the legislator did not dared to perform it, a specific meaning has been required in the practice of the administrative courts. Instead, the notion of "abuse

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[2] See GEO no. 27/2003 on the tacit approval procedure (published in Official Gazette no. 291/25.04.2003 and entered into force on 19.09.2003) approved with amendments by Law no. 486/2003 (published in Official Gazette no. 827/22.11.2003).

[3] See Daiana Vesmaş, Nicolae Scutea, *Problem of government passivity in German law. Substantive and procedural issues* in R.D.Pb. no. 3 / 2003, p. 2 7-44. Also, as regards the tacit approval procedure, see Ana Rozalia Lazar, Procedural aspects of the issue of administrative acts. Some considerations on the tacit approval procedure in R.D.Pb. no. 3 / 2003, p. 84-102. See for the opposite concept of the need to motivate decisions: Liliana Visan, *Reasoning principle in matters of administrative procedure*. *Aspects of comparative law*, in RDPb. no. 4 / 2005, pp 24-40.

[4] Jacqueline Morand-Deviller, op. tit., p. 354; on the same idea, see: Georges Dupuis, Marie-Jose Guedon, Patrice Chretien, *Droit admirdstratif, 10e edition*, (Sirey Universite, Paris, 2007), p. 472 et sequens

[5] Established by Law of 12.04.2000.

[6] Decrees of 20/06/2001 and 03/10/2001 establish the list of cases in which the term exceeds 2 months, especially in the case of some complex procedures.

[7] We can illustrate to this end: the tacit approval of building and deforestation.

[8] Jean Rivero, Jean Waline, *Droit administratif, 21e edition*,(Editions Dalloz, Paris, 2006), p. 569 and pp. 357-358.

of power", it appears in our doctrine as a key- concept in a monographic research, only in the last decade.[9]

Law no. 554/2004, as amended, understood to relate the notion of unjustified refusal of the power abuse concept.

The abuse of power occurs when the administration has assessment right, when the law allows it to adopt a solution from several possible ones, issue discussed in our literature since the Second World War under the form " opportunity of administrative acts". Hence, the known dispute between the Cluj School of Prof. Tudor Drăganu and Bucharest School of Professor Romulus Ionescu on the idea "opportunity is a condition of validity of the administrative act, along with legality, or is it a dimension of legality?"

Beyond the theoretical disputes, compared to the principles established by art. 16 2nd paragraph of Constitution, it is not conceivable to exercise the right of assessment beyond the law. As government seeks to provide more efficient public services for "those administered", it is inherent that the limits of its assessment right are given precisely by the limits of the rights of citizens, provided by Constitution and law. Where the right of the citizen begins is the point where it finishes the assessment right of administration. Issuance of an administrative according to the assessment right, but by infringing one right, for example, ownership of a citizen, is, of course, an abuse of law, which is an excess of power.

On this direction of ideas, the High Court of Cassation and Justice held that[10] in a constitutional state, the discretionary power granted to public authority can not be regarded as an absolute and unrestrained power, whereas the exercise of assessment right by violation of the rights and freedoms of the citizens, provided by the Constitution or law, constitutes abuse of power, in accordance with the provisions of art. 2 of the Administrative Court Law. Concurrently, the Supreme Court noted that the opportunity expresses an element of legality, which derives from the ability of the issuing authority to choose between several possible solutions the one that best matches the will of the legislator. Therefore, even if the legislator uses phrases meaning the discretionary power of the administration (for example: "is able", "is allowed", "it should"), it can not be interpreted as a freedom beyond the law, but one within its limits[11].

Both national and community courts do not exclude the control of judicial power over administrative acts issued within the margin of freedom granted to public authorities, often the error showed by the assessment or non-reasonableness being used by judges within a minimum control of discretionary power held by the Authority.

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[9] D.A. Tofan, *Discretionary power and power abuse of public authorities*, (All Beck Publishing House, Bucharest, 1990.

[10] Decision no. 4868 of 14.12.2007 pronounced by ICC] - Department of Administrative and Fiscal Court (unpublished).

[11] In the test case subject to trial, it was considered the existence or not of a granting right of a professional rank. On this issue, the Constitutional Court ruled that the text of art. 73 paragraph (3) of Law no. 360/2002 provides that, upon termination of employment, in case of cumulative fulfillment of several conditions, the police chief commissioners should be granted the professional rank of police quaestors. The constitutional court considered that such commissioners have only a vocation and not a right which they automatically enjoy and competent public authorities are entitled, not obliged to grant such professional rank. The same Court noted that obtaining and providing superior military or professional rank is not a fundamental right provided by the Constitution and does not require a corresponding obligation for the authorities. Based on these considerations, the administrative court considered that following the interpretation of the legal text under discussion, there is no any right to benefit those in the area of its addressability. On the other hand, the High Court pointed out that the interpretation given to the phrase "it may be granted" means exactly the discretionary power of the public authority, which, as previously stated, may not exceed the limits of legality. In other words, the managed people have the legitimate vocation and interest in the fair application of the assessment right of administration and may, in their turn, require the punishment of the misuse or misapplication of discretionary power. In this case, the High Court considered that the court of first instance had to obliged the authority to motivate its option within the legal permissiveness provided by art. 73 paragraph (3) of Law no. 360 / 2002 and to show whether the appellant-plaintiff meets or not the legal requirements materialized in order to be proposed.

However, in order to perform an audit of the administrative act issued within the margin of freedom granted by the legislator to the issuing authority, such act must contain the reasons for choosing one of the options allowed by the legislator.

A breakdown of reasons is also required when the issuing authority has a broad assessment power, as motivation gives transparency to the act and that individuals can check if the document is fundamentally correct.

Not every refusal to favorably resolve a request is an unjustified refusal; the refusal is unjustified only when it is based on the excess of power.

A simple letter from the issuing authority, by which the petitioner is notified that his request was not favorably resolved, is not "proof" of unjustified refusal. However, "the proof" must result from reasoning, if it is communicated to the applicant. Moreover, these notices related to the position of public authority is to be subject to the rules of evidence to be given before the administrative court.

We remember, however, that in case of an unjustified refusal, we must face an express statement of the position of public authority to which the request was addressed, so in the presence of an authentic notification, on the one hand, and on the other hand the refusal to settle favorably the request should be based on overcoming the limits of assessment rights, which is the excess of power. It is understood that only the court will ultimately decide, following the settlement of substance of administrative proceedings, whether the refusal to settle favorably the applicant's request was really an unjustified refusal; until now, that refusal appears as unjustified only in the opinion of the petitioner, the rule outlining this definition helping him to make an assessment as close to reality as possible. However, the existence of this concept is not without practical relevance, because once the unjustified refusal has been proven, the action is to be admitted in whole or in part. Motivation of court decision must state the reasons for which the refusal of the administrative authority appears unjustified, according to the competent court. Proof of the unjustified refusal is the evidence of the administration guilt and (legal nature of contested act when action is subject to an individual administrative act, being a matter of the unjustified refusal to revoke or amend the contested action. In such cases, practically, it is attacked a proper administrative act (typical act) and not an atypical administrative act (unjustified refusal).

If the object of application to administration is represented exactly by the request for issuing an administrative act, for example, an authorization and the public authority unjustifiably refuses to issue such act, in the administrative court, logically, it will be attacked only the atypical administrative act (refusal). The court, if it considers that the refusal is unjustified, by a disposition it shall require the defendant authority to issue the administrative act (authorization), possibly within a certain deadline and with the sanction of a fine for the head of the administrative body for each day of delay.

Last, but not the least, it should be noted that Law no. 262/2007 has extended the scope of the concept of "abuse of power", since it has provided that it means to exercise the assessment right of the public authorities, by violating the limits of competence provided by law or by violation of the rights and freedoms of citizens[12].

Therefore, we must stress the idea that any right or freedom of the citizens, stipulated by law, should be considered when reviewing an excess of power and not just a fundamental right or freedom, as was stated in the previous regulation.

On the other hand, the novelty brought by Law no. 262/2007 in defining the analyzed concept is represented by the inclusion within its scope of the exercise of assessment right of public authorities by violating the limits of legal competence.

In addition, the Romanian legislator has changed its optics as regards the concept of "unjustified refusal to settle a claim" by inserting therein the situation of non-enforcement of

[12] See art.2 paragraph.(1) letter n) of Law no..554/2004, as amended.

administrative act issued following the favorable resolution of the application or, where appropriate, of the preliminary complaint. [13]

Consequently, the assumption of non-enforcement of an administrative act issued by the public authority, in response to petitioner's request, was classified in the notion of unjustified refusal.

In addition, we can detach the two sides of the unjustified refusal, which are also maintained under the new administrative court law, namely the unjustified procedural refusal (namely the refusal to reasonably respond to the citizen's request) and substantially unjustified refusal (namely refusal to favorably resolve the citizens request). The problem of the relationship between unjustified refusal, subjective right and the excess of power appears only in this latter situation.

From the practice of the High Court of Cassation and Justice Decision, it draws the attention Decision no. 4096 of 13th November 2008[14], in which this court has shown to be unjustified refusal, within the meaning of art. 2, 1st paragraph, letter i) of Law no. 554/2004, the fact that the competent authority refuses to issue to the entitled person the standardized certificate provided by the rules of implementation of the Emergency Ordinance no. 36/2003, arguing that the position of permanent representative is not a diplomatic or consular position. So, by not issuing this certificate, which attests a seniority in the labor activity, the individual is directly injured.

Another issue resulted from the practice of courts on the unjustified refusal, can be drawn from the application of Law no. 290/2003 as regards the grant of indemnities or compensations to Romanian citizens for their own property goods, seized, retained or remained in Bessarabia, Northern Bucovina and Herta region, following the war situation and the application of the Peace Treaty between Romania and the Allied and Associated Forces, signed at Paris on 10th February 1947.

Thus, the application of this law led to two situations, in practice: if the refusal of execution of the administrative act by which that person has been established right to compensation is assimilated as unjustified refusal to settle a request addressed to a public authority, which in its turn is assimilated to the administrative act and which would be the competent courts to rule on such requests, to the extent that such refusal derives from a public authority located at the central level.

Thus, in the decision no. 1030 of October 21st, 2009, Pitesti Court of Appeal stated the following: by sentence no.152/CA/30th April 2009, Arges Court ignored the action filed by the plaintiff L.M. by which it obliged the National Authority for Property Restitution to pay damages based on Law no. 290/2003.

In order to pronounce in the meaning of the above, the Court considered that pursuant to decisions no.178/19th December 2006 and no. 264 / 6th July 2007, the defendant is to pay the plaintiff the amount of 192,006.71 lei for the outbuildings and related land and the amount of 429.057,28 lei for the area of 50 ha., property that belonged to its authors.

It has also been considered by the first court that the provisions of art. 18 of Government Decision no. 1120/2006 on approving the Methodological Norms for applying Law no. 290/2003 regulating the payment scheduling during two consecutive years are applicable only in the event that sufficient funds are allocated from state budget for the payment of damages established under Law no. 290/2003.

In the case, it was considered that by paying the first installment of compensation set by the decision no. 278/2007, the defendant has fulfilled its obligations. Failure to pay the first installment representing 40% of the amount established by decision no. 264/2007 is not attributable to the defendant, because there were not allocated sufficient funds from the state budget for this purpose, on the other hand, by an eventual acceptance of this action, the plaintiff would create two titles for the same debt, which is inadmissible.

[13] See art.2, paragraph.(1) letter i) of Law no.554/2004, as amended.

[14] See, I.C.C.J.,s. administrative and tax accounts., dec. no. 4096 of 13th November 2008, in J.S.C.A.F. semester II/2008, (Hamangiu Publishing House, Bucharest, 2010), p. 84

Against the sentence within the statutory term, an appeal was lodged by the plaintiff, by which it has been asserted that the action was rejected by an unlawful interpretation of the provisions of article 18, paragraph 5 of GD 1120/2006, as the retention of existence of sufficient funds is equivalent to the undertaking of an obligation under a mere potestative condition of the debtor, which is absolutely void. Even in this assumption, there has not made any test to certify that the necessary funds have not been allocated but, on the contrary, by notice of 26th May 2008 it was notified by the Ministry of Finance that the amounts claimed paid by the National Authority for Property Restitution had been paid.

Moreover, it received 40% of compensation set by the decision no. 278/2007 even in 2007, not for decision no.264/2007 decision and this action has been introduced to obtain a writ of execution.

On October 8th, 2009 it was recorded the statement of defense motioned by the National Authority for Property Restitution, by which it was requested the rejection of appeal as unfounded, with the main motivation that it has not available the necessary funds for paying installments.

On the hearing of 14th October 2009, the Court of Appeals invoked ex officio and put into the discussion of the parties the objection of material incapacity of the court in the settlement of actions based on the provisions of Law no.290/2003 and the Government Decision no. 1120/2006.

Examining this exception prevalently (which makes useless the investigation of the other grounds of appeal), the Court finds the following: according to provisions of article 8, paragraph 5 of Law no.290/2003 on granting compensations or damages to Romanian citizens for their property assets which have been seized, retained or remained in Bessarabia, Northern Bukovina and Herta region, due to a belligerence condition and applying the Peace Treaty between the Allied and Associated Force and Romania, signed at Paris on 10th February 1947, updated (regulation on which the plaintiff's right is based), the decisions of the National Authority for Property Restitution shall be subject to judicial control and can be brought before the administrative court in terms of Law no. 554/2004, as amended. By the methodological rules for the application of this law, approved by GD no.1120/2006, amended by GD no.57/2008 (in force at this time) it was established that the resolutions of authority, as well as decisions issued by the Vice President for certain situations, are subject to means of appealing to the tribunal in whose jurisdiction resides the petitioner.

Provided that the application object, as indicated therein, does not aim any resolution or decision of the Vice-president of the National Authority for Property Restitution – Department for enforcing Law no. 290/2003, but exclusively regards the obligation to pay compensation (subsequent operation of the administrative act, by which it has been admitted the right to compensation), obviously the provisions of law relating to the competence of the tribunal are not incidental and the rules of jurisdiction laid down by Article 10, 1st paragraph of Law no. 554/2004 are to be applied-framework-law in the matters of administrative court.

*Refusal to execute administrative act by which that person has been established the right to compensation is treated as unjustified refusal to settle a request submitted to a public authority, which in its turn is assimilated to administrative act under art. 2, 1st paragraph, letter i), second sentence and 2nd paragraph of administrative court law. As a consequence, the trial actions to follow is that of administrative court.*

In consideration of the special law, of administrative court no. 554/2004, the jurisdiction of settling this case is incumbent to Pitesti Court of Appeal, considering the central rank of such sued public authority.

## 5. Conclusions

This study desired to emphasize the importance of the assimilated acts, along with the proper administrative acts - in censoring the abuses committed by the administration. Therefore, starting from the idea of power abuse, it has been analyzed the impact of unjustified refusal to settle a request

on the individual, who may be thus injured in a right or interest recognized by law. Once the conditions of an unjustified refusal are met, the individual is required to sanction the defendant authority by taking legal action before the administrative court, by which this refusal should be penalized and the authority should be obliged to issue the document.

Also, it was considered the other side of the unjustified refusal, namely the refusal of execution of the administrative act, also prosecuted by the court.

The conclusion that emerges is that the individual confronted with an attitude arising of excessive power of authority needs to go to court in order to censor this type of behavior, because the activity of public authorities should be primarily subject to the legality principle.

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