ASPECTS REGARDING THE TERMINATION OF THE LEGAL EFFECTS OF NORMATIVE ADMINISTRATIVE ACTS

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Abstract

The final cessation of the legal effects of administrative acts can be achieved by annulment and revocation. Both are legal operations that lead to the termination of legal effects of administrative acts. A controversial issue is the one regarding the authorities that may exercise the right of revocation and annulment of an administrative act. As concerns normative administrative acts, the specific manner of termination of enforcement of such acts is to repeal them. On the relationship between repeal on the one hand and cancellation and revocation on the other hand, various contradictory opinions were voiced in the legal doctrine. An aspect with important implications in the administrative practice is the one concerning the possibility of invalidating a normative administrative act before its entering into force. Finally, the article deals with the notion of non-existent administrative acts, which has become a constitutional institution as concerns administrative normative acts.

Keywords: *administrative normative act, annulment, revocation, repeal, non-existence*

1. Introduction *

The administrative act is one of the palpable forms of public administration bodies activity, coupled with the administrative acts and operations. The administrative act is a manifestation of will with the intention of producing legal effects, namely to create, modify or extinguish legal relations. It is the main form of activity of public administration, the other forms being accomplished for the preparation, drafting or enforcement of administrative acts.

In terms of incidence in the activity of public administration, it was noted that administrative acts are the predominant aspect in the activity of central public administration, while administrative acts and operations are more numerous in the activity of public administration at lower levels[1].

The doctrine defines the administrative act as "the main legal form of activity of public administration bodies, which consists of a unilateral and explicit manifestation of the will to create, modify or extinguish rights and obligations, in the enforcement of public power, under the main control of legality by judicial courts"[2].

The narrow sense of the administrative act is also defined by the legislator in art. 2 para. (1) letter c) of the Administrative Litigation Law no. 554/2004[3], with subsequent amendments. According to this text, the term "administrative act" means "the unilateral act of an individual or normative nature issued by a public authority, in the enforcement of public power, in view of organising law enforcement or of actually enforcing the law that creates, modifies or extinguishes legal relations".

Broadly, by an administrative act, one means any legal act emanating from public authorities under the enforcement of public power[4].

The distinction between the unilateral administrative act of an individual nature and the normative administrative act, performed by the legislator under the Law no. 554/2004, is traditionally accepted in the doctrine of administrative law also. According to the criterion of the extent of legal effects they produce, most authors divide administrative acts by normative administrative acts and individual administrative acts. According to this classification criterion, some authors also mention the *internal acts* category, their characteristic being that "they are enforced within a public authority or institution, generating effects in relation to the staff of said institution"[5].

Normative administrative acts contain general, impersonal rules, generating judicial effects for an undermined number of subjects. In this category, we mention the following: Government orders; Government decisions; decisions of the local council of a commune, city, municipality or of a Bucharest municipality sector; county council decisions; decisions of the General Council of Bucharest municipality, etc.

Individual administrative acts generate legal effect upon one or more specified subjects. Unlike the first category, these administrative acts are mostly issued by unipersonal bodies: decrees of the Romanian President; Prime Minister's decisions; Ministers orders;

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[1] Mircea Preda, *Drept administrativ, Partea generală*, Ediția a III-a (București, Lumina Lex, 2000), 180-181.

[2] Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, *Forme de realizare a administrației publice. Domeniul public și serviciul public. Răspunderea în dreptul administrativ. Contenciosul administrativ* (București, Editura All Beck, 2005), 25.

[3] Published in the „Romanian Official Gazette", Part I, no. 1154 of December 7, 2004.

[4] Anton Trăilescu, *Drept administrativ*, Ediția a 3-a (București, Editura C.H. Beck, 2008), 179.

[5] Verginia Vedinaș, *Drept administrativ*, Ediția a IX-a (București, Editura Universul Juridic, 2015), 101.

acts issued by the heads of central specialised bodies*;* Prefect orders; Mayor provisions; provisions of the county council president. Individual administrative acts may also be acts adopted by collegial bodies of public administration, such as Government decisions or decisions of the local council.

Between normative and individual administrative acts, there are important differences as concerns the moment when the administrative act starts generating legal effects and the termination of such effects. Below we are going to present some controversial issues relating to the termination of the legal effects of normative administrative acts, highlighting the necessary features in connection with individual administrative acts.

2. Manners of termination for the judicial effects of normative administrative acts

The legal relationships that arose on the basis of administrative acts can cease by means of a legal act with equal or greater force or following the occurrence of a material fact.

Legal acts that have the effect of terminating the legal effects of administrative acts are acts of authority ordering the annulment or revocation of the administrative act. Most authors also include suspension in this list[6], although the latter is a way to interrupt the legal effects of an administrative act and not to put a definitive end to them. In case of suspension, the administrative act becomes inapplicable on a temporary and provisional basis, but it continues to exist within the legal domain[7].

The doctrine states that it is necessary to distinguish between the suspension of a legal act and the suspension of its judicial effects. In the first case, the act in question no longer generates any effect whatsoever, while in the latter case only the legal effects of the act in question are interrupted[8].

Suspension occurs when there are doubts about the legality or appropriateness of an administrative act. The suspension can occur only after the entry into force of the act, that is after the moment when it begins to produce legal effects. The suspended administrative act may have a normative or an individual nature[9].

The suspension may occur by law (such as the suspension referred to in art. 123 para. (5) of the Constitution) or due to an act belonging to a public authority (the administrative court, the body which issued the act or the superior body)[10].

The occurrence of a material fact may be a way to terminate legal effects, as a rule, only for individual administrative acts. Among these material facts, the following can be mentioned: death of the subject the act is addressed to, termination of a legal entity, material execution of the act, the completion of a certain period of time[11].

For normative administrative acts, this manner of judicial effects termination is exceptional, being possible only for temporary normative administrative acts "whose legal effects cease by means of completion of the term - the material fact - for which they were issued"[12].

2.1. Annulment

Annulment was defined as the "legal operation consisting of a manifestation of will in order to determine directly the dissolution of an act and therefore the cessation of the definitive effects produced by it"[13]. The object of annulment can be both an individual administrative act and a normative administrative act.

In the literature, there is no single point of view on the relevant authorities certified to cancel administrative acts.

Most authors consider that the right to void administrative acts belongs to both superior administrative authorities and courts[14]. Administrative authorities exercise this right under the administrative subordination report. For example, under art. 28 para. (2) of the Law no. 90/2001 on the organisation and functioning of the Romanian Government and of ministries, as amended and supplemented, the Government is entitled while exercising hierarchical control, "to rescind illegal or inappropriate administrative acts issued by public authorities subordinated to it and to prefects".

Administrative courts exercise the right of annulment of administrative acts under art. 21, art. 52 and art. 126 para. (6) of the Constitution as well as under the Law no. 554/2004. Among the solutions that the administrative court can provide, art. 18 para. (1) of the Law no. 554/2004 also stipulates the annulment of the administrative act, in whole or in part.

Another opinion claims that the annulment must be understood as a way to abolish administrative acts exclusively reserved for the courts, while revocation is

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[6] Rodica Narcisa Petrescu, *Drept administrativ* (Bucureşti, Editura Hamangiu, 2009), 340; Corneliu Manda, *Drept administrativ, Tratat elementar*, Ediția a V-a (București, Editura Universul Juridic, 2008), 413; Lucian Chiriac, *Drept administrativ, Activitatea autorităților administrației publice* (București, Editura Hamangiu, 2011), 143.

[7] Tudor Drăganu, *Actele de drept administrativ* (București, Editura Științifică, 1959), 278.

[8] Vedinaș, *Drept administrativ*, 122.

[9] Trăilescu, *Drept administrativ*, 194.

[10] Cătălin-Silviu Săraru, *Drept administrativ, Probleme fundamentale ale dreptului public* (București, Editura C.H. Beck, 2016) 105.

[11] Alexandru-Sorin Ciobanu, *Drept administrativ, Activitatea administrației publice, Domeniul public* (București, Edditura Universul Juridic, 2015), 81-82.

[12] Petrescu, *Drept administrativ*, 356; Trăilescu, *Drept administrativ*, 198.

[13] Iorgovan, *Tratat de drept administrativ*, 72.

[14] Petrescu, *Drept administrativ*, 344; Vedinaș, *Drept administrativ*, 130; Manda, *Drept administrativ*, 416; Dumitru Brezoianu, *Drept administrativ român* (București, Editura All Beck, 2004), 91; Chiriac, *Drept administrativ*, 159.

a way of abolishing reserved only to an administrative body[15]. To support this view it was stated that the issue is essentially terminological and that this distinction is required for revocation and annulment to acquire "internal consistency, which alone justifies their usefulness"[16]. The doctrine also highlighted the possibility that annulment would remain the responsibility of an administrative body when it is an administrative-jurisdictional authority[17].

We agree with the expressed opinion that it is possible for the annulment of the administrative act to be ruled by the administrative court and, exceptionally, by a jurisdictional-administrative organ. We underline the observation that, through its implications in the administrative and judicial practice, this issue is crucial to the legal regime of the administrative act and it is necessary to form the subject of an explicit provision in the future Administrative Procedure Code.

Within the boundaries of the current regulatory framework, an argument in favour of this theory ensues from the provisions of art. 1 para. (6) of the Law no. 554/2004: "The public authority issuing an unlawful unilateral administrative act may request its annulment to be court, if the act can no longer be revoked since it joined the circuit civil and generated legal effects". Even if by that provision, the legislator took into account the individual administrative acts whose legal effects escaped the field of the administrative law regime[18], we consider it relevant to legally delimitate the judicial operations that the issuing administrative bodies, respectively the administrative court can perform.

The effects of the annulment are different depending on whether the cancellation of the administrative act conducted done for reasons of unlawfulness or for inappropriate reasons.

Authors who claim that annulment can also be ordered by the hierarchically superior body emphasize this distinction given that, in this case, the administrative act may also be cancelled for lack of opportunity. Therefore, if the act was annulled on grounds of illegality, the effects occur both for the future (*ex nunc*) and for the past (*ex tunc*). When the act is annulled for reasons of untimely circumstances, the effects occur only for the future (*ex nunc*) as the act maintains its legal effects so far.

According to the opinion limiting the scope of the bodies that can rule the annulment of the administrative act only to the administrative courts sphere, it is stated that the abolition of the act can only be made on grounds of illegality. One must remember however that following the analysis of administrative case law, the doctrine recognised the possibility of the court to also investigate the timeliness of the administrative act issuance "in the context of finding an excessive enforcement of power by the authority issuing the administrative act"[19].

Regardless of the scope of the authorities that may rule annulment, we believe that it can be taken as a rule of the legal regime concerning the annulment of the administrative act that "the annulment of an administrative action has the effect of nullity of all subsequent legal acts that were conditioned, in terms of their legality, by the existence of the said administrative act"20. One also pointed out that beyond the validity of this principle, in practice there are many difficulties resulting from the absence of procedural means to unconditionally support this effect[21].

2.2. Revocation

Revocation is one way of terminating the legal effects of an administrative act by the express manifestation of will of the issuing administrative body or of the hierarchically superior body[22]. When the body that rules on the revocation is the issuing body of the act in question, revocation is also called retraction or withdrawal[23].

The doctrine emphasizes that revocation should also be understood as a principle of the legal regime of administrative acts. Although not specifically provided for in legislation, this principle is widely recognised in the specialty literature. Given the dominant place of the revocability principle in public law, it is considered that "revocation of administrative acts must be regarded as a manifestation of the public power regime specific to these acts"[24].

Following the approval of the Law no. 554/2004, it was pointed out that for the first time one regulated, in a partial manner, the issue of administrative acts revocation. While regulating the preliminary complaint requirement, art. 7 para. (1) of the law stipulates that "before addressing the competent administrative court, the person who considers himself harmed in his right or

[15] Ion Brad, *Revocarea actelor administrative, Instituția revocării sub exigențele dreptului european* (București, Editura Universul Juridic, 2009), 59-63; Săraru, *Drept administrativ*, 109. In this regard, it was suggested nearly a decade ago that "the future of the Administrative Procedure Code would expressly enshrine the principle according to which annulment can only be imposed by the court and revocation would devolve exclusively on the issuing authority or on the hierarchically superior authority." See also Dana Apostol Tofan, „Nulitatea actelor administrative. Corelația nulitate-revocare-inexistență. Aspecte controversate în doctrină, legislație și jurisprudență", *Dreptul* 1 (2017): 135.

[16] Brad, *Revocarea actelor administrative*, 63.

[17] Ciobanu, *Drept administrativ*, 109.

[18] Apostol Tofan, „Nulitatea actelor administrative", 134; Ovidiu Podaru, *Drept administrativ*, vol. I, *Actul administrativ (I) Repere pentru o teorie altfel* (București, Editura Hamangiu, 2010), 289.

[19] Apostol Tofan, „Nulitatea actelor administrative, 133; Săraru, *Drept administrativ*, 111.

[20] Iorgovan, *Tratat de drept administrativ*, 82; Vedinaș, *Drept administrativ*, 131.

[21] Ciobanu, *Drept administrativ*, 111.

[22] Chiriac, Drept administrativ, 150.

[23] Petrescu, Drept administrativ, 346.

[24] Brad, Revocarea actelor administrative, 42-43.

in a legitimate interest by means of an individual administrative act, must request the issuing public authority or the superior authority, if any, within 30 days from the notification date of the document, to revoke it, in whole or in part".

Upon analysis of this text, it can be seen that the legislator referred exclusively to individual administrative acts in order to establish the duration of the 30 days term prior to formulating the complaint. Art. 7 para. 11 of the law stipulates that "in the case of the normative administrative act, the prior complaint may be made at any time".

Unlike individual administrative acts, in the case of normative administrative acts, the principle of revocability has an absolute nature[25]. This means that competent public administration authorities may at any time revoke or modify a normative administrative act by issuing another administrative act with a legal force at least equally binding.

The reasons that may entail revocation may be related to the illegality or inappropriateness of the administrative act. Depending on the time when they occur in relation to the issuance of the act, the grounds for revocation may be prior, simultaneous or subsequent.

In general, the legal effects determined by revocation are for the past (*ex tunc*) when the causes are prior or concurrent, or for the future (*ex nunc*) when the causes are subsequent to the issuing of the act[26]. As concerns normative administrative acts, it was pointed out that from the perspective of the requirements imposed by art. 15 para. (2) of the Constitution, those provisions may only be revoked with effect for the future (*ex nunc*), except for the more favourable acts of criminal matter[27].

Another important aspect is that revocation must be understood not only as a way to terminate legal effects but also as a way of abolishing an administrative act. For this reason, the doctrine underlined the impossibility to accept the existence of a partial revocation, the use of this concept within art. 7 para. (1) of the Law no. 554/2004 being considered a "terminological confusion"[28].

2.3. Repeal

Repeal is defined as "the procedure provided for by law for the removal of existing normative acts"[29]. The doctrine mentions repeal as a distinct way for terminating the legal effects of normative administrative acts, included either in the category of annulment[30] or in that of revocation[31]. As concerns this latter perspective, it was mentioned that a particular feature of repeal is the possibility of the repeal being decided not only by public administration government bodies but also by the Parliament. Given the hierarchy of normative acts, the law may at any time repeal a normative administrative act, so unlike revocation which is "a way reserved for the Administration, repeal may be the work of both the Administration and the Parliament"[32].

Repeal is achieved by effect of the law or by adopting or issuing another administrative act of the same level or higher. When the provisions of a previous administrative act are contrary to a new regulation with a judicial force equal or superior, the repeal shall be deemed implicit[33]. Some authors consider tacit repeal as a form of amending normative administrative acts while considering the "constant need of the administrative body to adapt to changes occurring in the economic, social and political life, in order to ensure the public interest"[34].

Its effects are produced only for the future (*ex nunc*), regardless if it intervenes for inappropriateness or illegality of the administrative act subject to repeal[35].

The Law no. 24/2000 on legislative technique regulations for drafting normative acts, republished[36], amended and supplemented, considers repeal as a "legal event" that may arise after the entry into force of a normative act, together with modification, addition, republication, suspension "or the like" [art. 58 para. (1)].

Repeal may be full, when all legal provisions of the repealed normative administrative act cease, or partial, when certain provisions of that act continue to remain in force[37]. According to art. 64 para. (5) of the Law no. 24/2000 partial repeals "are similar to changes in normative acts, a partially repealed normative act remaining in force through its non-abrogated provisions ". Where successively, several partial repeals are involved, the last repeal will have to cover the whole normative act and not just the texts remained in force.

Repeal is definitive. In this respect, art. 64 para. (3) of the Law no. 24/2000 provides, as a principle, that „it is not admitted to re-enforce the initial normative act by means of repealing a previous repeal".

This rule is allows only one exception, also provided for by art. 64 para. (3) of the Law no. 24/2000:

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[25] Manda, Drept administrativ, 417.
[26] Vedinaș, Drept administrativ, 124.
[27] Podaru, Drept administrativ, 307.
[28] Brad, Revocarea actelor administrative, 57-58.
[29] Anton P. Parlagi, Dicționar de administrație publică, Ediția a 3-a (București, Editura C.H. Beck, 2011) 3.
[30] Petrescu, Drept administrativ, 340.
[31] Chiriac, Drept administrativ, 151; Trăilescu, Drept administrativ, 195; Podaru, Drept administrativ , 334; Săraru, Drept administrativ, 105.
[32] Brad, Revocarea actelor administrative, 70.
[33] Ioan Alexandru, Mihaela Cărăușan, Sorin Bucur, Drept administrativ, Ediția a III-a (București, Editura Universul Juridic, 2009), 326.
[34] Chiriac, Drept administrativ, 155.
[35] Podaru, Drept administrativ, 334-335.
[36] Republished in the „Romanian Official Gazette", Part I, no. 260 of April 21, 2010.
[37] Trăilescu, *Drept administrativ*, 195.

"the provisions of Government ordinances stipulating abrogation norms that have been rejected by the Parliament".

The doctrine considers that the effect of "regeneration" of the rules repealed also operates in situations that upheld the objection of unconstitutionality of a repealing law or ordinance[38]. Jurisprudence of the Constitutional Court has consistently held the following interpretations: during the period between the entry into force of the repealing law and the publication of the decision finding the unconstitutionality of the repealing norm, the repealed provisions do not generate judicial effects, but after publication of the decision they "re-enter the active foundation of the law".

The Law no. 24/2000 stipulates in art. 58 para. (2) the possibility to repeal a normative act "highly important and complex" during the period between the date of publication in the Official Gazette of Romania, Part I and the date set for its entry into force. This possibility is subject to the cumulative fulfilment of three conditions: a) the existence of a thoroughly justified situation (a concept that the Law no. 24/2000 does not define); b) the repeal needs to be ordered by the issuing authority of the act repealed; c) the termination should take effect at the same date as the normative act subjected to this legal event.

2.4. Non-existence

Inexistent administrative acts hold no appearance of legality and they cannot be enforced. By means of this feature, inexistent acts are essentially different from administered acts declared null and void which, enjoying the presumption of legality, generate legal effects until the finding of their nullity[39].

The lack of the administrative act theory is accepted by most authors, being considered a creation of the Romanian administrative legal doctrine between the two world wars[40].

The doctrine distinguishes between lack of fact and legal absence. In the first case, will was never expressed, under any form. In the second case, will was expressed but "the law, considering certain capital flaws affecting it, does not even recognize its existence"[41]. In other words, a distinction was established as concerns material absence, when the act does not exist in reality, and legal absence, when the "illegality is so grave and flagrant that goes beyond mere nullity"[42].

Non-existence can be established by any interested legal subject: the court, other public authorities, addressees of the inexistent act, other individuals and businesses.

Among the cases of non-existence the doctrine retained we can mention: the administrative act was issued under a law repealed; the administrative act was adopted or issued by a body with no material and territorial jurisdiction; the administrative act deals with a dispute incumbent upon the jurisdiction of a court[43].

In the case of normative administrative acts, we can find mentions regarding non-existence among the Constitution stipulations regarding the acts of the Romanian President and of the Government[44]. Thus, according to art. 100 para. (1) of the Constitution, failing to publish the presidential decree in the Official Gazette attracts "the lack of existence of the decree" and in accordance with art. 108 para. (4), failure to publish entails "the lack of existence of the decision or order".

Given these constitutional provisions, it was pointed out that currently non-existence ought to be considered „not only a concept, but also a constitutional institution"[45]. Consequently, it has been shown that failure to publish normative administrative acts attracts the sanction of non-existence should publication of said documents be a condition of validity. It is irrelevant whether the administrative acts in question are adopted or issued by central or local public administration authorities[46].

The doctrine emphasized the practical interest in establishing the lack of existence of an administrative act. Taking into account that acts cannot be challenged in administrative proceedings, attention was drawn upon the fact that "should courts fail to rule on the legality of these acts in a direct way, they can find *their non-existence*"[47]. The practical difficulties are obvious given that the regulatory framework does not provide (an aspect considered natural from a certain perspective) legal proceedings which have as their object the finding of non-existence of an administrative act[48].

3. Conclusions

Upon analysis, even sequential, of the ways for termination of the legal effects of administrative acts, one can see a need for regulation in this area. Legal doctrine, administrative practice and case law of

[38] Ciobanu, *Drept administrativ*, 82.
[39] Trăilescu, *Drept administrativ*, 198.
[40] Iorgovan, *Tratat de drept administrativ*, 74; Manda, *Drept administrativ*, 415.
[41] Podaru, *Drept administrativ*, 395.
[42] Chiriac, *Drept administrativ*, 158.
[43] Vedinaș, *Drept administrativ*, 131; Săraru, *Drept administrativ*, 114.
[44] Dan Constantin Mâță, *Drept administrativ*, volumul I, *Noțiuni introductive, Organizarea administrației publice, Funcția publică și funcționarul public* (București, Editura Universul Juridic, 2016), 104-106, 138-139.
[45] Iorgovan, *Tratat de drept administrativ*, 79.
[46] Apostol Tofan, „Nulitatea actelor administrative", 129.
[47] Petrescu, Drept administrativ, 346.
[48] Ciobanu, Drept administrativ, 116.

administrative courts in recent decades have revealed a series of principles and rules of nature to clarify most controversial aspects. However, legislator intervention is imperative given that the administrative act is the main form of activity of public administration. Clarity and stability of the legal regime of the administrative act is likely to contribute not only to increase the efficiency of the administration but also to strengthen the legal safety for the recipients of the administration activity. We hope that in the near future the adoption of the Code of Administrative Procedure will be able to meet these requirements.

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