

SUSPENSION OF THE ENFORCEMENT OF THE REGULATORY ADMINISTRATIVE DEED - A FATA MORGANA OF CASE-LAW AND DOCTRINE

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Abstract

The article aims to be an analysis of the effects of suspending the enforcement of the regulatory administrative deed in the context in which, as we shall see, opinions are divided both in the specialized literature and in the case-law of administrative contentious courts. Starting from the provisions of Law no. 554/2004 of the administrative contentious, the study shall go through a comparative analysis in regard to the institution of annulment of the administrative deed, as there are authors but also courts of law considering the two concepts as equal ones.

We have also shown why we do not adhere to the latter current, inclusively by reference to a series of decisions of the Constitutional Court from which clearly results the individuality of the effects that the two institutions produce on regulatory administrative deeds.

We concurrently exemplified this, in the content of the study, with a recent case of the Bucharest Court of Appeal having as a subject matter the suspension of enforcing a regulatory administrative deed.

We express our belief, or perhaps at least hope, that in the end, both the specialized literature and especially the practice of the courts of law shall be uniform in the sense of recognizing the independence of the institution to suspend the enforcement of the regulatory administrative deed and its own effects that each case separately has.

Keywords: *regulatory administrative deed, annulment of the administrative deed, suspension of enforcement, Constitutional Court, decisions, case, Court of Appeal, independent, own effects.*

1. Introduction

The present study aims to analyze the effects of suspending the regulatory administrative deed, in the context in which at doctrinal level there are differences of opinions, an issue that we shall also develop during this material.

On the other hand, such an analysis is also necessary in view of a comparison in regard to the annulment of the regulatory administrative deed, a situation clearly regulated by Law no. 554/2004 of the administrative contentious in view of the effects of such a solution by the court of law. For the rigor of research, we appreciate that it is necessary to emphasize the differences between the two institutions, from the perspective of the effects produced by the solution of suspending the enforcement/annulment of the regulatory administrative deed.

If the situation of regulatory administrative deeds does not involve discussions, Law no. 554/2004 expressly providing the effects produced by a final decision annulling such a deed, the issues mainly occur in case of ruling a decision suspending the enforcement thereof where there is no clearly outlined regulation.

Taking advantage of this legislative void, let's say, some of the authors went so far as to equate the effects produced by the two institutions (cancellation vs. suspension of enforcement), strictly by reference to the fact that a regulatory administrative deed produces erga omnes effects, completely ignoring the specific

conditions and characteristics of the two concerned institutions.

On the other hand, we do not consider it necessary to concretely regulate the effects of a decision admitting the suspension of the enforcement of a regulatory administrative deed, in the context in which, from our point of view, besides other authors, we consider that they clearly result from the conditions expressly provided by art. 14 and art. 15 of Law no. 554/2004.

Last but not least, the present analysis would not be complete, if it did not include a case study, starting from a solution ruled by the Bucharest Court of Appeal in a case¹ in which it was requested to suspend the enforcement of a regulatory administrative deed, a solution favourable to the plaintiff. Why did I feel the need for a reference to the Fata Morgana concept in the title of the article? Precisely in the light of the mirage that a favourable solution in an application to suspend the enforcement of an regulatory administrative deed can create versus all the other recipients of the concerned deed. And the proof lies precisely in the case study that we analyzed at the end of this material.

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¹ Civil Judgement no. 132/02.03.2020, ruled by the Bucharest Court of Appeal in file no. 7222/2/2019, having as a subject matter the suspension of enforcing the Order of the President of ANRE no. 216/2019, a regulatory administrative deed, published in the Official Gazette of Romania Part I, no. 1001/12.12.2019.

2. Content

2.1. Annulment of the regulatory administrative deed vs. suspension of its effects

2.1.1. Regulation from Law no. 554/2004 - legislative issues

The relevant provisions in this analysis are those of art. 14 and 15 of Law no. 554/2004 which refers to the suspension requested by the “injured person”, the request for suspension of the enforcement of the administrative deed having a subjective component. Therefore, we deal with an injured person, who considers that by a regulatory administrative deed there is the possibility of inflicting an “imminent” prejudice. Therefore, if the imperative requirements of the contentious law impose the existence of an injured person who, “for the prevention of imminent prejudice” can resort to the court with a request to suspend the enforcement of the administrative deed, it is more than obvious that we cannot talk about an objective contentious, but a subjective one, with the specificity of the person formulating the request. Such claim is based on the existence of an own “imminent prejudice” of the applicant and is not a claim concerning the “general interest”. It can be rightfully concluded that in view of ordering the suspension of enforcing an administrative deed, the lawmaker imposed a subjective condition, specific to the plaintiff - the imminent prejudice, which has to be proven in his patrimony. It is true that the second condition should be also cumulatively fulfilled - the well-justified case which presupposes a proven illegality of the administrative deed (which is obvious and supposes a superficial investigation of the merits), but this second condition obviously pertains to the objective side of contentious, the illegality being the same regardless of the plaintiff in the suspension request.

On the other hand, Law no. 554/2004 expressly provides the effects, which the admittance of a request for annulment of the regulatory administrative deed produces in case of annulling a regulatory administrative deed, by non-appealable decision. Thus, according to the provisions of art. 23 “Final and irrevocable court decisions by which a regulatory administrative deed was fully or partially annulled in are generally binding and have power only for the future”. From the mentioned text it can be noticed that we are talking about an expressly regulated situation, so that, *per a contrario*, in all other situations, inclusively in case of suspending a regulatory administrative deed, we deal with effects exclusively produced against the person who proved the cumulative fulfilment of the two conditions provided above, and against which the effects of a possible decision by which the suspension of the enforcement of the deed

was ordered shall take place. In such a context, it is obvious that we cannot speak of *erga omnes* effects in case of court decisions suspending the enforcement of regulatory administrative deeds, as on the one hand, the lawmaker did not provide for any subsequent measures to rule such a solution, as no reference is made either to the general effects or to the obligation to publish the decision in the Official Gazette, as art. 23 thesis II of Law no. 554/2004.

Anyway, such a solution is consistent with the fact that, unlike the annulment of a regulatory administrative deed, the suspension of enforcement is a provisional and extraordinary measure. Moreover, the suspension of enforcement is always and regardless of the nature of the administrative deed a provisional measure, “is exceptional and is ordered only in well-grounded cases”².

It is important to remember, in support of our statements there is also a series of decisions of the Constitutional Court, which had as a subject matter the exception of unconstitutionality of the provisions of art. 23 and 24 from Law no. 554/2004. We consider that such decisions are relevant, even if they did not have as a subject matter the analysis of the constitutionality of the provisions of art. 14 or 15 of the mentioned regulatory deed, in view of the effects of suspending a regulatory administrative deed. Thus, by Decision no. 914 of 23 June 2009³, the Constitutional Court held that „the provisions of art. 23 of the Law on administrative contentious no. 554/2004 consecrates, at the level of the substantive law, the *erga omnes* effects of the non-appealable and irrevocable court decisions by which a regulatory administrative deed was fully or partially annulled. The binding nature of this type of decisions towards all legal subjects is concretely ensured by publishing in the Official Gazette of Romania the court decisions regarding the regulatory administrative deeds issued by the Government and the other central bodies of public administration, in the official monitors of counties respectively of those decisions regarding the annulment of certain deeds of the local public administration bodies, corresponding to the counties, municipalities, towns and communes. The usefulness of this publication is indisputable, considering the fact that, by their nature, regulatory administrative deeds approach an indeterminate number of legal subjects.” Also, by Decision no. 126 of 10 March 2015⁴, the court of constitutional contentious ruled that “for persons who had the capacity of a party to the dispute in which the court ordered the full or partial annulment of a unilateral regulatory administrative deed, insofar as they also request the recognition of the claimed right, together with reparations, the effects of annulment of the deed occur by virtue of the principle of the relative

²Alexandru-Sorin Ciobanu, *Administrative Law. Public Administration Activity. Public Field*, Universul Juridic, Bucharest 2015, p. 84 et seq.

³Published in the Official Gazette of Romania, Part I, no. 544 of 5 August 2009.

⁴Published in the Official Gazette of Romania, Part I, no. 346 of 20 May 2015.

effect of court decisions” also occur for the past, meaning that, for the parties to the dispute, the annulment of the unilateral regulatory administrative deed produces legal effects also for the past. Therefore, “*the annulment of a unilateral regulatory administrative deed, considering the provisions of art. 23, produces erga omnes effects also only for the future for third parties who did not have the capacity of party in the dispute in which the annulment decision was ruled, after the publication of this decision*”. In conclusion, as it results from the practice of the Constitutional Court, the lawmaker conditioned the production of *erga omnes* effects, inclusively by the publication of the final annulment decision in the Official Gazette.

Finally, it is important to also mention an attempt by the courts to obtain a settlement of the issue from the High Court of Cassation and Justice, which was asked to rule by a second appeal in the interest of the law on “*the interpretation and application of the provisions of art. 14 and 15 of Law no. 554/2004 on administrative contentious, with subsequent amendments and supplementations and of art. 435 of the Civil Procedure Code, regarding the hypothesis of admitting the request for suspension of the enforcement of an regulatory administrative deed and the effects of this solution towards the parties to the dispute as well as towards third parties*”. In the notification filed by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, “*Starting from the fact that the suspension of the enforcement of the administrative deed is a means to ensure compliance with the principle of legality, which governs the entire activity of public administration, the author of the notification believes that the suspension of a regulatory administrative deed produces erga omnes effects, and it is fair that, as long as the public authority or the court, as a result of challenging the administrative deed, is pending the verification of its legality, it should not produce its effects on the targeted persons*”. The author of the notification also believes that “*due to reasons of legal logic*”⁵ “*the fact that “the decision aiming at the suspension of such a deed, legally enforceable under the conditions of art. 14 par. (4) of Law no. 554/2004, in turn produces also effects erga omnes, whereas a possible application having a similar subject matter is irrelevant” and considers that “It would be discriminatory for an regulatory administrative deed to produce the legal effects for which it was adopted towards all concerned persons, except those who were parties to the dispute of administrative law, in which the court ordered the suspension of enforcing the administrative deed.*”

Unfortunately, the High Court dismissed by Decision no. 18/02.10.2017⁶ the notification as inadmissible, motivated by the fact that “*in this case,*

there was no evidence of divergent case-law regarding the invoked legal issue, an issue which, moreover, is neither contemporaneous versus the period of ruling the concerned decision, and the alleged non-unitary practice, invoked in the notification, concerns only decisions ruled by the supreme court”.

2.1.2. Views expressed in doctrine

As noted in the doctrine, the suspension is “a temporary measure of temporary protection of the rights and legitimate interests of the recipient of the deed or other injured persons.”⁷ Starting from these issues, corroborated with the fact that, as previously shown, in order to rule a decision of suspending the enforcement of an (individual or regulatory) administrative deed is necessary the cumulative fulfilment of the two conditions expressly provided by Law no. 554/2004.

Returning to Decision no. 18/02.10.2017 of the High Court of Cassation and Justice, in order to resolve the appeal in the interest of the law, the court requested even the views of specialists from the Faculty of Law of the “Babeş-Bolyai” University from Cluj-Napoca and the Faculty of Law of the Bucharest University (from here probably comes the surprise that, although it seems that it rigorously analyzed the case, the solution was to dismiss the complaint as inadmissible).

As mentioned at point V. 20 of the said Decision, the Faculty of Law of the “Babeş-Bolyai” University of Cluj-Napoca, by the point of view expressed by Univ. Reader PhD Ovidiu Podaru, appreciated that, in the spirit of the systematic interpretation of the provisions of art. 7, 14 and 1 of Law no. 554/2004, the suspension of a regulatory administrative deed, as well as its issuance, revocation, abrogation and annulment, by symmetry, produces *erga omnes* effects; the applicable legal reasoning is, *mutatis mutandis*, the one provided by art. 60 par. (2) of the Civil Procedure Code, according to which, since, by the nature of the legal relationship, the effects of the regulatory administrative deed are extended to an indeterminate number of persons, the effects of the decision to suspend such is beneficial to everyone. On the other hand, the Faculty of Law of the Bucharest University - through the point of view expressed by Univ. Prof. PhD Dana Tofan and Verginia Vedinaş and Univ. Readers PhD Alexandru-Sorin Ciobanu and Univ. Lecturer PhD Bogdan Ionuţ Dima - appreciated that the court decisions by which, pursuant to art. 14-15 of Law no. 554/2004, the enforcement of regulatory administrative deeds is suspended (except for a few situations related to the actions in objective administrative contentious and to the damage of a legitimate public interest by the concerned deeds) do not produce, *de lege lata*, *erga omnes* effects.

⁵ We do not understand what they are, in the context in which the solutions of the courts have to comply with the legal provisions, in the letter and spirit of the law, there are no norms of legal logic expressly regulated, which would represent a possible source of law (our note).

⁶ Published in the Official Gazette of Romania, Part I, no. 970 from 07 December 2017.

⁷ Gabriela Bogasiu, *Justice of the Administrative Deed. A Bi-univocal Approach*, Universul Juridic, Bucharest, 2013, p. 247.

In the specialized literature were outlined two currents of opinion in regard to the effects of the suspension of the regulatory administrative deed.

Thus, in a first opinion, it was noted that “the effects of the suspension occur *inter partes litigantes*, irrespective whether they concern individual deeds or regulatory deeds” even if “it is true that maintaining the applicability of a regulatory administrative deed, for persons who did not request and obtain the judicial suspension, may seem unfair, but we have to also consider the fact that the plaintiff had to prove the two conditions imposed by law, including the threat of concrete material prejudices in their regard”⁸. Since we fully agree with this opinion, we shall not insist upon it, but shall try to debate more the theories comprised in the second opinion formed in regard to the legal effects and their *erga omnes* extent in case of suspending the enforcement of a regulatory administrative deed.

Another current of opinion (as it also results from the considerations of the HCJC Decision no. 18/2017), is the one according to which “the issue of the effects of extending the suspension of a regulatory administrative deed can be analyzed only by relating to the provisions of art. 14 and art. 15 of Law no. 554/2004 to the provisions of art. 23 of Law no. 554/2004 which, regulating the effects of annulment of a regulatory deed by a final decision of the administrative contentious court, states that the effects of annulment, by publishing the final court decision in the manner provided by law, occur for the future and have *erga omnes* effects. As a consequence, by applying the principle of symmetry, if the annulment of the regulatory administrative deed produces effects for the future and *erga omnes*, the suspension of enforcing the regulatory administrative deed has to produce the same legal effects”⁹. Although the author invokes the principle of symmetry, but which to our knowledge represents something completely different (i.e. we do not understand how the annulment can be symmetrical with the suspension of enforcing the regulatory administrative deed), he does not bring any argument to support his statements, whereas his entire theory remains in the stage of pure claim.

Moreover, in supporting this opinion, the author states that “such a conclusion is highlighted also in the judicial practice”¹⁰ invoking a solution ruled (how else) by the Court of Appeal Cluj, in the merits, without notifying us whether the solution was maintained or not in a possible second appeal at the High Court.

A theory, which we could say is at least curious, is outlined at another author¹¹ who believed that “Since it is a party in the lawsuit in which the suspension of enforcing the regulatory administrative deed was

ordered, for the public authority the court decision ordering the suspension is mandatory in terms of the power of *res judicata*. As the authority is bound not to enforce the deed in respect of the plaintiff, implicitly it will not be able to perform enforcements deeds against other legal subjects (...) and the suspension should concern all subjects for whom the act is intended, regardless of whether they had or not the capacity of a party to the dispute in which the deed was suspended.”

If we admit such a theory, we could reach the absolutely bizarre situation from a legal point of view, when a decision to suspend the enforcement of a regulatory administrative deed ruled by the court further to verifying the cumulative fulfilment of the two conditions expressly provided by Law no. 554/2004, would it end up producing *erga omnes* effects, but in fact only partially, towards the authority issuing the deed?! We do not understand how the said author reached such a theory, but obviously it exceeds any legal norm applicable to administrative law and not only.

2.2. Case study - a solution of the Bucharest Court of Appeal, from ecstasy to agony for the other recipients of the concerned challenged regulatory administrative deed

We shall analyze at this point, the solution ruled in the case that was the subject matter of file no. 7222/2/2019 ordering the suspension of enforcing *Order no. 216/2019* - regulatory administrative deed, in which the plaintiff was the National Company Nuclearelectrica. The solution, a lucky one for the plaintiff in the case, generated numerous discussions in view of its invocation by another operator (Hidroelectrică¹²) in its own dispute having the same subject matter, but also by a company having the capacity of a shareholder of the two operators (Fondul Proprietatea - the Ownership Fund¹³). In both cases, the applicant relied on the solution in File no. 7222/2/2019, strongly claiming that it is a regulatory administrative deed *e*, the solution produces *erga omnes* effects, the suspension of enforcing *Order no. 216/2019* operating against all those involved. Obviously, by reference to both the legal and doctrinaire issues invoked in the antecedence, our opinion is to the contrary, so that the solution is not binding to all operators, as such a situation is not regulated in the law of administrative contentious, *i.e.* that the suspension of a regulatory administrative deed produces general effects, *erga omnes*.

In accordance with this opinion, in the two subsequent cases, the same court - the Bucharest Court of Appeal, ruled in favour of dismissing the suspension

⁸ Alexandru-Sorin Ciobanu, *op.cit.*, p.88-89.

⁹ Oliviu Puie, *Administrative and Tax Litigation. Law no. 554/2004. Law no. 212/2018. EOG no. 57/2019 on the Administrative Code. Legislative Correlations. Comments. Explanations. Doctrine. Case-law*, Universul Juridic, Bucharest 2019, p. 299.

¹⁰ *Idem*, p. 299.

¹¹ Claudiu-Angelo Gherghină – *The Legality of the Regulatory Administrative Deed in the Rule of Law*, Universul Juridic, Bucharest 2019, p. 206 et seq.

¹² In File no. 1267/2/2020; the request for suspension was dismissed on the merits.

¹³ In File no. 426/2/2020; the request for suspension was dismissed on the merits.

requests filed by both Hidroelectrica and Fondul Proprietatea.

In view of the topic submitted to the analysis of this study, not so much the solution is relevant, but the considerations of the two ruled judgements. Thus, by the civil judgement no. 258/23 April 2020¹⁴ ruled by the Bucharest Court of Appeal, the court ruled that “the reference to the solution ruled by the Bucharest Court of Appeal in file no. 7222/2/2019 has no implications on this action, one posing its own individuality related to the holder of the summons and the invoked reasons, not in view of the standing of the company Nuclearelectrica SA that obtained the suspension solution in the concerned case, but of a company in which Fondul Proprietatea is a shareholder, namely Hidroelectrica SA.” Moreover, the court goes further and notes in a detailed analysis that “starting from the premise that the suspension of enforcing a unilateral administrative deed at the request of a plaintiff determines the lack of interest or the lack of interest of a similar request filed by another plaintiff, it omits the fact that the standing of the latter person no longer depends in such a circumstance in view of suspending the enforcement of the solution to be ruled in its own merits action in annulment of that administrative deed, but on the court decision by which it analyzes the action of the first plaintiff, who obtained the concerned suspension, respectively the extent to which it assumes the continuation of the procedural steps”. The approach of the court in this case is interesting, but beyond this issue, even indirectly perhaps, the Bucharest Court of Appeal ruled that a solution to suspend the enforcement of a regulatory administrative deed does not produce effects against another person, a third party to the dispute in the case.

On the other hand, in the second case that I mentioned, the same court noted by the civil judgement no. 350/03.06.2020¹⁵ that “on the first argument of the plaintiff regarding the existence of the well-justified case, namely the fact that by the civil judgement no. 132/02.30.2020 (...) it was already ordered to suspend the enforcement of Order no. 216/2019 (...) until the ruling of the court of first instance, the Court shows that the plaintiff who promoted this request for suspension is Nuclearelectrica” so that “the court does not consider that the order to suspend the enforcement of Order no.

216/2019 at the request of Nuclearelectrica would automatically lead to the adoption of the same solution in this case”. In the conclusion of these considerations, and also in agreement with our opinion, the Bucharest Court of Appeal ruled that “as it obviously results from the regulation of art. 15, art. 14 of Law no. 554/2004, the suspension of enforcing the administrative deed, as an extraordinary measure that can be ordered by the administrative contentious court in the hypothesis that an injured person proves the fulfilment of the legal conditions, does not produce *erga omnes* effects”.

3. Conclusions

We consider that the institution of suspending the enforcement of the regulatory administrative deed deserves more attention, both from the doctrine, but especially from the courts of law.

We make this statement, in the context in which, in view of the effects that a decision of the court of first instance confirming such a solution, is legally enforceable and a possible second appeal does not suspend its enforcement. Therefore, we believe that the administrative contentious judge should more rigorously analyze the cumulative fulfilment of the two conditions expressly provided by Law no. 554/2004 and order the suspension of enforcing the regulatory deed only if they are cumulatively fulfilled. We cannot agree, in any form, with the theory according to which such a decision has to produce *erga omnes* effects, as such an interpretation would deprive of content the very institution of suspending the enforcement of the administrative deed. None of the supporters of this opinion convinced us (nor did they explain in any way) how the threat that a prejudice occurred proven in a dispute can (or is) the same for all recipients of that deed!

On the other hand, in the absence of a careful analysis of the well-justified case and the existence of threatened prejudice upon the property of the person considering itself injured, serious consequences may arise in the disruption of the issuing authority, which practically undergoes the impossibility of applying any legal norm throughout the period of suspending the concerned deed.

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¹⁴ The applicant filed a second appeal. But it gave up his trial, considering the lack of interest generated by the repealing of Order no. 216/2019.

¹⁵ In this case, too, the plaintiff filed a second appeal but filed a waiver of the lawsuit, as there was no longer any interest in filing an action.