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Amendments to the Law No. 554/2004 introduced by Law No. 212/2018*

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Abstract

The paper discusses the amendments regarding the definition of the administrative act, the limitations of the control of the contentious administrative courts, the prior procedure, the object of the legal action, the competence of courts, the parties, the procedure and the enforcement of the court decision. The analysis of the amendments introduced in the Law no. 554/2004 by Law no. 212/2018 is made in corroboration with other normative acts. Generally, the legislator managed to harmonise the provisions of the Law no. 554/2004 with other normative acts and at the same time, to preserve the specific of the contentious administrative. However, dispute procedure for the administrative contracts together with the rules for contesting the first instance decision do not respond to the specificity of the administrative law.

Keywords: *Law no. 554/2004, contentious administrative, prior procedure, administrative act, administrative contract [K39, K41]*

1. INTRODUCTION

Since its enforcement, Law 554/2004[1] of the contentious administrative has suffered many alterations. Some of them were driven by decisions of the Constitutional Court of Romania, other by the will of the legislator who tried to improve the procedure in accordance with the principles of public law that govern the area of contentious administrative. The law has even risen a conflict of ideas between the legislator, the Constitutional Court and the High Court of Cassation and Justice regarding the possibility of establishing the legality of an individual administrative act during any type of lawsuit, no matter when the administrative act was issued, according to the dispositions of art. 4 para. 1 regulating the plea of illegality. The Constitutional Court agreed with the

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[1] Published in the Official Gazette of Romania, Part I, no. 1154 from 7 December 2004.

legislator, maintaining the text as being in accordance with the Romanian Constitution and the European Convention of Human Rights, but the High Court of Cassation and Justice refused to apply the same text, claiming that it is against the principles derived from the case-law of the European Court of Human Rights and the Court of Justice of the European Union and decided that only individual administrative acts issued after the enforcement of Law 554/2004 may be verified under the dispositions of art. 4. Although the case-law of the High Court of Cassation and Justice remained constant and was followed in time by all the courts, the legislator has not amended the text of art. 4 in accordance with the case-law of the courts.

Several amendments were introduced in the Law 554/2004 of the contentious administrative by the Law 212/2018[2]. Some of the amendments are consequences of decisions of the Constitutional Court of Romania, others seek to improve the procedure rules, either in accordance with the Civil procedure code or in accordance with the specific requirements of the principles of public law which govern the contentious administrative. We will concentrate our study on the amendments introduced for these reasons, as well as on the amendments regarding the definition of the administrative act and the administrative contracts mentioned by the Law 554/2004. In the latter case, an analysis of the history of these legal dispositions is done, in order to conclude upon the solution introduced by the Law 212/2018.

2. THE DEFINITION OF THE ADMINISTRATIVE ACT

Law 554/2004 is defining the administrative act *per se* and acts that are taught administrative acts. Romania has not adopted yet a law regarding the administrative procedure, so it was considered that some definitions have to be shaped in this law for the purpose of the contentious administrative procedure. According to art. 2 para. 1 letter c), the administrative act is the act with an individual or normative character, issued by a public authority exercising public power with the aim of organising the implementation of the law or of implementing the law, which creates, modifies or ends legal relationships. The definition considers the main characteristics of the administrative act referred to in the doctrine, respectively the aim to organise the implementation of the law or to implement the law (Iovănaş, 1977, p. 219) and the fact that it is issued in the exercise of public power (Iorgovan, 2002, p. 24). The original form of the law considered that are taught administrative acts the contracts concluded by the public authorities having as object the enhancing of public property value, the

[2] Published in the Official Gazette of Romania, Part I, no. 658 from 30 July 2018.

carrying out of public works, public service delivery and public procurement. It also specified that by special laws other administrative contracts may be submitted to the control of the administrative courts. That implied that administrative contracts, other than the ones expressly referred to by the wording of art. 2 para. 1 letter c) may be subjected to the control of the administrative courts only if the special law regulating such contracts contained dispositions in that sense. Otherwise, those administrative contracts will be subjected to the control of civil courts (Iorgovan, 2004, p. 284). It has to be noticed that the notion of administrative contract was mentioned for the first time in a law by the Law 554/2004, until then, the existence of such a contract being a subject of controversy in the Romanian doctrine. Some authors accepted the concept born in the French law (Gilescu, 1970, p. 122) other rejected it (Teodorescu, 1929, pp. 394-397). For this reason the legislation issued after 1989 considered that contracts that were typical administrative contracts in the French law, such as the concession contract, should be submitted to the control of the civil courts. Law 554/2004 marked a direction by recognising the administrative contract as a distinct category. It did not provide a definition, but considered it a taught administrative act and mentioned four categories, depending on the object of the contract.

Law 212/2018 modified the content of art. 2 para 1 letter c), maintaining only the definition of the administrative act *per se* and introduced a new letter, c^1) referring to administrative contracts. Art. 2 para. 1 letter c^1) asserts that are taught administrative acts the contracts concluded by the public authorities having as object the enhancing of public property value, the carrying out of public works, public service delivery and public procurement and that other administrative contracts may be regulated through special laws. This expression of the law implies that any contract defined by a special law as being an administrative contract is considered a taught administrative act and will be subjected to the control of the administrative courts.

It would seem that the legislator has decided to enlarge the area of control of the administrative courts, form administrative contracts named by Law 554/2004 and given into the competence of administrative courts by special law, to administrative contracts named by the Law 554/2004 and all other administrative contracts, with the exception, of course, of those for which special laws establish the competence of control in favour of other courts. But this impression is tempered by the special dispositions of the Law 554/2004 regarding the specific procedure applied to the administrative contracts, as modified by the Law 212/2018, as discussed further.

3. AMMENDMENTS FOLLOWING DECISIONS OF THE CONSTITUTIONAL COURT

Administrative acts with limited control possibilities

The original form of the Law 554/2004 mentioned in art. 15 para. 3 a set of administrative acts for which the control of the administrative courts was limited: the administrative acts issued for the implementation of the state of war, the siege state or the emergency state, the ones regarding the national defence and security or the ones issued for re-establishing the public order, as well as for removing the consequences of natural calamities, epidemics and epizooties.

The limitation consisted, first of all, in the fact that such administrative acts could be subjected to the control of the administrative court only for reasons concerning the *excess of power*. It was considered that legal acts issued in such circumstances aim to limit some of the human rights normally protected by the Constitution in order to protect the public interest, limitations being permitted in accordance with art. 53 of the Romanian Constitution in situations similar to those mentioned in art. 5 para. 3 of the Law 554/2004. For this reason, the only reason a court could examine the legality of the act was to find out if the act was necessary in the aforementioned circumstances in a democratic society and if the limitation is proportionate with the pursued objective (Iorgovan, 2004, p. 307). It was thus impossible to contest the legality of such an administrative act for reasons related, for example, with procedural irregularities. The solution looked for a balance between the emergency of the situation and the finality of public interest pursued by the administrative act on one hand and the protection of human rights on the other hand.

Other limitations consisted in the fact that a request for suspending the effects of such administrative acts according to the provisions of art. 14 of the law (after the prior procedure but before a claim in court has been introduced) was not admissible. The emergency appeal procedure, regulated by art. 21 of the Law 554/2004 in its original form, was not admissible either.

The Constitutional Court was presented with a plea of unconstitutionality of the text that included the administrative acts regarding national defence and security among those with a limited possibility of control in court. The Constitutional Court found, in the decision no. 302/2011[3], that although art. 52 para. 2 of the Constitution mentions that the conditions and limits of the right to contest in court administrative acts are to be established by an organic law (and Law 554/2004 belongs to this category), the exclusions from the control of the courts are established by art. 126 para. 6 of the Constitution, which only excludes

[3] Published in the Official Gazette of Romania, Part I, no. 316 from 09 May 2011.

the administrative acts in relation with the Parliament and the military commandment orders. Thus, it was concluded that excluding the administrative acts regarding national defence and security from the control of the courts, in case the reason for the claim was other than the excess of power, was unconstitutional.

Following the reasoning from decision no. 302/2011 of the Constitutional Court, Law 212/2018 removed the limitation regarding the motives that could be invoked in a claim to court concerning all the administrative acts referred to in art. 5 para. 3 of the Law 554/2004. The content of art. 21 of the original form of the Law 554/2004 has been already repealed by the Law 262/2007[4]. In these circumstances, the Law 212/2018 reformulated the text of art. 5 para. 3, stating that in the case of disputes concerning the administrative acts issued for the implementation of the state of war, the siege state or the emergency state, the ones regarding the national defence and security or the ones issued for re-establishing the public order, as well as for removing the consequences of natural calamities, epidemics and epizooties, the effects of such acts cannot be suspended according to the provisions of art. 14 of the law. The only possibility for demanding in court the suspension of the effects of such administrative acts remains the one regulated by art. 15 of the Law 554/2004 that can be introduced together with or after the request for the annulment of the illegal administrative act has been submitted to court.

The prior procedure for the one injured by an administrative act addressed to another

The one injured by an administrative act addressed to another is known in the doctrine and case-law as "the injured third party". This person is not a party in the legal relationship born between the administrative authority that issued an individual administrative act and the beneficiary of the act, being outside this relationship, but is injured by the effects of the act that prevail against others. Law 554/2004 consecrated the right of the injured third party to contest the administrative individual act addressed to another, if the act adversely affects one of his rights or legitimate interests. Such a possibility was recognised before by the case-law, as art. 48 of the Constitution provided that anyone injured by an administrative act may contest it in court (Fodor, 2008, p. 344).

The first law of the contentious administrative adopted after 1989, Law 29/1990, established the obligation to perform the "prior procedure" for the person injured by the individual administrative act. Art. 5 of the law showed that the injured person shall apply to the issuing authority, or its superior, to revoke

[4] Published in the Official Gazette of Romania, Part I, no. 510 from 30 July 2007.

the act within 30 days from the date when the act was notified to him. It was decided in the case-law that for the third party the 30 days interval starts with the date he had taken notice of the existence of the harmful act[5].

Law 554/2004 regulated the prior procedure in art. 7. In the first para. of the article a time limit of 30 days is provided for the beneficiary of the harmful act to perform the prior procedure. Para. 7 of art. 7 shows that this interval can be extended for good reason up to 6 months starting with the date the act was issued. In para. 3 of this article was shown that the third party is entitled to the prior procedure, from the moment he had taken notice, in any way, of the existence of the act, within the time interval of 6 months mentioned by para. 7 of the same article. Para. 7 of art. 7 regulated a time interval of 6 months starting at the moment the individual administrative act was issued. The 6 months are defined as a statute of limitations. In the case-law, the entitlement referred to by para. 3 was considered an obligation.

The most frequent situation when an administrative individual act injures a third party is the case of building permits that may bring harm to the legal rights of the neighbours. Such a situation was used as an example by the initiator of Law 554/2004 in explaining the meaning of art. 7 para. 3. It has been shown that, in the case of the building permits, neighbours are able to take notice of the existence of a building permit from the panels fitted on the land that have to present the building conditions in public (Iorgovan, 2004, p. 315). A plea of unconstitutionality was brought before the Constitutional Court, derived from a case where a third party was injured by a building permit. The plaintiff claimed that in his case, the existence of the building permit issued to his neighbour was made public after the time limit of 6 months starting from the moment the building permit was issued. In these conditions, the statute of limitations, the way it was defined, obstructed the access to justice of the injured third party. Through Decision no. 797/2007[6], the Constitutional Court found that para. 7 of art. 7 from the Law 554/2004 was unconstitutional if it applies to the injured third party. The reasoning of the decision emphasized that no time limit may begin to run until the injured third party takes notice of the existence of the act and that it cannot be conceived that a time limit can be completed before the injured third party took notice of the existence of the harmful act.

After the publication of the Constitutional Court's decision the legislator did not amend the law in respect to art. 7 para. 7, so it remained unclear if the time limit to exercise the prior procedure for the injured third party was 6 months, as referred to in para. 3 of art. 7 or 30 days, similar to the one for the beneficiary of

[5] Bucharest Court of Appeal, Chamber of Administrative and Fiscal Contentious, civil decision no. 1231/2007, https://legeaz.net/spete-contencios/anulare-act-acte-ale-autoritatilor-1231-2007, accessed 11.01.2019.

[6] Published in the Official Gazette of Romania, Part I, no. 707 from 19 October 2007.

the harmful act. One opinion was that the time limit of 30 days applies both for the beneficiary of the act and the injured third party. This term can be extended up to 6 months starting with the day the act was issued for the beneficiary or the day the person took notice, in any way, about the existence of the act for the third party[7]. Another opinion was that for the injured third party the time limit for lodging the prior procedure is 6 months, as stated by para. 3 of art. 7, starting from the date the injured third party took notice, in any way, about the existence of the act (Bogasiu, 2014, p. 237). Our comment at the time was that the last opinion was right (Fodor, 2015). It is not enough that the third party takes notice about the existence of an administrative act addressed to another. The third party has to find out if the administrative act is harmful for him, if the administrative act is legal or not and then to decide if it will contest the act or not. In connection with building permits things are more complicated, as the third party can establish if the administrative act addressed to another is harmful for him and if the act is legal or not. In most of the cases such information are to be found in the technical documentation that was authorized by the building permit. But the local authorities do not provide easily information about the technical documentation to a third party, in most of the cases the court action being a "shot in the dark", the necessary documents being provided in the course of the trial to the court (Fodor, 2018, pp. 142-144). As 30 days is the time limit for the administrative authority to offer an information by request, it appears with evidence that a longer time is needed by a third party do find out sufficient information that is necessary in order to decide if he will contest the administrative acts and on what grounds.

Law 212/2018 finally amended art. 7 in respect with the injured third party. According to this amendment, the injured third party is entitled to lodge the prior procedure within 30 days starting from the day he took notice, in any way, about the content of the administrative act. An important change can be observed in the text. The starting point for the running of the time limit to lodge the prior procedure does not depend on the moment the third party takes notice about *the existence* of the act, but on the moment the third party takes notice about *the content* of the act. As shown before, this can rise a problem in the case of the building permits, or any other permits that are based on a technical documentation that is integrated in the permit. "The content" of the act in these situations is given by the documentation approved by the authorisation and not the text of the authorization. The importance of knowing the content of the technical documentation was emphasized by the opinion of the Court of Appeal Cluj in the request for clarification of a legal matter addressed to the High Court

[7] Cluj Court of Appeal, Chamber of Financial and Administrative Contentious, civil decision no. 347/2010, https://legeaz.net/spete-contencios-jurindex/autoritati-publice-locale-347-2010-xnr, accessed 12.01.2019.

of Cassation and Justice in accordance with art. 519 of the Civil procedure code[8]. All these considered, the solution of the legislator chose the shorter time limit, the one of 30 days, but tied it to the moment the third party not only is aware of the existence of the act, but knows it's content, providing a better possibility of preparing a defence, without which the right of access to court would not be effective.

The extraordinary appeal

One of the most important amendments of Law 554/2004 introduced by Law 262/2007 changed the content of art. 21, dedicating it to the extraordinary appeals. At the time, the Civil procedure code[9] provided two types of extraordinary appeal: the review of a decision (*revizuirea*) and the contestation for annulment of a decision (*contestația în anulare*). Both extraordinary appeals were known as "retraction appeals", as they were in the competence of the same courts that delivered the contested judgements (the same courts, not the same panel of judges). According to para. 1 of art. 21 of Law 554/2004 in the form amended by Law 272/2006, in the contentious administrative procedure all the types of appeal provided by the Civil procedure code were permitted. Furthermore, according to para 2. of the same art. 21, an extra reason for the review of a decision was defined in contentious administrative procedure: a breach of the principle regarding the priority of European law against national law. Para 2., in its second part, set some procedural rules regarding the time limit and conditions for lodging a request for review in the case of the extra reason: "the request for review could be lodged within 15 days of the decision has been served, which, by derogation from art. 17 para. 3 of the Civil procedure code, will be done at the reasoned request of the interested party within 15 days of the judgement being delivered. The third part of art. 21 para 2. imposed to the courts to give a solution within 60 days of the lodging of the review request. Decision 1609/2010 of the Constitutional Court[10] found that the dispositions of art. 21 para 2. second part to be unconstitutional because the text was confuse regarding the time limits and the competence of courts, breaching the right to a fair trial. In the same decision, the court maintained as in accordance with the constitution the first part and the

[8] High Court of Cassation and Justice, decision no. 74/2018 regarding the clarification of a legal matter, http://www.monitoruljuridic.ro/act/decizia-nr-74-din-29-octombrie-2018-referitoare-la-pronun-area-hot-r-rii-prealabile-pentru-dezlegarea-unei-chestiuni-de-drept-emitent-209703.html, accessed 12.01.2019.

[9] Published in the Official Gazette no. 200 from 11 September 1865, republished for the fourth time in the Official Gazette of Romania, Part I, no. 177 from 26 July 1993 and brought to date in the Brochure from 15 August 2002.

[10] Pblished in the Official Gazette of Romania, Part. I, no. 70 from 27 January 2011.

third part of the art. 21 para. 2. The Constitutional Court underlined the benefits of the first part, ensuring the priority of the European legislation. It was noted in the doctrine that this extra reason can only be used if during the lawsuit there was no discussion about the incidence of a European legal norm. Otherwise, in the absence of totally new arguments, the appeal would be one in reformation, not in retraction as a review of the case should be (Ungur, 2016, pp. 138-139) and, at the same time will infringe the principle of security of legal relationships.

Giving an incorrect interpretation to the Decision no. 1609/2010 of the Constitutional Court, Parliament adopted Law no. 299/2011[11] which abrogated entirely para. 2 of art. 21. In the exposé of the law it was shown the necessity of putting art. 21 of the Law 554/2004 in accordance with Decision no. 1609/2010 of the Constitutional Court as it was requested by art. 147 para. 1 of the Constitution. Following Law no. 299/2011, Law 76/2012[12] for the enforcement of the Law 134/2010[13] regarding the Civil procedure law repealed the para 1 of the art. 21 of the Law 554/2004. It would appear that the whole art. 21 regulating the extraordinary appeals has disappeared from the Law 554/2004. But, through Decision no. 1039/2012 of the Constitutional Court[14], Law no. 299/2011 was found to be unconstitutional, as it disagreed with the Decision no. 1609/2010 of the Constitutional court, was walking away from the dispositions of art. 147 para. 1 of the Constitution and was diverting the obligation of the legislator to put national legislation in accordance with the European one.

After all this journey, Law 212/2018 reshaped art. 21. Para. 1 of the article states that an extra reason for a review request against a definitive court decision, added to the ones presented in the Civil procedure code, is the breach of the principle of the priority of European legislation against the national one, established by art. 148 para. 2 corroborated with art. 20 para. 2 from the Constitution of Romania. Following a long discussion in doctrine and case-law (Ungur, 2016) about the possibility of reviewing under art. 21 of the Law 554/2004 definitive court decisions in which the substance of the case was not evoked, Law 212/2018 specified in para. 2 of the new form of art. 21 that definitive court decisions regarding lawsuits where the substance of the case was not evoked is also possible. As for the procedure, para. 3 of the new form of art. 21 sets a time limit of one month for lodging the review request, starting the date the judgement was served to the party and obliges the court to give a solution with priority and emergency.

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[11] Published in the Official Gazette of Romania, Part I, no.916 from 22 December 2011.

[12] Pblished in the Official Gazette of Romania, Part. I, no. 365 from 30 may 2012.

[13] Published in the Official Gazette of Romania, Part I, no. 485 from 15 July 2010 and republished the second time in the Official Gazette of Romania, Part I, no. 247 from 10 April 2015.

[14] Pblished in the Official Gazette of Romania, Part. I, no 61 from 29 January 2013.

The time limit of one month from the day the judgement was served to the party is consistent now with the one imposed by the Civil procedure code in art. 511. The fixed time limit for giving a solution to the review request was replaced with the obligation to emergency and giving priority in solving the request.

One question remains though: is there possible to use the other extraordinary retraction appeal, namely the contestation for annulment (*contestația în anulare*)? The text of art. 21 no longer mentions the possibility of exercising in contentious administrative all types of appeal regulated by the Civil procedure code. At the same time, art. 28 of the Law 554/2004 shows that the dispositions of the law shall be supplemented with the dispositions of the Civil procedure code, except for the situation where the latter dispositions are not compatible with the specifics of the power legal relations established between the public authorities on one side and the persons injured in their legal rights or legitimate interests on the other side. As, on the one hand, in contentious administrative procedure the principles of security of legal relationships and of the emergency of reaching a final decision are very strong, and on the other hand a former disposition that expressly allowed the exercise of all types of appeal regulated by the Civil procedure code was abrogated, the question is legitimate. It is our opinion that, as long as art. 21 allows again the exercise of the review request, there is no reason to consider that the other type of retraction appeal, namely the contestation for annulling a definitive decision (*contestația în anulare*), could not be exercised.

4. AMENDMENTS REGARDING THE PROCEDURE RULES

Reasoning of the request in prior procedure

As we presented before, in the case of a harmful administrative act, before the injured person shall apply to the issuing authority, or its superior, to revoke the act within 30 days from the date when the act was notified to him. Such a procedure does not limit the access to justice, but offers the possibility of a fast and free of charge procedure for obtaining one's legal right, as was found by the Constitutional Court in Decision no. 1/1994[15] and Decision no. 1224/2011[16].

If the issuing authority or its superior refuses to grant the request, the injured person may address the court with a request for the annulment of the administrative act. This possibility is described by art. 8 para. 1 of Law 554/2004, regarding the object of the judiciary action in contentious administrative. The law did not say anything about the extent of the reasoning of the request addressed

[15] Published in the Official Gazette of Romania, Part I, no. 69 from 16 March 1994.
[16] Published in the Official Gazette of Romania, Part I, no. 796 from 10 November 2011.

in the prior procedure, nor about the fit between the reasons invoked in the prior procedure request with the ones mentioned in the action in court. The case-law reflected different views. In a decision of the Court of Appeal Cluj the court found that the law does not impose any requirements for the reasoning of a request in prior procedure, so, the simple demand for annulling the harmful act was enough[17].

Law 212/2018 added to the initial form of art. 8 para 1 a second part, stipulating that the reasons invoked in the request addressed to court for the annulment of the administrative act are not limited to the ones invoked in the request during the prior procedure. One could argue that it is not fair against the administrative authority, as it was not confronted during the administrative procedure with all the arguments of the injured party that could perhaps lead to the admission of the administrative request. On the other hand, it is possible that the injured person will gather new information, sometimes even from the administrative authority after lodging the request in prior procedure. This may be possible due to the short time, of 30 days, from the date the act was served to the beneficiary or the date the third party took notice of the content of the harmful act, during which he has to react and lodge the request in prior procedure. As a final argument, the administrative authority should be able to find itself the reasons of illegality, once the injured person drew its attention to the fact that the act may be illegal.

The prior procedure in the case of administrative act that cannot be revoked due to the fact it entered the civil circuit and produced legal effects

The exceptions from the compulsion to perform the prior procedure were presented in para. 5 of art. 7. In the original form of the Law 554/2004 the Prefect, the Ombudsman, the Public Ministry, the National Agency of Public Servants as well as the persons injured by G.O. or certain dispositions from G.O. found to be unconstitutional were exempted from the compulsion to perform the prior procedure. Also, in the case of the plea of illegality, the prior procedure vas not necessary. Law 262/2007 introduced two new exemptions: the case of an unjust refusal of the administration to solve a request and the case when the administration was "silent", giving no answer during the legal duration for solving the request.

From the dispositions of art. 6 of the Law 55/2004 derived the conclusion that the prior procedure is not necessary when contesting and administrative jurisdictional act. The conclusion was logic, as, according to doctrine the

[17] Cluj Court of Appeal, Chamber of commercial law and administrative and fiscal contentious, civil decision no. 986/2014, https://www.curteadeapelcluj.ro/Jurisprudenta/sectia%20comerciala/Comercial%20trim%201 %202014.pdf, accessed 13.01.2019.

administrative authority had no right to withdraw an administrative jurisdictional act it has issued.

Law 212/2018 added a new exemption situation: the case of the administrative act that entered the civil circuit producing legal effects. This situation was considered by the doctrine one in which the administrative act could no longer be revoked by the issuing administrative authority (Petrescu, 2004, p. 327). The principle was legally recognized by the Law 554/2004 where, in art. 1 para 6 it was shown that in case the public authority cannot revoke an illegal act, because it entered the civil circuit and produced legal effects, it can lodge a request to the contentious administrative court asking for the annulment of the act, within a year from the date the administrative act has been issued.

The amendment introduced by the Law 212/2018 in para. 5 of art. 6 does not specify if it refers to the situation where the administrative authority is addressing to court pursuant to art. 1 para 6, or it refers to any situation where the injured person is contesting an administrative act which has entered the civil circuit and produced legal effects. The answer should be that the legislator considered the latter situation. That would seem logic, as there is no logic of thinking the public authority could address to itself a request in prior procedure. So, the first situation was certainly not in the mind of the legislator. But, if this would be true, another question arises: why are not exempted from the compulsion of performing the prior procedure all the situations when the administrative act cannot be revoked, such as the acts that gave birth to legal rights with a stability guaranteed by the impossibility of revocation of the basic act or the administrative acts containing dispositions that have been entirely executed (Petrescu, 2004, pp. 327-330)?

The forced intervener

One of the amendments of the Law 554/2004 introduced by the Law 262/2007 was art. 16^1 stipulating that the court can introduce in the lawsuit the social organisms that have an interest, at the request of any of the parties, or it can call into question on its own motion the need of introducing them, as well as other legal entities. Situations where the court sought necessary to introduce other legal entities in the lawsuit were for example the introduction of the authority whose name was incorrect mentioned by the plaintiff, of the beneficiary of the act in the case the administrative act was contested by a third party, of the legal subject who started the procedure finalized with the issuing of the contested act, of the person that will be affected by the annulment of the contested act (such as the public servant that occupied a function which became vacant due to the issuing of the contested act and was in danger to lose his job if the act was annulled). At the time the Civil procedure code adopted in 1865, with

further amendments, was in force, the courts interpreted the dispositions of art. 16^1 in the sense that if neither party agreed to request the introduction in the lawsuit of the law subject suggested by the court, the court had the power to introduce them on its own motion, in order to create the correct frame of the proceedings (Bogasiu, 2015).

The new Civil procedure code (Law 134/2010) created, in art. 78 para. 2 the institution of the forced intervener, where the court could rise the question of the necessity for a legal entity to be introduced in the lawsuit. If neither part of the lawsuit submitted a request of the introduction of the suggested legal entity, the court will dismiss the complaint. The person who entered the lawsuit in this way, would take the procedure as it was at the moment of his entry and is entitled to defend his rights in every way. Neither part can pretend anything from this person, as he has not the position of a defendant. But, the person will have to obey the court decision, as he is party in the lawsuit.

If the court finds that in the trial should have been introduced a person having the position of defendant, it will give the plaintiff the possibility to do this until the first day in court. After this moment, the claim addressed to court can no longer be modified, unless all the parties agree to this expressly, according to art. 204 of the Law 134/2010 (the Civil Procedure code). In the case a forced intervener is introduced, he will take the procedure from the moment he entered the trial.

In this context, it has been shown that, as the dispositions of Law 554/2004 are to be completed with the ones of the Civil procedure code, it was no longer possible for the court to introduce in the lawsuit a legal subject that would be interested in the outcome of the trial. The court will only rise the question and in case neither party will follow the suggestion of the court, it will dismiss the claim. Law 212/2018 consecrated this thinking and amended art. 16^1 of the Law 554/2004 in this respect, introducing the same sanction for the refuse of the parties to extend the procedure frame as suggested by the court: the dismissal of the complaint.

The appeal procedure

It is to be noticed that in the case of administrative and fiscal contentious disputes, no appeal is permitted by the Law 554/2004 against the order of the first instance court. The contestation possibilities are reduced to the extraordinary appeals. The second appeal (*recursul*) is an extraordinary appeal belonging to the group of reformation remedies and limited to issues concerning the legality of the contested court order. The review and the contestation for annulment of the court order are both extraordinary appeals belonging to the retraction remedies, which can be used in very limited situations.

According to the rules of substantive jurisdiction, the second appeals (*recursurile*) against the court orders issued in the first instance trials by the chambers of administrative and fiscal contentious of the county courts are within the competence of the courts of appeal and the second appeals (*recursurile*) against the court orders issued in the first instance trials by the chambers of administrative and fiscal contentious of the courts of appeal are within the competence of the High Court of Cassation and Justice. Considering the dispositions of the Civil procedure code, this situation introduced different procedures for the two situations. Art. 493 of the Civil procedure code describes the filtering procedure in the case of second appeals brought to the High Court of Cassation and justice. According to this procedure, a second appeal can be dismissed as manifestly ill-founded without an oral public hearing. Such a procedure is not applicable for the second appeals referred to the courts of appeal.

Two problems were found regarding this situation. The first one regards the existence of a difference in procedure for second appeals promoted in the same area of law. The second one regards the fact that the filtering procedure may lead to a final solution in a procedure that is not public nor oral. In case of second appeals lodged against a court order solving an appeal, the procedure may be justified, as, after two jurisdictions, the reasonable time for finalizing the case allows the possibility of ending sooner the case if the second appeal is manifestly ill-founded.

In the contentious administrative procedure, the injured person is defending his legal right or interest against the power of the administration and if the first instance court is a court of appeal it means that the legal right is harmed by administrative act regarding taxes, contributions, customs duties and accessories of the previous of a value over 3.000.000 RON, or by an administrative act issued by a central authority. Being in the situation of defending themselves, the ones injured by administrative acts should benefit from broad possibilities of protecting their legal rights and legitimate interests. Instead, the Romanian legislation narrows the possibility of defence to a minimum: no appeal where the factual and legal problems could be re-analysed, the single remedy against the court order of the first instance court being limited to the possibility of discussing legal matters. In this situation, we welcome the amendment introduced by the Law 212/2018 to the art. 20 para. 2 according to which the dispositions of the art. 493 of the Civil procedure code do not apply to the second appeal in contentious administrative.

5. RULES REGARDING THE ADMINISTRATIVE CONTRACTS

Jurisdiction

As we have shown before, Law 554/2004 in its original form, considered that are taught administrative contracts the contracts concluded by the public

authorities having as object the enhancing of public property value, the carrying out of public works, public service delivery and public procurement and that Law 212/2018 modified the content of art. 2, mentioning in para. 1 letter c^1) that other administrative contracts may be regulated through special laws. The conclusion was that this expression of the law implies that any contract defined by a special law as being an administrative contract is considered a taught administrative act and will be subjected to the control of the administrative courts, with the exception of those for which the special laws establishes the competence of control in favour of other courts.

Other amendments introduced by Law 212/2018 regarding administrative contracts follow a tumultuous legal path on the subject which has to be presented, for a good understanding of the latest amendments. After 1989, the first regulation on public procurement was G.E.O. no.60/2001[18] which defined the contract as an administrative contract and gave all disputes regarding these contracts in the jurisdiction of the contentious administrative courts. Later on, Law 554/2004 entered into force, defining all public procurement types of contract (for works, services and goods) as administrative contracts and again establishing the jurisdiction for disputes regarding such contracts in favour of the contentious administrative courts. In 2006, as Romania was preparing to join the European Union, new legislation was adopted in the field of public procurement, enhancing the transparency in the conclusion of contracts. The procurement of public goods and the concession of public works and public services were regulated by G.E.O. no. 34/2006[19]. The Ordinance contained a lot of rules for concluding the contract, but no rules for the performing of the contract or the jurisdiction for disputes on the subject of performing the contract. In respect to the procurement procedure, the parties could solve their disputes in front of the National Council for Solving the Complaints (*Consiliul Național de Soluționare a Contestațiilor*), an administrative body with jurisdictional activity, and further in front of the chambers of contentious administrative of the courts of appeal in the judiciary system. Our opinion, at the time, was that these were administrative contracts, as stipulated by art. 2 para 1 letter c) of the Law 554/2004 and according to the jurisdiction established by law; we also sustained the opinion that all the characters of the public contracts as established by the doctrine should apply (Fodor, 2008, p. 227). Those characters referred, among other, to the fact that the contract is always concluded between a public authority and a private supplier, the nature of the contract was onerous, the parties have to accept dispositions imposed by the public authority in the public interest (*les clauses exorbitantes*), the public authority is entitled to modify or end the contract

[18] Published in the Official Gazette of Romania, Part I, no. 241 from 11 May 2001.
[19] Published in the Official Gazette of Romania, Part I, no. 418 from 15 May 2006.

in a one-sided manner and without the intervention of the court if there is a question of public interest or the obligation of the private party became too onerous, the contract is governed by the principle of financial equilibrium between the parties entitling the private supplier to damages if the contract is modified or ended without his fault, the rules of public law are governing the contract (Iorgovan, 2002, p. 115).

However, through G.E.O. no. 76/2010[20] the Government showed another opinion, as this legal act amended G.E.O. no. 34/2006 introducing para. 11 to the art. 286, stating that the disputes concerning the performing, nullity, annulment, cancelation or one-side termination of the public procurement contracts are in the jurisdictions of the commercial chambers of the county courts where the corporate seat of the public authority lies. Some authors concluded that the parties, after concluding an administrative contract with all the rigor specific to such contracts, will act as equal parties in a commercial contract, the disputes in this stage being in within the jurisdiction of the commercial courts and not subjected to the rules of public law (Tabacu & Singh, 2011, p. 176). We did not agree. What was to be understood, that a contract may be governed at the same time both by the rules of public and private law? A mixed jurisdiction divided between the stages of the contract could only lead to confusion in the interpretation of the clauses of the contract (Fodor & Fodor, 2013, p. 84). G.E.O. no. 77/2012[21] ended the confusion, defining al public procurement contracts regulated by G.E.O. no. 34/2006 as administrative contracts (amendment of art. 3 para. 1 letter f) of G.E.O. no. 34/2006). Art. 286 was also amended, all disputes concerning the performing, nullity, annulment, cancelation or one-sided termination of the public procurement contracts were established within the jurisdiction of the fiscal and administrative contentious chambers of the county courts where the corporate seat of the public authority lies.

But, normality had a short life, as G.E.O. no. 34/2006 was replaced by Law 98/2016[22] regulating public procurement. The dispositions regarding disputes about such contracts formed the object of a distinct normative act, Law 101/2016[23]. According to art. 53 para. 1 of this law disputes derived from the procedure for concluding the contract, the annulment or nullity of the contracts are, in the first instance, within the jurisdiction of the fiscal and administrative contentious chambers of the county courts where the corporate seat of the public authority lies. Disputes concerning the performing of the contracts are, in the first instance, within the jurisdiction of the civil courts where the corporate seat of the public authority lies. So, the legislator brought us back to the confusion

[20] Published in the Official Gazette of Romania, Part I, no. 453 from 02 July 2010.
[21] Published in the Official Gazette of Romania, Part I, no. 827 from 10 December 2012.
[22] Published in the Official Gazette of Romania, Part I, no. 390 from 23 May 2016.
[23] Published in the Official Gazette of Romania, Part I, no. 393 from 23 May 2016.

generated by a dual nature of the contract of public procurement, but with a little bit of order: disputes connected to the conclusion of the contracts, namely the conclusion, nullity and annulment (as nullity is a sanction for not observing the legal rules when concluding a contract) were within the jurisdiction of the contentious administrative courts, while the disputes connecting with the performing of the contracts were within the jurisdiction of civil courts.

But things can get complicated this way. One example was generated by a court action demanding the annulment of the document finding the fulfilment of the obligations of the contract, issued by the contracting public authority. This is a legal act connected with the performing of the contract, but the object of the legal action was a request for annulment. The negative jurisdiction conflict (as bot the civil chamber and the fiscal and administrative contentious chamber of the county court declared themselves not competent to judge the legal action) was solved by the High Court of Cassation and Justice. The supreme court decided in favour of the fiscal and administrative contentious chamber, but on the grounds of G.D. no. 925/2006, containing the methodology regarding the awarding of contracts, which stipulated that the contracting authority is obliged to issue documents regarding the fulfilment of the obligations of the supplier, documents which can be contested to the contentious administrative courts in accordance with the procedure of Law 554/2004[24]. The court did not consider that the dispositions from a G.D. cannot be contrary to the dispositions of a low, especially if the G.D. is older than the law and, in our opinion gave priority to the contentious administrative chamber considering the nature of the contract, even if the dispute was in connection with the performing of the contract.

We maintain all the critics to the solution of a divided jurisdiction. Furthermore, Law 98/2016 does not provide any dispositions that may reflect the public nature of the contract, the uneven balance between the power of the contracting public authority and the power of the supplier, as it emerges from the rules dominating the administrative contract established by the doctrine.

Law 212/2018 deepened the confusion. Trying to put the dispositions of Law 554/2004 in accordance with the ones of law 101/2016, it amended art. 8 para 2 of the Law 554/2004. The new dispositions show that the contentious administrative court is competent to decide in disputes regarding the phases preliminary to the conclusion of an administrative contract, as well as any disputes related to conclusion of the administrative contract, including the ones regarding the annulment of the contract; disputes arising from the performing of the administrative contracts are within the jurisdiction of the civil courts. But para. 2 of art. 8 is followed by para. 3 of art. 8 which remained unchanged and

[24] High Court of Cassation and Justice, Chamber of fiscal and administrative contentious, decision no. 408/2018, idrept.ro/DocumentView.aspx?DocumentId=17442769, accessed 16.01.2019.

stipulates that when deciding in the disputes described by para. 2 the courts will observe the rule saying that the contractual freedom is subordinated to the principle of the priority of the public interest. So, if the courts have to observe the priority of the public interest against the contractual freedom, what is the point of establishing the jurisdiction in favour of the civil courts? Besides that, what does this priority mean, as long as no reference is made to the principles that govern an administrative contract in any national law? We have mentioned, in the past, foreign legislation where, articles from a civil law presented with extreme precision and clarity the possibilities of the contracting public authority during the performing of the contract in keeping with the principle of the priority of public interest, suggesting that all things would be simple if similar rules will be clearly stated in our legislation for the guidance of the contentious administrative or civil courts (Fodor, 2012, pp. 34-36). Such rules would be also in accordance with European documents regarding other administrative contracts[25].

The prior procedure

Art. 6 of the original form of Law 554/2004 was consistent with the Civil procedure code (1865) in force at the time of the enforcement of the law. The code demanded that in the case of disputes with a commercial nature, a prior procedure had to be performed, called "the conciliation procedure" (art. 720^1). The Code described the procedure in detail. Para. 6 of art. 6 of the Law 554/2004 established that in the case of administrative contracts, the prior procedure has the significance of the conciliation procedure demanded for commercial disputes. Law 134/2010 regarding the Civil procedure code replaced the Code of civil procedure (1865). The new Civil procedure code abandoned the notion of commercial contract as well as the ned for the conciliation procedure. In this context, the question whether any prior procedure was needed any more in the case of disputes regarding administrative contracts in front of contentious administrative courts arose. We considered, along with other authors, that the need for prior procedure remains in case of the administrative contracts, but the rules established before by art. 720^1 of the former Civil procedure code (1865) no longer apply (Fodor, 2017, p. 372). This opinion was sustained later by a decision of the High Court of Cassation and Justice which found that the great majority of the contentious administrative courts adopted this solution.

Law 212/2018 resolved this problem. Art. 7 para. 6 of the Law 554/2004 was amended, providing now that the prior procedure is compulsory in case of

[25] For example the Green Paper on public-private partnership and Community law on public contracts and concessions, Brussels, 30.4.2004, COM (2004) 327 final, eur-lex.europa.eu/legal-content/hu/TXT/?uri=CELEX:52004DC0327, accessed 15.01.2019.

administrative contracts, within 6 months starting the date the contract was concluded, in disputes related to the conclusion of the contract, or the date the reason for annulment was known, but no longer than one year from the date the contract was concluded.

6. CONCLUSIONS

After several decisions of the Constitutional Court of Romania regarding texts from the Law 554/2004 and the enforcement of a new Civil procedure code, as well as the enforcement of new legislation regarding public procurement contracts, it was clear that changes had to be made in the law. Law 212/2018 tried to bring the text of Law 554/2004 in accordance both with the ideas of the Constitutional Court and the dispositions of the new major laws to which the Law 554/2004 was connected: Law 134/2010 (Civil procedure code) and Law 101/2016. Some of the solutions were good, such as the harmonization of art. 16^1 of the Law 554/2004 with art. 78 para 2. of the Civil procedure code regarding the forced intervener. Dispositions regarding the administrative contracts as taught administrative acts, with the consequence of consecrating the competence of contentious administrative courts for solving disputes regarding all administrative contracts are also a progress. A progress is also the connection of the starting point of the time limit for performing the prior procedure, in the case of the third party injured by an administrative individual act addressed to another, with the moment he took notice in any way about the content of the act. The only problem that remains is the possibility of the third party to gain access to the content of administrative act addressed to another, as the administrative authorities are very reticent, even if no personal data has to be revealed. Improvements were also made concerning the appeal procedures, as the filtering of the second appeals logged to the High Court of Cassation and Justice was removed in case of contentious administrative disputes and the dispositions regarding the review were clarified.

The regulation of the administrative contracts remained a major problem. Law 212/2018 tried to harmonise Law 554/2004 with the special laws regarding the public procurement. But the problem lies with the latter laws. Maintaining and generalising the dual nature of administrative contracts – administrative contracts in respect with the procedure of conclusion and annulment, but civil contracts in respect with the performing of the contracts results in an inacceptable mix between public and private law and will create confusion in respect to the characteristics of an administrative contract.

Bibliography

1. Bogasiu, G., 2014. *Legea Contenciosului administrativ.* Bucharest: Universul Juridic.

2. Bogasiu, G., 2015. *Comentariu la articolul 16^1 din Legea contenciosului administrativ,* s.l.: Universul Juridic.

3. Fodor, E.-M., 2008. *Drept administrativ.* Cluj-Napoca: Albastra.

4. Fodor, E.-M., 2012. Despre unele contracte administrative prin prisma teoriei generale a dreptului. *Fiat Iustitia*, Issue 1, pp. 20-36.

5. Fodor, E.-M., 2015. Considerații privind practica judiciră în legătură cu procedura prealabilă prevăzută de Legea nr. 554/2004 a contenciosului administrativ. *Universul Juridic*, 9 July.

6. Fodor, E.-M., 2017. *Drept administrativ.* Cluj-Napoca: Albastra.

7. Fodor, E.-M., 2018. Transparency of the Activity of Public Authorities – a Guarantee of Democracy. *Fiat Iustitia*, Issue 1, pp. 137-149.

8. Fodor, E.-M. & Fodor, G.-A., 2013. Public Law and Private Law within Administrative Law. *The Juridical Current*, March, Volumul 52, pp. 78-86.

9. Gilescu, V., 1970. Natura juridică a contractului de specializare universitară. *Revista română de drept*, Issue 7.

10. Iorgovan, A., 2002. *Tratat de drept administrativ.* Bucharest: ALL BECK.

11. Iorgovan, A., 2004. *Noua lege a contenciosului administrativ. Geneză şi explicații.* Bucharest: Roata.

12. Iovănaş, I., 1977. *Drept administrativ şi elemente ale ştiinței administrației.* Bucharest: Editura Ştiințifică şi Pedagogică.

13. Petrescu, R.-N., 2004. *Drept administrativ.* Cluj-Napoca: Accent.

14. Tabacu, A. & Singh, A., 2011. Recentele modificări ale O.U.G. nr. 34/2006, un temei pentru reorientarea contractelor administrative spre libertatea contractuală?. *Revista Transilvană de Ştiințe Administrative*, 28(1), pp. 166-178.

15. Teodorescu, A., 1929. *Tratat de drept administrativ.* s.l.:s.n.

16. Ungur, L., 2016. Some Reflections on the Reason of Judicial Review Stipulated under Art. 21 para. 2 in the Cntentious Administrative Law nb. 554/2004. *Fiat Iustitia*, pp. 132-142.