

The cancellation of administrative acts.

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Abstract

The cancellation is a specific form of termination of the legal effects of administrative acts, it can not be applied to material legal facts that produce changes in the material world because the good transformed through a material fact can not be restored to its original state by an act of cancellation but possibly also by a juridical material fact. Contrary, the legal act is a manifestation of the will and it will be disbanded in its legal effect also through a manifestation of will. In this article are examined the following forms of cancellation of administrative acts: absolute nullity, relative nullity, absence of administrative acts.

Keywords: *administrative acts, material legal facts, act of cancellation, juridical material fact, manifestation of the will, absolute nullity, relative nullity, absence of administrative acts*

In legal doctrine, the cancellation is defined as a legal operation that consists of a manifestation of will in order to determine, directly, the dissolution of act and therefore definitive cessation of legal effects produced by it.

In terms of its nature, the nullity of a legal act, and also of an administrative act represents a sanction that occurs when the act is hit by some legal flaws. A definition in this regard we find to Professor M. Orlov that considers the cancellation as a penalty imposed to the administrative acts issued / adopted by breaking the law and consists in depriving them of the legal effects for which they were issued / adopted.

Cancellation is a specific form of termination of the legal effects of administrative acts, it can not be applied to material legal facts that produce changes in the material world because the good transformed through a material fact can not be restored to its original state by an act of cancellation but possibly by a legal and material fact. On the contrary, the legal act is a manifestation of the will and it will be disbanded in its legal effects also through a manifestation of will.

The defects of illegality that affects a legal act can be more or less serious. Sometimes they jeopardize the general interests, sometimes only affect their personal interests. Sometimes the illegality is so obvious that the manifestation of will does not even have the appearance of a legal act, sometimes the act presents external signs of a valid manifestation of will, although it is made in breach of some legal provisions.

Still the reputed Romanian Professor P. Negulescu recognized the following categories of nullity:

- a) non-existent acts, which do not require any finding;
- b) null and void acts that have legal appearance but are hit by a defect of a such depth that it can be found anytime, and it can not be covered by the passage of time;
- c) canceled acts, when the act presents only some formal defects that can be invoked in a determined period of time and only for those subjects of law, authorities or individuals that have a direct and personal interest.

In the analysis of the nullity of the administrative act we have to start from the substance and form conditions which the legislator sets out, from the research of the influence of non-compliance with a condition on the validity of the act, who and how long he may invoke the respectively defect. The Professor V. Vedinas distinguishes three categories of interest of which the law must take into account and reconcile them: - general interests, ie the interests of the collectivity represented by the state; - Local interests, represented by administrative-territorial units; - Individual interests of the private individuals, of the administrations.

In the doctrine it admits the idea that in matters of administrative acts operates the absolute nullity and the relative nullity according to the interest protected by the legal rule infringed by illegal administrative act, by the seriousness of the illegal defects or by the opposition that exists between the device laws and imperative laws.

Regarding these nullities were supported two views : bipartite and tripartite opinion.

Bipartite theorists argue that administrative acts may be null and cancelable. The cancelable act is characterized by the fact that the defect of illegality does not affect the presumption of legality of what generally enjoyed the administrative acts, and the act in question continues to produce legal effects until it is canceled by the competent

authority. The null act is struck by a defect so serious that the presumption of legality can not operate in his favor and therefore this act can not produce any legal effect.

Tripartite theorists argue that administrative acts may be absolutely null and void, may be relatively null or may be nonexistent. The common feature of absolutely and relatively null acts is that they enjoys of the presumption of legality until such time as these nullities are found or declared by competent authority. While thus acts were not canceled, they shall be considered binding, only in the absence of the act does not exist the condition of finding the defect, to deprive it of legal effect. We, personally agree with that opinion that presents fairly the cancellation situations of the effects of the administrative act.

In Republic of Moldova, provisions on cancellation of the administrative acts we find in the Constitution: "The person aggrieved in his legitimate right by a public authority through an administrative act or failure to solve in legal term of an application is entitled to obtain the acknowledgment of alleged right , the cancellation of the act and remedies for the damage. "More detailed provisions we found in the Administrative Litigation Law: "Any person who is considered harmed in his legitimate right, recognized by law, by a public authority through an administrative act or through failure to solve in legal term of an application, it may address to the competent administrative court to obtain the cancellation of the act, the recognition of the alleged right and repair the damage that was caused".

Full invalidity has as specific the fact that it sanctions the non-observance, when concluding a legal document, of a standard which protects a general, social interest. [1] It occurs when some basic conditions as to the content of the document, [2] essential conditions for the act validity, are violated. In this situation, the invalidity is considered as a sanction and may be invoked by any interested person or ex officio. [3]

Partial invalidity sanctions the non-observance, when concluding a legal document, of standards which protect a particular, individual or personal interest. [4] It occurs in order to sanction the non-observance of some conditions of form. In such situations, the invalidity may be invoked only by persons whose rights are legalised by a document or ex officio.

There are situations when the law sets that the non-observance of some procedural forms results in full invalidity of document. It is the case of the art. 445 of the Contravention Code, which establishes the invalidity of minutes as to contravention, if some data or facts not registered. These data refer to:

- a) date (day, month, year) and place when the minutes concluded;
- b) quality, surname and first name of official examiner, name of authority he/she represents;
- c) surname, first name, domicile, occupation of offender, his/her identity card data, as to a legal entity, the name, address, fiscal code, data of private person he/she represents;
- d) offense, place and time when committed, circumstances on the cause that are important in order to establish the facts and their legal consequences, evaluation of possible damages caused by the offense;
- e) legal inclusion of the action, contravention material standard and qualifying clues of elements constituting the offense;
- f) informing the offender and victim about their rights and liabilities provided by the art.384 and 387;
- g) objections and evidences which the offender provides as to his/her defence, as well as objections and evidences of victim. [5]

The specialised legal literature highlighted that there is a rather small differentiation as to importance between full and partial invalidity, by taking into consideration their similar juridical regime and situation when invalidity is decided by administrative authorities.

In order to support the opinion as to the similitude of juridical regime is also provided the legal standard – contested administrative act may be annulled fully or partly in situation when:

- a) is basically illegal, by being issued against the legal provisions;
- b) is illegal, by being issued by violating competence;
- c) is illegal, by being issued by violating the set procedure. [6]

Partial invalidity of an administrative document is in principle possible, but only if „the part” from the document which was annulled has no organic or intrinsic connection

to the other clauses of the document, which might exist independently and may be adopted even if the cancelled clauses do not exist. The competent body has to take measure of full invalidity of administrative document or this measure implicitly intervenes by impossibility to implement the part of the document which has not been expressly cancelled. [7]

Regardless of the fact if the administrative document has violated a standard which protects a general or personal interest, these authorities may annul the legal document *ex officio*.

The cancelling of administrative document as sanction may be ordered by a hierarchically superior body (in the virtue of report on hierarchical subordination) or by court (under art.6 of the Contentious Administrative Law). The procedure of invalidity will be different depending on the body which orders the invalidity. If the annulment ordered by the hierarchically superior body, the legal instrument by which it is ordered the invalidity will be the administrative document, which means that the procedure will be the one specific to the issuance of an administrative act. In situation when the court rules the invalidity of document, the procedure will be the one set by chapter IV of the Contentious Administrative Law.

As regards the **effects of invalidity**, when an administrative document invalid, usually these produce *ex tunc* effects, meaning – retroactive for the past. In case when the document was annulled on the ground that it is illegal, the effects produce only for the future (*ex nunc*), as well as for the past (*ex tunc*), respectively, once issued, - the document is abolished as it has never existed. [8] However, as the doctrine stresses, only the legal effects of the cancelled document are abolished, as material consequences, which in fact are a reality which happened in the past and cannot be ignored. [9]

Professor R. Ionescu [10] says that when the invalidity is decided due to reasons of inopportunity, the produced legal effects are *ex nunc*, namely for the future – opinion which in fact I share with most of authors. [11] In other words, the invalidity document produces effects only since the date of issuance, by maintaining the effects produced before the annulment.

Professor A. Iorgovan develops the principle of right *quod nullum est, nullum producit efectum* and proposes to remember a rule referring to the legal regime of invalidity of administrative document, namely: „the invalidity of an administrative document results in annulment of all documents the legality of which is conditioned by legality of cancelled administrative document”. [12]

The cessation of legal presumption when contesting the illegality of administrative document has also to be included in the category of effects.

Non-existence of administrative documents. The theory of non-existent documents has been worked out by French and Romanian authors in the interwar period and the court practice of these states devoted to the category of inexistent administrative documents.

The inexistence means that the issued document did not observe certain legal, form, content and procedural requirements etc. and results in lack of a legal force, which it usually has to have. Such documents cannot be taken into consideration and, respectively, cannot be executed. Behaviour towards such acts has to be as towards something that has never existed. [13]

The inexistence occurs in situations when the violation of conditions is so serious that the principle of sanction of effects of administrative document cannot be used, thus it being respectively implemented the sanction of non-existence. [14]Administrative documents, which lack essential elements regarding its nature and object, without which it cannot be developed [15] which were worked out or issued by violating the material or territorial competence (for instance, the mayor of a settlement pronounces a divorce or the local council regulates the behaviour of citizens from another settlement; or even elaboration of a document by a person who does not have the status of public servant) are inexistent. The violation of the law in such situation is so obvious that it is not necessary anymore to invoke the illegality of document and pronounciation of its invalidity. [16]

The opinion of Mr E. Demciuc is meant to underline the opinion of Professor P. Negulescu: [17] „the inexistent administrative documents do not provide at least the appearance of legality, as the violation of the law is that obvious that anyone may notify it, and, respectively, no finding is necessary”.

The present legal background of inexistence of administrative document is provided by two express constitutional provisions, which transform this institution into a constitutional one. It is about the art. 94 paragraph (1), which regulates documents by president, respectively decrees, the mandatory publication of which in the Moldovan Official Journal is set by the respective constitutional text. The same is provided by the art. 102 paragraph (4) which reads: „Decisions and ordinances adopted by the government are signed by prime minister, countersigned by ministers, who are obliged to execute them, and are published in the Official Journal of Moldova. The non-publishing leads to inexistence of decision or ordinance.”

We may identify the following dimensions [18] of the legal regime of inexistent documents:

a) Inexistent administrative documents do not enjoy the presumption of legality of administrative document;

b) Subjects recipient at law of document, which fall under its incidence, have to take advantage of the inexistence of document and, thus, to refuse to execute liabilities which result from the document. Often, in the juridical literature, both theses are gathered into a single one – in situation of inexistent documents it is not valid anymore the presumption of legality and nobody may be obliged to observe clauses stipulated by such documents. [19]

c) It arises the obligation (correlative, as to right of subjects) of other subjects at law and, especially, of public authorities to take note of occurred inexistence, which means that they will not, based on document, carry out *ex officio* execution and exercising the force of coercion of the state, as the document is not considered legal anymore and, respectively, it has no enforcement, does not enjoy the feature of *executio ex officio*.

d) Institution of inexistence of administrative document, due to its importance, enjoys the attention of law-enforcer and has an express constitutional dedication.

The French juridical literature makes difference between inexistence and invalidity through the viewpoint of moment of withdrawal: [20] The inexistent document may be withdrawn by administration at any time, whereas the invalid document may be withdrawn only within the appeal term.

As a conclusion, we believe that it is necessary to put more emphasis on this aspect of the activity of administrative authorities. It is necessary a well-defined policy as to control of administrative documents, it is necessary to pay increased attention to training of inspectors, especially within bodies who exercise express control competences. When checking documents and administrative actions, it will be taken into account all reasons: starting from legality, continuing with opportunity, regularity, advantageousness and their efficiency.

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