ASPECTS REGARDING THE PRELIMINARY PROCEDURE IN THE CONTENTIOUS ADMINISTRATIVE LITIGATION

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Abstract
The functioning of any legal system (and not only) goes through blocking stages, when regulations seem to be outdated, and the legal procedure for settling litigations is unnaturally long, which leads to the citizens' dissatisfaction; they feel wronged by an administration that should protect them.
As an amicable solution to the violation of citizens' rights through administrative acts, the institution of the preliminary procedure aims at providing to the administration, a "time of reflection" within which it may, after its own analysis, correct the cases of illegality or inappropriateness and revoke, in whole or in part, the harmful administrative act, all this with minimum spending on both sides.
The present paper aims at analyzing the institution of the preliminary procedure throughout regulations in the Romanian legal system.
Keywords: *administrative litigation, preliminary procedure, voluntary appeal, administrative appeal*

Introduction

In a specific litigation with two degrees of jurisdiction - the merits of the case and the appeal - the preliminary procedure was considered by the legislator as a way that could give the prejudiced person the opportunity to obtain faster, the settlement of the dispute by recognizing the prejudiced right or the legitimate interest without the court intervention.

The reason for setting up a separate procedure than the one of bringing an action before the court has always been understood as an attempt to avoid, as much as possible, a litigation, in other words, a chance to settle a complaint in a more operative manner, in a shorter term and with minimum spending.

The evolution of the regulation

Even since 1925, the first special law on administrative litigation specified, by resuming the French model, that if the individual filed a petition to the administration, the claim was brought in Court after a period of 30 days since its registration by the

administrative authority or from its notification through bailiffs and within 30 days from that date. In other words, the law laid down different deadlines for bringing contentious matters in administrative courts, after an action against an act of authority or against the silence (or absence) of the administration to settle a claim concerning a right [1].

Later, Law 1/1967 generalized the 30-day period left at the administration disposal to repair the prejudice caused.

Although the regulation was criticized in the doctrine of the time, Law 29/1990 of the contentious administrative maintained that solution, and even came with the request for a preliminary action, even in the case of an unjustified refusal of the authority to solve a petition, considered by some authors to do nothing else than to prolong the abuse of the administrative authority [2]

Thus, according to Article 5 of paragraph 1 of Law 29/1990: before requesting the court to annul the act or to order the release of the act, the person who considers himself/herself prejudiced could claim the defence of his / her right within 30 days from the notification of the act or at the end of that period, to the issuing authority that is required to settle the claim within 30 days from that date [3].

It is also worth noting that the arguments in favour of preserving this “reflection term” for the public authority, period in which it can enter into legality without initiating proceedings before the specialized court is based on the idea of protecting the right of the citizen perfectly framed in the definition of the right to a good administration. It is always preferable for the authority to settle the conflict resulting from the entry into force of its acts in a non-contentious procedure, which would give value of efficiency to the administrative work.

The current regulation

The new law on administrative litigation, Law 554/2004, stipulates in Article 2, paragraph 1 letter j, that the preliminary procedure is the claim requesting the issuing or hierarchically superior authority, as the case may be, the re-examination of an administrative act of individual or normative character, in the sense of its revocation or modification.

The headquarters of the regulation is Article 7, entitled “preliminary procedure”. The text provides: "before appealing to the competent administrative court, a person who considers himself/herself prejudiced in his/her right or a legitimate interest, by an individual administrative act must request the issuing public authority or the hierarchically superior authority, if it exists, within 30 days from the date of communication of the act, the revocation in whole or in part thereof ".

The provisions of paragraph 1 are also applied in the case where the special law provides a jurisdictional administrative procedure and the party does not opt for it. Moreover, also entitled to file a preliminary complaint is the person prejudiced in his/her own right or legitimate interest, by means of an administrative act of individual nature, addressed to another subject of law, from the time he was notified by any means, of its existence, within the 6-month period provided in paragraph 7, and if the matter of the case is the administrative contract, the meaning of the preliminary complaint is similar to that of conciliation in the case of disputes between professionals, the provisions of the Civil Procedural Code being applied properly [4].

Scouring the preliminary procedure

The contentious matter can be brought before the administrative courts, according to legal provisions, by the following categories of persons, who consequently have to go through the preliminary procedure:

- the natural person who considers himself / herself harmed in his/her own right or legitimate interest by an administrative act issued by a public authority and addressed to it or to another subject of law, or the group of natural persons, without legal personality, holder of subjective rights or legitimate private interests;
- the private legal entities, in a subjective contentious action only if it involves the protection of their subjective rights or legitimate private interests because the legal persons are subjects with rights, obligations and patrimonies distinct from those of their members [5];
- other legal entities of public law than those mentioned in Article 7 may bring actions in contentious administrative after having gone through the voluntary appeal in advance. In the category of subjects of law to which the law recognizes the procedural active

legitimacy is the mayor, as local autonomous public authority, the local council or the county council as deliberative authority, but also the communes, the cities, the municipalities and the counties. All these while implementing the regulations of the European Charter of Local Self-Government [6], which stipulates that the local public administration authorities must have the right to appeal to the courts in order to ensure the free exercise of their competences and the compliance with the principles of local autonomy provided by the Constitution or by national law.

The preliminary procedure is mandatory, according to Article 2, paragraph 2 of the Law also in the case of administrative acts which may be subject to special administrative jurisdiction. They may be appealed to the administrative litigation court if the party understands not to exercise the administrative-judicial procedure.

The discussion is still around the phrase "special administrative jurisdiction". Several concrete situations of this case refer to the character of the procedure for settling the appeals against fiscal administrative acts, governed by the Code of Fiscal Procedure.

On several occasions, the Constitutional Court consistently expressed its position that the Code of Fiscal Procedure did not establish special administrative jurisdictions within the meaning of Article 21 of the Constitution, context in which the contentious administrative department of the High Court of Cassation and Justice adopted the principle solution according to which the procedure for settling tax appeals governed by the Code of Fiscal Procedure was a preliminary administrative procedure and not a special administrative jurisdiction (DCC nr. 563/2006).

Another problem appeared in practice is the assimilation of the preliminary procedure to the contestation, as an administrative remedy for some administrative acts, the regulation of which is made by special norms. In this context, a decision of the HCJC [7] establishes: "the appeal as administrative remedy is synonymous with the preliminary complaint regulated by Article 7 of Law 554/2004. The Supreme Court asserts that the decision adopted in the resolution of the appeal is an administrative act which is pronounced within an administrative appeal, and not a judicial act, since the appeal procedure is not circumscribed to the notion of administrative jurisdiction. In order to clearly distinguish the notions, it is stated that the administrative jurisdiction is a legal activity of settlement, by a state body independent of the parties to the dispute of some

legal conflicts which have been given in their competence by law, which ends by a judicial act against which remedies are provided. The jurisdictional administrative act is issued by an independent administrative authority, entrusted with administrative jurisdiction. In the settlement of appeals, the procedure is attributed to the body which issued the act, or to the hierarchically superior body, characteristic of a preliminary administrative procedure.

In the same register but in the opposite direction, the High Cassation and Justice Court has stated that the decisions of the National Council for Combating Discrimination are judicial administrative acts that are challenged under the special law, are not subject to Article 7 of Law 554/200, and therefore it is not necessary to carry out the preliminary proceeding. The difference between jurisdictional administrative acts and individual or normative administrative acts within the meaning of Article 7 of Law 554/2004 is the legal nature of the act. Thus, the individual or normative administrative acts are issued by public authorities under a regime of public power in order to organize the enforcement of the law, and by the administrative jurisdictional law, the enforcement of the law is not organized, but a decision is pronounced in the settlement of a legal conflict stipulated by the law in the competence of an independent administrative authority, following a procedure based on the principle of contradiction, of ensuring the right of defence [8].

Terms for bringing the action to court

The term stipulated by the law for the preliminary procedure, as mentioned above, is of 30 days from the date of communication of the act, being qualified in the doctrine as a term of recommendation and as a prescription term [9].

In some cases, the preliminary complaint may also be introduced beyond the 30-day time limit, but not later than 6 months, and only for good reasons, in the case of an individual unilateral administrative act; in the case of the administrative normative act, the preliminary complaint may be formulated at any time.

The phrase "good reasons" must be interpreted - as to the reason of being of the administrative contentious, detached from the letter and spirit of the Constitution - in a broader sense. The person concerned may invoke various subjective situations (special

family events, activities that could not be postponed) or objective situations (the administration fault) [10].

The current regulation provides the possibility of filing the prior complaint also by the prejudiced person in his/her right or legitimate interest by means of an administrative act of individual nature addressed to another subject of law from the moment he was notified, by any means, of its existence within a maximum of 6 months.

This change came after noticing several situations emerged in practice, in which the administrative act subjected to the censorship of the court did not harm the beneficiary, but a third party to whom a date of notification could not be imposed.

By Decision 797/2007, the Constitutional Court upheld the objection of unconstitutionality of the provisions of Article 7, paragraph 7, finding that the text of law was unconstitutional inasmuch as the 6-month period from the date of issue of the act applied to the preliminary complaint made by the party prejudiced in his/her right or legitimate interest, by an individual administrative act addressed to another subject of law. The Court found that the provisions of Article 7, paragraph 7 of the law did not make any distinction between the qualities of the person prejudiced by an individual administrative act, as it is the very addressee of the act or a third party to it. For third parties, the 6-month period begins to run from the date they were informed, by any means, of the existence of the act.

The individual administrative act is communicated to the addressee, and the third persons do not find themselves in the real possibility of knowing about its existence; under these conditions, the access of these categories of persons to the court is blocked [11].

Procedural aspects

According to the New Code of Civil Procedure, the failure to go through the preliminary procedure may be invoked only by the defendant's defence, under the penalty of forfeiture, which entails "a change in the legal status of the plea of inadmissibility of the action in administrative litigation for lack of prior complaint, from a formal, peremptory and absolute exception, in a peremptory and relative exception of substance.

In the case of actions concerning administrative contracts, the preliminary complaint is to be exercised according to the model of unilateral acts, until the legislator

expressly regulates this issue. It should be noted at this point that the regulation of Article 7 paragraph 6 refers to a similar procedure of conciliation in commercial matters, with the appropriate application of provisions of the Code of Civil Procedure, within a period of 6 months which begins to run:

- from the date of the conclusion of the contract, in the case of disputes related to its conclusion;
- from the date of the change of the contract or, as the case may be, from the date of refusal of the request for amendment made by one of the parties in the case of litigation related to the changing of the contract;
- from the date of breaching the contractual obligations, in the case of disputes relating to the execution of the contract;
- from the date of expiry of the term of the contract or, as the case may be, from the date of the occurrence of any other cause giving rise to the termination of contractual obligations, in the case of litigations concerning the termination of the contract;
- from the date on which a contractual clause might be interpreted, in the case of litigation relating to the interpretation of the contracts.

After the entry into force of the New Civil Code, the new text incidental to the matter refers to "dispute settlement between professionals" and provides the following: "In the money-valuing and contract-based lawsuits and demands between professionals, prior to the filing of the petition, the plaintiff will try to settle the dispute either by mediation or by conciliation with the other party".

In the case of actions brought by the Prefect, the People's Advocate, the Public Ministry, the National Civil Servants' Agency or those concerning the claims of those injured in their rights by ordinances or provisions of ordinances declared unconstitutional, as well as in the case of unjustified refusal to settle a petition referring to a legitimate right or to a legitimate interest, or to the failure to settle a request within the legal time [12], but also in the case of actions which have as object the plea of illegality, the preliminary procedure is not mandatory.

Also, in the case of actions brought by the body which issued the administrative act, the preliminary procedure is not necessary.

The non-fulfilment of the preliminary procedure draws the inadmissibility of the action according to the provisions of Article 193 paragraph 2 of the Code of Civil Procedure, in which, if the law provides expressly, the notification of the court can be made only after the completion of a preliminary procedure, under the conditions established by that law.

The proof of going through the preliminary procedure shall be attached to the request for a summons.

The failure to do so can be invoked only by the defendant, by way of a grievance, under the penalty of forfeiture.

As a necessary requirement for initiating judicial proceedings, the exception to the lack of preliminary procedure is a substantive exception, which is added to the other conditions of admissibility of an action in contentious administrative.

Compared to the effect it produces, the exception to the absence of the preliminary procedure is a peremptory exception, because it tends to reject the action. If the action is brought before the settlement of the preliminary complaint, it can be dismissed as premature, because the right to action has not been born yet. If, however, the issuing authority has not been notified, there is no condition for the exercise of the action and then the solution that is imposed is the rejection and that makes the action inadmissible.

Conclusions

The legislator has given the preliminary procedure a special importance, based on the imperative nature of the legal rule: "the person... must claim....", but also from the interest protected by the rule of law, namely to avoid burdening the courts with claims which can be settled in a non-contentious way. The solution has also been reinforced by the Constitutional Court, which has on several occasions stated the mandatory nature of the preliminary procedure, considering that there is no constitutional provision prohibiting the establishment of a preliminary administrative procedure without jurisdiction for the purpose of settling violations of the rights of persons by administrative acts, through a quick and exempt from stamp duty procedure.

Often criticized or regarded as a dying legal institution, the preliminary procedure still finds its place in the Romanian legal system, being maintained in every regulation of the law of administrative contentious.

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