

The Amendments Made in Romania by Law No. 102/2023 to Administrative Litigation, Only Apparently Minor

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Abstract

At first glance, the changes brought by Law no. 102/2023 to administrative litigation concern (only) the time limits: the starting point of the limitation period for bringing an action for annulment of the administrative act for which the prior complaint is no longer mandatory; the time limit within which the suspension of the administrative act that can no longer be revoked prior to the bringing of a substantive action for its annulment may be requested and the time limit within which the action for annulment must be brought if suspension has been requested under art. 14 LCA; the maximum time limit up to which the suspension of the execution of an administrative act for which an action for annulment has already been brought may be requested. On the other hand, some time limits are drastically shortened and other solutions are atypical both from the perspective of civil procedure and traditional rules in administrative litigation. The amendments are also important because they concern administrative acts for which prior complaint is no longer mandatory, and most administrative acts fall into this category (as they immediately produce legal effects). The article is a point-by-point analysis of the most recent amendments to the Administrative Litigation Act, apparently minor but with a potentially significant impact.

Keywords: administrative law, administrative litigation, Romania, administrative act.

JEL Classification: K23, K41

1. Introduction

On 21 April 2023, Law No. 102/2023 on the amendment and completion of Law No. 50/1991 on the authorisation of construction works, Law No. 554/2004 on administrative litigation and the completion of Article 64 of Law No. 350/2001 on spatial and urban planning entered into force. This Law amended the laws mentioned in its title, including some of the most widely used articles in administrative litigation. Law No. 102/2023 introduced a new letter (d¹) in Article 11(1) of Law 554/2004 and amended Art. 14 para. 1 and Art. 15 para. 1 of the same act².

In a first part of the article, we will present the content of the articles of Law 554/2004 amended on this occasion, prior to Law 102/2023. Then, we will show the amendments made by the new law and, in a third section, analyse the meaning and impact of these amendments.

2. Law No. 554/2004 prior to its amendment by Law No. 102/2023

Law No 102/2023 introduced a new letter (d¹) in Article 11(1) of the Act. 1 of Act No. 554/2004 and amended Art. 14 para. 1 and Art. 15 para. 1 of the same act.

Article 11 of the Administrative Litigation Act No. 554/2004 (hereinafter referred to as the LCA) regulates the time limit for bringing an action in administrative litigation, both in the form of a prescription period of 6 months (para. 1) and a limitation period of one year (para 2)³. As the 6-month period is a prescription period, "all the provisions of the Civil Code relating to suspension (Article 2532 of the Civil Code), interruption (Article 2537 of the Civil Code) and reinstatement of the prescription period (Article 2522 of the Civil Code) are applicable to it. However, the provisions of the Civil Code on the subject matter of prescription, the invocation of limitation and the time by which it may be invoked are also applicable. (...) Prescription may only be invoked at first instance, by means of a statement of defence or, if not invoked, at the latest at the first trial date at which the

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² The Law was published in Official Gazette no. 322 of April 18, 2023.

³ Regarding the legal nature of these terms, see Cătălin-Silviu Săraru, *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, 2022, p. 311-322; Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 493-499.

parties are legally summoned, in accordance with Article 2513 of the Civil Code."⁴

According to art. 2513 of the Civil Code, prescription may be opposed only in the first instance, by means of a statement of defence or, in the absence of a statement of defence, at the latest at the first trial date at which the parties are legally summoned. According to Art. 2545 para. 2 of the Civil Code, failure to exercise the subjective right within the period established by law entails its loss. The forfeiture may be opposed by the interested party, and the court is obliged to invoke and apply the forfeiture period *ex officio*, regardless of whether or not the interested party puts it into question, unless it concerns a right which the parties can freely dispose of.

According to Article 14 para. 1 of Law 554/2004, "in well-justified cases and for the prevention of imminent damage, after having referred the matter to the public authority that issued the act or to the superior authority, in accordance with Article 7, the injured party may request the competent court to order the suspension of the execution of the unilateral administrative act until the decision of the court on the merits. If the injured party does not bring an action for annulment of the act within 60 days, the suspension shall be automatically terminated without any formality".

According to Art. 15 para. 1 of the same normative act, "the suspension of the execution of the unilateral administrative act may be requested by the plaintiff, on the grounds provided for in Article 14, by means of a request addressed to the competent court for the annulment, in whole or in part, of the contested act. In this case, the court may order the suspension of the contested administrative act until the final decision of the case. The application for suspension may be made at the same time as the main action or in a separate action, pending determination of the action on the merits.

The provisions of Articles 14 and 15 of Law No 554/2004 are the subject-matter of the suspension of the execution of administrative acts through the courts.

Article 14 of the LCA allows injured parties, in well-justified cases and in order to prevent imminent damage, to apply to the competent court to suspend the execution of the unilateral administrative act until the court has ruled on the merits of the case, after having referred the matter to the public authority which issued the act or to the hierarchically superior authority in accordance with Article 7. Article 15 imposes an additional condition, namely that the application for suspension must be made at the same time as the application for annulment of the act, either in the same action or in a separate action. The distinction between the provisions of Article 14 and Article 15 of the LCA is based on whether or not the action for annulment of the administrative act is pending before the courts, a condition which is verified in relation to the date on which the application for suspension was lodged.

The suspension of the execution of an administrative act is an exceptional measure, by which the court removes the enforceability of the administrative act *ex officio* and can only be ordered under the conditions expressly provided by law. The taking of this measure presupposes proof of the existence of circumstances which are such as to create serious doubt as to the legality of the administrative act and the necessity of temporarily removing the enforceability of the act in order to prevent imminent damage, damage which is to be analysed in concrete terms by reference to the time of the examination of the application for suspension.

The provisions of Art. 2 para. (1), letter t) of the Law no. 554/2004 define the well-justified case as the circumstance related to the state of facts and law, which is likely to create a serious doubt about the legality of the administrative act. Under this condition, the legality of the act whose suspension is requested is not examined, this being the task of the contentious court which will examine the action for annulment. In determining the existence of a well-founded case, the judge may proceed only to a summary analysis of the act, apparently without prejudging the merits, by reference to the factual and legal grounds relied on by the applicant on the basis of minimal evidence, excluding an analysis of the merits of the legality of the administrative act.

It is important to point out that if, in order to verify the criticisms raised by the applicant, the judge were to have to administer complex evidence or prejudice the merits of the case, then the

⁴ Eugenia Marin, *Legea contenciosului administrativ nr. 554/2004, comentariu pe articole*, Hamangiu Publishing House, Bucharest, 2020, p. 326.

condition of a manifest appearance of illegality of the contested act in favour of the applicant would not be satisfied in the case, but, on the contrary, there would be an appearance of legality of the act in favour of its beneficiary.

In its case-law, the Supreme Court has held that such well-founded cases may include the issue of an act by an incompetent body, failure to state reasons for the administrative act, failure to indicate the legal basis for the issue of the administrative act, the declaration that the government order on the basis of which the administrative act was issued is unconstitutional, the annulment or partial revocation of the administrative act by the issuing public authority or by the hierarchically superior authority.

Imminent damage is defined by Art. 2 para. (1) letter (s) of Law No. 554/2004 as the foreseeable future material damage or, as the case may be, the foreseeable serious disruption of the functioning of a public authority or a public service. As has been held in national case-law, the possibility of damage is a question of fact, left to the discretion of the legislature.

3. Amendments made by Law No. 102/2023

Art. II, para. 1 of Law no. 102/2023 introduced a new letter, letter d¹), in Art. 11 para. 1 of Law No. 554/2004, which provides: "the date of becoming aware of the content of the act, if the prior complaint is no longer mandatory". Currently, Art. 11 para. 1 of Law 554/2004 reads as follows: "Applications for the annulment of an individual administrative act, of an administrative contract, for the recognition of the right claimed and for the compensation of the damage caused may be filed within 6 months from: a) the date of the communication of the answer to the preliminary complaint; b) the date of the communication of the unjustified refusal to settle the application; c) the date of the expiry of the deadline for the settlement of the preliminary complaint, respectively the date of the expiry of the legal deadline for the settlement of the application; d) the date of the expiry of the deadline referred to in Art. 2 para. (1) letter h), calculated from the communication of the administrative act issued in the favourable settlement of the request or, where applicable, of the preliminary complaint; d¹) the date of taking cognisance of the content of the act, if the preliminary complaint is no longer mandatory".

The new text of the law aims to regulate the moment from which the 6-month limitation period for bringing an action for annulment of the act starts to run, if the prior complaint is not mandatory. Thus, its understanding refers to Art. 7 para. 5 of the LCA, a legal norm which lists the cases in which the prior complaint is not mandatory before the court is seized with the annulment of the act: actions brought by the prefect, the People's Advocate, the Public Ministry, the National Agency of Civil Servants, those concerning the requests of persons injured by ordinances or provisions of ordinances or actions directed against administrative acts which can no longer be revoked since they have entered the civil circuit and have produced legal effects, unjustified refusal to resolve a related request and failure to respond to the applicant within the legal deadline. To these situations are added those exempted either expressly or implicitly by special rules from the obligation of prior complaint.

The date of knowledge of the content of the document is a factual situation, which must be duly proved and whose assessment is left to the discretion of the court. We believe that a wording such as the date of knowledge of the content of the act, if the prior complaint is no longer mandatory and if the law does not provide otherwise, would have been preferable, since other rules regulate the same situation differently. For example, in the case of administrative guardianship, "the prefect may appeal directly to the administrative court against acts issued by the local public administration authorities, if he considers them to be unlawful; the action shall be brought within the time-limit laid down in Article 11 para. (1) which shall start from the moment of communication of the act to the prefect and under the conditions provided for by this law" (art. 3 para. 1 LCA). In the hypothesis evoked, the question arises as to the moment from which the 6-month limitation period starts to run: the date of taking cognisance of the act (art. 11 para. 1 letter d¹ LCA) or the moment of communication of the act to the prefect (art. 3 para. 1 LCA). In our opinion, should be applied art. 3 paragraph 1 LCA, with the title of *lex specialis*.

Although the law has only recently entered into force, the problem has also been noted by other authors. "The amendment should have been expressly limited to the category of acts that can no longer be revoked because they have entered into civil law and have produced legal effects. This is the only category of acts exempted from the preliminary complaint for which Law 554/2004 does not provide a special rule on the start of the prescription period. All other categories are already covered by other assumptions in Art. 11: for assimilated unilateral administrative acts (unjustified refusal and administrative silence), the start of the 6-month period is already clarified by Art. 11 para. (1) letters (b) and (c); b) for actions brought by the Prefect, the Ombudsman, the Public Ministry and the National Civil Servants Agency, the start of the 6-month period is already provided for in Art. 11 para. (3); (c) in the case of the plea of illegality (Art. 4) there is no question of bringing an action for annulment; and (d) finally, in the case of actions concerning the claims of persons injured by ordinances or provisions of ordinances, they may be brought at any time under Art. 11(4). Therefore, the new letter d¹) introduced by the amending Law should have referred exclusively to the hypothesis of administrative acts which have entered into the civil circuit and produced legal effects. With regard to the other categories of acts exempted from the requirement to lodge a preliminary complaint, the amending law merely introduces a rule that is contradictory to those already existing"⁵.

Secondly, given that the text of the law does not distinguish, Art. 11 para. 1 letter d¹ LCA applies both to the addressee of the act and to the third party who considers that his legitimate rights and interests have been infringed by an administrative act addressed to another person. Issuers of individual administrative acts are obliged to communicate them to their addressees, the communication of the act having the purpose of bringing it to the knowledge of its addressee. The lawful performance of the procedure for communicating the administrative act gives rise to a presumption of knowledge of the act by its addressee. In the context of the new provision, the addressee of the act will be able to invoke knowledge of the act at another (most likely later) date in relation to its communication by lawful means.

On the occasion of this amendment, we believe that it is important that the legislator intervenes to define the concept of an administrative act that can no longer be revoked, since it has entered the civil circuit and has produced legal effects, in the sense of whether these effects are specific only to civil law or to any branch of law⁶. The issue can be summarised as follows: "the legislature uses the phrase 'has entered the civil circuit', referring to the unlawful administrative act, bringing together in the same normative provision notions which relate to different areas of law (...). The literature has interpreted the phrase in question differently, on the one hand arguing that, regardless of the nature of the administrative act, individual or normative, with the conclusion of legal acts based on them, the act enters the civil circuit⁷, and on the other hand, a restrictive solution is presented, in the sense that the rule must concern only individual acts, with patrimonial effect, and that the administrative act enters the civil circuit, in the sense of the text, not by producing effects, but by transacting the right determined by it⁸". In our practical work, we have found that the extensive interpretation of the text of the law prevails, which we also share.

Art. 14 para. 1 of the LCA currently reads as follows: "in well-justified cases and in order to prevent imminent damage, after having referred the matter to the public authority that issued the act or to the hierarchically superior authority, in accordance with the provisions of Article 7, or within a maximum of 30 days of becoming aware of the content of the act that can no longer be revoked, the

⁵ Irina Săutean, *Scurtă radiografie a ultimelor discrete propuneri de modificare a Legii contenciosului administrativ adoptate de Parlamentul României la finalul anului 2022*, „Forum Juridic” no. 1/2023, p. 15, available at <https://www.juridice.ro/676614/noi-modificari-in-domeniul-construcțiilor-urbanismului-si-contenciosului-administrativ.html> (consulted on 1. 05. 2023).

⁶ Andreea Tabacu, *Despre revocabilitatea actului administrativ cu caracter normativ*, „Revista Transilvană de Științe Administrative”, nr. 1 (48)/2021, p. 114. The author concludes in the following sense: "the administrative act itself does not enter the civil circuit, but produces effects within it, influences it, attracts a concrete modification of the existing legal reality prior to its issuance. The act does not circulate, does not enter and is not transferred in the civil circuit, only the rights it confers on the holder can be transmitted under the law, if the respective act is not intimately attached to the holder (diploma, driver's license)".

⁷ Dacian Cosmin Dragoș, *Legea contenciosului administrativ. Comentarii și explicații*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2009, pp. 52-53.

⁸ Ovidiu Podaru, *Drept administrativ, vol. I. Actul administrativ, (I) Repere pentru o teorie altfel*, Hamangiu Publishing House, Bucharest, 2010, pp. 295-296.

injured party may request the competent court to order the suspension of the execution of the unilateral administrative act until the court has ruled. If the injured party does not bring an action for annulment of the act within a maximum of 60 days from the lodging of the application for suspension and if the substance of the application for suspension has not been dealt with, the court hearing the application for suspension shall find that this is the case and dismiss the application for suspension as devoid of interest. If the stay has been ordered, it shall be lifted automatically and without any formality".

The request for suspension of execution of administrative acts which cannot be revoked (the text does not indicate the reason for the impossibility of revocation, but most probably it was intended that they would enter into civil circulation and produce legal effects) must be made within 30 days of becoming aware of the content of the act. This time limit has been drastically shortened, as previously the application could be made within a maximum of 6 months. "A fundamentally different regime is thus created between (i) acts for which prior complaint is mandatory (where Article 14 does not provide for a time limit for bringing an action for suspension) and (ii) some of the acts exempted from prior complaint (which will only be able to be suspended within 30 days of becoming aware of the content of the act). There is no justification for this difference"⁹.

Secondly, the person who requested the suspension must also bring the action for annulment of the act within a maximum of 60 days of the bringing of the action for suspension. In so far as he has not done so, which is established prior to the decision on the substance of the application for suspension, the application for suspension will be rejected as devoid of interest. If the suspension has been ordered, but the person has not lodged an application for annulment of the administrative act within 60 days of the application for suspension of the act, the suspension shall be terminated automatically and without any formality. The solution of rejecting the application for suspension as uninteresting is atypical in relation to civil procedure.

The revised form of Art. 15 para. 1 of the LCA reads as follows: "The suspension of the execution of the unilateral administrative act may be requested by the plaintiff, on the grounds provided for in Article 14, by means of an application to the competent court for the annulment, in whole or in part, of the contested act. In this case, the court may order the suspension of the contested administrative act until the final decision of the case. The application for suspension may be made at the same time as the main action or in a separate action within a maximum of 60 days from the date of the main action".

Under the previous rules, the application for suspension could be made after the action for annulment of the act, pending the outcome of the main action. The procedural time-limit has now been reduced to a maximum of 60 days after the main action has been brought.

4. Only apparently minor changes

At first glance, the changes introduced by Law No. 102/2023 to administrative litigation concern the time limits: the moment of expiry of the prescription period for bringing an action for annulment of the administrative act for which the prior complaint is no longer mandatory; the time limit within which the suspension of the administrative act which can no longer be revoked prior to the bringing of the substantive action for its annulment may be requested and the time limit within which the action for annulment must be brought if suspension has been requested under Article 14 LCA; the maximum time limit within which the suspension of the execution of an administrative act in respect of which an action for annulment has already been brought may be requested.

In principle, time limits regulate the procedure and ensure the stability of legal relationships. However, time-limits also constitute a restriction on access to justice, which is admissible provided that the time-limit does not affect the substance of the right of access or make access to justice impossible. From this point of view, the amendment made by Article 11(1) letter d¹ of the LCA guarantees effective access to justice for persons who consider themselves aggrieved by an

⁹ Irina Săutean, *op. cit.*, p. 17.

administrative act, since the prescription period begins to run from the date on which they become aware of the content of the act. However, what may be adversely affected is the stability of legal relations, since the injured party may bring an action after the act has been communicated. Although letter d¹) of Article 11(1) is inserted 1 of the LCA concerns only one category of administrative acts (those in respect of which the prior complaint is no longer mandatory), it will have a significant impact in practice, since most administrative acts can no longer be revoked as they immediately produce legal effects. Another discussion will concern the way in which knowledge of the content of an act can be proved after its legal communication.

The amendments to Article 14(1) of the LCA are significant. The time limit for bringing an action for suspension of an administrative act based on Article 14 of the LCA has been drastically shortened to 30 days, but the reduction of the time limit is also accompanied by a guarantee of the moment from which this time limit starts to run, i.e. the date on which the content of the act becomes known. Mentioning the content of the act is extremely important, as it excludes knowledge of the existence of the act, for example. A problematic issue from the point of view of access to justice is when both legal requirements for suspending the administrative act, the well-founded case and the imminent damage, would arise after the expiry of the maximum 30-day period. If, as regards the well-justified case, the possibilities are reduced because it is, as a rule, contemporaneous with the issuance of the administrative act, the imminent damage, being a subjective and personal situation, could occur later. Another unresolved issue concerns the nature of the 30-day period, as the legislator does not indicate whether it is a limitation or a forfeiture period.

The holder of the right of action for annulment of the administrative act is in a position to bring this action more quickly if he has previously requested the suspension of the administrative act under Article 14 of the LCA, so that the merits of the request for suspension can be judged. If the action for annulment of the administrative act is not brought within 60 days of the filing of the action for suspension and if the merits of the application for suspension have not been decided, it will be dismissed as uninteresting.

The solution of dismissal as devoid of interest, to which the legislator has stopped, seems bizarre from the point of view of civil procedural law. Procedural interest presupposes the practical material or moral benefit sought by the person bringing the civil action. It must be determined, legitimate, personal, born and actual. In our view, the interest persists with all its characteristics even if the action for annulment has not (yet) been brought. On the other hand, the time limit seems too short in relation to the general time limits for bringing this action (Article 11 of the LCA). Also, in the context of this amendment, it should be borne in mind that the preliminary procedure must be completed, including waiting for the public authority's reply or the expiry of the legal time limit for resolving the preliminary complaint. If we refer to the customary 30-day time limit for the resolution of the preliminary complaint, the injured party can be covered by the maximum time limit of 60 days, but in the case of more complex works, the preliminary complaint can also be resolved after 30 days.

Law No. 102/2023 has also drastically reduced the time limit within which an administrative act may be suspended after an action for annulment has been brought. In the previous form of the LCA, the time limit was until the resolution of the action on the merits. This time limit is now a maximum of 60 days after the main action has been brought, which will mean that the request for suspension will often still have to be made before the first hearing on the merits of the action for annulment. In this respect, we have in mind the provisions on the procedure prior to the setting of the first deadline in civil proceedings, according to the rules of which administrative disputes are also settled, obviously in compliance with Article 28 of the LCA.

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