

ISSUES RAISED BY THE CASE LAW ON ADMINISTRATIVE SUSPENSION

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Abstract

This paper has taken into account the legal practice generated by the two texts excerpted from Law no. 554/2004, respectively articles 14 and 15. The need of such an endeavour is justified by a heterogeneous practice, which has created confusion amongst justiciable people. The suspension of administrative acts represents an institution in itself, and in this situation, we deal with the cancellations ruled by the courts when certain cumulative conditions are not complied with. This is precisely why we need both a theoretical and a practical analysis of the institution of administrative suspension by an administrative court, in the context of the two texts of the law mentioned above.

Keywords: *administrative courts, administrative act, suspension, well-grounded case, imminent damage*

Introduction

At present, one observes an increasing interest of European countries in consolidating and developing procedural warranties for protection against damages or hurting that might occur by the execution of the administrative act, even in the stages that are preliminary to the legal administrative procedure. Thus, legal regimes can have stricter or broader regulations pertaining to the reasons that entitle the judge to rule the measure of suspension.

This study is trying to present the institution of suspension by the law courts of the effects of administrative acts, as a measure that is meant to defend the interests of the people who had their rights harmed and who, at the same time, apply for the cancellation of the act that is considered to be legal.

This scientific endeavour reviews the European systems that give the judge the possibility to temporarily interrupt the effects of an administrative act. Also, the paper provides a thorough presentation of the texts excerpted from Law no. 554/2004, respectively articles 14 and 15, which entitle administrative court judges to suspend such an act, whenever they consider this measure necessary.

The paper also presents certain cases when legal courts have ruled the suspension of such documents, by making reference both to the legal provisions and to the actual case submitted to judgement.

We consider that this paper is useful both for theoreticians and practitioners in the field of law, and especially for those who work in the field of administrative courts, as the paper targets to clarify certain aspects pertaining to the suspension of administrative acts within administrative-related actions.

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The suspension of administrative acts in European legal systems

In the category of legal systems that make it possible to rule the measure of suspension under stricter conditions, we mention the system existing in France, where article L 521-1 of the Code on administrative justice¹ stipulates that, when an administrative decision (even one ruling a rejection) makes the object of an application for annulment or for reformation, after having been informed by means of a notification in this respect, the judge of the “referés” (recourses, applications for annulment that are being judged by the administrative court) may rule the suspension of the execution of such decision or of some of its effects, provided that this be justified by emergency and there is a means that might generate, during the course of trial, “serious doubt” as far as the lawfulness of the decision is concerned. The above-mentioned law also stipulates that, when the suspension is ruled, the application for annulment or reformation of the decision is regulated as soon as possible, and the suspension ends at the latest when a decision is ruled pertaining to the application for annulment or reformation of the decision.

The French system is dominated by the non-suspensive effect of the recourse stipulated in the article L 4 of the Administrative Code for Justice, which affects not only administrative recourses, but also the recourse ways before administrative justice.

Recent administrative doctrines consider that both the derogations from the principle of the suspensive effect and the organisation of the judges' powers to rule upon the postponement or suspension of the execution fall under the incidence of the law.²

The Belgian legal system (the Law of October 17, 1991), the application for suspension has an accessory system, compared to the application for annulment, and the execution can only be suspended if serious reasons are invoked, reasons that might justify the cancellation of the act or regulation attacked, provided that the immediate execution of the act or regulation represents a risk for causing serious prejudice, which would be difficult to repair.

Amongst the systems that make it possible to rule the measure of suspension under less strict conditions, one can mention the German system which, by means of paragraph 80-1 1 of the law on administrative jurisdiction grants a suspensive effect to the preliminary administrative complaint and to the application for annulment, without the intervention of the judge, but the German legislation also regulates exceptions from the principle of the suspensive effect of the recourse, by means of paragraph 80- 11 of the above-mentioned law. The consequence of the suspensive effect is the fact that the legal force of the administrative document is suspended, such act lacks such force in the first stage and, therefore, it cannot be executed, nor can it generate consequences of another type. In theory, the German administrative law considers that the constitutional requirement of an effective protection of the rights leads to the possibility to make interventions in early stages, before the occurrence of an irreversible situation or of a prejudice that cannot be repaired.

One of the most advanced systems for the protection of citizens before administrative authorities is enforced in Portugal, where the court has the power to take any temporary measures, to make any type of pressure that might be necessary for solving the case, without such ruling being conditioned by the parties' requests.

¹ C. Lepage, Ch. Huglo, S. Le Boulch, Code de justice administrative (*Translation : Code on administrative law*), Litec, Edition du Juris-Classeur Publishing House, Paris, 2002-2003, 79

² L. Visan, D.I. Pasare, Cerinte normative si jurisprudentiale, europene si nationale in materia suspendarii executarii actelor administrative (*Translation : European and national normative and case law requirements in the field of suspension of the execution of administrative acts*), in the magazine “Revista de Drept Public”, issue no. 3/2006, 111

We continue the discussion at European level and speak about the suspension of the execution of administrative acts. In this context, on September 13, 1989, the Ministers' Committee within the Council of Europe adopted the Recommendation R (89) 8, pertaining to the temporary jurisdictional protection in administrative matters, which recommends the governments of the member states of the Council of Europe to make use, both in theory and in practice, of the principles stipulated in this Recommendation. One can therefore draw the conclusion that, if an administrative act is challenged before a jurisdictional authority and this authority has not made a ruling pertaining to the lawfulness of such act, it is desirable that, as far as it is asked to rule on measures for temporary protection, in order to avoid any irreparable prejudice and by taking into account all circumstances and interests in question, the court be allowed to decide the full or partial suspension of the execution of the administrative act, by means of a quick procedure and for as long as it is considered to be necessary.

Also, another recommendation, respectively Rec (2003) 16 on the execution of administrative and jurisdictional decisions in the field of administrative law, a recommendation that was adopted by the Ministers' Committee within the Council of Europe, suggests states to include in the established legal framework the possibility of private individuals to request before an administrative or jurisdictional authority the suspension of the challenged decision, if the law does not stipulate that the rightful suspension of the execution of the decision occurs at the very moment when the complaint is formulated.

An interest of this type can also be found at Community level, such as it results from the case law of the Court of Justice of European Communities (CJEC), which decided that, if recourse is filed for the interpretation of a community rule, in order to appreciate the compatibility of the national norm with a community rule submitted to interpretation, while waiting for the interpretative decision and with the purpose of ensure full effectiveness of community law, the judge who is to settle the recourse may postpone the execution of the national norm whose lawfulness is questioned; also, the judge will have the obligation to remove any national norms that might prevent them from taking temporary measures. An additional argument presented is the system established by article 177 TCE, whose useful effect would be reduced if the national court postponing the ruling of a decision until the Court responds the preliminary question failed to order the taking of temporary measures before such moment.

Suspension of administrative acts – theoretical aspects

From a theoretical point of view, the suspension is the operation of temporary interruption of the effects of administrative acts. The suspension of administrative acts is a warranty for lawfulness, but this a warranty that only occurs in exceptional cases, in special situations. It supposes the temporary interruption of the production of legal effects, as well as the temporary postponement of the production of legal effects. Moreover, it is considered that the term "suspension" must also include the situations when an administrative act becomes effective subsequently to the moment when it was issued. This is also the case of administrative acts that become effective later than they were published. The fact that an administrative act becomes effective after its publication means the suspension of the execution obligation. This happens as, in keeping with the common law principles, this obligation must occur the moment when the act is created.

The following are reasons for suspension:

- a) Challenging of lawfulness;
- b) Change of actual conditions after the issue and, implicitly, the change of the aspects pertaining to opportunities;

- c) The need to have compliance of the administrative act with the acts that are subsequently issued by superior bodies;
- d) The enforcement of a sanction on a natural person who has perpetrated an administrative deviation;
- e) Clarification of a doubt formulated by the issuing body on the lawfulness of the document.

However, these reasons cannot transform the suspension in a rule of the legal status of administrative acts, just like it happens in the case of cancellation.

Suspension is different from cancellation, with the difference been made by several aspects:

- a) Cancellation appears as a rule, while suspension is an exceptional operation;
- b) Cancellation is ruled when there are certainties that the act is illegal, including as far as its opportunity is concerned, while suspension is ruled when there are doubts concerning the lawfulness, including as far as opportunity is concerned;
- c) Any cancellation generates the final cessation of the effect of the administrative act (from this point of view, it is a type of nullity), while any suspension generates the temporary cessation of such effects (it is a singular aspect within the status of administrative acts).

As far as the forms of suspension are concerned, if we take into account the legislation in effect, we can appreciate that the suspension of administrative acts may occur:

- a) rightfully (on the grounds of an express provision of the law);
- b) on the grounds of an order issued by the superior body;
- c) on the grounds of the decision of temporary withdrawal ruled by the issuing body;
- d) on the grounds of a court order or of an ordinance of the Public Ministry.

In conclusion, suspension can be ordered by a *legal act*, but it can also be produced by the lawmaker.

The most important situation for suspension in keeping with the law is stipulated in article 123, paragraph 5 of the Constitution. According to this piece of legislation, the presentation of the prefect's action before an administrative court against an act of the county or local council or of the Mayor will withdraw *the rightful suspension* of the act, if the prefect considers that the act in question is illegal. Another example of suspension in keeping with the law is given by the Government's Ordinance no. 2/2001 *on the legal status of contraventions*. The provisions of article 32 of this law stipulate that any complaint filed by the contravener against the report drawn up for the contravention will withdraw the suspension of the execution of the act of sanction.

Also, the provisions of Law no. 554/2004 *on administrative courts* stipulate a situation of suspension by means of a legal act: Upon request, the court has the right to take the measure of suspending the administrative act making the object of a litigation submitted to judgement "in better justified cases and in order to prevent the occurrence of imminent damages, the application for suspension will be immediately settled by the court, even without the parties attending, and the order ruled will be rightfully enforceable".

Suspension of administrative acts by the courts

At present, following the suggestions made in the administrative doctrine and taking into account the solutions ruled by administrative courts, the provisions of Law no. 554/2004 were reconsidered, as far as the suspension of the execution of administrative acts is concerned, due to

the changes and additions made by Law no. 262/2007. The current regulations stipulate, as a general rule, the legal suspension, upon request, of the execution of administrative acts, simultaneously to the filing of the administrative recourse or of the application for the annulment of the administrative act before an administrative court, the grounds of the matter being the provisions of articles 14 and 15 of the law. Also, it is stipulated that the attacked document be rightfully suspended if the court is informed by the prefect or by the National Agency of Public Officers.

The Romanian law recognizes the principle of the automatic execution of administrative acts, and therefore Law no. 554/2004, by means of the provisions pertaining to the suspension of the execution of administrative documents creates an exception to this principle and correlates European requirements with national ones. The suspension of the execution of administrative acts is a warranty for lawfulness, which only occurs in exceptional cases and in special situations. Suspension involves either the temporary interruption of the production of legal effects, or the temporary postponement of the legal effects.

Article 14 of Law no. 554/2004, with subsequent changes and additions, regulates the procedure for suspension of the execution of administrative acts by legal means, as suspension is optional and only admissible following the filing of the preliminary administrative recourse, in keeping with the provisions of article 7, as the well-grounded case and any imminent damage that should be prevented must be proved.

Recent administrative doctrines claim that, in the case of suspensions that are based on the exercise of an administrative recourse, administrative courts play a decisive role, in the sense that they must appreciate the apparent illegality of the administrative act and then carefully decide the suspension of the act, only when this is obviously necessary. However, legal practise has proven that there are cases when the suspension of the execution of an administrative act must verify if all legal conditions are complied with, by analysing the evidence existing in the file and the statements made by the parties; the legal arguments of the persons involved in the litigation must also be verified.

As for the conditions pertaining to the actual justification of the suspension, if we are to analyse the provisions of article 14, paragraph (1) of the law, we can see that the suspension of the execution of an administrative act can only be ruled if the following conditions are jointly complied with: the existence of a well-grounded case and the need to prevent imminent damage. The provisions of article 14, paragraph (3) regulates the situation when a major public interest is involved, an interest that might seriously affect the functioning of an administrative public service and which would justify the measure of suspension. A third condition is added, a procedural one this time: the plaintiff must prove the initiation of the preliminary administrative procedure. This condition is decisive for the admissibility of the application for suspension of the execution of an administrative act, in keeping with the provisions of article 14 and the compliance with this condition is proven by the previous notification of the issuing body. If no such proof is presented, the correct solution of the court is to reject such application as not admissible.

- a) **Existence of a well-grounded case.** At present, the provisions of article 2, paragraph (1) and letter T of Law no. 554/2004 define the phrase “well-grounded case” as a legal actual and lawful circumstance that might generate serious doubt as far as the lawfulness of the administrative act is concerned.

The fact that previously there was no definition for well-grounded cases led to numerous interpretations in the legal practise, as far as the content of this notion was concerned. Numerous examples were given and, with the purpose of limiting the range of this notion, the administrative doctrine gave examples of circumstances that might prove that there is a “well-grounded case” (for example, those connected to the actual and lawful situation, including aspects that emphasize the

illegal nature of the act and the abuse of authority, the efforts made, the attitude of the authority, the method of summoning the interested body and the casting of votes).

Legal practise has constantly mentioned the fact that the existence of a well-grounded case may be withheld if the case showed powerful and obvious doubt as far as the lawfulness presumption was concerned, as this presumption represents one of the basic elements of the enforceable nature of administrative acts. Other criteria that can be taken into account when proving a well-grounded case are: the actual nature of the measure enforced by the public authority, the subsequent conduct of the addressee of the act and the effects such act might have on certain associated legal relations.

Well-grounded cases cannot be justified by invoking certain aspects that pertain to the lawfulness of the administrative act, as such aspects concern the basis of the act, which is only analysed by the action for annulment.

The court only has the possibility to perform a limited research on the appearance of common law, as the grounds of the litigation cannot be harmed during the procedure stipulated by law.

The provisions of article 2, paragraph (1), letter s) define the term “imminent damage” as any future and predictable material prejudice or, as the case may be, the serious predictable damaging of the functioning of a public authority or of a public service.

Following an analysis of the notion of “prejudice”, one might say, just as in the case of offensive civil responsibility, any violation of a right has a patrimonial value. Future prejudice is the prejudice that has not yet occurred, but is certain to occur, even if one cannot estimate how long such prejudice will last. Therefore, both current and future prejudices are certain and can be evaluated. If the lawmaker has included the idea of future prejudice in the notion of “imminent damage”, it is obvious that, even if the prejudice is under development and has partially occurred, one can speak about imminent damage, as even in this situation there are reasons justifying the suspension, if we are to take into account the fact that an administrative act which has produced the entire prejudice it was susceptible to generate cannot be suspended.

Future prejudice must also be predictable, that is certain – as it is mentioned in the terminology used for civil responsibility matters –, even if one cannot estimate how long such prejudice will last. Any prejudice that is not certain to occur does not allow the urgent measure of the suspension of the administrative act that was attacked.

As for the form any prejudice may take, this can be material, actual and trial-related. This means any prejudice that is capable of putting the plaintiff in a disadvantageous situation, such as creating a new legal situation by the execution of the administrative act, by the future generation of certain rights that did not exist when the preliminary complaint was filed, a situation that might persuade the plaintiff to adopt a trial-related position that might also involve any third party who might benefit from the act that was attacked. In order to admit the suspension of execution, any prejudice must basically be unlikely to be repaired by a subsequent indemnity.

As far as imminent damage was concerned, the practise of some courts has also shown that this notion is construed in the sense of the civil law, that there must be a material, real and actual prejudice which must be proved. The definition of the term “imminent damage” leads to the conclusion that the serious and predictable disturbance of the functioning of a public authority or service, as stipulated in the 2nd part of article 2, letter s) of the law can be mentioned as the grounds for an application for suspension. However, it is necessary that the disturbance begun or which is to begin be so serious as to threaten not only an activity of the public authority or of a public service, but their very functioning.³

³ Antonie Iorgovan, Liliana Visan, Alexandru Sorin Ciobanu, Diana Iuliana Pasare, *Legea contenciosului administrativ, comentariu si jurisprudenta (Translation : Law on administrative courts – comments and case law)*, Universul Juridic Publishing House, Bucharest, 2008, 252 and the following

As the suspension of the execution can only be ruled under express and limited conditions stipulated by the law, as this represents an exception from the rule of automatic execution of administrative acts, it results that the delegated judge has the responsibility to actually evaluate, with no discrimination or bias and by comparing the situation to each case, the compliance with the conditions pertaining to the admissibility of the application for suspension, in keeping with the provisions of article 14 of the law, but without a restrictive interpretation of the actual grounds justifying the suspension, as otherwise the purpose of the suspension cannot be reached.⁴

The measure for suspension of the execution of an administrative document ruled in keeping with the provisions of article 14 only lasts until the ruling of the main issue. The measure of suspension is rightfully extended until the case is finally and irrevocably settled, even if the plaintiff has not applied for the suspension of the execution of the administrative act on the grounds of paragraph (1) of article 15 of the law, as regulated in article 15, paragraph (4). Thus, the lawmaker has given an even greater efficiency to the institution of suspension of the execution of the administrative act, as the lawfulness appearance was rejected by the fact that the main issue was admitted.

The term for the recourse was established within 5 days from the date when the ruling is communicated, and it was made clear that the recourse does not suspend the execution. The express will of the lawmaker was to free this category of decisions from the possibility of ruling the suspension of execution by exercising any possible means of attack, as such decisions are special by the fact that they are rightfully enforceable.⁵

The regulation mentioned in article 15 of Law no. 554/2004, as changed by Law no. 262/2007, refers to the application for suspension of the execution of the unilateral administrative act, as formulated after the initiation of the legal stage involving the lawfulness control performed on the administrative act. The plaintiff may file such an application either by an action addressed to the competent court for the total or partial cancellation of the act that was attacked, or by a separate action.

After analysing the provisions of article 15, we can identify the conditions that must be complied with for the admissibility of such an application. These conditions are: the existence of an action for the total or partial cancellation of a unilateral administrative act; the existence of a well-grounded case; the prevention of imminent damage; the filing of an application of this type, until the main issue is settled.⁶

Another aspect taken from legal practice was the idea of reiterating the application for suspension. This idea is grounded on the provisions of article 15; therefore this happens at the same time with the action for annulment or until the settling of the main issue pertaining to the action for annulment, after courts had previously rejected such an application.

In such situations, some trial courts appreciated that, in keeping with the provisions of article 14, paragraph 6 of Law no. 554/2004, there would be a matter to be judged and therefore admitted this exception, which was invoked either automatically by the court, or by the other party involved in the litigation.

Having this solution at hand, the following defences were reiterated during the recourse. Thus, the decision of the trial court to reject the application for suspension on the grounds of

⁴ Iuliana Riciu, *Procedura contenciosului administrativ (Translation: The procedure of settling administrative matters)*, hamangiu Publishing House, Bucharest, 2009, 322

⁵ Gabriela – Victora Birsan, Bogdan Georgescu, *Legea contenciosului administrativ nr. 554/2004 adnotata (Translation: Comments on the text of Law no. 554/2004 on administrative courts)*, Hamangiu Publishing House, Bucharest, 2007, p. 87 and the following

⁶ Iuliana Riciu, *op. cit.*, 331

article 166 of the Code for Civil Procedure (the exception of the matter to be judged) is illegal from two points of view.

From a first point of view, the court's arguments based upon the provisions of article 14, paragraph 6 of Law no. 554/2004 cannot be maintained for the following reasons:

It is true that the provisions of article 14, paragraph 6, target to avoid the abusive exercise of trial-related rights, by filing successive applications for suspension for the same reasons, also ignoring the fact that the application for suspension was rejected by the court. However, by introducing this interdiction in the text of articles 14 and 15, the lawmaker obviously took into account the enforcement of the interdiction distinctly, in each and every mentioned situation.

In the case of the application for suspension based upon the provisions of article 14, we speak about a distinct procedural stage – the suspension of the execution of the administrative act during the preliminary procedure and until a ruling is made for the main issue; in the case of the same application, but based upon the provisions of article 15, another procedural stage is stipulated – the suspension of the execution of the administrative act following the filing of the action for the cancellation of the act, either at the same time or by a separate action, until a ruling is made for the main issue.

Therefore, in the case submitted to judgement, the application for suspension has other legal grounds, as it was formulated during a different procedural stage. Thus, one cannot state that there is a successive application for suspension, even if the reasons are in fact the same.

In the presented case, as long as it can be proven that the right stipulated in article 15 was used in good will, on the grounds of new rightful reasons for applying for suspension, the court should analyze such application.

The legal provisions pertaining to “successive applications for suspension for the same reasons” mandatorily stipulate that these applications must include the main actual and rightful reasons, as stated in the provisions of article 112, paragraph 1 and point 4 of the Code for Civil Procedure. Therefore, the filing of an application for suspension with other legal grounds cannot be included in the interdiction imposed by the lawmaker.

From the second point of view, one cannot say that the case involves the authority of solved matter, as there is no case identity. This conclusion becomes even more necessary as one may say that the provisions of the above-mentioned article 14, paragraph 6 and article 15, paragraph 2 grant efficiency to the principle of the authority of solved matter, as regulated by the provisions of article 1201 of the Civil Code. This principle supposes a triple identity: parties' identity, object identity and case identity. However, if the new case is based by other legal grounds than the first one, like the case submitted to judgement, there is no judged matter. (in this sense, see T.S., dec. no. 568/1955 and dec. 816/1955, C. D 1955, volume 2, page 219, respectively page 220).

Therefore, the reasons presented by the trial court in the sense of admitting the authority of judged matter for the subsequent application for suspension and which are based upon the provisions of article 15 of Law no. 554/2004 infringe the principle of the fundamental right of free access to justice, a right that is guaranteed by article 21, paragraph 1 of the Constitution. Therefore, the reasons presented render these provisions unenforceable.

Furthermore, interpreting these provisions contrary to those that were mentioned previously would mean infringing the provisions of article 6, paragraph 1 of the European Convention of Human Rights regulating the equity of the procedure, as the plaintiff's application, if based upon the provisions of article 15 could not be "heard" – it could not be legally examined by the notified court. The case law of the European Court of Human Rights has constantly stipulated that the convention guarantees actual and effective rights, not theoretical and illusory ones. Moreover, according to the Court, the fact that trial courts fail to explicitly rule on an express application, but they prefer to implicitly reject the case, making this dependant on the settlement of another

application is an infringement of the provisions of article 6, paragraph 1 of the Convention (the case *Gheorghe vs. Romania*, Decision of March 15, 2007, application no. 19215/04).

This is the current point of view of the supreme court, such as one may see by analysing the content of the Decision no. 2190/2009 of the High Court of Cassation and Justice (the decision was not published).

Conclusions

The purpose of this paper was to revise the idea of temporary interruption by the courts of the effects of administrative acts. In fact, the paper was intended to be a theoretical and practical analysis of the institution of suspension, based upon the provisions of articles 14 and 15 of Law no. 554/2004.

Also, the paper presented some examples taken from legal practise, in order to facilitate the activity of practitioners in the field of law.

This analysis is important as, in the case of suspension, we deal with derogation from the rule of the automatic execution of administrative acts and this exception is worth being minutely analyzed.

Also, this paper is important due to the fact that it presents the different stands that courts take as far as the issue discussed is concerned.

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