Public Law

Assimilated Administrative Acts

Vasilica NEGRUȚ[1]

Abstract: The present paper analyzes a current issue not only for the legal research but also for the practical activity. We chose a topic which other authors have researched, but we emphasized based on analysis and comparison, certain peculiarities of the legal regime applicable to the legal acts assimilated to the administrative acts, as they are outlined in the Contentious administrative law. Given that the legal documents assimilated to the administrative acts have a greater share in the public administration activity, it requires knowledge of its legal effects, in order to see whether there are fulfilled the above-mentioned law conditions or not, in order to use the action in the administrative contentious, when appropriate. In conclusion, we can say that, although the law defines these legal acts, it is required amending the Contentious administrative law, that is including in article 1 the assimilated administrative acts.

Keywords: administrative act; assimilated administrative act; contract; legal regime

1. General Considerations

The assimilated administrative acts have an increased share in the public administration activity, and the need for this research was required in order to detail the aspects of the legal regime applicable to each legal act qualified by the law to be treated as assimilated to the unilateral administrative act. It is widely recognized that the administrative act has a major significance in the work of public authorities.

[1] Professor, PhD, Dean of Faculty of Law, "Danubius" University of Galati, 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author: vasilicanegrut@univ-danubius.ro.

AUDJ, vol. 8, no. 2/2012, pp. 66-71

Starting from the formal-material sense of the notion, in a synthetic form, the administrative act is "that legal form of activity of the public administration bodies, which consists of a unilateral and express manifestation of the willingness to create, to modify or extinguish rights and obligations in achieving public power, mainly under the control of legality of the courts." (Iorgovan, 2005, p. 25)

The contentious administrative law no 554/2004, as amended, in article 2, line (1), c) the sentence defines the administrative act as unilateral act with individual or normative feature issued by a public authority in order to organize the execution or enforcement of the specific law that creates, modifies or terminates the legal relations. This definition of the law takes into account the typical unilateral administrative act. However, the contentious administrative law assimilates to administrative acts and other legal acts, as we will analyze below.

2. Legal Acts Assimilated to Administrative Acts

We refer to the administrative equivalent of unilateral legal acts, namely: the unjustified refusal to process an application for a right or legitimate interest, the unjustified refusal on the non-execution of the administrative act issued following the favorable resolution of the application or, where appropriate, prior complaint (article 2, line (1), letter. i); non-solving in a legal term of the request.

We will also consider the administrative contracts, which, as determined by Law no. 554/2004, are assimilated with the administrative acts and not with the unilateral administrative acts, a fact which involves legal consequences. (Albu, 2008, p. 36) As stated in the specialized literature, the unjustified refusal to settle a claim means the explicit expression of the will of not dealing with the application. (Brezoianu & Oprican, 2008, p. 314)

If the refusal is unjustified, violating a right or a legitimate interest, the entitled holder of the violated right can also appeal to the court, attacking the refusal. Although the law leaves no room for interpretation, in the specialized literature there were expressed different views on the legal nature of the unjustified refusal to settle a claim regarding a right or legitimate interest.

According to an opinion, the refusal is not an administrative act, therefore, it produces no legal effect, and the right holder can always come back with a new application, as the public authority to which it is addressed could reconsider the rejection solution of the request. (Brezoianu &Oprican, 2008, p. 314)

The opinion is objectionable, because, if the refusal to grant the request concerning a right or a legitimate interest does not produces legal effects, the legal action brought against that refusal would no longer be justified.

Another opinion that we share is the unjustified refusal to satisfy a request, concerning a right recognized by law, producing legal effects, because it prevents the exploitation of that right, a fact which would lead to a new legal situation. (Brezoianu & Oprican, 2008, p. 314). Therefore the unjustified refusal means that the public authorities will not address a request expressed explicitly. (Puie, 2009, p. 262) However, as required by the law, the unjustified refusing to settle a claim for a right or a legitimate interest is related to the excess of power. (Alexandru, Cărăuşan & Bucur, 2009, p. 487)

The excess of power, identified by overcoming the discretionary power available to public authorities (Apostol & Tofan, 1999, p. 217), is defined by the Contentious administrative law as "exerting the right of appreciation of public authorities by violating the limits of competence prescribed by law or by jurisdiction violation of citizens' rights and freedoms". Therefore, the administration refusal is unjustified when it is based on abuse of power, when the authorities refuse to answer, although they are competent to adopt a particular solution. (Iorgovan, 2005, p. 552)

Note that, that if there was an unjustified refusal, we find ourselves in the presence of an express communication of the authority's position to which the request was addressed, i.e. the genuine notification, on the one hand, and on the other hand, the refusal to favorably solve the request to exceed the limits based on the appreciation right. (Iorgovan, 2005, p. 553) Also, it should be noted that in this situation it is about the claimant's estimation on the unjustified refusal character, whereas only the court will assess whether the refusal was justified or not. (Iorgovan, 2005, p. 599)

The Law, by article 2, line (1), letter h) assimilates the unjustified refusal (and therefore the administrative act, our emphasis) to settle a claim and the *failure to execute the administrative act issued following the favorable resolution of the application or, where appropriate, of the prior complaint*.

As noted in the specialized literature, there are situations in which the public authorities, while accepting the applicant's petition contesting an unlawful administrative act, do not complete the settlement, delaying such a state. (Dragos, 2009, p. 125)

In order to understand this aspect, we rally to the opinion expressed in the specialized literature, where in the absence of express stipulations, the term in which the administrative act must be performed is 30 days, which may be extended by the 15 days, maximum. (Dragos, 2009, p. 125)

By law, it is assimilated to the administrative act and not solving within the legal term of a request, i.e., failure to respond to the applicant within 30 days from the registration, if by law it does not provide otherwise.

According to the opinions expressed in the specialized literature (Lazarus, 2004, p 69), not solving within the legal term *an application* it means the unjustified refusal to deal with the application and the administration's silence. The view is partially shared by other authors, because it is estimated that the administrative silence cannot be included in the concept of "non-solving within the legal term" because, administrative silence means that the public authority does not respond to the petitioner, as for the concept to which we refer it means only that the applicant does not respond within the legal term, respectively, within 30 days of filing the request. (Puie, 2009, p. 263)

Another aspect which we emphasize is related to the existence of a special regulation in this area, namely, the Government Ordinance no. 27/2002 on regulating the resolution of complaints activity. Under that normative act, the petition represents the request, the objection, the complaint or proposal in writing or by electronic mail, which a citizen or a legal organization may submit to the public and local authorities and institutions, decentralized public services of ministries and other central agencies, companies and firms of county or local interest, and the autonomous administration, called authorities and public institutions. Not respecting the terms of resolution of complaints represents misconduct and it is penalized in accordance with the depositions of Law no. 188/1999. (Albu, 2008, p. 177)

On the other hand, the answer to the petition within the period prescribed by law, according to the regulations, even unfavorable to the petitioner, is not the equivalent to an unjustified refusal of solving the request within the meaning of article 2, line (1), letter h) of Law no. 554/2004 or not solving the petition within the legal term, according to article 2, line (1), letter g) of the same law. (Albu, 2008, p. 177)

The Contentious administrative law assimilates the administrative acts and the contracts concluded by public authorities dealing with the enhancement of public

assets, executing the works in the public's interests, carrying out public services, public acquisitions (article 2, line (1), letter c)

The administrative contract is a highly topical theme, with broad implications in the economic, administration, the social and political field, (Săraru, 2009, p. 5) at both national and European level.

The existence of administrative contracts and the applicable legal regime were a constant concern in the specialized literature, ranging from recognition (Tarangul, 1944, p. 412) and denial of administrative contracts theory. (Teodorescu, 1929, p. 394)

After 1990, the existence of administrative contracts was accepted and supported by great authors of Administrative Law (Albu, 2008, p. 70), Law no. 554/2004 analyzing clearly the problem of their legal nature.

Thus, considering the requirements of this law, it results that, in the case of administrative contracts it is applicable the legal regime of administrative law regarding the litigations on the assignment of these contracts by the public authorities and on the litigations involving the conclusion, execution and annulment of administrative contracts.

It should be pointed out that Law no. 554/2004 assimilates the administrative contracts to the administrative acts, in general, and not with the unilateral administrative acts, precisely because these contracts are bilateral legal documents.

While unilateral administrative acts (normative or individual) are adopted or are issued as a result of deliberations or decisions of public authorities, the administrative contracts are concluded through negotiation between the public authority and the contractor, according to the law. Also, the unilateral administrative acts may be, under certain conditions, modified or even revoked by the issuing public authority, while the administrative contracts can be amended only by the agreement of the both parties and they cannot be revoked.

However, the unilateral administrative acts enforcement is provided by the public power, while the administrative contracts enforcement is guaranteed by criminal clause and there are compensations for the non-execution or improper performance. (Sararu, 2009, p. 29)

3. Conclusion

The administrative act is the legal form of major significance in the activity of public authorities. Since the Contentious administrative law assimilates to the administrative acts certain legal documents, it is necessary to analyze the applicable legal regime, precisely because they produce legal effects, in order to see whether there are fulfilled the law conditions mentioned for the use of administrative contentious action, where appropriate. We also consider necessary to review the Contentious administrative law, so that article 1 would refer specifically to the legal acts assimilated to administrative acts.

4. References

Albu, Emanuel (2008). *Dreptul contenciosului administrativ/The Law of administrative contentious*. Bucharest: Universul Juridic.

Alexandru, Ioan; Cărăuşan, Mihaela & Bucur, Sorin (2009). *Drept administrative/Administrative Law*. Second revised and added edition. Bucharest: Universul Juridic.

Apostol-Tofan, Dana (1999). *Puterea discreţionară şi excesul de putere al autorităţilor publice/Discretionary power and the excess of power of public authorities.* Bucharest: All Beck.

Brezoianu, Dumitru & Oprican, Mariana (2008). *Administraţia publică în România/The public administration in Romania*. Bucharest: C.H. Beck.

Dragoş, Dacian, Cosmin (2009). *Legea contenciosului administrativ. Comentarii şi explicaţii/The Contentious administrative law. Comments and explanations*. Second edition. Bucharest: C.H. Beck.

Iorgovan, Antonie (2005). *Tratat de drept administrative/Treaty of administrative law*. Vol II. 4th Edition. Bucharest: All Beck.

Lazăr, Rozalia-Ana (2004). Consideraţii asupra Proiectului Legii contenciosului administrative/Considerations on the contentious administrative law project. *Revista de drept public/The Journal of Public Law*, no 3.

Puie, Oliviu (2009). *Contenciosul administrativ/Administrative Contentious*. Vol. II. Bucharest: Universul Juridic.

Săraru, Cătălin-Silviu (2009). *Contractele administrative. Reglementare. Doctrină. Jurisprudenţă/Administrative contracts. Regulation. Doctrine. Jurisprudence*. Bucharest: C.H. Beck.

Tarangul, Erast, Diti (1944). *Tratat de drept administrativ roman/Romanian administrative law treaty*. Cernăuţi.

Teodorescu, Anibal (1929). *Tratat de drept administrative/Treaty of administrative law*. Vol. I. Bucharest.