The Obligation of the National Administrative Organs to Reexamine their own Decisions in the Context of the Recent Jurisprudence of the Court of Justice of the European Union

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Abstract: At the European Union's level, the primary law does not include express regulations regarding the revocation or the reexamination of the administrative acts. The possibility to revoke or retreat an EU act, adopted based on its competencies, granted in breaching the law, represents a matter regarding which the Court of Justice manifests a tendency to change practice in the past years.

Keywords: national administrative acts; res judiciata; national administrative authorities; reexamination obligation

Introduction

At this moment, the procedure of internal reexamination of administrative acts is applied at the level o Union institutions and national administrative authorities in virtue of the regulations existent within the secondary legislation of the Union. For example, in case of environment issues, the institutions of the European Union are obliged to offer value to the right to internal reexamination. By Decision on April 30th 2008[1] the Commission is obliged to reexamine an administrative act and observe any breach of the legislation in environmental matters.

In Romania, the reexamination of the administrative acts is possible only in the context of the secondary legislation of the European Union. Thus, in EC Regulation no. 883/2004 and its Implementation Regulation no. 987/2009 in matters of retirement, acts that are mandatory and directly applicable for our country as well, it has been stated that in case the rights of a solicitant "*are affected*

[1] The European Commission, 2008/ 401/ CE, Euratom, Decision on April 30th, 2008 on the amendment of the procedure regulation regarding the detailed norms of applying EC Regulation no.1367/ 2006 of the European Parliament and Council on the application, for the community institutions and organisms, of the dispositions in The Aarhus Convention on the access to information, public participation in decision making and access to justice in environment issues.

in a negative manner by the interaction between the decisions taken by the competent institutions" the solicitant has the right to have the decision taken by these institutions reexamined, with he obligation to respect the terms provisioned by the national legislation as well as the obligation to notify the decision in written to the notary.

Problem Statement. The issue of revoking administrative acts has to be regarded from the perspective of ensuring a good administration. Thus, in what concerns the possibility to reexamine or revoke an administrative decision in front of an administrative organ, remained definitive, to an instance of final rank, through a judicial decision based on an erroneous interpretation of the Union's law, the Court[1] held that this is possible as long as in the ulterior jurisprudence of the Court interpretations have been made regarding some dispositions in strong connection with the decision made. Also, there is no obligation for the plaintiff in the main cause to have invoked the provisions of the Union so that the reexamination is admissible.

Concept and Terms

As initially there hasn't been any regulation within the legislation of the EU, the principle of revocability of administrative acts was defined by the Court of Justice of the EU in Algera Cause[2] in which the Court held that the retreat of a non legal act cannot take place, even if it created subjective rights. Thus, the revocation of the non legal act can take place at any moment, in the conditions in which the institution retracting the act respects due time and the legitimate confidence of the beneficiary of the act believed in its legality. In other words, **the administrative authority has the power to analyze, if imposed, the retreat or not of the act, but this does not mean that it has a discretionary power**, being held to respect the **request of due time in revoking the act as well as the interests implicated in the cause**. Contrariwise, a breach is brought to the principles of judicial security and legitimate confidence and in consequence, **the act has to be annulled**.

The obligation of an administrative organ to reexamine an administrative decision was established by the Court in Decision Kühne& Heitz[3] in which the conditions in which an interpretation of a relevant disposition held by the Court in the meantime were presented. The four conditions that have to be fulfilled and were held by the Court of Justice in cause Kühne& Heitz are: **the regulation of the right to return**

[1] CJCE, Decison on Februray 12, 2008, *Willz Kempter* c. *Hauptzollamt Hamburg-Jonas*, Cause 2-06 în CJCE, *Repertoire of the Jurisprudence of the Court of Justice and First Instance Tribunal*, Part I, Ed. CURIA, Luxemburg, 2008-2, p. I-468.
[2] CJCE, Decision on July 12, 1957, *Algera and others/Assembly*, 7/56, 3/57-7/57, Rec., p. 81, p 116.
[3] CJCE, Decision on January 13, 2004, *Kühne&Heitz*, C-453/00, Rec., p. I-837.

to an administrative decision with definitive character, in the law of the member state; **the existence of a definitive decision,** taken by a national instance of final rank; the decision taken by this instance has to be based on **an erroneous interpretation of the European Union's law, issued without the request of an appeal of interpretation;** the request **that the person interested in reexamining the case has to address to the administrative organ immediately after being informed on the recent jurisprudence of the Court.**

The issuing of such a decision determined numerous reactions from the states but also ulterior interpretations from the Court, considering the decisions in interpretation granted to it. In the first place, the issue related to the necessity of ensuring the stability of the judicial decisions remained definitive was brought to attention, more exactly, the **principle of *res judiciata*** existent within the national judicial order. Thus, the member states were facing a fact, as many principles had to be interpreted in view of ranking the importance granted. To start with, we have to mention the principle of supremacy that determines the respect of the EU law. But once such a decision imposes its application to the member states in view of reexamining a decision, the following question is raised: can the judicial security, as stability of the definitive judicial decisions be brought to discussion? In this context, the member states have responded indicating that regarding the guarantee of the stability of law and judicial relations as well as a good administration of justice cannot be brought in discussion, in the context in which a decision obtained by a definitive decision after exhausting the ways of appeal is again brought in discussion.

The answer to this issue can be extracted from the interpretation given by the Court in the cause Germany Arcor[1] in the light of the decision given previously in the cause Kühne& Heitz from which results that the administrative organ "responsible for the adoption of an administrative decision is obliged, according to the principle of cooperation deriving from article 10 EC, to reexamine this decision and eventually, to get back to it, if the four conditions are fulfilled". The first condition mentioned this time refers to the possibility to reexamine an administrative decision with definitive character by the member states.

Thus, giving value to the principle of cooperation and procedural autonomy the states have the attribution to designate the procedural modalities, respectively the instances or competent authorities, as well as the procedural terms in which the reexamination of the decisions given with the breach of the Union's law will take place, the means or procedural remedies that have to be in accordance with the principle of effectiveness and equivalence.

[1] CJCE, Decision on September 19, 2006, *i-21 Germany and Arcor*, C-392/04 şi C-422/04, Rec., p. I-8559.

Solution Approach

As long as within the national law there is the condition of revoking the non legal administrative acts, this has to be extended also regarding to a law provisioned by the EU.

The Romanian legislation does not allow the possibility to revoke an administrative act which involves a jurisdictional administrative act (it cannot be revoked as it benefits from res judiciata), an administrative act that generated judicial relations others than of administrative law (for example, based on a diploma, a person concluded a work report), an administrative act of sanctioning (as they can only be annulled or reformed by the competent jurisdictional organ), respectively an administrative act that has been materially realized (these acts cannot be revoked because of the fact that the anterior situation cannot be reestablished from a material point of view). (Negruț, 2008, pp. 301-302)

We encounter an issue related to the states that do not recognize the right to reexamine the decision within the EU internal judicial order that can be invoked in front of an administrative organ or recognize the right to review in front of a national instance but into strict conditions as is the case of Romania.

According to law no. 7 in Law no. 554/ 2004 of the administrative contentious the prior administrative procedure is regulated, this being in most of the cases mandatory, before the prejudiced in relation to a right to legitimate interest will address to the administrative contentious instance. The purpose for which this procedure was instituted for the reexamination of the administrative acts issued by public administration authorities was the one to obtain from the issuing authority a reevaluation of the legality and opportunity of the acts issued by them.

Article 21 on Law no. 554/2004 provisions that the review is possible in the cases in which there is a decision that breaches the Law of the Union involved. The right to review the definitive decisions is involved here, issued based on this law, given with the breach of the principle of priority of the EU law. The term to introduce a request if 15 days from the communication of the decision, request that has to be solved urgently and in particular, respectively within maximum 60 days from registration. Or, the following question is being raised: what will be the term in which the reexamination or the revocation of an administrative decision can be solicited in case the Court of Justice comes subsequently with a different interpretation?

Analysis of Results

Certainly the right to reexamination in the meaning of the jurisprudence mentioned above is not the equivalent of the review of the decisions mentioned in article 21, as the term is strict, respectively 15 days from communication and the Court's Decision abovementioned takes into consideration the right to reexamination by an administrative organ, after an instance of final rank issued a decision grounded on an erroneous interpretation of the law of the European Union and in the circumstances in which the instance (court of first instance or appeal) did not solicit the Court of justice for a prejudicial decision.

The breach of the EU law can be considered from a material point of view, respectively regarding the content of the EU law (that concerns the erroneous application of the EU provisions by the national instances) or in procedural perspective, respectively the breach of the national instance's obligation to address the Court of Justice, based on article 267 TFEU, mandatory, if it was in front of a national instance whose decisions weren't subordinated to a way of appeal according to the internal law.

Specifically, the right to due trial entails that the solving of the litigations is made based on the principle of legality. The fact that in the subsequent jurisprudence of the Court appeared an interpretation according to which the right of the legitimate interest of a person, breached by the solution given by the national instances, but by the public authorities in the first place, in the stage of prior procedure or not, is more clearly delimited and is due to the activity of interpretation[1] performed by the Court.

Two aspects must be delimited regarding the impact of the Court's jurisprudence on the judicial stability at state level**. The reason of reexamining a definitive decision doesn't have to be regarded from the perspective of the retroactive application of the law, as the substantial law has existed in the moment of creating the judicial relations**. Judicial security is ensured by the character non retroactivity character of the judicial acts, with certain exception related to the achievement of a certain purpose, in the cases in which the legitimate confidence of the persons is respected. Also, the principle of non retroactivity imposes that a measure adopted by a public authority is not to be applied to a person in the cases in which that person is not acquainted to it[2]. According to the Romanian Constitution in 1991, reviewed, the principle of non retroactivity of the law has an imperative character thus the legislator cannot eliminate in unjustified manner or attenuate certain unjust situations. This assertion has been confirmed by a decision

[1] The special role of the Court of Justice of the European Uion resides in the dynamics with which interprets the general principles of law. See V. Negruţ, *Le Rôle de la Jurisprudence (CEJ) dans le Développement du Droit Communautaire,* Acta Universitatis Danubius. Juridica, Vol. 1, No. 1/2008.
[2] CJCE, Decision on January 25, 1979, *Racke/Hauptzollamt Mainz*, C-98/78, Rec., p. 69.

of the Constitutional Court in 1994[1] that stated that "if the legislator would want in unjustified manner to eliminate or attenuate some unjust situations, it cannot accomplish this by a law that would have a retrospective character, but has to find the adequate means that wouldn't come against this constitutional principle". Or, considering the new approach of the Court of Justice[2], given the provisions of article 148 in the Constitution and keeping in mid the fact that according to the position of the Court of Justice, it is a case of effective application of the EU law[3] in our opinion, all the conditions are met for introducing within the law of administrative contentious, a provision regarding the possibility of reexamining the decisions by the authorities of the public administration if the three conditions held by the Court of Justice in the case Kühne& Heitz are met.

Also, the issue of the *res judiciata* is not brought in discussion here, as the right to review does not have the purpose of destabilizing and creating chaos in what concerns the certainty and stability of the existent judicial relations. It is about the recognition of a right to review that is obviously much more democratic than the one regulated so far, that is based on the principle of legality, the guarantee of an effective jurisdictional protection. Practically, this possibility is to address to an administrative organ immediately after being notified of the recent jurisprudence of the Court which brings us back to the stage of prior procedure.

Conclusions

The force of this principle of European administrative law has to be understood as a manner to solve a conflict between the administration and the citizens, as a mandatory stage, prior to the solving of the case, with which the instance of administrative contentious will be invested in case the administrative authority will not proceed to reexamining the act, or will give an unfavorable answer to the prejudiced. The fact that the jurisprudence mentioned above does not mention, as successive condition, the possibility to address subsequently to the instances in the extent in which the administrative authorities do not solve or apply in correct manner, the subsequent jurisprudence, seems justified considering that non recognizing **the free access to justice, the main double degree of jurisdiction,** is already a memory of the debut stage of democracy.

[1] CCR, Decision no. 9 on March 7, 1994 on the execptions of unconstitutionality of the provisions in article V, par. 7 in Law no. 59/1993.
[2] CJCE, Decision on January13, 2004, *Kühne&Heitz*, C-453/00, Rec., p. I-837.
[3] CJCE, Decision on July 13, 1989, *Wachauf*, C-5/88, Rec., p. 2609, pct. 17-22; CJCE, Decision on June 18, 1991, *ERT*, C-260/89, Rec., p. I-2925, pct. 41-45; CJCE, Decision on March 25, 2004, *Karner*, C-71/02, Rec., p. 2609, pct. 17-22; CJCE, Conclusions of the General Lawyer Sharpston, *Bartsch*, C-427/06, Rec., p. I-7267, pct. 69.

In what concerns the **res judiciata**, in Decision on July 17th, 2007 issued in the Lucchini cause[1] the Court held that the EU law is opposed to the application of a disposition of the national law that seeks to consecrate the principle of res judiciata, in the extent in which its application impedes the recovering of a state aid that has been granted by breaching the community law and whose incompatibility with the common market was declared in a decision of the Commission of the European Communities that became definitive. **In reality, neither the CJEC stimulates the revocation of the administrative acts in unconditional manner**. The Algera cause already clarified these aspects. Even if the act already created subjective rights, **its revocation is possible on the condition that the due time and the interests implicated in the cause are respected**. Any abuse determines a breach in the **judicial security and legitimate confidence** of the particulars, reason for which the annulment of the act can be requested in front of the competent instances.

In what concerns the **term of submitting such a request**, as held by the Court in Kempter cause[2] the EU law does not impose the member states limits regarding the period of time for submitting such a request of reexamination of an administrative decision remained definitive. The only obligation is the one to establish a due time of submitting the actions, according to the two principles mentioned above. Regarding the term for referring to the Court after the prejudicial procedure, in our opinion it is imposed that it will not be different from those provisioned in the content of the Law 554/ 2004. **The principle of effectiveness** incumbent the states the obligation that these proceedings will not make impossible or excessively difficult the exertion of the rights conferred by the Union's judicial order, respectively not to be less favorable than those applicable at internal level, for similar actions (the principle of equivalence). More exactly, the principle of equivalence imposes that the assembly of norms of national procedure to be applicable without any distinction both for the actions involving the violation of the Union's law as well as those involving the violation of the internal law.

To this end, the legislator could stop at the **term of 30 days,** existent in the case of graceful appeal or hierarchic appeal, or the term of **6 months** provisioned with prescription term when there are solid reasons that have impeded the submission of the administrative complaint prior in the case of unilateral administrative acts, a right or a legitimate interest is involved, prejudiced by an administrative act with individual character or in the matter of administrative conducts.

[1] CJCE, C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato c. Lucchini SpA, former Lucchini Siderurgica SpA.*

[2] CJCE, Decision on February 12, 2008, *Willz Kempter KG* c. *Hauptzollamt Hamburg-Jonas*, Cause 2-06 în CJCE, *Repertoire of the Jurisprudence of the Court of Justice and First Instance Tribunal*, Part I, Ed. CURIA, Luxemburg, 2008-2, p. I-468.

Future Work

It is imposed thus that regulations should exist al national level regarding the possibility that an administrative organ disposes the reexamination of a decision, in the context of the conditions mentioned above. From this point of view, it is necessary to correlate the Romanian legislation with the newly defined principles in the jurisprudence of the Court of Justice of the European Communities.

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