

ISSUES REGARDING THE ADMISSIBILITY OF THE PRESIDING JUDGE'S ORDER IN CONTENTIOUS-ADMINISTRATIVE LITIGATIONS

Author

Grațian URECHIATU-BURIAN*

ABSTRACT: *The research aims to clarify the issues regarding the admissibility of the presiding judge's order in contentious-administrative litigations.*

As we know, the public administration activity is governed by the principle of legality. According to this principle, public authorities operate within the powers given by the law. Therefore the administrative acts issued by central or local government authorities are presumed to be legal. Of course, the presumption is relative.

An interesting problem that arose in practice is the following: is the procedure of the presiding judge's order admissible in the contentious administrative litigations? The answer is mostly negative. Thus, in contrast to articles 996-1001 from the Civil Procedure Code, the Law no. 554/2004 provided for a specific/special procedure to annul an administrative tool, to adjourn or to order the public authority to issue an administrative act. In an exceptional way, the presiding judge's order can be used in order to remove abusive facts.

Taking all of the above into consideration, the practice of the courts does not provide a common point of view. Thus, some courts consider that the request of the presiding judge's order in the administrative contentious litigations is admissible and others consider such a request as being de plano, inadmissible.

KEY WORDS: *Contentious-administrative litigations, presiding judge's order, Civil Procedure Code, adjournment, inadmissibility, public authority.*

JEL CLASSIFICATION: *K23, K4, K41*

1. PRELIMINARIES

The juridical norms coexist symbiotically with the social relationships that they govern. Nevertheless, the essence of the social relationships resides in their dynamic character, they depend on the necessities of the society from a certain historical period, as

* Student, Business Law – Master Program, Faculty of Law Cluj-Napoca, “Dimitrie Cantemir” Christian University Bucharest, ROMANIA.

well as on the economic and technical development or in other words, on the degree of evolution of the society.

Regarding the elaboration of the juridical rules, the German philosopher Rudolf von Ihering said: "*The lawmaker must think as deeply as a philosopher but he must express himself clearly, like a peasant*".

Thus, the juridical rule must be accessible firstly to those to whom it is addressed, so that they can comply with its provisions.

Moreover, the specialised literature underlined that regardless of the necessity of drawing up new legal rules or regardless of their object, they must satisfy the ideal of justice of that particular society¹.

Consequently, synthetically speaking, the drawing up of juridical rules must ensure a balance between the reflection of reality reflection and the regulation of reality².

The Civil Procedure Code (the Law no. 134/2010) adopted in 2010 and effective since 2013 intends to create a balance between the current social reality and the new rules of civil procedure.

The provisions of the Civil Procedure Code are meant to revive the civil procedure. Among the most important objectives of the Code we mention: the celerity of the justice act, the interpretation and the unitary application of the procedure rules, the celerity of the enforcement of decisions and decrees, all of these leading to the efficiency of the justice act. The new regulation includes new perspectives regarding the presiding judge's order and the Law no. 76/2012 regarding the implementation of the new Civil Procedure Code, modifies, among others, the Law no. 554/2004 in some respects³.

2. CONSIDERATIONS REGARDING THE PRESIDING JUDGE'S ORDER

In the Romanian law, the presiding judge's order was regulated for the first time by the Law-Decree no. 1228/1900 (The Official Monitor no. 281, from March, 15, 1900) which substantially modified the 1865 Civil Procedure Code.

Thus, article 66bis was introduced in the Civil Procedure Code, stipulating the procedure of the presiding judge's order. This procedure was very similar with the procedure regulated by articles 806-811 of the 1806 French Civil Procedure Code⁴.

In 1948 the Civil Procedure Code was republished and the presiding judge's order was regulated by articles 581-582.

Currently, the presiding judge's order is regulated by articles 996-1001 of the 2010 Civil Procedure Code. The current regulation is, from many points of view, identical to the previous one, but it also includes some new doctrinal points of view.

¹ E. M. Fodor, *Norma juridică – Parte integrantă a normelor sociale*, Argonaut Publishing House, Cluj-Napoca, 2003, pp. 63-80.

² G. Boboș, C. Buzdugan, V. Rebreanu, *Teoria generală a statului și dreptului*, Argonaut Publishing House, Cluj-Napoca, 2008, p. 295.

³ For details regarding the impact of the Law no. 134/2010 (the new Civil Procedure Code) upon the contentious administrative litigations, see L. Ungur, *Implicațiile noului Cod de Procedura Civilă asupra litigiilor de contencios administrativ*, in the Review „Fiat Iustitia”, no. 2/2013, pp. 70-84, available at <http://fiatiustitia.ro/ojs/index.php/fi/article/view/130/116> accessed on 10.01.2014.

⁴ For details regarding the history of the presiding judge's order see C. Crișu, *Acțiuni urgente în justiție. Ordonanța președințială*, Juris Argessis Publishing House, Curtea de Argeș, 2002, pp. 14-19.

Among the new issues brought by the present regulation we mention:

- the condition of appearance of right (the color of law) is explicitly regulated. Previously, both the doctrine and the jurisprudence admitted that this condition arises from the transitory character of the presiding judge's order⁵,
- the request for the presiding judge's order can be transformed into a common law request under the conditions of article 1000 of the Civil Procedure Code,
- the means of appeal consist only in the appeal. Consequently, we must remember that the presiding judge's order becomes final once it is pronounced by an appeal court, as the High Court of Cassation and Justice does not adjudicate by means of appeal,
- regarding the adjudicative body, the solutions which had been mentioned in doctrine and jurisprudence were transposed in the new regulation.

The presiding judge's order is one of the most used procedures especially due to its operative character.

The usability of this procedure consists mostly in the procedure's special and derogatory character but also in its scope. Moreover, its field of application is vast and concerns the majority of civil litigations and, as we are going to see, it includes some litigations which are in the competence of the contentious-administrative courts.

The presiding judge's order has an important role of conservation of an apparent right. The specialised literature stated that "*such measures and such an expeditious intervention of justice, cannot take place according to the common civil procedure, but only in the circumstances of an operative and flexible procedure*"⁶.

From another point of view, the procedure of the presiding judge's order is considered as being "*the simplest and the fastest way to solve a situation that otherwise would require a long time and huge expenses*"⁷.

In the present regulation, the conditions to issue the order were not modified, as compared to the previous code. Thus, the conditions⁸ to issue the presiding judge's order are:

- the existence of an emergency (the urgent matters),
- the temporary character (the measures taken through the presiding judge's order are transient),
- unprejudiced merits of the case (the provided measures cannot rule on the merits of the case).

The notion of *emergency* did not receive a legal definition, but the hypotheses that can justify it are provided for: „*to preserve a right that might be prejudiced through delays, to*

⁵ I. Stoenescu, S. Zilberstein, *Drept procesual civil. Căile de atac și procedurile speciale*, Educational Publishing House, Bucharest, 1981, p. 117; G. Boroi, O. Spineanu-Matei, *Codul de procedură civilă adnotat*, 3rd edition, Hamangiu Publishing House, Bucharest, 2011, pp. 853-864; M. Tăbărcă, Gh. Nuta, *Codul de procedură civilă comentat și adnotat cu legislație, jurisprudență și doctrină*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2008, pp. 1494-1513.

⁶ I. Leș, *Proceduri civile speciale*, 2nd edition, All Beck Publishing House, Bucharest, 2003, p. 70.

⁷ C. Crișu, *op. cit.*, pp. 22-23.

⁸ For details see I. Deleanu, *Tratat de procedură civilă*, vol. II, 4th edition, Servo-Sat Publishing House, Bucharest, 2004, p. 375.

prevent an imminent and irreparable damage, to remove the obstacles that might appear in case of an enforcement”⁹.

The temporary character supposes that definitive measures can not be taken through the order, for example the demolishing of buildings. A definitive measure could be taken only if the urgency is well justified and it is meant to remove some abusive acts¹⁰.

Unprejudiced merits of the case (the law appearance): thus the court of law must verify only the *right's appearance*¹¹, avoiding pronouncement regarding the existence of the right and its scope.

Concerning the *unprejudiced merits of the case*, the jurisprudence includes the following observation “*nonetheless, a brief examination of the litigation is authorized by the law and it is even compulsory, both to establish the court's competence to take a transitory measure and for the justice to appreciate which of the parties involved in the litigation has in its favour the appearance of a legal juridical position and justifies a lawful interest to maintain a state as by fact or by right*”¹².

The request of the presiding judge's order is judged by a court that has the competence to rule on the merits. The request can be made even if the merits of the case are subject to a lawsuit.

The request of the presiding judge's order can be judged without summoning the parties involved in the lawsuit.

The order can be subjected to appeal in five days since its pronouncement in case the parties were summoned, respectively from its notification, when the order was issued without summoning the parties¹³.

In the following lines we will analyse to what extent the presiding judge's order can provide for: the annulment of the administrative act, the coercion of the public authority to issue an administrative act, the adjournment of the administrative act and the fulfilling of the obligation to do something.

3. THE PRESIDING JUDGE'S ORDER AND THE ANNULMENT OF THE ADMINISTRATIVE ACT

⁹ Art. 996 alin. 1 Civil Procedure Code.

¹⁰ M. Tăbărcă, *Drept procesual civil*, vol. II, 2nd edition, Universul Juridic Publishing House, Bucharest, 2008, p. 206; B. Mischie, *Ordonanța președințială. Culegere de practică judiciară*, C.H. Beck Publishing House, Bucharest, 2007, p. 103.

¹¹ See V. M. Ciobanu, G. Boroi, T. C. Briciu, *Drept procesual civil. Curs selectiv*, 5th edition, C.H. Beck Publishing House, Bucharest, p. 417.

¹² Supreme Court, civil department, Decision no. 38/1957, in *Repertoriu de practică judiciară pe anii 1952-1969* de I. Mișuță și Al. Lesviodax, Scientific Publishing House, Bucharest, 1969, p. 897-880, nr. 706 *apud* I. Deleanu, *op. cit.*, p. 378.

¹³ For details regarding the regulation of the presiding judge's order in the Civil Procedure Code, see G. Boroi, O. Spineanu-Matei, A. Constanda, C. Negrilă, V. Dănăilă, D. N. Theohari, G. Răducan, D. M. Gavriș, F. V. Păncescu, M. Eftimie, *Noul Cod de procedură civilă. Comentariu pe articole*, Vol. 2. art. 527-1133, Hamangiu Publishing House, 2013, pp. 569-586; C. C. Dinu, *Proceduri speciale în noul Cod de procedură civilă*, Universul Juridic Publishing House, Bucharest, 2013, pp. 160-178; M. Tăbărcă, *Drept procesual civil, vol II. Procedura contencioasă în fața primei instanțe. Procedura necontencioasă judiciară. Proceduri speciale*, Universul Juridic, Bucharest Publishing House, 2013, pp. 745-761; Gh. Piperea, C. Antonache, P. Piperea, Al. Dimitriu, M. Piperea, A. S. Ratoi, A. G. Atanasiu, *Noul Cod de procedură civilă. Note. Corelații. Explicații*, C.H. Beck Publishing House, Bucharest, 2012, pp. 953-961.

According to the Law no. 554/2004, article 18, the administrative court can pronounce the following decisions:

- the Court, solving the plaintiff's request, can entirely or partially annul the administrative act, can order the public authority to issue an administrative act, to issue another one or to do a certain administrative operation,
- besides the situations stated in article 1, paragraph 8, the court has the authority to decide on the legality of the acts and the administrative operations that were the reason for issuing the administrative act,
- in case the request is solved, the court will also decide on the material and moral damages that were caused, if the plaintiff requests it,
- when the object of the action in the contentious administrative matters concerns an administrative contract, depending on the facts, the court may:
 - a) decide the partial or entire annulment of the act;
 - b) order the public authority to conclude the contract that the plaintiff is entitled to;
 - c) constraint one of the parties to fulfil a certain obligation;
 - d) if the public interest demands it, substitute for the consent of one of the parties;
 - e) order the payment of compensations for moral and material damages.

Taking into consideration this regulation, the specialised literature underlined that we are in the presence of an *administrative contentious tribunal of full jurisdiction*¹⁴.

Thus, the administrative contentious court has the competence of complete jurisdiction and it may decide¹⁵: to annul the administrative act, to force the public authority to issue another administrative act or another deed¹⁶, to fulfil an administrative operation, to order the payment of compensations.

The annulment of an administrative act leads to the lack of past and future effects of the administrative act, from the moment when the annulment request is introduced.

The annulment has a permanent character, therefore the illegal act becomes null and void. Thus, the annulment of an administrative act has a permanent character.

It is clear that it is not possible to request the annulment of the administrative act through the presiding judge's order; such a request would be inadmissible. As we mentioned before, the measure taken through the presiding judge's order has a temporary character.

Moreover, the court may not rule on the merits or, the annulment of an administrative act; this would require a deep analysis of the merits, to see if the administrative act is legal and on the other hand if the request for annulment is admitted and the decision was declared immutable, the administrative act is definitively revoked.

¹⁴ E. M. Fodor, *Drept administrativ*, Blue Publishing House, Cluj-Napoca, 2008, p. 336.

¹⁵ For details see E. M. Fodor, *Raporturile juridice date în competența instanțelor de contencios administrativ conform Legii nr. 554 din 2004*, în Al II-lea Simpozion Național de Teoria Generală a Statului și Dreptului. Raporturile Juridice, Argonaut Publishing House, Cluj-Napoca 2006, pp. 161-162.

¹⁶ For the particular situations see E. M. Fodor, *Admisibilitatea acțiunii privind obligarea autorității publice la îndeplinirea unei atribuții prevăzute de lege. Instanța competentă să soluționeze acțiunea*, in the Review „Fiat Iustitia”, nr. 2/2003, pp. 36-47.

In the request of the presiding judge's order, the judge only makes a very brief analysis of the evidence.

After analysing it, the judge will decide the temporary measures that should be taken. Thus, the request of annulling an administrative act through a presiding judge's order is inadmissible. In spite of all these, there were some cases in which the annulment of an administrative act was required using a presiding judge's order. Briefly, the plaintiff requested in a presiding judge's order that the court annul a mayor's decision¹⁷. The action was dismissed as inadmissible.

4. THE PRESIDING JUDGE'S ORDER AND ORDERING THE PUBLIC AUTHORITIES TO ISSUE AN ADMINISTRATIVE ACT

When the public authority does not solve the plaintiff's request or refuses to issue a certain act, the plaintiff has the right to bring an action to the contentious administrative court. By doing so, the plaintiff will request the annulment of the act through which the authority refuses to solve the plaintiff's request and that the authority be ordered to issue the administrative act, or he/she will request only that the authority be ordered to issue the act (in case of administrative silence).

The court shall order the authority to issue an administrative act, according to the provisions of the Law no. 554/2004, articles 1, 8, 11, 18¹⁸. The request that the authority be forced through the presiding judge's order to issue, the administrative act is beyond the specific character of the regulation provided by the Contentious Administrative Law, as this would lead to a decision regarding the merits of the case without any adjudication, which is inadmissible¹⁹.

Moreover, such a measure does not have a transitory character, nor does it comply with the three conditions for issuing the presiding judge's order.

Thus, the request through which the public authority is ordered to issue an administrative act must be made according to the provisions of the Law no. 554/2004, articles 1, 8, 11, 18. The request based on the provisions of articles 996-1001 from the Civil Procedure Code is not admissible.

5. THE PRESIDING JUDGE'S ORDER AND THE ADJOURNMENT OF THE ADMINISTRATIVE ACT

¹⁷ Mehedinți County Court, commercial and administrative contentious department, Decision no. 2326/2009, available at <http://www.jurisprudenta.com/speta/ordonan%C5%A3a-pre%C5%9Fedin%C5%A3ial%C4%83-nu-este-admisibil%C4%83-%C3%AEEn-materia-contenciosului-administrativ-fiind-incompatibil%C4%83-qvs7m/> accessed on 17.11.2013.

¹⁸ E. M. Fodor, *Raporturile juridice...*, pp. 160-161.

¹⁹ Mehedinți County Court, commercial and administrative contentious department, Decision no. 437/2007, available at <http://portal.just.ro/101/Lists/Jurisprudenta/DispForm.aspx?ID=2&ContentTypeId=0x010017854362C029DA4EB7A0C1650A0C0651> accessed on de 18.11.2013.

In order to clarify this problem, we must first of all analyse some issues that concern the procedure of the adjournment of the administrative act, regulated by articles 14 and 15, Law no. 554/2004.

5.1. Brief considerations regarding the adjournment of the administrative act

The activity of the public administration authorities is mainly governed by the principle of legality. According to this principle, the activity of the public authorities must be within the powers conferred by the law. Therefore, the administrative acts which come from central or local government authorities are presumed to be legal. Of course this presumption is relative.

The administrative act is enforceable *ex officio* and, given that it is issued by the public authorities, it is presumed to be valid and authentic²⁰.

The adjournment of an administrative act is the legal operation of temporary cessation of the legal effects of the administrative acts, until the adjournment ceases²¹.

Thus, the adjournment can concern only an administrative act that has not exhausted all its effects. If the request concerned the adjournment of an administrative act that has exhausted its effects, the request would not have an object since the administrative act has fulfilled its purpose²².

Thus, we may say that the adjournment of the administrative acts is an exception to the principle of *ex officio* enforceability of the administrative acts that has a unilateral character²³. Moreover, from the plaintiff's point of view, the adjournment is a preventive measure to counter-balance some juridical effects that are considered to be illegal. We may say that the adjournment is similar to the notion of remedy but it has a transitory character.

The Contentious Administrative Law, through articles 14 and 15, regulates two situations in which the adjournment of the administrative act can be requested.

5.1.1. The adjournment of the administrative act according to the Law no. 554/2004, article 14²⁴

According to article 14, *after the administrative preliminary procedure*, in duly

²⁰ E. Albu, *Dreptul contenciosului administrativ*, Universul Juridic Publishing House, Bucharest, 2008, p. 229.

²¹ See High Court of Cassation and Justice, contentious administrative and fiscal department, Decision no. 2052/2006, available at: <http://www.scj.ro/SCA%20rezumate%202006/SCA%20r%202052%202006.htm> accessed on 18.11.2013.

²² *Ibidem*.

²³ Oradea Appeal Court, the contentious administrative commercial and fiscal department, Decision no. 267/2010, available at <http://www.avocatura.com/speta-1514-contencios-administrativ-si-fiscal--suspendare-executare-ac.html> accessed on 10.11.2013.

²⁴ R. N. Petrescu, *Drept Administrativ*, Hamangiu Publishing House, Bucharest, 2009, pp. 495-498; E. Albu, *Dreptul contenciosului administrativ*, Universul Juridic Publishing House, Bucharest, 2008, p. 229-238; G. Bogasiu, *Legea contenciosului administrativ. Comentată și adnotată cu legislație, jurisprudență și doctrină*, Universul Juridic Publishing House, Bucharest, 2008, pp. 220-238; D. C. Dragoș, *Legea contenciosului administrativ. Comentarii și explicații*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2009, pp. 248-297; I. Riciu, *Procedura contenciosului administrativ*, Hamangiu Publishing House, Bucharest, 2009, pp. 307-324; D. A. Tofan, *Drept administrativ*, vol. II, ed. 2nd edition, C.H. Beck Publishing House, Bucharest, 2008, pp. 370-372; E. M. Fodor, *Drept administrativ*, Blue Publishing House, Cluj-Napoca, 2008, pp. 400-402.

justified cases and for the prevention of an imminent damage, the injured person can request the court to order the adjournment of the enforcement of the unilateral administrative act until the first jurisdiction court gives its decision.

We notice that in this case the adjournment request must be made after the administrative preliminary procedure. Thus, in this case the request must be accompanied by the proof that the administrative preliminary procedure has began.

The adjournment request can be admitted to *prevent the causing of an imminent damage and in duly justified cases*. Through *imminent damage*, we understand the future and predictable damage, or, depending on the case, the serious disturbance of the public authority or public service²⁵ functioning and through *duly justified cases*, we understand the circumstances concerning the state of fact and right that may create a serious doubt regarding the legality of the administrative act²⁶. The two conditions must be cumulatively fulfilled.

Besides these two conditions, another one must be fulfilled, and this is the implicit condition that the attacked act must be an unilateral administrative act with an individual or normative character issued by a public authority, having the power to enforce the law that specifically generates, modifies or ends juridical relationships. Thus, *only the unilateral, individual or normative acts can be adjourned*.

All of the above result in the *cumulative conditions* in which the adjournment of the administrative act provided for in the article 14 can be requested:

- the plaintiff must have fulfilled the preliminary administrative procedure or the hierarchical recourse,
- the act, whose adjournment is requested, must be an individual or normative act and be the object of the judgement of the merits in the contentious administrative matter,
- the proof of preventing *an imminent damage and in duly justified cases* must be produced.

The decision through which the adjournment is *ope legis* enforced by law and the administrative act cannot be enforced until the adjournment period is over. According to the article 14, paragraph 1, the maximum duration of the adjournment lasts until the merits have been adjudicated by the court.

If the adjournment request was admitted during the preliminary request, and as a consequence of bringing the action to court, the request for the adjournment of the administrative act was also admitted, the adjournment will be extended by right, even if the injured part did not ask this²⁷.

The court can solve the request only if the parties were summoned.

According to the Law no. 554/2004, article 14, the decision through which the request for adjournment was admitted or denied can be attacked with recourse, within five days

²⁵ Art. 2 alin. (1) lit. s) of the Law no.554/2004.

²⁶ Art. 2 alin. (1) lit. t) of the Law no.554/2004.

²⁷ E. M. Fodor, *op. cit.*, 2008, p. 401.

since its notification. The recourse cannot be stayed, so if the request was admitted, the effects of the adjournment can be seen during the recourse.

In case the adjournment request was admitted, the injured parties have the obligation to bring an action for the annulment of the injuring act, within sixty days. If the annulment action is not introduced in this time interval, the adjournment ends by right²⁸.

The period of sixty days begins since the decision through which the adjournment request is admitted becomes irrevocable. It is important to remember that it is impossible to introduce several subsequent requests of adjournment for the same purpose.

If the authority that issues the adjourned act issues another act having the same content, this act is also adjourned *ope legis*.

5.1.2. The adjournment of the administrative act according to the Law no. 554/2004, article 15

According to article 15, the adjournment of the unilateral administrative act can be requested by the plaintiff, if the provisions of article 14 are fulfilled, that is, the prevention of an imminent damage and in duly justified cases, through the request addressed to the court to partially or entirely annul the administrative act.

In this case the court can decide to adjourn the administrative act until the case is definitely adjudicated. The request for adjournment can be made at the same time with the main action of annulment or separately.

The provisions regarding the adjournment request, the effects of the adjournments, the legal attack are also applicable to the adjournment request made during the lawsuit.

5.2 Can an administrative act be adjourned by a presiding judge's order?

An interesting issue that has appeared in practice is the following: can an administrative act be adjourned through the procedure of the presiding judge's order?

In this respect, professor I. Deleanu considers that the presiding judge's order has no application in the contentious administrative courts.

Thus, the presiding judge's order has no application in the contentious administrative courts "*not because the content of the administrative contentious would be inconsistent through definition with the presiding judge's order, neither because the administrative contentious courts would be and would function in a different way compared with the other courts, but for the reason that the Law no. 29/1990 (currently the Law no. 554/2004), organizes another procedure for the resolution of some emergency situations*"²⁹.

To give more arguments, we must firstly consider as a starting point, the specific character of the public law juridical relationships³⁰. In these juridical relationships, the parties are not on equal juridical positions but on juridical subordination positions³¹.

²⁸ Art. 14 alin. (1) of the Law no.554/2004.

²⁹ I. Deleanu, *op. cit.*, p. 382.

³⁰ See E. M. Fodor, G. A. Fodor, *Public Law and Private Law within Administrative Law*, in the Review „Juridical Current”, no. 1/2013, pp. 78-79.

³¹ For the particular situations see E. M. Fodor, *Public services and private law*, in the Review „Acta Universitatis Lucian Blaga. Iurisprudentia”, no. 2/2012, pp. 228-240.

The acts of the public administration are obligatory for those to whom they are addressed. As a consequence, generally speaking, the issues that belong to the public administration activity (mainly the issuing, modification, enforcement and suspension of the administrative acts) got a certain resolution procedure through the Law no. 554/2004. The juridical provisions of the procedure as stated in the Contentious Administrative Law, articles 14 and 15 are substantially different as compared with the presiding judge's order procedure.

The regulation provided through the Law no. 554/2004 is stricter, as the legislature defines the majority of the terms and expressions used, including the "duly justified cases" and "the prevention of an immediate damage". As we mentioned, the "urgent matters" were not defined by the presiding judge's order.

Another important difference concerns the summoning of the parties. If for the presiding judge's order the request can be made without summoning the parties, for the request based on the Law no. 554/2004, the summoning of the parties is mandatory³². The procedure of the presiding judge's order does not include a preliminary procedure while in the case of the procedure regulated by the Contentious Administrative Law, the preliminary procedure provided by article 7 is mandatory. The presiding judge's order can only be subjected to appeal while the administrative contentious' adjudication only to recourse.

Nevertheless, the jurisprudence does not provide an unitary point of view. Thus, some courts consider the request of the presiding judge's order for the adjournment of an administrative act as being admissible and others as inadmissible. Thus, in a case, the court annulled the decision of taxation issued by the Buzău Court of Auditors through the presiding judge's order, the court considered that the procedure of the presiding judge's order is compatible within the contentious administrative procedure and the administrative act can be adjourned³³. The adjournment was attacked by recourse, which was admitted and the court modified entirely the solution and according to the merits of the case rejected as inadmissible the request of the presiding judge's order³⁴.

In another case, the adjournment of a fiscal claim was ordered through the presiding judge's order³⁵.

³² Art. 13 of the Law no.554/2004.

³³ Buzău County Court, Decision no. 1052/2010, available at http://www.studijuridice.ro/resurse_juridice/jurisprudenta/jurisprudenta_romania/16687-admisibilitatea-ordonantei-presedintiale-pentru-suspendarea-executarii-actului-administrativ-contestat.html accessed on 11.11.2013.

³⁴ Ploiești Appeal Court, the contentious administrative commercial and fiscal department, Decision no. 1316/2010, available at http://www.studijuridice.ro/resurse_juridice/jurisprudenta/jurisprudenta_romania/16687-admisibilitatea-ordonantei-presedintiale-pentru-suspendarea-executarii-actului-administrativ-contestat.html accessed on 22.11.2013. Also see Gorj County Court, Decision no. 539/2012, available at <http://legeaz.net/spete-contencios/ordonanta-presedintiala-ordonanta-presedintiala-539-2012> accessed on 18.11.2013. C. A. Timișoara, the contentious administrative commercial and fiscal department, Decision no. 545/2002.

³⁵ Ploiești Appeal Court, the contentious administrative commercial and fiscal department, Decision no. 51/2005.

The recourse was adjudicated by the High Court of Cassation and Justice³⁶ which admitted it and rejected the request as being inadmissible³⁷.

Also, the presiding judge's order cannot be used to adjourn building authorisations³⁸. Nevertheless, the adjournment of some construction works that do not need or can be carried out without an administrative authorization can be ordered through the presiding judge's order³⁹.

Concerning the practice of the High Court of Cassation and Justice, it is important to know that this court has an unitary practice; it considers that the request of the presiding judge's order for the adjournment of an administrative act is inadmissible⁴⁰.

Thus, in contrast to articles 996-1001 of the Civil Procedure Code, article 14 of the Law no. 554/2004 stipulates a *special procedure* specific for the adjournment of an administrative act.

Thus, because Law no. 554/2004 is a special law that waives from the general norm (the Civil Procedure Code), the provisions that regulate the presiding judge's order procedure become inapplicable⁴¹ and the adjournment of administrative act can not be disposed. The request of adjourning an administrative act based on articles 996-1001 of the Civil Procedure Code must be considered *inadmissible*⁴².

³⁶ It is important to mention that unless other courts, the High Court of Cassation and Justice, has a unitary practice regarding the inadmissibility of the adjournment of the administrative act through a presiding judges' order; see G. Boroï, O. Spineanu-Matei, *op. cit.*, p. 860; M. Tăbărcă, Gh. Buta, *Codul de procedură civilă comentat și adnotat cu legislație, jurisprudență și doctrină*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2008, p. 1504.

³⁷ High Court of Cassation and Justice, contentious administrative and fiscal department, Decision no. 4189/2005, available at <http://www.scj.ro/SCA%20rezumate%202005/SCA%20r%204189%202005.htm> accessed on 15.10.2013.

³⁸ To the contrary, see Cluj Appeal Court, administrative contentious and fiscal contentions department, Decision no. 4690/2004, quoted by G. Boroï, O. Spineanu-Matei, *op. cit.*, p. 855.

³⁹ B. Mischie, *op. cit.*, p. 17.

⁴⁰ G. V. Bîrsan, L. Sârbu, B. Georgescu, *Înalta Curte de Casație și Justiție. Jurisprudența Secției de contencios administrativ și fiscal pe anul 2007, semestrul II*, Hamangiu Publishing House, Bucharest, 2008, pp. 171-175; G. V. Bîrsan, L. Sârbu, B. Georgescu, *Înalta Curte de Casație și Justiție. Jurisprudența Secției de contencios administrativ și fiscal pe anul 2006, semestrul I*, Hamangiu Publishing House, Bucharest, 2006, pp. 153-154; G. V. Bîrsan, L. Sârbu, B. Georgescu, *Înalta Curte de Casație și Justiție. Jurisprudența Secției de contencios administrativ și fiscal pe anul 2006, semestrul II*, Hamangiu Publishing House, Bucharest, 2007, p. 390.

⁴¹ Bucharest Appeal Court, administrative contentious and fiscal contentious department, Decision no. 117/2010; High Court of Cassation and Justice, administrative contentious and fiscal contentious department, Decision no. 1648/2005; Galați Appeal Court, administrative contentious and fiscal contentious department, Decision no. 152/2010; Craiova Appeal Court, administrative contentious and fiscal contentious department, Decision no. 85/2010; Bucharest Appeal Court, 7th department, administrative contentious and fiscal contentious department, Decision no. 811/2010; Cluj Appeal Court, commercial department of administrative and fiscal department, Decision no. 1469/2006, in L. Neagu, *Suspendarea executării actului administrativ – Practică judiciară*, Hamangiu Publishing House, Bucharest, 2011, pp. 33-47.

⁴² See I. Leș, *Codul de procedura civilă. Comentariu pe articole*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2007, p. 1289; *Idem*, p. 1295.

6. THE PRESIDING JUDGE'S ORDER AND THE OBLIGATION TO DO (SOMETHING)

If up to this point we showed that the presiding judge's order cannot be used in order to achieve the annulment and the adjournment of the administrative act or ordering the public authority to issue an administrative act, in the case of the obligation to do (something), the issue must be considered differently.

In jurisprudence, it has been constantly underlined that through the "special procedure of the presiding judge's order, in an exceptional way, the obligation to do (something) can be ordered, on the condition that its purpose is to re-establish a situation prior to the accomplishment of an abusive act and not to create a new situation that did not exist before"⁴³.

In this respect, the High Court of Cassation and Justice stipulated that "in the situation in which the case does not have as an object the adjournment of an administrative act but temporary measures, such as enforcing a temporary obligation to one of the parties until the merit of the case is adjudicated, the request of the presiding judge's order is admissible"⁴⁴. In this case, the plaintiff requested that the court force the defendant, the Romanian National Integrity Agency to temporarily remove, until the final decision of the contentious administrative court, the postings regarding the plaintiff's incompatibility state⁴⁵ from their official website.

7. CONCLUSIONS

Taking into consideration all of the above, we notice that we can make the distinction between a situation of principle and an exceptional situation. Therefore, in principle, the presiding judge's order is not admissible in contentious-administrative litigations if the plaintiff seeks to annul an administrative act, to adjourn or to order the public authority to issue an administrative act. In an exceptional way, the presiding judge's order can be used for the removal of abusive facts.

⁴³ Oradea Appeal Court, the contentious administrative commercial and fiscal department, Decision no. 325/CA/2008, available at <http://portal.just.ro/35/Lists/Jurisprudenta/DispForm.aspx?ID=212> accessed on 18.11.2013; See Bucharest Court, third civil department, Decision no. 870/1993, in B. Mischie, *op. cit.*, p. 6; Bucharest Appeal Court, fourth civil department, Decision no. 1045/1995, in B. Mischie, *op. cit.*, p. 22; See M. Tăbărcă, *Drept procesual civil*, vol. II, 2nd edition, Universul Juridic Publishing House, Bucharest, 2008, p. 206.

⁴⁴ High Court of Cassation and Justice, contentious administrative and fiscal department, Decision no. 2462/2012, available at <http://www.scj.ro/SCA%20rezumate%202012/SCA%20dec%20r%202462%202012.htm> accessed on 15.11.2013.

⁴⁵ *Idem*, „Generally speaking, the presiding judge's order is admissible when the merits of the case are not circumscribed to Law 540/2004, art. 14 regarding the adjournment of the unilateral administrative act, as there is no incompatibility between this procedure and the contentious administrative one, when the case does not have as an object the adjournment of the administrative act but transitory measures such as the enforcement of a transitory obligation to one of the parties until the merits of the case are adjudicated” (High Court of Cassation and Justice, contentious administrative and fiscal department, Decision no. 2462/2012).

In conclusion, the presiding judge's order is not, *de plano*, incompatible with the procedural legal system established by the Law no. 554/2004, but only in those situations in which the Law no. 554/2004 imposes another procedure, distinct and special, compared with the presiding judge's order.
