

THE LEGALITY CONTROL MADE BY THE PREFECT'S INSTITUTION ON THE ACTS OF THE LOCAL PUBLIC ADMINISTRATION AUTHORITIES

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ABSTRACT: *The prefect may directly contest, in front of the administrative legal department, the acts issued by the local public administration's authorities, if they find them illegal; the action is drawn within the time foreseen by the article 11 paragraph (1), from the law of the administrative legal department, time frame starting to flow from the moment the prefect communicates the act and in the terms foreseen by law.*

Article 124 of the Law nr. 215/2001 – Law of local public administration, republished, with the ulterior alterations and completions, regulates the law of local councils to „give in free use, for a limited time, the mobile assets and the real estates public or private, local or county property, according to the case, to the companies with no lucrative purpose, that develop the charity or public utility or public services activities”.

From the content of the legal dispositions listed above it clearly results, that the local public authority decides, in exercising its attributions, only through decisions, in all fields attributed through law.

The court of law has the duty to delimit the categories of these decisions, according to their legal nature of authority administrative acts, of acts of civil law, of commercial law etc, with the consequence of delimiting the material competence of the administrative legal department related to other courts.

In order for the decisions adopted to constitute adopted acts/ issued as public power, even though to be censored in the conditions of the administrative legal department, these must aim the public or public property.

KEY WORDS: *Prefect; administrative acts; legality control; public property; private property*

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The law issue subject to analysis aims the application and interpretation of the legal disposals, considering the jurisprudence relevant for the matter out of which divergent points result related to the competence of the Prefect to attack in court the acts issued by the local public authorities, considered to be issued in an illegal manner.

Therefore, by the HCL nr. 122 and 123/29.11.2013 adopted by the Sebiș Local Council the sell on public auction was decided, organized under the law conditions,

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regarding the land originated from the Land Book 300990 Sebiș representing Pasture, plot 2 with the surface of 71.824 square meters, namely pasture plot 3 with the surface of 15.669 square meters, private property of the city of Sebiș.¹

In exercising the administrative tutelage,² the plaintiff Prefect of the county of Arad has drawn action in administrative court, invoking the transgression of the orders contained in OUG nr. 34/2013 regarding the organization, administration and exploitation of the permanent grass plots, invoking that the lands that have this destination cannot be taken out, for good or temporary, of the agricultural circuit of the grass plots except for certain investments categories, which are not found in the presentation of reasons on which the appealed decisions were grounded, and, on the other hand, invoking the necessity that the said lands stay available for the local commission of land fund, for finalizing the restitution process regulated by the Law nr. 165/2013.³

The illegality of the adopted decisions aim the lack of observance of the provisions of the article 1 paragraph 2 of the OUG nr. 34/2013 - regarding the organization, administration and exploitation of the permanent grass plots and for the alteration and completion of the Law of land fund nr. 18/1991, the permanent grass plots, hereinafter grass plots, are agricultural plots of pasture and meadows, natural or man cultivated, used for the grass production or for other fodder plants, which have not been included for at least 5 years in the crops rotation system and that are used for animal feeding and for fodder production, with the observance of the good agricultural and environmental conditions, and of the article 4 of H.G. nr. 1064/2013 regarding the approval of the Methodological norms for the application of the provisions of the Government emergency ordinance nr. 34/2013, it foresees that the „administration of the grass plots found in the public and/or private domain of parishes, cities, towns and of the city of Bucharest is made by the local councils, respecting the legal provisions”.⁴

The culprit invoked himself the provisions of the Law 215/2011 regarding the local public administration, which regulates the competence of the local council which adopts the decisions related to the selling, concession or rental of the private property assets pertaining to the parish, city or town, according to the case, under the law conditions, also claiming that the orders of this organic law are mostly required in respect to the provisions of OUG nr. 34/2013.

Another reason related to the illegality of the Decision nr. 122/29.11.2013 and of the Decision nr. 123/29.11.2013 adopted by the Sebiș local council invoked by the Prefect in the exercised case is that, in compliance to the provisions of the article 6, paragraph 1 of the Law nr. 165/2013 regarding the measures for finalizing the restitution process, in nature or by equivalent, of the estates abusively taken during the time of the communist regime in Romania, "T? time of 180 days from the constitution day, the commission foreseen by the art. 5 draws, according to the norms of application of this law, the status

¹ Civil sentence nr. 214 of 09 .02 .2008...pronounced by the Court of Arad in file. Nr. 5332/108/2009, peremptory and irrevocable through the Decision nr. 1027 of 29.09.2009 pronounced by the Timișoara Court of Appeal ;

² Law nr. 340/2004 regarding the prefect and the prefect institution, published in the Official Gazette of Romania, nr. 658 of 21st July 2004 ;

³ Law nr. 165 of 2013, published in the Official Gazette nr. 278 of 17th May 2013;.

⁴ Government Emergency Ordinance nr. 34 of 2013 published in the Official Gazette nr. 474 from 26th May 2015;.

of the agricultural lands, with or without investments, and forestry ones, found in the state public or private domain or, according to the case, of the territory administrative unit, which may be the object of reconstitution of the ownership right on each territorial administrative unit.

Thus, the said lands should have been the object of the Law nr. 165/2013, whose term foreseen at article 6 paragraph 1 was extended, in the sense of institution of another term of 180 days, term which on the day when the decisions were adopted was not due, and the land surfaces – pasture – should have remained available to the local commission of land book, for solving the restitution requests, in nature, of the estates abusively taken during the communist regime.

In this case, the provisions of OUG nr. 34/2013 and the provisions of the Law nr. 165/2013, as special laws, are applicable to the two decisions, and not the provisions of the article 36 paragraph 2 letter c, paragraph 5 letter b and of the article 123 paragraphs 1 and 2 of the Law nr. 215/2001, based on which the administrative acts were grounded.⁵

Furthermore, the administrative acts represent the legal way of law enforcement and its actual enforcement, between the administrative act and the law a subordination report is set, so that it is necessary that the administrative act is issued in compliance to the law.

According to the public authority issuing the administrative act, it was invoked that the decisions of the local council appealed in this case were not authority administrative acts in the acceptance of the Law 554/2004 therefore, having a civil nature, were not subject to the control of the administrative court, but these aspects prefigure less an exception of lack of competence of the administrative legal courts, and rather an exception of inadmissibility based on the dispositions of the article 5 paragraph 2 of the Law nr. 554/2004, that set that, on the administrative court cannot be appealed the administrative acts for whose alteration or annulment is foreseen, by the organic law, another legal procedure, because, in fact, as long as we're talking about acts by which it is decided on certain assets found in the private domain of the territorial administrative unit, they have a civil nature, therefore appealing them in court should be made according to another proceeding, and not according to the one regulated by the Law nr. 554/2004.

First, as principle, we think that in this case we are not talking about a conflict between the dispositions of Law 215/2001 regarding the local public administration and the provisions of OUG nr. 34/2013, regarding the organization, administration and exploitation of the permanent grass plots, approved with alterations by the Law nr. 86/2014, because the Law nr. 215/2001 contains norms with general feature, regarding the organization and functioning of the local council, as well as its attributions, holding, basically, that the deliberative public authority represented by the local council decides, in exercising the attributions that it has, only through decisions, in all the areas granted by law, and, on the other hand OUG nr. 34/2013 regulates the status of permanent grass plots and the measures needed for their administration and exploitation and, as long as it does not regulate the same area, we can't talk about the existence of a legal norm of common law or of a derogatory norm in the same matter, so that the conflict of laws is incident.

⁵ Law nr. 215 of 2001 regarding the local public administration, republished in the Official Gazette of Romania nr. 123 of 20th February 2007.

On the other hand, but in the same order of ideas, we remind the fact that, according to the dispositions of the article 5 paragraph 2, together with the provisions of the article 1 paragraph 1 and of the article 2 paragraph 1 letters c and f of the Law nr. 554/2004, we state that, it is the essence of the administrative court that the litigation submitted to the competent court was born from the conclusion, or, according to the case, the refuse to conclude an administrative act and, according to article 3 paragraph 1, the prefect may directly appeal in front of the legal court the acts issued by the authorities of the local public administration, if found illegal.⁶

From the perspective of the categories of organs whose acts are subject of the legality control of the prefect and may be the object of a trial in the administrative court, it must be held that not all acts of the local administration are appealed in front of the courts of administrative court when illegal.

That being, we notice that in the article 123 of the Constitution of Romania there are references to the acts of the local, county council, and of the mayor, thus only the decisions of the local council, the decisions of the county council, and the orders issued by the mayor stay in the area of the legality control exercised by the prefect. We find the same reference defined by the legislator in the article 19 paragraph 1 letter e) of the Law nr. 340/2004.⁷ Which refers to the "*acts issued by the authorities of local public administration*".

The acts exempted from the legality control are expressly and mandatorily foreseen in the article 126 paragraph (6) of the Constitution and by the provisions of the Law nr. 554/2004 of the Administrative court, this is why we say that the legislator did not expressly grant to the prefect the right to appeal, in administrative court, the acts issued by the president of the county council.

Thus, we remind that the case in administrative court has as object the acts adopted/ issued within some legal reports of administrative law or the refusal to issue such acts.

The administrative act is defined, in the article 2, paragraph (1) letter c) of the Law nr. 554/2004, thus resulting that the administrative act represents the legal category of acts by which the unilateral will of the public authority is expressed, on the ground and for the realization of the public power, having a mandatory feature towards individuals and companies whose activity gets under its incidence, as it has a mandatory feature for the issuer himself, which involves its default execution, without the fulfilment of any formality for enforcement.⁸

Withal, the administrative authority act is issued in compliance to the law and for the actual organization of the law and of other normative acts, with a superior legal force and

⁶ Art. 7 paragraph 5 of the Law nr. 554/2004, was altered by point 9 of the article I, of the Law nr. 262/2007, and has the following content: "For the actions submitted by the prefect, the ombudsman, the Public Ministry, National Agency of Public Civil Servant or those that refer to the requests of injured persons through ordinances or orders from ordinances, as well as for the cases foreseen by article 2 paragraph 2 and article 4, the previous complaint is not mandatory.

The text foresees that the prefect's attribution to "verify the legality of the administrative acts of the county council and of the mayor's acts, the text foresees that the prefect's attribution to verify the legality of the administrative acts of the county council and of the mayor

⁷ The text foresees that the prefect's attribution to "verify the legality of the administrative acts of the county council and of the mayor's acts.

⁸ Law n. 554 of 2004 of the administrative court, published in the Official Gazette of Romania

is subject to a special legal regime, of administrative law, made from a complex of rules regarding the form, the procedure for adaptation/ issuance, terms of validity and control exercised on it.

By administrative acts we intent unilateral acts with individual or normative feature issued by a public authority in regime of public power for the organization of actual law enforcement which gives birth, alters or extinguishes legal reports.

It pertains to the administrative act the condition according to which it was issued in regime of public power, meaning in regime of super-ordination of the issuing authorities in respect to the one it addresses to.

In order to set the legal nature of the decisions issued by the local councils, as organs of the local public administration, the dispositions of the article 36 paragraph 1 of the Law nr. 215/2001 republished must be analysed, which foresee the general attribution of the local council to have initiative and to decide, under law, in all the local interest issued, except for those when the law gives the competence to the authorities of the local or central public administration.

In article 36 paragraph 2 of the Law nr. 215/2001 republished are enumerated the categories of attributions exercised by a local council, at letter c of the article also being foreseen the attributions regarding the administration of the public and private domain of the parish, city or town.

Article 36 paragraph 5 letter a of the same law foresees that, in exercising the attributions foreseen at paragraph 2 letter c, the local council decides to give in administration, concession or rental the assets public property of the parish, city or town, according to the case, as well as the public services of local interest, under law, and at the letter b of the same paragraph it is said that it decides the sell, concession or rental of the assets private property of the administrative territorial units.

According to article 45 paragraph 1 of the same law, in exercising the attributions devolving upon the local council, it adopts decision, with the vote of the majority of the present members, except for the cases when the law or the council's organization regulation demands another kind of majority.

Article 115 paragraph 7 of the Law nr. 215/2001 republished foresees that the decisions of the local council are subject to the legality control of the prefect under the conditions of the law regulating its activity.

In exercising the attributions hold by the local councils, also the article 123 paragraphs 1 and 2 of the Law nr. 215/2001 republished must be highlighted, which foresees their right to decide that the assets belonging to the public or private domain, of local interest, should be given into administration to the self-governing administrations and public institutions, should be given in concession or rented, stating that they decide about the purchase of certain assets or the selling of assets that are part of the private domain of local interest, under law.

Article 124 of the law regulates the right of the local councils to give in free use, for a limited time, mobile assets and estates local public or private property, to companies without lucrative purpose, that develop charity activities or public utilities or public services.

From the content of the listed legal dispositions it results that the local public authority decides in exercising the attributions devolving upon itself only through decisions, in all the areas of activity conferred by law, but that does not mean that all decisions adopted in

compliance to article 36 of the Law nr. 215/2001 are administrative acts, in the meaning given by article 2 paragraph 1 letter c of the Law nr. 554/2004, but there must be a delimitation of these decisions, according to their legal nature, into administrative acts of authority, or of acts of private law (civil or commercial).

In order to determine the legal nature of the appealed decisions, we started from the definition given to the administrative act through article 1 paragraph 1 letter c of the Law nr. 554/2004, in the sense that it is issued by one side, in regime of public power, for the law enforcement, by which are born, altered or extinguished legal reports, being assimilated to this category of acts also the contracts concluded by public authorities that have the object to improve the assets public property, execute the assets of public interest, to render public services or public activities.

So, in order for the decisions of local councils to constitute acts issued in regime of public power, therefore subject to censorship under the conditions of the administrative court, they must aim public interest or public property, conditions not reached in this case, as long as the assets whose selling was approved by the said decisions are part of the private domain of the city X. which thus exercises its attributions of owner, observing the procedural norms contained in the Law nr. 215/2001.

As long as this legal requirement is not reached, deducted from article 2 paragraph 1 letter c of the Law nr. 554/2004 altered, the decision of the local council may not be appealed in the procedure regulated by the Law nr. 554/2004 due to the fact that it regards legal reports of other nature than the public law, known being that a local council also has attributions in other areas of law, as it has resulted from the content of the legal dispositions listed by the Law nr. 215/2001 republished, the local public authority being also authorized to enter in reports of civil, commercial and other types of law in issues of local interest of the administrative territorial unit, which is a public law person with full legal capacity and own patrimony, according to article 21 paragraph 1 of the Law nr. 215/1002 republished.

A legal argument that leads to the conclusion of existence of two categories of decisions issued by the local councils, according to their legal nature, is also constituted by article 121 paragraphs 1 and 2 of the Law nr. 215/2001 republished, which expressly foresees that the private domain assets of the administrative territorial units are subject to the dispositions of common law, unless the law foresees differently.

So, the decisions of the local councils that aim the private domain are not acts of administrative law and cannot be appealed in administrative court.

From the content of the legal dispositions listed above it clearly results that the local public authority decides, in exercising its attributions, only through decisions, in all areas conferred by law.

In the context of the legal dispositions in the matter of the administrative court, we think that it devolves upon the trial court to delimitate the categories of these decisions, according to the legal nature, in administrative acts of authority, acts of civil law, acts of commercial law etc., with consequence of delimitation of the material competence of the court of administrative court in respect to other courts.

In order for the 2 adopted decisions to constitute acts adopted/ issued in regime of public power, therefore subject to censorship under the administrative court, they must aim the public interest or public property, because the prefect – public authority aims the

defence of public order and the status of legality, therefore the protection of the public legitimate interest.

Considering the fact that this legal requirement is not reached, deducted from the content of article 2 paragraph (1) letter c) of the Law nr. 554/2004 – Law of administrative court, with the ulterior alterations and completions, the 2 decisions could not have been appealed at the court of administrative court, because both decisions aim different nature legal reports than the one of public law, being known that any local council also has attributions in other law areas, as it results from the content of the legal dispositions listed by Law nr. 215/2001 – Law of local public administration, republished, with the ulterior alterations and completions, the Local Council also being authorized to enter in reports of civil, commercial and other types of law, in the issues of local interest of the administrative territorial unit, which is, according to the provisions of the article 21 paragraph (1) of the Law nr. 215/2001 – Law of local public administration, republished, with the ulterior alterations and completions, public local legal person with full legal capacity and own patrimony.

In conclusion, seeing that the appealed decisions of the council aim the private domain of the city, it does not result the legal ground in the virtue of which the Prefect's action may be admitted, drawn under the conditions of the article 3 of the Law nr. 554/2004, being incident the dispositions of the article 5, paragraph 2 of the Law nr. 554/2004.

Currently, the prefect is entitled/ has the possibility and not the duty to request to the local public administration authorities to analyse again some of their administrative acts, stating that the said authorities may or may not give course to the prefect's request, may have a different point of view, which in the end, with delays, will lead always to the appeal of the acts considered illegal in the administrative court, the court of administrative court being the one to decide about their legality.

It was found that in many cases the authorities of the local public administration, reanalysing, based on the notifications made by the prefect, for the said act, it was altered, completed or even revoked, thing considered beneficial for establishing the status of legality that the activity of the local administration assumes.⁹

⁹ On the list of the Court of Arad several actions of the Prefect of the county of Arad were filed, by which the annulment of the decisions issued by the local councils was requested, decisions thought to be illegal. Examples of actions registered in the files: 593/108/2015; 198/108/2015; 197/108/2015; 196/108/2015; 195/108/2015; 157/108/2015; 28/108/2015; 5583/108/2014; 5463/108/2014; 5329/108/2014; 5207/108/2014; 5205/108/2014; 5191/108/2014; 5190,4960, 4907/108/2014; 3103/108/2014; 4162/108/2014; 1724/108/2014.

Particularity; 1. If during the trial the culprit has proceeded to the revocation of the adopted decision, the prefect's action was rejected (file 5583/108/2014), being found that in that cause the decision lacks its legal effects, therefore it does not reach the requirements from article 1 paragraph 1 of the Law nr. 554/2004, for example it was hold the civil sentence nr. 280/06.09.2007, published in the Gazette of Jurisprudence – 2007.

Thus, through the civil sentence nr. 174 of 25th February 2015, pronounced in the file nr. 5096/108/2014 it was held that the Order nr. 1988/2005 of the Mayor of Arad Municipality, through which compensations were granted for the land plots and buildings that could not be returned in nature or in equivalent; were not enforceable within maximum 3 years from their communication to the person entitled, in compliance to article 25 paragraph 6 of the Law nr. 10/2001, and since in the meantime legislative alterations intervened, brought by the Law nr. 165/2013 which foresaw that for finalizing the restitution procedure, prior to the documentation, after the prefect performed the legality control, this control was not performed in 2013 since the two dispositions were transmitted/ received, nor until the day the action was registered, in 2015 (*more than 2 years!?*) (article 21 paragraph 3 of the Law nr. 165/2013: *The dispositions of the authorities of the local public administration issued in compliance to Law nr. 10/2001, republished, with the ulterior alterations and completions, are transmitted to the Secretariat of the National Commission, after the exercise of the prefect's legality control.*)

As far as the due term in which the control of legality should be exercised from the day of issuance/ communication of the administrative act, we state that there is no legal regulation about this term; however, as long as according to the provisions of article 11 paragraph 1 of the Law 554/2004 the prefect may appeal in court the administrative act within 6 months from its issuance or communication; especially since the duty to forward the acts to the prefect is regulated by law, we think that the legality control should derive as a duty of control exercise in a time that should be properly set by law, precisely for accountability. Given that the prefect – public authority aims the protection of public order and of the legality status, therefore to protect the public legitimate interest.

Any administrative control on the activity of the local public authorities must normally consider only the observance of the legality and of the constitutional principles (Popescu , 1999).

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