THE PRELIMINARY PROCEDURE IN THE ADMINISTRATIVE CONTENTIOUS

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Abstract

The right to notify the court is not an absolute right, it can be limited by law to the extent that it does not limit the access to a court.

The free access to justice is realized only in respect of the equality of citizens before the law and the public authorities, so that any exclusion which would signify breaking the equality of legal treatment is unconstitutional.

The absence of the procedure can be invoked through a background exception, the preliminary procedure being a condition for the exercise of action, it is preemptory/dirimated because, its admission has as a result the annulment of the lawsuit and is relative because it can be invoked only by the defendant by contestation under the penalty of forfeiture.

Admission or rejection of the exception by the court or failure to be resolved constitute grounds for appeal or recourse.

By establishing preliminary conciliation procedure, the legislature wished to put into practice the principle of speeding up litigation between the parties - more prominent in commercial matters - and to relieve the work of the courts. The role of procedural rules, of establishing the procedure is to regulate an extrajudicial procedure that provides the parties an opportunity to agree on any claims of the applicant, without the involvement of the competent judicial authority. To these major reasons, conditioning the referral of the court, by going through the conciliation procedure with the opposing party can not be qualified as a violation of access to justice in the sense prohibited by the constitutional reference, as long as the interested party may apply to the court with the request for summons.

Keywords: *preliminary procedure, exception, Administrative Contentious, Court, request for summons*.

Any person who considers himself harmed in his legitimate right or a legitimate interest by a public authority through an administrative act or by failure to solve within the statutory period of an application, may appeal the contentious administrative court[2] competent for the recognition of the claimed right or legitimate interest and repaying the damage that was caused. The legitimate interest can be both private and public[3].

It can appeal the contentious administrative court and injured party in his legitimate right or a legitimate interest by an individual administrative act, addressed to another subject of law[4].

The preliminary procedure provided for by art. 7 of Law no.554 / 2004 on administrative litigation[1] stipulates that, before addressing the contentious administrative

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[2] Administrative Court - the activity of dispute by the courts of administrative court competent authorities according to the organic law of disputes in which at least one of the parties is a public authority and the conflict was born from either the issue or the conclusion, as the case may be, of an administrative act within the meaning of this law either of the Strasbourg court at the end of the lawful term times from Unjustified refusal to resolve an application relating to a right or to a legitimate interest.

[3] injured person - any person holding a right or a legitimate interest injured by a public authority through an administrative act or by failure to solve of an application, within the statutory period; under this law, they are treated the injured person and the group of individuals without legal personality, holder of subjective rights or legitimate interests in private and social bodies claiming injury by the administrative act under either a legitimate public interest or rights and interests of certain individuals determined

[4] administrative act - act unilaterally with individual or normative nature issued by a public authority, in a public power, to organize law enforcement or law enforcement in concrete, which creates, modifies or extinguish legal relations; are administrative acts which, under this law, also contracts from public authorities that that concern the the enhancement of public property, works of public interest, public services, public procurement; may be provided by special laws and other administrative contracts subject to the jurisdiction of administrative courts

court, the person who considers himself harmed in his legitimate right or a legitimate interest by an individual administrative act must request the issuing public authority or hierarchically superior authority (prior complaint), if any, within 30 days from the date of the document, to revoke, in whole or in part thereof. Are assimilated to unilateral administrative provisions unjustifiably refusing to resolve a request regarding a right or a legitimate interest or, where appropriate, failing to respond to the applicant within the statutory period, but in this case the prior complaint is not mandatory.

The prior complaint is defined in Article 2 paragraph 1 letter j) of the Law no.554 / 2004 as the demand requesting the issuing authority or hierarchically superior, as applicable, to review of an administrative act with individual or normative character within the meaning of revocation or amendment[2].

The phrase in the text of the law "should require the public authority" means that the preliminary procedure is mandatory and must be made within 30 days from the date the administrative act.

These provisions also apply if the special law provides a legal administrative procedure and the party did not opt for it.

It is entitled to make a prior complaint and the person aggrieved in his legitimate right or a legitimate interest, by an individual administrative act addressed to another subject of law, since it has become aware in any way of its existence, within the period of 6 months.

The analysis of these laws follows that there are two administrative procedures for verifying the legality of unilateral administrative acts namely, one administrative and one judicial.

In the case of the normative act, the prior complaint can be filed at any time.

The prior complaint in the case of unilateral administrative acts it may be introduced for good reasons, and over the period of 30 days but not later than 6 months from the date of issuance of the act. The 6-month term, is the prescription period.

The prior complaint shall be settled within 30 days of filing the application.

In the case of actions brought by the prefect, the Ombudsman, the Public Ministry, the National Agency of Civil Servants or those relating to applications by persons aggrieved by ordinances or provisions of the ordinance, and in cases "Are assimilated to unilateral administrative acts, even unjustified refusal to resolve a request regarding a right or a legitimate interest or, where appropriate, that the applicant does not respond within the statutory period "when it invokes the exception of illegality of the administrative act the prior complaint is not mandatory.

The complaint preliminary to actions that concern the administrative agreements the provisions of the Code of Civil Procedure. In this case, the complaint must be made within 6 months which commences:

a) from the date of conclusion of the contract in legal disputes concerning its conclusion;

b) after the amendment of the contract or, where applicable, from the date of of refusal of the request for amendment made by one of the parties in disputes relating to the contract amendment;

c) from the date of breach of contractual obligations, disputes related to contract execution;

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[1] Law no.554 / 2004 on administrative litigation, published in M.Of.no.1154 / 07.12.2004, amended by Law 262/2007 published in M.Of.no.510 / 30.07.2007, Law No.76 / 2012 for the implementation of the Code of civil procedure, published in M.Of.no.365 / 30.05.2012.

[2] public authority - any organ of state or administrative-territorial units acting in a public power, to satisfy a legitimate public interest; They are treated as public authorities, private legal persons which, by law, have obtained the status of public utility or are authorized to provide a public service, the public power

d) the date of expiry of the contract or, where applicable, from the date of the occurrence of any other causes which attracts extinction of contractual obligations in disputes relating to termination;

e) the date of the finding, the character interpretable of a contract, in disputes concerning the interpretation of the contract.

According to article 12 of Law no.554 / 2004, the plaintiff attached the copy of the administrative action that is attacking him or, as applicable, the answer of the public authority which shall communicate its refusal processing the application. If the complainant received no response to his request, will file the copy of the application certified by number and date of registration at the public authority and any document proving the fulfillment of the preliminary procedure, if this approach was required. If the complainant begins the proceedings against the authority that refuses to enforce an administrative act following the favorable settlement of prior complaint or demand, will file the certified copy after this act.

Where, it notifies the court without the preliminary procedure, the court rejects the request.

They can address the contentious administrative court also who is considered harmed in his legitimate right recognized by law, by the failure to settle or the unjustified refusal to resolve the application. That is, if the application has not been resolved within 30 days of filing the application, the person may appeal to the contentious administrative court, in this case the preliminary procedure is not mandatory.

According to article 2 paragraph 2 of Law no.554 / 2004, assimilating unilateral administrative provisions unjustifiably refusing to resolve a request regarding a right or a legitimate interest or, where appropriate, failing to respond to the applicant, in the legal deadline.

Unresolved in the legal term of the request is failing to respond to the applicant within 30 days of filing the application, unless the law provides otherwise. And unjustified refusal to deal with the application , is the explicit expression with excess power of the will not to solve a person's the request. It is assimilated to the unjustified refusal also failure to enforce administrative act issued as a result of the favorable settlement of the application or, where applicable, the prior complaint.

Referring to Article 7 of Law no.554 / 2004 it was held that no constitutional provision does not prohibit by law to establish a prior administrative procedure without judicial determination, as for example the graceful administrative appeal procedure or the hierarchical[1] .

By Decision No. 220/2004 showed also that the establishment , the prior or the graceful appeal is a simple method, fast and exempt from stamp duty, by which the person aggrieved in his legitimate right by a public authority has the possibility to obtain recognition of his claimed right or legitimate interest directly from the issuing body. Is done as on the one hand, to protect the injured person and the administration, on the other hand, relieving administrative courts of those disputes that can be resolved administratively, giving expression to the celerity principle[2].

From the analysis of the text, it appears that text of the law is not likely to affect the right of access to justice or the right to a fair trial also that the imposition of appeal prior or graceful is a simple method, fast and exempt from stamp duty, the person aggrieved in his

[1] Decision no.39/2005 of the Constitutional Court published in Of.Mo.no.165/24.02.2005.
[2] Decision no.220/2004 of the Constitutional Court published in Of.Mo.no.539/16.06.2004.
Decision no.1355/2008 of the Constitutional Court published in Of.Mo.no.893/30.12.2008.
Decision no.96/2007 of the Constitutional Court published in Of.Mo.no.168/09.03.2007.
Decision no.1039/2008 of the Constitutional Court published in Of.Mo.no.761/11.11.2008.
Decision no.687/2008 of the Constitutional Court published in Of.Mo.no.563/25.07.2008.
Decision no.973/2010 of the Constitutional Court published in Of.Mo.no.561/10.08.2010.

legitimate right by a public authority has the possibility of obtaining recognition of its right or legitimate interest directly from the issuing body[1].

As for the issue of terms governed by art. 11 of Law no. 554/2004 within which the injured party must exercise the right to Administrative Contentious action, it noted that "setting preconditions for the introduction of legal actions does not constitute infringement of free access to justice and a fair trial" and "the legislature may establish, by reason of special circumstances, special rules of procedure, as the manner of exercise of procedural rights, the principle of free access to justice assuming unrestricted opportunity to those interested to use these procedures, the forms and arrangements established by law "[2].

Par. (1) art. 11 provides the general rule that the deadline for the application to the administrative court is six months, and par. (2) lays down the exception in the sense that for good reasons, if unilateral administrative act, the application may be introduced over this period, but no later than one year from the date of issuance of the act. These regulations apply equally to all persons who consider themselves aggrieved by an administrative act and want to attack it. "[3]

The Constitutional Court observed that it can not be accepted any criticism of unconstitutionality on the violation of Art. 52 para. (1) of the Constitution on the right of a person aggrieved by a public authority. According to para. (2) the alleged constitutional text, "the conditions and limits of this right shall be established by organic law". Or, criticized legal provisions include rules on certain conditions and time limits within which the injured party in his rights by a public authority may exercise its right of action against administrative acts issued by it, so that there is no contradiction between art. 7 and art. 11 of Law no. 554/2004, on the one hand, also art. 52 para. (1) of the Constitution, on the other hand[4].

Establishment of the appeal prior or graceful is a simple method, fast and exempt from stamp duty, by which the person aggrieved in his legitimate right by a public authority has the possibility to obtain acknowledgment of those rights or of its legitimate interest directly from the issuing body [5].

The preliminary procedure governed by the legal text criticized is not likely to affect the right of access to justice or the right to a fair trial also that the imposition of appeal prior or graceful is a simple method, fast and free of stamp duty by the injured party in his legitimate right by a public authority has the possibility of obtaining recognition of its right or legitimate interest directly from the issuing body.

The Constitutional Court stated with value of principle that "it is the exclusive competence of the legislature to institute such proceedings intended generally to ensure faster resolution of certain categories of disputes, decongest the courts of cases that can be solved in this way, avoidance costs "and" the legislator may establish, in consideration of special circumstances, special rules of procedure, as the manner of exercise of procedural rights, the principle of free access to justice assuming unrestricted opportunity to those interested to use these procedures, in forms and modalities established by law ".[6]

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[1] Decision no.973/2010 of the Constitutional Court published in Of.Mo.no.561/10.08.2010.
[2] Decision no.123/2006 of the Constitutional Court published in Of.Mo.no.257/22.03.2006
[3] Decision no.534/2006 of the Constitutional Court published in Of.Mo.no.666/02.08.2006
[4] Decision no.382/2007 of the Constitutional Court published in Of.Mo.no.340/18.05.2007.
[5] Decision no.1355/2008 of the Constitutional Court published in Of.Mo.no.893/30.12.2008.
Decision no.96/2007 of the Constitutional Court published in Of.Mo.no.168/09.03.2007.
Decision no.1039/2008 of the Constitutional Court published in Of.Mo.no.761/11.11.2008.
Decision no.687/2008 of the Constitutional Court published in Of.Mo.no.563/25.07.2008.
Decision no.973/2010 of the Constitutional Court published in Of.Mo.no.561/10.08.2010.
[6] Plenum of the Constitutional Court Decision No.1 / 1994 on free access to justice for persons to defend the rights, freedoms and legal interests, published in M.Of.no.69 / 03.16.1994.
Decision no.1224 / 2011 of the Constitutional Court, published in M.Of.no.796 / 10.11.2011.

In connection with these texts, the Constitutional Court ruling that the criticized text of the Fiscal Procedure Code governs the administrative appeal procedure, which leaves the possibility that bodies have issued administrative acts or appealed their upper bodies to return the measures taken. Such procedures, the complaints and appeals that are assigned to himself, the originator of the contested act or superior body it does not meet the elements of the business of jurisdiction - characterized by resolution by an independent and impartial dispute regarding the existence, scope or the exercise of subjective rights - they are a specific administrative function. In conclusion, the documents dealt with by administrative organs complaints, that claims made under the provisions of the Fiscal Procedure Code, there are acts of jurisdiction, but administrative acts subject to censorship court[1].

Establishment of the appeal prior or graceful is a simple method, fast and exempt from stamp duty, by which the person aggrieved in his legitimate right by a public authority has the possibility to obtain acknowledgment of those rights or of its legitimate interest directly from the issuing body . It is done as on the one hand, to protect the injured person and the administration, and, on the other hand, relieving administrative courts of those disputes that can be resolved administratively, giving expression to the celerity principle.

Therefore, it was held that "by going through an administrative procedure prior compulsory non-judicial does not hinder the right of access to justice, as long as the administrative decision may be challenged before a court."

Particularly from those detained must be pointed out that the text of the law criticized states unequivocally that this remedy does not remove the right of action of those who consider themselves wronged in their rights through a fiscal administrative act or lack thereof, and, in the practice of the administrative courts, the lack of appeal does not constitute a plea of inadmissibility of legal action[2].

The competent court

According to article 10 of Law no.554 / 2004, disputes concerning administrative acts issued or concluded by local authorities and county, as well as those concerning taxes, contributions, customs duties and accessories thereof up to 1,000. 000 lei shall be settled ultimately by the courts of administrative tax and those concerning administrative acts issued or concluded by government, as well as those concerning taxes, contributions, customs debt and accessories thereof below 1,000. 000 lei fund shall be settled in the administrative section also fiscal courts of appeal, unless the special organic law provides otherwise.

All requests for administrative acts issued by central public authorities that have considerable amounts of the grant from the European Union, regardless of value, shall be settled in the polling fund of the administrative and fiscal courts of appeal.

According to article 96 paragraph 1 of the Code of Civil Procedure, the Court of Appeal in the first instance, claims in administrative and fiscal matters[3].

The appeal against sentences handed down by courts administrative and fiscal sits in the administrative section also fiscal courts of appeal, and the appeal against sentences handed down by the administrative section also fiscal courts of appeal shall be heard by the Division of Administrative Contentious also fiscal High Court of Cassation and Justice, unless the special organic law provides otherwise.

The applicant may appeal from his residence or that of the defendant. If the applicant has opted for court at defendant can not invoke the exception lacked territorial jurisdiction.

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[1] Decision no.409 / 2004 of the Constitutional Court, published in M.Of.no.1063 / 16.11.2004
Decision no.927 / 2007 of the Constitutional Court, published in M.Of.no.801 / 23.11.2007

[2] Decision no.687/2008 of the Constitutional Court published in Of.Mo.no.563/25.07.2008.
Decision no.132/2010 of the Constitutional Court published in Of.Mo.no.219/08.04.2010

[3] Law no.134 / 2010 Code of Civil Procedure, republished in M.Of.no.247 / 10.04.2015, GEO no.1 / 2016 amending Law no.134 / 2010 on the Civil Procedure Code and certain legislative acts related published in M.Of.no.85 / 02.04.2016.