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**The Settlement of the Exception of Illegality according to the Latest
Regulations in the Matter of Administrative Contentious**

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Abstract: It has been already held in jurisprudence, that the exceptions of illegality may be invoked within processes of any kind, by judging these incidents by the courts vested with the trial of the main requests. Reason for the amendment of Art. 4 of Law no. 554/2004 was that of relieving the administrative courts by prosecution of exception of illegality raised following the litigations of any kind by transferring their jurisdiction to the courts vested with their main demands.

Keywords: jurisprudence; administrative courts; jurisdiction

One of the fundamental principles of administrative law is the principle of legality of the work carried out by public administration bodies, enshrined in art. 1, par. (5) of revised Romanian Constitution.

According to constitutional provisions, legislation and jurisprudence of the Court of Justice of the European Union, of Law no. 554/2004, of administrative litigation and under the provisions of Emergency Ordinance no. 34/2006 on the award of public acquisition contracts, public works concession contracts and service concession contracts, the non-respect of general principles of administrative law by public authorities draw nullity sanction of administrative acts.

In a previous decision, the High Court of Cassation and Justice held that the plea of illegality is a means of defense, an indirect way of controlling the legality of an administrative act, which can only be used in a trial pending, regardless of its nature.

According to recent jurisprudence of the Constitutional Court regarding dispositions of art. 4 of Law no. 554/2004, this regulation "establishes a procedural means by which the interested party may challenge the legality of a unilateral administrative action with individual nature of which the adverse party intends to rely to prove their claims or to defend or assert a right.

The criticized text of law is consistent with the provisions of art. 126 par. (6) of the Basic Law, which guarantees the control of administrative acts within the administrative court as through the plea of illegality even this is done in practice, expanding the possibility of control also over acts whose legality was not contested on the main track.

The Constitutional Court² explains that, in the absence of any distinction in art. 126 par. (6) first sentence of the Constitution, this concept refers equally both to the control of legality of administrative

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² Constitutional Court Decision no. 267/2014 regarding the reject of plea of unconstitutionality of art. 4 para. (2) and (3) of Administrative Contentious Law no. 554/2004 published in the Official Gazette, Part I no. 538 of 21.07.2014.

acts of public authorities exercised on the main track and the control of their legality exercised incidentally of the plea of illegality.

So now, according to the amended provisions of art. 4 para. 1 of Law no. 554/2004, the legality of an administrative act with individual nature, regardless of the date its issue can be investigated at any time in a trial, by way of exception, *ex officio* or at the request of the interested party.

The court vested with the substance of the litigation and before which was invoked plea of illegality, noting that the administrative act of individual nature depends on resolving the litigation in substance, is competent to rule on the exception, either through an interlocutory closure, or by decision that will rule in question. In case the court decides on the exception of illegality through interlocutory closure, it can be appealed together with the substance (art. 2 of Law 554/2004).

Consequently, according to par. (3) of art. 4 "if has been found the illegality of the administrative act of individual nature, the court before which was invoked the plea of illegality will settle the case, notwithstanding the act of which illegality has been found".

Regarding the reasons that may cause the conviction of the court that the act is wrongful drafted, these refer to the noncompliance of the administrative act express or assimilated by the imperative text of law namely by the hypothesis, the disposition of the legal standard or the application of a sanction other than that provided for existing legal situation.

For example, an essential condition for legal administrative act to be legally issued is that the issuing authority to follow the procedure foreseen for it. By issuing some administrative acts which infringe the dispositions of the law or principles of law creates an abuse or excess of power, in concreto by violating the limits of competence foreseen by law of the issuer of act or by violating of the legal rights of the addressee.

Legality of administrative acts requires also their compliance with the general principles of administrative law (such as the predictability of legal rules, the legitimate expectations of citizens in administrative bodies, legal certainty, equality, proportionality¹, non-discrimination etc.) created and promoted by the constant jurisprudence of the Court of Justice of the European Union and the one of European Court of Human Rights.

Regarding the insurance of legality of administrative acts, public authorities, in drafting administrative acts, are obliged to respect not only provisions of domestic law with higher legal force, but also main or derivative communitarian documents, as well as general principles of law, some codified in domestic and European legal acts and others imposed by the established practice of the Court in Luxembourg and the Court in Strasbourg. The compliance of principles set out above of illustrative nature, principles which can be invoked in the exception of illegality is rooted in the Constitutional provisions. According to the Romanian Constitution, it is imperative to respect domestic laws, international treaties priority, namely the priority of legislation and jurisprudence of the European Union. This implies that all principles of administrative law of the European Union in material public acquisitions, implicitly jurisprudence of Court of Justice of the European Union, are mandatory for Member States.

¹ This principle designate that the legality of acts issued is subject to the condition that the means used be appropriate to the objective pursued and does not exceed what is necessary to achieve this goal.

One such example may be the act issuer possibility to infringe the principle of priority of satisfying community interests, by issuing with bad faith a notice of termination on a public acquisition contract¹. If this principle is raised by way of plea of illegality, after considering the plea of illegality raised, the court / arbitral tribunal may find infringement of the public interest², noting consequently the illegality of the issued act.

Regarding the noncompliance of the administrative act issued with the substance of the provision of the violated legal norms, in practice we can find the circumstance when the defendant disposes the issuance of an administrative act without respecting the principle of foreseeability³ **and legitimate expectations**⁴. Thus, the administrative act is issued prematurely, for example issuing a notice of termination without compliance with the procedural order regulated by the parties by a public works acquisition contract⁵. The European court sanctioned the non-respect of the principle of foreseeability, declaring null the acts issued without respecting it, on the ground that are abusive, depriving their recipients from the opportunity to get acquainted with them in a reasonable time and to adapt their behavior according to the changes made by them. Regarding the principle of legitimate expectations/principle of legitimate trust, it is an element of the principle of legality of administrative acts and establishes on one hand, the obligation of public authorities to protect (through consistent and non-contradictory behavior) legitimate expectations of individuals, and, on the other hand, establishes their right to evolve into a stable and predictable legal framework in who to trust, at shelter from its brutal changes. The Luxembourg court also ruled that the administrative acts issued with violation of their legitimate trust of their recipients are void, those interested being entitled to bring actions for compensation for damages.⁶

Also, failure to comply preliminary procedure of conciliation before issuing an administrative act, may lead both at harming the interests of the addressee of the administrative act issued in the sense that, given the contractual relationships between the parties and the subject of counter provisions to which

¹ *Public works acquisition contract is regulated by GEO no. 34/2006 on the award of public acquisition contracts, public works concession contracts and service concession contracts, fully transposing the provisions of Directive 2004 / 18 / CE in Romanian law on the coordination of procedures for the award of public works, supplies and services acquisition contracts of the Directive 2004/17 / CE on the coordination of procedures for the award of contracts in the water, energy, transport and postal services sectors (JOUE L 134 of 30 April 2004), as amended, and of the Directive 1989/665 / CEE on the coordination of laws and administrative acts related to the application of procedures aiming appeals against the award of supply public acquisitions and works public contracts (JOCE L 395 of 30 December 1989), as amended, namely of the Directive 1992/13 / CEE coordination of the laws and administrative acts concerning the application of Community rules on the public acquisition procedures of entities operating in the water, energy, transport and telecommunications sectors (JOCE L 76 of 23 March 1992), as amended.*

² Thus, according to Art. 2 pt. R of Law 554/2004, the interest of legitimate public is the interest aiming at legal order and constitutional democracy, guarantee of rights, freedoms and citizens fundamental duties, community needs satisfaction, achieving competence of public authorities. If it is about an administrative contract that will include an agreement (bilateral) between two parties, for example, the enhancement of public assets and public services delivery, to which the provisions of Art. 1270 par. 1 of the Code. civ. are applicable, it is withheld the regulatory part requiring the priority of public interest in freedom of contract in accordance with art. 8 of Law no. 554/2004.

³ See Decision of the European Court of Justice in Case C-368/89 Crispoltoni v. Fattoria Tabacchi di Citta di Castello , Reports 1991, p. I-3695.

⁴ The principle of legitimate trust is the materialized possibility through which individuals (enjoying some stable normative benchmarks) to carry out certain rights.

⁵ *Public works acquisition contract is that contract through which an economic operator designated usually through a procedure that ensures competition (public auction) performs for a contracting authority the execution of some works related to one of the activities listed in Annex. 1 of GEO no. 34/2006 or execution of construction, with or without design.*

⁶ In this respect, as an example, the Court in Strasbourg has condemned the activity of state authorities to take legal action in the demolition of buildings after a long time of their seizure, such a practice infringing upon their legitimate expectations of their owners, which created the belief that buildings cannot be abolished, considering that they have been accepted tacitly by the competent bodies. See the Decision of the European Court of Justice in cases reunited 7/56 and 3-7 / 57, Alger c. Common Assembly of CECO, Reports 1957, p. 81.

they were obliged by a contract of public acquisition, may cause higher damages that could have been avoided if this prior procedure had been followed.

From this perspective, we can easily deduce that the need to amend the provisions for settling the plea of illegality in the action where it has been raised, it is also justified in light of the fact that the judge has the possibility to examine the exception in consideration of delivery of a solution with substance of the case analyzing thus exception, where necessary, from the perspective of an ample probatory material.

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