



Consiglio di Stato



**Seminar organized by the Council of State of Italy and ACA-
Europe**

**“Techniques for the protection of private subjects in
contrast with public authorities: actions and remedies
– liability and compliance”**

Rome, 23 May 2022

Answers to questionnaire:

Romania - High Court of Cassation and Justice



**Co-funded by
the European Union**

“TECHNIQUES FOR THE PROTECTION OF PRIVATE SUBJECTS IN CONTRAST WITH PUBLIC AUTHORITIES: ACTIONS AND REMEDIES - LIABILITY AND COMPLIANCE”.

INTRODUCTION

The seminar will analyse the types of actions that can be brought before the administrative judge: action of annulment, action of declaration and action of condemnation. With particular reference to the latter, the seminar will focus on compensatory measures, including damages for loss of opportunity and damages as a result of delay.

The seminar also intends to examine the possibility of any and eventual special or fast-track procedure, for introductory terms and methods which pertain to certain subjects under consideration, for example, for their economic or political relevance, such as those to be found in the sphere of public contracts (see also transversal analysis).

The aim of this questionnaire and of the subsequent seminar is to provide a wider comprehension of the similarities and differences that exist among the various legal systems of the member States insofar as they apply to the situations to be dealt with by the administrative court, paying particular attention to the content and subject matter of the relative rulings.

SESSION I

LEGAL PROCEEDINGS THAT CAN BE BROUGHT BEFORE THE ADMINISTRATIVE COURT

- 1. In your legal system, which judges are competent to pronounce on disputes in which one of the parties is the public administration?**
 - An ordinary judge
 - An administrative judge
 - A judge who deals with special areas
 - Others

Romanian reply

In the Romanian legal system, competent to pronounce on disputes in which one of the parties is the public administration are both the common courts of law (ordinary) and the administrative courts.

The jurisdiction of the administrative court is provided for in Article 126(6) in the Romanian Constitution, Article 1(1), Article 2(1)(f) and Article 8(1) in Law No 554/2004 - Administrative disputed claims and in various organic laws. Administrative Courts are defined by Article 2(1)(g) in Law No 554/2004 - Administrative disputed claims.

The jurisdiction of administrative courts is not automatically triggered in all disputes to which a public authority is a party, but only in disputes which meet the following characteristics: one

party is a public authority, the conflict is based on a typical administrative act (unilateral administrative act) or assimilated (unwarranted refusal by the public authority to settle an application for an administrative act or to carry out a specific administrative operation or failure to settle the application within the time limit laid down by law, administrative contracts) and the competence is not expressly provided by law to a court of common law.

In situations where the action does not concern a typical or assimilated administrative act, the material competence does not fall on the administrative courts but on the ordinary courts established according to the object and cause of the action and not according to the quality of the parties.

2. Which actions can be brought before the administrative court in view of the exercise of administrative powers?

- Annulment of administrative acts
- action of condemnation
- Other actions

If you have replied 'other actions', please clarify which.

Romanian Reply

Law No. 554/2004 on administrative disputed claims states the following actions:

- actions for the annulment, in full or in part, of the administrative acts (article 8);
- actions concerning the obligation of the public authority to settle a request which it has not settled within the time limit or unjustified refused to settle (article 8);
- actions requiring the respondent authority to issue another act or another document, or to perform a certain administrative operation, under the sanction of delay penalties or of fine (article 8)

Other actions provided for in Law No. 554/2004 and other special laws are:

- actions for the repair of the damaged caused by issuing an administrative act and for the granting of satisfaction for moral prejudice (article 8).
- actions against Government ordinances that may have as subject to grant compensations for the prejudices caused by Government ordinances, to cancel of administrative acts issued pursuant to these, and, as applicable, to force a public authority to issue an administrative act or to perform a certain administrative obligation (article 9).
- actions for the recognition of a right;
- actions for the temporary suspension of the effects of administrative acts (articles 14 and 15),
- actions regarding the employment relations (in the case of public servants or other categories of persons paid from public funds), provide by different special laws;
- action for finding the status as a Security worker or a collaborator (O.G. nr. 24/2008);
- actions relating to the right of residence of foreigners or to the measure of declaration as undesirable (O.G. nr. 194/2002 concerning the regime of foreigners in Romania;)

When the object of the proceedings in the administrative disputed claims is an administrative contract (contracts concluded by public authorities for the value of public property, the execution of works of public interest, the provision of public services, public procurement; by special laws other categories of administrative contracts may be provided for), the court may (article 18(3)):

- order its cancellation, in full or in part;
- force the public authority to conclude the contract to which the applicant is entitled;
- impose to one of the parties the carrying out of a certain obligation;
- substitute the consent of one party, when the public interest requires it;
- to force the payment of certain compensations for material and moral damages;

3. From which sources can actions be proposed brought before the administrative court?

- Law
- Public authority regulations
- Guidelines
- Supreme Court rulings
- Other

Romanian Reply

In our legal system, the actions that can be brought before the administrative judge are regulated by laws and Government ordinances (which have the power of law).

4. Which administrative decisions can be challenged?

- Administrative acts which have a specific recipient
- General acts and regulations
- Acts inherent to the procedure
- Political acts

Romanian Reply

All administrative acts issued may be challenged in the administrative courts except for the administrative acts concerning the relations of the public authorities with the Parliament, acts of command of a military character and those on the modification or termination of which another judicial procedure is provided for by law. (Article 5 of Law No 554/2004).

Prior acts (administrative operations) which were the basis for issuing administrative acts may not be challenged autonomously, except where expressly provided for by law or where they directly harm the legitimate rights or interests or cause material damage.

Acts of an exclusively political nature shall not be challenged.

5. On the grounds of which defects can the annulment of an administrative act be requested?

- Breaches of the law

- Breaches of competence
- Technicalities and procedural defects
- Breaches of general principles
- Other

Romanian Reply

According to Law No 554/2004 – Administrative disputed claims, the annulment of an administrative act can be requested for reasons of violation of the law, violation of the limits of the competence provided by the law, violation of the technical regulations and pre-issue procedures, violation of general principles (e.g.: violation of the principle of legality in the case of an administrative act issued without having a legal basis), harm to a right or a legitimate interest (essential and mandatory requirement of an action for annulment promoted by natural or legal persons under private law).

The administrative acts issued in violation of the limits of competence laid down by law or by violation of the rights and freedoms of citizens constitute an excess of power of the public authority (Article 2(1)(n)) and shall be sanctioned with cancellation of the act or provisions.

In Romanian case-law, except in the cases expressly provided by law, the violation of the rules and formal procedures does not automatically entail the penalty of annulment of the act, if the content of the acts does not cause damage to the persons to whom they are addressed.

6. Can the judge partially annul the challenged administrative act?

- Yes
- No

If your reply is yes, please elaborate.

Romanian Reply

The court may partially annul an administrative act, determined by the fact that it was given partial cancellation by the applicant's application or by the fact that, although the document was requested to be annulled in full, the court finds that the illegality affects only partially the administrative act.

7. Can the judge substitute the Administration by modifying the content of the administrative act?

- Yes
- No

If your reply is yes, please elaborate.

Romanian Reply

No

8. When the judge annuls the challenged act, can he dictate provisions which the P.A. must abide by in the review proceedings of the subject-matter of the litigation?

- Yes
- No

If your reply is affirmative, please elaborate.

Romanian Reply

Since both the operative part and the reasoning of the judgments are binding on the parties, the court can order, both directly (by the operative part of the judgment) and indirectly (by means of the reasons set out in the reasoning of the judgment), the conditions which must be complied with when the administration gives new provisions after the annulment of the act.

9. When do the effects of the jurisdictional annulment of an administrative act become applicable?

- From the date of the adoption of the act (*ex tunc*)
- From the date on which the judgement becomes final (*ex nunc*)
- Other

Romanian Reply

The annulment of an act shall have retroactive effect, from the date of adoption of the act in question (*'ex tunc'*).

10. Can the judge modulate the effects over time of the ruling of annulment of an administrative act?

- Yes
- No
- Other

Romanian Reply

As regards public procurement (special public procurement procedure), the judge who declares certain procedural acts null may order the tender procedure to continue from a certain stage or procedural act.

11. Can the act of ordering payments for damages be proposed autonomously or must it always be proposed together with other kinds of actions?

- Yes
- No
- Only in certain cases

If your reply is yes, please elaborate

Romanian Reply

The provisions of Article 19(1) in Law No 554/2004 are in the sense that action of compensation for material and moral damage can be promoted in two ways:

a) at the same time as other actions (action for annulment, action for compulsory issuing the requested act, etc.);

b) autonomously.

When the injured party having requested the cancellation of the administrative act, without claiming compensations at the same time, the action of compensation for material and moral damage can be promoted autonomously within a period of one year from the date on which it was aware or had to be aware of the extent of the damage. (Article 11(1) and (2) of Law No 554/2004).

12. In the light of what kind of behaviour is the compensatory action for damages feasible when dealing with a Public Administration?

- Implementation of an illegal and detrimental administrative act
- Non-observance of the deadline of the procedure
- Lesion of good faith and trust
- Resultant behaviour of the public administration
- Other

Please elaborate

Romanian Reply

In the Romanian legal system, all the adverse conditions indicated above as well as any other conditions causing material or moral damage are relevant to the request for monetary redress.

13. Which are the different kinds of reimbursable damages?

- Material damage
- Non-material damage
- Loss of opportunity

Romanian Reply

In the Romanian legal system, all types of damages indicated above are relevant for the provision of financial compensation.

14. Does the omission of lodging an action of annulment result in elision or reduction of the compensatory damages?

- Yes
- No
- Other

Romanian Reply

The action for damages is inadmissible in the absence of promotion of an action to cancel the harmful administrative act. Thus, the failure to lodge a cancellation action leads to the elimination of the possibility of claiming and obtaining compensation for material and moral damages.

15. In order to award compensatory damages, is proof of the responsibility of the public administration required? If your reply is affirmative, which party is obliged to provide said proof?

- Yes – the party with burden of proof is...
- No

Romanian Reply

Yes. The injured party must provide proof of the responsibility of the public administration, but the public authority must prove the legality of the act by lodging the documents on which it was issued.

However, the case-law considers that in disputes relating to the determination of public servants' salary, the burden of proof lies with the employer – who is obliged to file with the case-file all documents drawn up concerning the establishment of the salary rights within the institution.

In the field of tax, the burden of proof of the legality of the act and of the determination of the tax liability lies with the tax body.

16. Can the judge convert *ex officio* one action into another?

- Yes
- No

If the reply is yes, please elaborate

Romanian Reply

No

17. Is there a time-limit for the proposition of the compensatory action?

- Yes
- No

If the reply is yes, please elaborate

Romanian Reply

Yes. In order to promote the action for damages, Article 19(1) and (2) in Law No 554/2004 provides for a limitation period of one year which runs from the date on which the injured person was aware or had to be aware of the extent of the damage.

18. Can the judge rule that the Administration implement an administrative act? If your reply is affirmative, what are the prerequisites for implementation?

- Yes – explain
- No

Romanian Reply

The administrative court may decide that the administration shall oblige the public authority to issue an administrative act, to issue another document or to carry out a certain administrative operation (Article 18(1) in Law No 554/2004). There are no prerequisites in the law, the judge appreciating according to each individual situation.

SESSION II – SPECIAL PROCEDURES

1. Does your administration have provisions for special procedures

- Yes
- No

If the reply is yes, please elaborate

Romanian Reply

Law No 554/2004 — Administrative disputed claims provides for the following special procedures:

- the preliminary procedure (article 7), which was used prior to the introduction of the action for cancellation;
- the administrative challenge (article ...), compulsory procedure to be used against tax administrative acts;
- the special procedure for promoting applications for suspension of administrative acts (articles 14 and 15);
- the procedure for the enforcement of judgments given in matters of administrative proceedings (Articles 24 and 25 of Law No 554/2004),
- short process on specific issues, such as the suspension requests, enforcement requests, public procurement;

2. What do the specialities consist of?

- Ways of introducing the appeal
- Procedural time-limits
- Jurisdiction of the court
- Other

Romanian Reply

The special procedures provide for a number of rules derogating from the usual ones. They generally refer to an accelerated procedure for the adjudicating of applications by introducing short procedural time limits, simplified procedures both as regards the substantive judgment of applications and the resolution of extraordinary remedies.

3. The special rites are established:

- According to subject (for example, tenders, procedures of expropriation, independent administration authorities)
- According to actions
- Both of the above

Please elaborate

Romanian Reply

The special procedures concern both subjects with the right to report administrative matters and the object of the action (public procurement, suspension of the execution of the act, expropriation procedures, actions by the independent administration authorities).

4. Does your system provide for appeals against the silence of the Administration at the request for an administrative provision presented by a private individual?

- Yes
- No

If the reply is yes, please elaborate

Romanian Reply

Yes. Law No 554/2004 — Administrative disputed claims provides for a specific action against the non-settling within the legal deadline of an application to the public administration or against an unjustified refusal to settle a request — (explicit expression of a willingness not to settle a person's request) the procedure of which follows the special rules laid down in Law No 554/2004 (determination of the obligation of the administration to settle the application, to issue an administrative or other document or to carry out certain administrative operations).

At the end of the trial, the judge may grant a deadline within which the administration must comply, under the sanction of a fine and penalties for delay for each day of delay.

5. Do the Administrations comply spontaneously with the decisions of the administrative courts?

- Yes, always
- No, never
- In the majority of cases, in any case more than in 50% of cases
- Hardly ever, in any case less than in 50% of cases

Romanian Reply

In most cases, in any case more than in 50% of cases.

6. . In your legal system, is there a special procedure for ensuring the integral execution of the sentence?

- Yes
- No

If the reply is yes, please elaborate

Romanian Reply

Law No 554/2004 - Administrative disputed claims provides for a special procedure for the enforcement of judgments (Articles 24 and 25).

If the debtor does not voluntarily perform his obligation, it shall be carried out by enforced performance, following the procedure laid down in the Articles referred to above

In matters of administrative disputes, the executing court shall be the court which has settled the merits of the administrative dispute which applies or grants the penalty and sanction referred to in Article 24(3).

Applications for enforcement, as referred to in Article 24 (3) and (4), shall be dealt with as a matter of urgency in the Chamber of the council under a simplified procedure and shall be exempt from the stamp duty. Judgments given on the merit of enforcement actions shall be appealed only on recourse (extraordinary appeal) within 5 days from its communication.

7. Are the judge's decisions which are not of the last resort immediately enforceable?

- Yes
- No

If the reply is yes, please elaborate

Romanian Reply

Judgments given at first instance in matters of administrative disputes are enforceable, however, the promotion of the legal remedy provided for by law (the recourse) suspends the enforcement (Article 20(2) in Law No 554/2004) without there being a need to require the suspension of the enforcement of the decision of first instance.

In the case of requirements to suspend the execution of administrative acts, judgments shall be enforceable in law and the recourse shall not suspend the enforcement (Article 14(4)).

8. Following the annulment of a decision characterized by discretionary power, the interested party is forced to challenge each of the ulterior negative decisions which have been deemed illegitimate by dint of defects which are different to those identified by the judge or, in alternative, are there certain mechanisms of "reduction" of the aforesaid discretionary power which ensure the definition of the litigation once and for all?

- Yes – elaborate
- No

Romanian Reply

As a rule, a judgment ordering the annulment of an administrative act on grounds of excessive power obliges the administration only in respect of the annulled act and the illegality identified by the court in the judgment.

However, where administrative courts have ordered the suspension of the enforcement of administrative acts, the discretionary power (excess power) is 'reduced' entirely by the effect of the judgment and the law. Thus, if a new administrative act is issued with the same content as the one suspended by the court, it is automatically suspended (Article 14(5)).

Also, in the event of cancellation, in full or in part, of the tax administrative acts, it is entailed the total or partial cancellation of subsequent bodies issued under the annulled tax administrative acts (Article 50 of Law No 207/2015 on the Code of tax procedure.)

SESSION III – PRECAUTIONARY MEASURES

1. Does the proposition of an appeal automatically suspend the effectiveness of the administrative act?

- Yes
- No

Romanian Reply

In matters relating to administrative disputes, the proposition of an application for annulment of the administrative act shall not automatically suspend the suspension of the implementation of the act.

2. In your legal system, are precautionary measures provided for?

- Yes
- No

Romanian Reply

Yes.

3. What kinds of decisions can the judge apply as a precautionary measure?

- The suspension of the challenged act;
- (if the subject of the challenge is the refusal of an application) a positive measure which provisionally anticipates the effects of the administrative act being contested;
- The order to the administration to re-examine the application on the strength of indications contextually provided by the judge;
- Whatever measure necessary to satisfy, in each case, the precautionary requests presented by both parties

Romanian Reply

In the Romanian legal system, the judge can order the measure of suspension of the enforcement of the administrative act (Articles 14 and 15 of Law no. 554/2004).

To prevent imminent damage (future and foreseeable material damage or, where appropriate, serious foreseeable disturbance in the operation of a public authority or public service), in duly justified cases, the person injured by an administrative act issued by a public authority may apply to the administrative court for suspension of the enforcement of the act pending the settlement of the application for annulment of the act (Articles 14 and 15 in Law No 554/2004).

4. What are the conditions for the acceptance of a precautionary request?

- The probable validity of the action
- The probable validity of the action together with a serious prejudice
- The prevalence of public or private interest, based on the results of the equilibrium/assessment

- The required prerequisites of trial law to accord precautionary measures vary according to the different types of litigation
- Other prerequisites (please specify)

Romanian Reply

Suspension of the enforcement of the administrative act shall be ordered by the administrative courts if two compulsory and cumulative conditions are fulfilled: the condition of the duly justified case (serious doubt as to the legality of the administrative act) and the condition of the prevention of imminent damage (future and foreseeable material damage or, where appropriate, serious foreseeable disturbance in the operation of a public authority or public service).

5. Can the judge force the petitioner to pay bail?

- Yes
- No
- If yes, in which cases?

Romanian Reply

In the Romanian legal system, the rule is that, the suspension of the execution of the administrative act is not conditioned on the payment of bail.

The payment of a bail is mandatory and is ordered by the court in the case of requests to suspend the enforcement of the tax administrative acts (administrative acts issued by the tax authorities) or in the cases expressly provided for by special laws.

6. Are precautionary measures generic?

- Yes
- No – are there some subjects in which precautionary measures are not admitted? Which?

Romanian Reply

The measure suspending the enforcement of the measure shall apply to all administrative acts the effects of which have not been exhausted until the decision suspending the enforcement of the measure has been taken.

The measure of suspension shall be exempted from the administrative acts expressly referred to in Article 5(3) of Law No 554/2004, namely administrative acts issued for the application of the regime of war, state of siege or emergency, those concerning national defense and security or those issued for the restoration of public order, and to remove the consequences of natural disasters, epidemics and epizootics.

7. Can a precautionary request be introduced autonomously before the presentation of the main trial proceedings (*ante causam*)?

- Yes
- No

Romanian Reply

In duly justified cases (where there is serious doubt as to the legality of the administrative act) and in order to prevent imminent damage, the injured party has the right to request the administrative court, even before bringing an action on the merit, to order the suspension of the enforcement of the administrative act.

The suspension of the execution of the act ordered before the introduction of an action is an urgent and temporary measure valid until the request is settled in the first instance.

8. In the event of cautionary request *ante causam*, does the precautionary decision of the judge lose effectiveness?

- Yes, in the event that the interested party does not initiate main trial proceedings within the mandatory time-limit
- No, its effectiveness remains intact even if the main trial proceedings have not been initiated within the mandatory time-limit or even if the time-limit has expired

Romanian Reply

If the request for suspension of the enforcement of the act has been accepted *ante causam*, it shall lapse in law and without any formality if, within 60 days, the injured party does not bring the action for annulment of the act.

9. When dealing with the precautionary request, does your legal system provide for specific procedure?

- Yes (give details of the main characteristics with regard to : trial deadlines, type of decision, motivational burden, ways for establishing debate)
- No

Romanian Reply

In the Romanian legal system, Administrative disputed claims regulates the special procedure for the trial of requests to suspend the enforcement of administrative acts (Articles 14 and 15).

Requests for suspension of documents may be lodged prior to or together with the request for annulment and shall be dealt with as a matter of urgency and in particular under a simplified procedure (without following the procedure for regularization of applications provided for in Articles 200 and 201 of the Code of procedure).

In order to allow suspension requests, both the conditions of the duly justified case and the prevention of imminent damage must be fulfilled.

The administrative court shall verify the fulfillment of the conditions without examining the merit of the case and shall give a final and enforceable decision in law. The decision ordering the suspension of the enforcement of the act may be appealed only with recourse (extraordinary appeal) within 5 days from its communication. The recourse shall not be suspensive of enforcement.

10. Is the precautionary decision taken unilaterally or collegiately?

- Unilaterally;

- Collegiately;
- Collegiately, but in the event of extreme urgency, the precautionary decision can be taken temporarily by means of a simple unilateral decree;

Romanian Reply

The decision shall be taken by the administrative Judge, with the parties being summoned, in public court and while respecting the principle of adversarial nature.

11. During the discussion of the precautionary request, can the judge directly define the judgement on the merit?

- Yes (explain in which conditions)
- No

Romanian Reply

No

12. Can precautionary measures be challenged before the Supreme Court /Council of State?

- Yes
- Yes, but only if they pass a test of eligibility
- No

Romanian Reply

Against decisions ordering measures to suspend the enforcement of the acts, the dissatisfied party may appeal with recourse within 5 days of the communication of the decision. The recourse shall be heard by the courts of appeal where judgments are given by the tribunals or by the High Court of Cassation and Justice when decisions are given by the courts of appeal.

13. Can the Supreme Administrative Court / Council of State, as a precautionary measure, suspend the judgements on the merit of a judge of a lower level?

- Yes
- No

Romanian Reply

Under the Romanian legal system, the effects of judgments given on the merits in matters of administrative disputes are suspended by the filing of the appeal against them.

14. On average, how many precautionary decisions are taken every year by the Supreme Court/ Council of State in comparison to the overall number of decisions taken?

Romanian Reply

In the last two years (2019/2020), the average number of decisions on precautionary measures was 692. These account for around 11% of all court decisions.

