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The Illegality of Transferring the Right of Administration Through an Act Titled "Protocol" Concluded between the Ministry of National Defense and a Territorial Administrative Unit

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Abstract: The right of ownership, along with all its derivative rights, has been and continues to be a constant concern of international, European, and national legislation, being also guaranteed by the Romanian Constitution. The right of administration over state property is a real right and entails the exercise of all prerogatives characteristic of the right of ownership, including legal remedies, such as filing a revendication action under common law. Law No. 213/1998 on public property and its legal regime governs the establishment and transfer of the right of administration, either through a Government Decision for assets forming part of the Romanian State's public property, or through a Local or County Council Decision, as applicable, for assets belonging to the public property of a territorial administrative unit. This study, based on a real-life case encountered in judicial practice, investigates the status of the holder of the right of administration over a public property asset allegedly acquired by a territorial administrative authority through an act titled "protocol" signed with the Ministry of National Defense. The subject of this study also concerns the legality of the establishment and transfer of the right of administration to the patrimony of the territorial administrative unit, the legal nature of the act titled "protocol," and the possibility of invoking the nullity of this act through the exception of illegality of an individual administrative act.

Keywords: right of administration; territorial administrative unit; protocol; exception of illegality; individual administrative act

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1. The Exception of Illegality of an Individual Administrative Act – Concept and Jurisdiction for Resolution

According to Article 4 of Law No. 554/2004 on administrative litigation, the legality of an individual administrative act, regardless of when it was issued, may be investigated at any time during a trial, by exception, either ex officio or at the request of the interested party.

The court, having been preoccupied with the merits of the dispute before which the exception of illegality has been raised, and having determined that the resolution of the dispute is dependent on the administrative act in question, has the authority to rule on the exception, either through an interlocutory ruling or through the case judgment. When the court rules on the exception of illegality through an interlocutory ruling, this ruling may be challenged along with the case's merits.

If the court finds the individual administrative act to be illegal, it will adjudicate the case without considering the act deemed illegal.

The competence of the civil court to resolve the exception of illegality is further supported by a comparative interpretation of Article 4 of Law No. 554/2004, in its current form and as amended by Law No. 202/2010, effective from November 25, 2010:

Article 4. – (1) The legality of a unilateral individual administrative act, regardless of its issuance date, may be examined at any time during a trial, by way of exception, either ex officio or at the request of the interested party. In this case, the court, finding that the resolution of the dispute depends on the administrative act, shall refer the matter, through a reasoned interlocutory ruling, to the competent administrative litigation court and suspend the case; the referral ruling to the administrative litigation court is not subject to appeal, while the ruling rejecting the referral request may be appealed together with the merits. The suspension of the case is not ordered if the court before which the exception of illegality was raised is the competent administrative litigation court or when the exception of illegality is raised in criminal cases.

Prior to the legislative amendment, the competence to resolve the exception of illegality belonged exclusively to the administrative litigation court, and if such an exception was raised before a civil court, the latter was obliged to refer the matter to the competent court.

With the adoption of Law No. 202/2010 on measures to expedite judicial proceedings, the legislator transferred competence to resolve the exception of illegality to the court seized with the merits of the case in which the administrative act is invoked.

Legal doctrine has recognized the exception of illegality as an effective defense mechanism, justified by the requirements of a fair trial. The interest in challenging the legality of a unilateral individual administrative act (and equally of a normative act) may arise in a wide variety of disputes across different legal fields.

The provisions of Article 4 of Law No. 554/2004 thus establish a legal institution aimed at depriving an individual administrative act, which the opposing party might rely upon, of legal effects solely in the context of the case being adjudicated.

We submit that the exception is admissible even when the contested administrative act produces indirect effects in the pending proceedings. For example, invoking the illegality of a building permit in a case concerning the violation of property rights boundaries.

The exception of illegality of an administrative act is a substantive and public order exception, which may be raised regardless of the issuance date of the contested administrative act.

Furthermore, the exception of illegality of an administrative conduct may be asserted at any point during the proceedings. In this regard, we recall High Court Decision No. 36/2016, published in the Official Monitor, Part I, No. 104 on February 7, 2017, which admitted the referral by the Cluj Court of Appeal - Section III for Administrative and Fiscal Litigation, in Case No. 4,225/117/2014, and it has been shown that the requirements of Article 4 of Law No. 554/2004 on administrative litigation, as modified, allow for the invocation of the exception of illegality of an individual administrative conduct directly during the appeal stage.

According to Article 4(3) of Law No. 554/2004, the effect of admitting the exception of illegality is the removal of the administrative act from the case. In this sense, the admission of the exception of illegality has evidentiary effects, as the administrative act deemed illegal remains part of the civil legal circuit.

This effect stems from the nature of the exception of illegality as a defense mechanism for the party against whom the administrative act is invoked. The effect of admitting the exception cannot be used by third parties through an action (except

where the general conditions for challenging an individual administrative act are met).

However, nothing prevents third parties from invoking the exception of illegality again with respect to the same administrative act.

We submit that even the party whose exception of illegality was admitted cannot rely on that ruling in a different case, with a different subject, legal basis, or cause, where the same administrative act, previously deemed illegal, is invoked.

In such cases, at most, the presumption of res judicata may be invoked in resolving the new exception of illegality, which has an evidentiary effect, indicating that the contested administrative act may be illegal.

Nevertheless, the jurisprudence of national courts does not constitute a source of law, and thus, a different court seized with resolving an exception of illegality regarding the same administrative act may issue a different ruling than a previous court.

2. The Exception of Illegality of the Protocol Regarding the Transfer of the Right of Administration over a State-Owned Public Property to the Patrimony of a Territorial Administrative Unit

2.1. Brief Overview of the Factual Situation under Analysis

In a case pending before the Constanța Tribunal, the plaintiff, the Municipality of Constanța, sought, in opposition to the defendant C.N., compensation for damages consisting of the loss of use of a national defense asset referred to as a "bunker" located in the Mamaia resort.

The Municipality of Constanța argued that, pursuant to Law No. 215/2001, Law No. 23/1998, and Article 136(4) of the Romanian Constitution, a private individual or legal entity cannot benefit from the gratuitous use of public property.

On April 3, 2000, Protocol No. L999/03.04.2000 was concluded between the Ministry of National Defense and the Constanța Municipality, registered with the latter under No. 20730 of March 22, 2000, regarding the renewal and updating of the modalities for using permanent defense structures within the administrative territory of the Municipality of Constanța, based on the provisions of Decree No. 686/1956, Article 8 of Decree No. 131/1961 of the State Council of the People's Republic of Romania, and Government Decision No. 62/1996.

This protocol stipulated that the local public authority would administer all permanent defense structures within the administrative territory of the Municipality of Constanța, which could be used without modifications or damage.

The Municipality of Constanța based its claimed right of administration, invoked as the basis for seeking compensation for damages caused by the defendant, on the provisions of the aforementioned Protocol.

The Municipality of Constanța submitted that the asset in question was entrusted to the defendant C.N. for maintenance and use based on an approval issued in 2002, subject to strict compliance with the Protocol's provisions and the conditions specified in an addendum concluded with the Constanța Municipality (compliance with Law No. 50/1991), for the construction on or near the fortification structure, without modifying or damaging its structural integrity or intended purpose.

It was argued that, although the Municipality of Constanța entrusted the "bunker" to the defendant C.N., this agreement ceased in 2007, and the asset was not returned to the territorial administrative unit.

2.2. Legal Nature of Protocol No. L999/03.04.2000

Protocol No. L999, concluded on March 4, 2000, constitutes a unilateral administrative act through which two public institutions, namely the Ministry of National Defense and the local administration of the Municipality of Constanța, respectively transfer and receive the right of administration over "all permanent defense structures within the administrative territory."

Furthermore, this protocol establishes a new legal relationship by creating the right of administration for the Municipality of Constanța and the Ministry of National Defense, directly producing legal effects in the case under discussion.

According to Article 2(c) of Law No. 554/2004, an administrative act is a unilateral act, whether individual or normative, issued by a public authority for the purpose of executing or organizing the execution of the law, giving rise to, modifying, or extinguishing legal relationships. For the purposes of this law, contracts concluded by public authorities concerning the valorization of public property, the execution of works of public interest, the provision of public services, or public procurement are assimilated to administrative acts.

According to legal doctrine, an individual administrative act is a manifestation of the public authority's will that creates, modifies, or extinguishes rights and obligations for a specific individual, whether a natural person or another public authority or institution. Thus, individual administrative acts produce legal effects with respect to a determined legal subject.

Protocol No. L999 of March 4, 2000, is the source of the right of administration invoked by the plaintiff territorial administrative authority, being an administrative act producing legal effects that may prejudice the rights or legitimate interests of individuals, which, in the view of both constitutional and statutory legislators, are fundamental to exercising the right to bring an administrative litigation action.

The fact that this Protocol was not published in the Official Monitor does not alter its legal nature.

*Indeed, the High Court of Cassation and Justice, through a precedent-setting decision, namely Decision No. 4039/2009, established that **normative administrative acts contain general, impersonal rules addressed to all, whereas individual administrative acts are addressed to specific subjects. Not all acts published in the Official Monitor are normative administrative acts, and publication does not automatically qualify an act as normative.**"

Thus, mere publication in the Official Monitor does not qualify an act as an administrative act, nor does the lack of publication change its legal nature.

In conclusion, we submit that Protocol No. L999/03.04.2000, concluded between the Ministry of National Defense and the Constanța Municipality, constitutes an individual administrative act, with the exclusion of an illegal administrative act.

2.3. Grounds for the Exception of Illegality

Article 3(2) of Law No. 213/1998 mentions that the state's public domain includes the assets stated in Article 135(4) of the Constitution, those listed in point I of the Annex, and any additional assets of national public use or interest proclaimed as such by legislation.

According to point I.24 of the Annex to Law No. 213/1998 on public property and its legal regime, the "bunker" asset belongs to the state's public domain.

The public domain of the state consists of the following assets:

24. border guard posts and national defense fortifications.

According to Protocol No. L999:

"1. The Constanța Municipality administers **all permanent defense structures within its administrative territory in accordance with applicable laws.**

*2. The permanent defense structures taken under administration **may be used as warehouses, shelters, housing, or for other similar purposes, without modifications or damage, subject to the mandatory approval of the General Staff (based on Government Decision No. 62/1996, point 4).**

*4. **As the sole administrator of the permanent defense structures, the Constanța Municipality is responsible, pursuant to Articles 2 and 4 of Decree No. 686/1956 and Decree No. 151/1961, for the integrity of concrete structures, embedded components, and ancillary camouflage works, such as wooden panels, wire meshes, stone or wooden constructions, earth coverings, and fillings, etc."*

It is evident from the text of this Protocol that the Ministry of National Defense transfers the right of administration to the Constanța Municipality.

According to Article 12 of Law No. 213/1998 on public property and its legal regime:

"(1) Assets in the public domain may be entrusted, as appropriate, to the administration of autonomous public entities, prefectures, central and local public administration authorities, or other public institutions of national, county, or local interest.

*(2) The granting of administration **is carried out, as appropriate, by Government Decision (for assets in the public domain of the state)** or by a decision of the county council, the General Council of the Municipality of Bucharest, or the local council."*

In the case under analysis, the right of administration over the asset forming part of the public domain was not transferred to the local public administration through a Government Decision but through an administrative act titled "protocol" concluded between the Constanța Municipality and the Ministry of National Defense through the General Staff, in violation of Article 12 of Law No. 213/1998.

Even if the Ministry of National Defense merely transferred the right of administration without establishing it, the transfer of this right should have followed the same rules provided by Article 12 of Law No. 213/1998, namely through a Government Decision.

The lawmaker drew no distinction between establishing and transferring the right of administration, implying that even transferring the right of administration requires a Government Decision.

The Ministry of National Defense cannot evade the provisions of Article 12 of Law No. 213/1998 (which were in effect at the time Protocol No. L999 was signed). The legal basis invoked for concluding this protocol consisted of:

- Decree No. 686/1956 regulating the handover for custody and preservation of certain defense structures built in the Timișoara and Craiova regions and Decree No. 131/1961.

These decrees do not confer a right of administration to the Ministry of National Defense over the "bunker" asset, which could then be transferred to the Constanța Municipality.

Moreover, even if the Ministry of National Defense held a right of administration over this asset, it could not have been transferred without a Government Decision, as provided by Article 12 of Law No. 213/1998.

- Government Decision No. 62/1996 regarding the approval by the General Staff of new investment objectives and the development of existing ones.

The aforementioned Government Decision only stipulates the obligation to obtain the General Staff's approval for the objectives listed in its annex and does not refer to any right of administration conferred to the Ministry of National Defense or the Constanța Municipality.

Under these circumstances, the Ministry of National Defense did not indicate through which act it acquired the right of administration over the "bunker" asset to verify whether it had anything to transfer to the territorial administrative unit through the Protocol.

*According to Article 11 of Law No. 213/1998: *"*(1) Assets in the public domain are inalienable, unseizable, and imprescriptible, as follows:*

a) they cannot be alienated; they can only be entrusted for administration, concessioned, or leased, under the conditions of the law;*

b) they cannot be subject to forced execution, and no real guarantees can be established over them;*

c) they cannot be acquired by other persons through usucaption or the effect of good-faith possession over movable assets.*

(2) **Legal acts concluded in violation of the provisions of paragraph (1) regarding the legal regime of public domain assets are subject to absolute nullity."**

Since Protocol No. L999 of April 3, 2000, attempted to transfer a right of administration to the Constanța Municipality in violation of the provisions of Law No. 213/1998, we submit that there are well-founded reasons to establish the absolute nullity of this act.

Without a Government Decision transferring the right of administration, the territorial administrative unit is unable to exercise the prerogatives recognized by Article 12(3) of Law No. 213/1998.

Through Constitutional Court Decision No. 563/2020, published in the Official Monitor No. 765 of August 21, 2020, it was established that ***"given the strictly defined constitutional and legal regime of assets exclusively owned by the state, the hypothesis raised by the authors of the constitutional objection, according to which the holder of public ownership rights would be unable to refuse to favorably resolve a request for the gratuitous transfer of the asset when, after its gratuitous use by a religious organization, it becomes the exclusive object of public ownership, for example, based on an organic law or the discovery of subsoil resources, is excluded de plano. The Court finds, in this regard, that, according to Article 136(4), the defining characteristic of assets subject to public ownership is inalienability, so any acts of alienation, regardless of the legal basis, are subject to absolute nullity."***

Furthermore, through Constitutional Court Decision No. 149/2024, paragraph 27, published in the Official Monitor No. 497 of May 29, 2024, it was held that ***"the transfer from the public domain of the state to that of territorial administrative units or vice versa is carried out under the conditions of the law, namely pursuant to Article 292(1) of Government Emergency Ordinance No. 57/2019 on the Administrative Code, published in the Official Monitor of Romania, Part I, No. 555 of July 5, 2019, at the request of the county council, the General Council of the Municipality of Bucharest, or the local council, as appropriate, through a Government Decision, or, symmetrically, at the request of the Government, through a decision of the county council, the General Council of the Municipality of Bucharest, or the local council."***

Thus, "the normative acts through which assets may be transferred from the public domain of the state to the public domain of territorial administrative units are either

organic laws amending the organic law by which the assets were declared the exclusive object of public ownership of the state or Government Decisions when the assets do not constitute the exclusive object of public ownership of the state" (Constitutional Court Decision No. 405/2016, paragraph 28, published in the Official Monitor No. 517 of July 8, 2016).

Under these conditions, despite of the fact that Article 2 of the Protocol states that defensive structures can be upgraded under specified conditions, and that, according to Article 4, the "leasing or concession of permanent defense structures" is possible (without specifying who would act as lessor or conceder), the Municipality of Constanța does not hold a real right of administration over the bunker but, at most, a conventional one, which blatantly violates the provisions of Article 11 paragraph (1) (a) of Law No. 213/1998, which states that assets in the public domain are inalienable, unseizable, and imprescriptible, and cannot be alienated but can only be entrusted for administration, concession, or lease, subject to the conditions of the law.

Since this Protocol creates rights and obligations only for its parties and cannot benefit or prejudice the interests of other persons, in the absence of the claimed subjective right – the real right of administration – the defendant's actions of using the bunker's roof allegedly without the express consent of the territorial administrative unit, but with its full acquiescence, which allowed, at least since 2010, the prolonged use of the concrete platform, cannot constitute an unlawful act in relation to the plaintiff.

The sanction of nullity produces retroactive effects, namely from the date of conclusion of the act deemed null. Consequently, by admitting the exception of illegality of Protocol No. L999, the plaintiff territorial administrative unit would no longer be able to prove that it holds a right of administration over the "bunker" asset for which it sought compensation for loss of use.

Thus, in the absence of a right of use held by the territorial administrative unit that the defendant C.N. would have violated, the appropriate resolution in the case under analysis would be to dismiss the action as unfounded, as no unlawful act can be established, and the legal basis for the claim is also lacking.

3. Conclusion

Following the entry into force of Law No. 213/1998, both the establishment and transfer of the right of administration can only be carried out through a Government Decision or a Local/County Council Decision, as appropriate.

Any different method of establishing or transferring the right of administration is subject to absolute nullity, regardless of the legal nature of the act concluded for this purpose.

The exception of illegality of an administrative act is one of the means to invoke absolute nullity in a proceeding where such an act is invoked against one of the parties.

We submit that the act titled "Protocol" concluded between the Ministry of National Defense and the Constanța Municipality in the case under discussion constitutes an administrative act, being concluded between two public authorities, in the exercise of public authority, unilaterally and with an individual character (referring exclusively to the granting of the right of administration to the territorial administrative unit), which gave rise to a new legal relationship between the two public authorities.

Thus, although protocols concluded between public authorities or institutions typically establish only the conditions for cooperation between them, in the case under discussion, the public authorities effect an apparent patrimonial transfer of the right of administration over a state-owned public property, which qualifies the concluded act as an administrative act.

We submit that such an act cannot be taken into account in the case under discussion, and it is also necessary to remove Protocol No. L999 of April 3, 2000, from the civil legal circuit.

To summarize, the analysis offered in this paper emphasizes the need of rigorously adhering to the legal framework controlling the establishment and transfer of the power of administration over public domain assets in Romania. As established by Law No. 213/1998 on public property and its legal regime, such rights must be conferred exclusively through formalized mechanisms—namely, a Government Decision for state-owned public property or a decision by the relevant local or county council for assets under territorial administrative units. This prescriptive approach is not just procedural, but also serves as a safeguard for the constitutional principles stated in Article 136 of the Romanian Constitution, which emphasize the

inalienability, unseizability, and imprescriptibility of public domain assets. Any deviation from these mandated pathways, as exemplified by the "protocol" in question, risks undermining the integrity of public ownership and invites scrutiny through mechanisms like the exception of illegality under Law No. 554/2004 on administrative litigation.

What may seem to be a mere cooperative agreement between public authorities reveals itself, upon closer inspection, as a unilateral individual administrative act that illicitly transfers the right of administration over a state-owned defense asset—a "bunker" classified under the public domain pursuant to the annex of Law No. 213/1998. This act not only bypasses the requisite Government Decision but also contravenes the foundational tenets of public property law by attempting to reallocate prerogatives akin to ownership without a legislative sanction.

Beyond the specifics of this factual scenario, the study highlights the broader utility and potency of the exception of illegality as a procedural tool in Romanian case law. As stated in Article 4 of Law No. 554/2004, this exception empowers courts to ignore unlawful administrative acts from ongoing proceedings, whether raised ex officio or by a party, without temporal limitations. In case law, this mechanism acts as a defence mechanism against administrative overreach, ensuring that only lawfully constituted may produce legal effects.

The implications of this analysis extend to the wider landscape of administrative law and public asset management in Romania. Although a remnant of old practices between state institutions, the present case can be viewed as a cautionary tale for public authorities against employing informal instruments like protocols for transferring state propriety rights. In an era where territorial administrative units increasingly seek to optimize local resources, including defense-related structures, the temptation to circumvent formalities may arise; however, such shortcuts invariably lead to legal precariousness, as seen in the present paper. Policymakers should prioritize compliance with organic laws and government decisions to facilitate legitimate transfers that respect constitutional hierarchies.

Ultimately, we maintain that Protocol No. L999/03.04.2000, while ostensibly a collaborative framework, embodies an impermissible administrative act that warrants exclusion from the civil legal circuit in the analyzed case. By admitting the exception of illegality, courts can uphold the sanctity of public domain assets, dismiss unfounded claims predicated on such flawed instruments, and reinforce the rule of law. This outcome not only resolves the immediate dispute, in this case denying the Constanța Municipality's claim for damages absent of a valid right of

administration, but also contributes to doctrinal clarity on the interplay between administrative acts, public property regimes, and defensive procedural tools.

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