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MANDATORY CHARACTER OF COURT RULINGS AND THEIR EXECUTION ACCORDING TO NEW SERBIAN LAW ON ADMINISTRATIVE DISPUTES

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Summary: In this paper, attention has been given to the question of obligation and execution of effective court rulings in administrative proceedings in the way they are regulated in the new Law on Administrative Disputes of Serbia. In order to explore the quality of new solutions, it was necessary to make a comparison with the solutions provided in the previous Law on Administrative Disputes. It was the best way to show that there is continuity in terms of law of the institute and that there has been a qualitative step forward in their superstructure. This step forward is reflected in the introduction of rights to compensation and possibilities for punishing managers by fines. The practice of the competent authorities and time will be the best judges as to whether all this will be effective.
Key words: court ruling, decision, effectiveness, administrative organ.

1. Introduction

The mandatory character of court decisions made in administrative disputes represents a significant principle. Such decisions have the value of 'legal truth' with respect to the disputed legal relations which are thereby settled. The authority of the given ruling (*res judicata*), being its main characteristic, implies that it is relatively definitive, unchangeable, and reinforces the stability of the situation created or confirmed by it.

The principle related to the mandatory nature of effective court decisions in administrative disputes has a remarkable practical significance. It is a way to ensure the evaluation of lawfulness of administrative acts in administrative disputes, which is twofold: a) subjective, aimed at ensuring judicial protection of civil rights and rights of other subjects, and b) objective, aimed at securing lawfulness. If this

principle did not exist, then the administrative dispute would constitute "just an intellectual construction with no practical effects".[1]

As far as the implementation of the effective court decisions arising from administrative disputes is concerned, it involves both legal and factual operationalization of their mandatory character on the part of the suitor, the sued party and the interested parties, if any. Further course of their actions depends on the outcome of the administrative dispute in question (Tomić, 1995; 388).

Our attention in this paper is focused on the issue of the mandatory character and implementation of court decisions in keeping with the new Serbian Law on Administrative Disputes (LAD). In order to examine the quality of legal solutions, they have been compared with the provisions contained in the previous Law on Administrative Disputes. This, in fact, is the best way to check whether there is continuity with respect to these institutions and whether qualitatively new steps have been made towards their development.

2. Mandatory Character of Court Decisions According to the Previous LAD

When discussing the scope of obligatory court rulings given in administrative disputes, distinction should be made between:

- cases in which an administrative act was cancelled in the administrative dispute, and
- cases in which the administrative dispute ended in declaring the plea unfounded and keeping the administrative act in place.

In the cases in which the plea was recognized as founded and the administrative act was declared void, the decision has absolute effect, which means that it is effective *erga omnes*. It is binding for any third persons, whether it is beneficial or detrimental for them. However, if the plea is rejected as unfounded and the administrative act in question is confirmed, then such a decision has relative effect, which means that it is effective *inter partes*. Therefore a decision made upon a plea which was rejected in an administrative dispute does not bind any third persons not being a party to the dispute. In other words, this means that if any third party should be subject to the same administrative act, they can institute administrative proceedings within a legal timeframe, regardless of the fact that the dispute initiated by the plea of an earlier plaintiff has already resulted in an effective court decision.

The mandatory nature of decisions made in administrative disputes refers both to the parties involved (the plaintiff, the sued party, and the interested person) and to other state organs and third parties. We shall therefore discuss the said mandatory character with respect to all of the subjects mentioned.

In the case of the decision being rejected, the plaintiff is obliged to act in keeping with the administrative act which he unsuccessfully tried to cancel in the

[1] See: Денковић, Д. Ђ. (1964). Обавезност пресуда донетих у управним споровима. *Анали Правног факултета у Београду*, no. 2–3, p. 305.

administrative dispute. In the case of a decision which accepts the plea and cancels the act, the plaintiff has the right to demand that a new administrative act be produced, in keeping with the court decision.

The decision also has effect on the sued party. If a ruling is made that the plea is rejected as unfounded, the disputed administrative act becomes effective, which means that it should be enforced unless it has already been executed. The effect on the sued party – in cases in which the decision recognizing the plea as founded and canceling the disputed administrative act – depends on whether the court has given its ruling in the dispute of full or limited jurisdiction. If the court has made its decision in a dispute of full jurisdiction, the sued party is obliged to always act in keeping with this decision pertaining to the administrative issue. If the decision is made in the dispute of limited jurisdiction and if the nature of the dispute is such that it calls for passing a new administrative act in place of the one which is cancelled, the sued party is obliged to pass such an act without undue delay and within 30 days following the receipt of the decision at the latest, and in doing so, they are bound by the legal understanding of the court and its remarks pertaining to the procedure (section 61).

Since an interested party has a role as a party to the administrative dispute, the court ruling also bears effect on them. This means that an effective decision is binding for any interested parties to the administrative dispute.

The binding nature of court rulings taken in administrative disputes does not bear effect only on the parties to such disputes, but also on other state bodies and third parties. They cannot act contrary to such court rulings. When an administrative act is cancelled by a court ruling, they cannot act as if it were effective, that is, they are bound to regard it as unlawful (Marković, 2002; 559).

3. Execution of Court Rulings in Keeping with the Previous LAD

The execution of court rulings in administrative disputes is closely related to their binding scope and, in fact, represents the legal sanction arising from them. If a court ruling were not binding for the administrative authorities, the execution of such decisions would be left to their good will.

When speaking about execution of court decisions, distinction should be made between:

- cases in which the court ruling is to reject the plea as unfounded and keep the disputed administrative act in place, and
- cases in which the court decides to cancel the disputed administrative act.

In the situation where the court ruling is to reject the plea and keep the administrative act in place, the court decision is enforced by executing the said act, unless it has already been executed, since the examination of its lawfulness has been concluded.

On the other hand, if the court decision is to accept the plea and cancel the disputed administrative act, its execution involves restitution or return to the state of affairs existing before the cancelled act was passed. If the court ruling does not

envisage the obligation of the sued party to pass a new act, it will not be passed. However, if the nature of the matter subject to administrative dispute is such as to call for a new administrative act in place of the cancelled one, then the sued party is obliged to pass such an act without undue delay and within 30 days following the receipt of the decision at the latest, in doing which they are bound by the legal understanding of the court and its remarks pertaining to the procedure (section 61). There are two types of 'non-enforcement' possible in such situations:

- improper execution of the court ruling; and
- failure to execute the court ruling, i.e. 'silence of the administration' regarding the execution of the court ruling.

Improper execution of court decision is present if the authority in charge, following the cancellation of an administrative act, passes a new one, but contrary to the legal understanding of the court or its remarks with respect to the procedure. The plaintiff then has the right to lodge a new complaint, and if he does so, the court will cancel the disputed act and, as a rule, resolve the dispute in its own capacity by a new court decision. Such court decisions entirely replace acts by relevant organs and the court reports on such cases to the supervisory organs (section 62). The new decision does not only cancel the newly-passed administrative act, but also resolves the administrative issue. This means that the court is entitled the power to cancel the unlawful administrative act which resolves administrative matters in question in an unlawful way and to dispose of such matters independently. The court decision made in such a case becomes immediately effective.[2]

Another case of non-execution of court decisions made in administrative disputes is a complete failure to execute a decision or 'the silence of administration' with respect to execution. Such a case is present if, following the cancellation of an administrative act, no new administrative act is passed immediately or within 30 days from the receipt of the court decision or if no act is produced as a result of execution of the court decision in the administrative dispute related to 'silence of administration' (such a decision recognizes the plea against the silence of administration and rules that the authority in charge making the decision). In such cases, parties may submit separate documents asking the authority in charge to pass such acts. If the authority in charge fails to pass the administrative act within seven days of the first request, the party may demand that the first-instance court passes the said act (section 63, paragraph 1). Upon the receipt of such a request the court shall ask the authority in charge for an explanation of reasons for failing to pass the administrative act. The authority in charge is obliged to give this explanation immediately, or within seven days at the latest. If it fails to do so or if the court finds that the explanation provided does not justify failure to execute the court decision, the court shall make ruling which completely replaces the act by relevant authority and which takes effect immediately. Thus the court resolves the disputed administrative matter, not settled by relevant authorities, and in these cases the

[2] See: В. Иванчевић, М. Ивчић, А. Лалић, Закон о управним споровима са коментаром и судском праксом, Загреб, 1958, pgs. 282–283; Д. Ђ. Денковић, Обавезност пресуда донетих у управним споровима, Анали Правног факултета у Београду, no. 2–3, 1964, p. 312.

court ruling in the administrative dispute is called a decision. This is also an example of a dispute of full jurisdiction. The court will forward any such acts to the executive body, at the same time notifying the supervisory body. The body in charge of execution is bound to execute such an act without delay (sect. 63, par. 2).

In explaining both cases of 'non-execution' of court decisions made in administrative disputes, court documents issued in the execution of court decisions, whether they are referred to as 'court rulings' or 'decisions' completely replace administrative acts. Yet, in any case, they are judicial acts, not administrative acts. Such an act is a judicial act, with respect to both the agent and manner of its passing, and therefore it is subject to the legal regimen of court rulings made in administrative judicial disputes (Marković, 2002; 562).

4. Binding Scope and Execution of Court Decision in the New LAD

The new Law on Administrative Disputes in Serbia maintains the continuity of obligations arising from court decisions and the execution thereof, but also makes a further step forward with respect to certain solutions.

Effective court decisions made in administrative disputes are legally binding (section 7). This mandatory character of judicial decisions in administrative disputes implies that they must be executed in a legally valid way. This obligation does not apply only to those subjects whose matter was disputed (the sued party), but also to the very suitor and the interested party possibly involved in the dispute (*inter partes*), as well as to the third persons (*erga omnes*) (Popović, 1968; 342).

Such court decisions are, naturally, binding primarily for the sued party, i.e. for the body which has passed the document the lawfulness of which was subject to administrative dispute. Thus, when the court cancels the act because of which the administrative dispute has been launched, the matter is returned for repeated consideration on appeal or for repeated consideration on the request of the party in the first-instance procedure if the possibility of appeal is ruled out by the law (the state of affairs prior to the passing of the cancelled act) (section 63, paragraph 1). If the nature of the disputed matter is such that it calls for passing a new administrative act in place of the one which is cancelled, the competent authority is obliged to pass such an act without undue delay and within 30 days following the receipt of the court decision at the latest, in which the authority in charge is bound by the legal understanding of the court and its remarks pertaining to the procedure (section 69, paragraph 2). On the other hand, the authority is not always obliged to pass a new administrative act to replace the one cancelled in the administrative dispute, but only when it is necessary due to the nature of disputed matter.

This means that the binding character of an effective court decision made in an administrative act with respect to the authority whose act has been cancelled because of its unlawfulness is twofold. In one case, the authority is obliged to pass a new administrative act in keeping with the opinion and remarks of the court and in the other the authority is obliged to refrain from passing a new act.

However, if the authority is obliged to pass a new administrative act based on the court decision, but does so in a manner contrary to the court ruling or procedural remarks made by the court, and the suitor submits a new plea, the court will cancel the disputed act and resolve the matter in its own capacity by making a decision, unless the nature of disputed matter rules out such a possibility or the law rules out full jurisdiction (section 70, paragraph 1). Since the court decision in such a situation completely substitutes the act issued by competent authorities (section 70, paragraph 2), it is a dispute of full jurisdiction. Should such a situation arise, the court shall report it to the supervisory body in charge of the authority violating the court order (section 70, paragraph 4). If the court finds that, due to the nature of disputed matter, it cannot independently dispose of the administrative dispute, it shall provide an explanation (section 70, paragraph 3).[3]

However, if, following the cancelation of an administrative act, the authorities in charge fails to pass a new administrative act immediately and within 30 days at the latest, the suitor may ask for such an act to be passed by filing a special document (section 71, paragraph 1). If the competent authorities fail to pass the act within seven days from the party's plea, the party may address the court that made the decision, asking that the act be passed (section 72, paragraph 2). Upon the reception of the party's request, the court asks the relevant authorities for information about the reasons due to which the new administrative act has not been passed. The relevant authorities shall provide such information promptly and within seven days at the latest. In case of a failure to provide such information or in case that the court should find that the information provided cannot justify failure to execute the court decision, the court will pass a decision which will entirely replace the act issued by the relevant authorities, if the nature of the matter allows it (section 71, paragraph 4). The court shall forward its decision to the competent executive body, informing the supervisory body at the same time. The executive body shall enforce this decision without delay (section 71, paragraph 4). It is obvious that in the case of 'silence of administration' related to the obligation to execute court rulings the court decision presents a special form of the full jurisdiction dispute. The full jurisdiction dispute exists because the court decision resolves the disputed administrative matter.

The court decision made in an administrative dispute is also binding for the suitor. With respect to the suitor, obligation arises in the situation when his plea is rejected as unfounded. The rejection of the plea means that the act in question is lawful. When the plea is rejected, the suitor is obliged to act not on the court ruling, but on the decision of the administrative act which has remained in power. In other words, in case the plea is rejected in the administrative dispute, all obligations arising from the administrative act become effective.

The decision of the court made in the administrative dispute is binding for the interested person in the dispute, if any, as well. Since it is in the interest of any such persons to keep the disputed administrative act in place, that is, to prevent its

[3] See: Лука Драгојловић, Милован Михаиловић, Коментар закона о управним споровима, Београд, 1979, p. 180.

cancellation, it means that the interested person has no obligations if the plea is dismissed (and the act thereby remains in place). However, if the administrative act in which this party is interested is cancelled, the interested party is bound to suffer the damage resulting from such a decision.

The court decisions made in administrative disputes are mandatory and all other subjects not being parties to the dispute must abide by them. This means that the court decision, besides being binding *inter partes*, i.e. for to the parties directly involved in the dispute, also has a binding effect on all others or the so-called third persons (*erga omnes*).

It is evident that the new Law on Administrative Disputes retains almost identical solutions as the previous one as far as the mandatory character and execution of court decisions made in administrative disputes, which has been demonstrated by the above comparison. However, it should be emphasized that it also envisages some new solutions, which present a firmer guarantee of the binding effects and execution of court decisions. This is achieved by introducing two new institutions that did not exist in the previous LAD. These are the right to redress for the damage caused by failure to execute a court decision and a fine paid by the manager of the authority in charge.

Firstly, the new LAD provides for the right of the suitor to redress for the damage arising from failure to execute or promptly execute a court decision made in an administrative dispute. The redress is ensured in a dispute before the competent court and in keeping with the law (section 72). The procedure conducted by the competent court is subject to the Law on Civil Suits.[4]

The application for redress may be aimed at the competent body which failed to execute the court decision or failed to do so promptly, despite the fact that it was obliged to do so. Although the new LAD does not define obligations of the suitor and sued party in the procedure for redress for the damage arising from failure to execute or promptly execute a court decision, the burden of proof here undoubtedly lies on the suitor, who has to prove the facts on which his demand for redress in based. On the other hand, it is in the interest of the sued party to prove the facts supporting the claim that no damage occurred. In other words, the suitor is obliged to prove facts which form the basis of the redress application, whereas the sued party is obliged to prove the facts possibly denying the grounds for such an application. [5]

Secondly, the LAD envisages that the manager of the authority which, following the cancellation of an administrative act, passed a new administrative act contrary to the court ruling or contrary to the court's remarks on the procedure (section 70, paragraph 1) or which, following the cancellation of an administrative act, failed to pass a new one (section 71), shall be ordered to pay a fine (section 75, paragraph 2). The court can repeatedly fine the manager of the relevant body in case he fails to fulfill the obligation for which he was fined (section 75, paragraph 3). The fine collection is officially executed (section 76).

[4] Службени гласник РС, 125/2004.
[5] See: Кулић, Ж., Васиљевић, Д. (2009). *Радни односи у органима државне управе.* Београд: КПА, 81.

The institution of fine is aimed at coercing the body in charge and its manager to comply with court decisions made in administrative disputes. In fact, the manager, among other things, is responsible for the lawfulness of work in the body which he manages.

5. Conclusion

It is clear that control of administration by its internal organs was not sufficient guarantee for the lawfulness of its work. Besides, this form of control did not ensure complete protection of civil rights against illegal and improper moves of administration made in the sphere of civil rights and interests.

Hence the need to dislocate the final control of lawfulness from the system of administration and assign it to independent state organs, without rejecting administrative control of the administration. These independent bodies are courts, having judicial, and not administrative powers, which means that judicial control of the administration is the highest instance of legal control of the administration. Thus the principle of lawfulness of administration is institutionally guaranteed, since it is completely regulated by law, so that it can be said that judicial control of the administration is the roof of the building called a legal state.

An administrative dispute is a form of judicial control over the administration and primarily control of the lawfulness of administrative (individual, specific) acts, granting the court powers to cancel such an act if its unlawfulness is established. However, as we have seen, such control in certain cases outlined in the LAD empowers the court to resolve disputed administrative matters where unlawful administrative acts have been cancelled.

The issues of obligation and execution of court decisions made in administrative disputes present conditions *sine qua non*, and administrative disputes would be pointless without them.

Without the principle of obligation and execution of effective court decisions, administrative disputes would have no practical implications. The binding character of court decisions ensures evaluation of lawfulness of administrative acts subject to administrative disputes. Otherwise, an administrative dispute would have purely intellectual nature.

Administrative disputes have a long-lasting tradition in the legal system of Serbia (Vasiljević, 2009; 355–379). Judicial control of administrative authorities existed in the South Slav states even before they were united in the Kingdom of Serbs, Croats and Slovenians in 1918, then in the so-called New Yugoslavia, and it has remained in place even today in Serbia as an independent country. This fact implies that the principles of obligation and execution of court decisions have been long-established in our legal system and that the new LAD could not make radical moves with respect to it. Still, it has moved forward towards finding new solutions aimed at providing stronger guarantees for observing the obligations stemming from court decisions and their execution. These solutions include two judicial

institutions: a) the right to redress for the damage arising from non-execution, and b) fines for managerial staff.

The efficiency of these institutes should certainly be viewed in the context of the principle of division of power proclaimed by the Constitution of Serbia (section 4), which provides for the division on legislative, executive and judicial authorities, which are balanced and subject to mutual control, the judicial authorities being independent.

All in all, it is very significant that there is, finally, a firmer legal foundation for ensuring that court decisions are executed and that obligations stemming from them are observed. Thanks to it, additional mechanisms for the protection of this principle have been created as well as conditions for effectively curbing violations against it. Time and practice of competent authorities will be the best judges of their effectiveness.

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OBAVEZNOST I IZVRŠENJE SUDSKIH PRESUDA PO NOVOM ZAKONU O UPRAVNIM SPOROVIMA SRBIJE

Rezime

U radu su predmet pažnje bila pitanja obaveznosti i izvršenja pravnosnažnih sudskih presuda u upravnom sporu prema novom Zakonu o upravnim sporovima Srbije. Da bismo se uverili u kvalitet tih rešenja, bilo je neophodno napraviti poređenje sa rešenjima koja je predviđao prethodni Zakon o upravnim sporovima. To je bio najbolji način da se vidi da postoji pravni kontinuitet u pogledu ovih instituta, ali i da je napravljen kvalitativan korak napred u njihovoj nadgradnji. Taj korak ogleda se u uvođenju prava na naknadu štete zbog neizvršenja presude i u novčanom kažnjavanju rukovodioca organa. Da li će sve ovo biti i delotvorno, pokazaće praksa nadležnih organa i vreme koje je najbolji sudija.