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Specificities of the Entry into Force and Suspension of an Individual Administrative-legal Act

The paper focuses on the following topics: the specificities of the entry into force and suspension of individual administrative-legal acts; the rule of official presentation thereof; the practices of specific administrative authorities with respect to the entry of individual administrative-legal act into force; legal nature of unpromulgated individual administrative-legal acts; judicial practice in relation to the entry of individual administrative-legal act into force. The paper reviews the entry of individual administrative-legal act into force with additional stipulations as well as the cases of its suspension in case of filing administrative complaint, and in case of appealing in court.

Key words: *General Administrative Code of Georgia, individual administrative-legal act, additional stipulations, judicial practice; suspensive effect.*

1. Introduction

The goal of the paper is to demonstrate the specificities of the entry into force and suspension of individual administrative-legal acts, the rule of official presentation and promulgation thereof, legislative gaps of these institutions and issues related to their smooth functioning. Administrative bodies often introduce practice that connects the entry of an individual administrative-legal act into force with an instance of its signing. The paper reviews the above-mentioned practice and provides legal assessment of this fact. Other preconditions for the entry of individual administrative-legal acts into force, in addition to those prescribed by legislation, are presented, based on the Supreme Court practice. The paper also reviews the entry into force of individual administrative-legal acts with additional conditions, legal definition of which is not envisaged by the legislation of Georgia. This institution contributes to more effective and flexible operation of administrative authorities. The paper offers an insight into the essence and the advisability of introducing the above concept in the legislation.

The paper provides an overview of the matter of suspending individual administrative-legal acts, when, according to the law, different approaches are stipulated for suspending an act appealed through the administrative channel, versus taking a case to court. The challenging issues associated with each of these two mechanisms are presented, as well as recommendation for the improvement of the mentioned institution is proposed.

The paper examines the mechanism of functioning of similar institutions in foreign states (primarily, the Federal Republic of Germany, since, Georgian administrative law institutions are largely regulated similar to the German legal system) and proposes solutions.

2. The Entry of an Individual Administrative-legal Act into Force

The entry of individual administrative-legal acts into force is one of the most important aspects of administrative procedure. An individual administrative-legal act becomes binding for an addressee after the entry into force, prescribing a party to take certain action or refrain from such action. Remedies come into action at this stage as well, in case a addressee deems that its rights have been breached.

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The process of drafting, adoption and validity of an administrative act is a special legal procedure that is regulated extensively in the legislation of foreign states. In Western states, these matters are usually governed by special legislation, specifically, USA 1964 Law on Administrative Procedures and relevant laws of states, Switzerland 1968 Law on Administrative Procedures and Switzerland analogous laws, 1976 Law of Germany, legal regime of public administration of Spain and 1992 General Administrative Procedures Law, the Netherlands Law on General Administrative Law, France 2000 Law on the Rights of Citizens towards the Public Administration.¹

2.1 Official Presentation of an Individual Administrative-legal Act

According to the example of the practice of foreign states, the entry of an individual administrative-legal act into force is connected with its official presentation.² The legislation of Georgia contains a similar regulation, specifically, pursuant to Article 54 of the General Administrative Code of Georgia (GACG), unless otherwise prescribed by legislation, an individual administrative-legal act enters into force immediately after it is served to the a party per the law prescribed rule or on the day of promulgation. Furthermore, presentation according to the rule, per Article 58(2) of the same Code, involves the handing over of such act or sending through mail, while promulgation, according to Article 56(1), involves publishing it in an official publishing body of its administrative body.

2.2 The Practices of Specific Administrative Bodies with Respect to the Entry of Individual Administrative-legal Act into Force

It is important to overview the specific practice of administrative bodies with respect to the entry of individual administrative-legal acts into force. Some administrative bodies connect the entry of individual administrative-legal acts into force with their signing. The following cases can be brought as an example of the above: pursuant to Article 3 of the Minister of Education of Sciences of Georgia March 31, 2014 Order N 388 on Approving the Schedule for Organized Professional Testing in Spring, 2014, by the National Assessment and Examination Center, a Legal Entity of Public Law, this Order enters into force upon signing³; According to Paragraph 4 of the Staffing Schedule Structure and Wages of the State Audit Service, approved under March 11, 2015 Order N42/37 of the General Auditor of the State Audit Service, this Order shall become effective upon signing⁴.

It is evident from the presented examples that in some cases administrative bodies connect the entry of individual administrative-legal acts into force with their signature. It is self-evident here that the regulation prescribed under Article 54(1) of the General Administrative Code of Georgia, which connects the entry of an act into force with its presentation to an addressee, cannot be fulfilled, and respectively, despite such provision, an act cannot enter into legal force. Official presentation of an individual administrative-legal act is not only a criterion for its legality, but also a precondition for its existence. Similar to a law taking force through its official promulgation, an individual administrative-legal act acquires force by means of its official presentation to a addressee. In the process of presentation an individual administrative-legal act, attention should be paid to Articles 55-58 of the General Administrative Code of Georgia and specificities stipulated in special laws. The failure to comply with the law-prescribed format for presenting an individual administrative-legal act to a party does not necessarily prevent its entry into force; rather, it renders an act illegal. In such case, an individual administrative-legal act does not take force, i.e., an act is not binding for a party.⁵ The Supreme Court of Georgia

¹ *Kozirin A., Shmamina M., Zelentsov A., Bogdanovskaya I., Danilov S., Sazhina V., Reitelmeier K., Shaikh K., Nikerov G., translators: Kharshiladze I., Ovsanykova N., Administrative Law of Foreign States, Tbilisi, 2014, 202 (in Georgian).*

² *Ibid*, 213.

³ <<http://mes.gov.ge/old/upload/editor/file/Brdzanebebi/2014/marti/388.pdf>>, [29.07.2017].

⁴ <<http://sao.ge/files/proaqtiuli/safinanso/sahtato-nusxa.pdf>>, [29.07.2017].

⁵ *Turava P., Tskepladze N., Handbook of General Administrative Law, 2nd ed., Tbilisi, 2013, 84-85 (in Georgian).*

develops a similar opinion in one of its decisions.⁶ The entry of an act into force is almost similarly regulated in the German law as well. A decision taken by a state authority should enter into force. An administrative act enters into force at the instance when an addressee of such act is notified about this. Presentation is an important part for an administrative act. The importance of presentation is twofold: following notifying, it can be said about an administrative act that it has acquired the legal presence function and secondly, presentation concludes an administrative procedure.⁷

It is especially important to serve a prohibiting (binding) individual administrative-legal act to an addressee. In such case, the entry into force is related to the activation of the administrative enforcement mechanism. The Cassation Court explains that the institution of the entry of individual administrative-legal acts into force is related to the institution of enforcement of an act, since enforcing individual administrative-legal act is an important stage of administrative procedure. Results of a decision taken based on administrative procedure are manifested in its enforcement. Enforcement implies the possibility of enforced execution of public legal obligations of citizens or other entities of law. Save the exceptions strictly defined by the law, enforcement of an administrative-legal act may not be commenced unless it is served to an addressee per the law prescribed rule.⁸

2.3 The Legal Nature of an Unpromulgated Administrative-legal Act

It is interesting what happens to an already promulgated and signed act when it has not been served to a addressee, or has not been promulgated according to the legislation prescribed rule. Can an administrative body amend an act that has not been served to an addressee, or abolish it altogether; how should a party interested in issuing an act defend itself in such case. A team of authors notes in relation to this issue that official presentation of an individual administrative-legal act is not only a criterion for the legality of an act, but also a precondition for its existence. Similar to a law that takes force through its official promulgation, an individual administrative-legal act acquires binding power through its official presentation to an addressee.⁹ The precondition for the entry of administrative acts into force is the departure of the internal state system and moving into the public domain. An act has to take force in order for it to exist. An act becomes existant only after it is presented officially; prior to this exists something that will become an administrative act. A document passed prior to its official presentation is a decision within an administrative body. A document that may later become an act and the entry into force should be differentiated, the former is the precondition for the latter.¹⁰ Respectively, if an administrative authority would like to amend or cancel an administrative legal act that has already been promulgated but has not taken force, it will not have legal basis for doing so.

2.4 The Practice of the Supreme Court with Regard to the Entry of Individual Administrative-Legal Acts into Force

The Supreme Court of Georgia makes a very significant commentary in relation to the entry of an individual administrative-legal act into legal force, in one of its decisions: the cassation court explains that the judiciary, when examining the legitimacy of an administrative-legal act conferring the power of appeal cannot assess the right of an addressee to legitimate expectation; respectively, they will neither be able to defend themselves, since an addressee of an act derives legitimate expectation only after an act takes legal force, i.e., as has been mentioned above: 1. Once the term for appealing an act expires; or 2. In case of appealing an act, once it is left unaltered.

⁶ The Supreme Court of Georgia Administrative Chamber July 9, 2013 Decision №36-220-212(2j-13) (in Georgian).

⁷ *Peine F.J.*, Allgemeines Verwaltungsrecht 7. neu bearbeitete Auflage, schwerpunkte C.F. Muller, Heidelberg 2004, 125.

⁸ The Supreme Court of Georgia Administrative Chamber July 9, 2013 Decision №br-220-212(2j-13).

⁹ *Turava, P., Tskepladze N.*, Handbook of General Administrative Law, (2nd ed.), Tbilisi, 2013, 87 (in Georgian).

¹⁰ *Peine F.J.*, Allgemeines Verwaltungsrecht 7. neu bearbeitete Auflage, schwerpunkte C.F. Muller, Heidelberg 2004, 125.

It is the very entry of an act into legal force that gives rise to the emergence of the entitlement to legitimate expectation of an addressee of such act, and respecting this right becomes priority in relation to the principle of legality. Thus, in the course of legal procedure, it is inadmissible to assess legitimate expectation of an addressee of an appealed administrative-legal with a conferring power; this is a nonlegal approach, since in such conditions it will be impossible to defend legitimate interests of an appellant.¹¹

It can be concluded based on such judicial decision that the entry of an individual administrative-legal act into force depends not only on the serving of such act to an addressee according to a law prescribed rule, or its promulgation, but two other criteria are added to it: the expiration of the term of appealing an act and, in case of appealing an act, leaving it unaltered. It is exactly after the expiration of every term for appealing an act, or, if appealed, leaving it unaltered (based on the final decision), that an interested party derives legitimate expectation towards such act and it can receive benefit or right set forth under this act.

2.5 The Entry of an Individual Administrative-legal Act into Force with Additional Conditions

The following is worthy of a separate mention: the entry into force of an individual administrative-legal act which entry into force, or retaining an already valid act in force, is connected with the fulfillment of a certain condition by a addressee. In the governance practice, additional stipulations of an individual administrative-legal act are of essential importance, especially, if a conferring act is issued. Its goal is to overcome those legal and effective barriers that impede the issuance of a specific permit and hence, the issuance of a conferring individual administrative-legal act. If an applicant fails to fully meet the preconditions for issuing an individual administrative-legal act stipulated by the law, an administrative body may, instead of a refusal to issue an act, issue such individual administrative-legal act through appending additional stipulations.¹² The mentioned institution is also envisaged in the German legislation. Regulation is crucial for an administrative act. It establishes main opinion as to how a state authority has to issue a desirable act. The act may be limited through any method. Such limitation may be exercised through additional stipulation.

This legal definition of the concept of the additional stipulations concept is provided in Paragraph 36 of the Administrative Procedure Act of the Federal Republic of Germany. Sub-paragraph 2 of this paragraph lists 5 additional stipulations of an administrative act: term (time limit), condition, a reservation regarding annulment, an obligation or a reservation to the effect that an obligation may subsequently be introduced, amended or supplemented (condition).¹³

For administrative authorities to enjoy this highly flexible mechanism, it is better to reflect it in legislation, specifically, in the relevant articles of the General Administrative Code of Georgia, since thus it will be clear and explicit for administrative bodies that they can apply the mentioned mechanism, which will streamline administrative legal procedure and render it more effective, especially when such practice exists at the example of the German legislation.

3. Suspending an Individual Administrative-legal Act

It is important to establish in which case a valid act can be suspended. This may be effected by means of appealing such act, within the administration or outside – in court. The filing of an administrative complaint gives rise

¹¹ The Supreme Court of Georgia Administrative Chamber July 16, 2013 Decision №br-192-184(3j-13) (in Georgian).

¹² *Adeishvili Z., Vardiashvili K., Izoria L., Kalandadze N., Kopaleishvili M., Skhirtladze N., Turava P., Kitoshvili D.*, Handbook of General Administrative Law, Tbilisi, 2005, 158-159 (in Georgian).

¹³ *Peine F.J.*, Allgemeines Verwaltungsrecht 7. neu bearbeitete Auflage, schwerpunkte C.F. Muller, Heidelberg 2004, 118.

to the suspension of an appealed act. Suspensive effect is the suspension of an individual administrative legal act, following remedies, administrative complaint and counterclaim. It is a suspensive effect and not the suspended state.¹⁴

3.1 Suspensive Effect Theories

In German literature, there are three main theories of the suspensive effect. Two of these are the branches of the “validity theory”.¹⁵

The first, the so-called “strict validity theory” delays the¹⁶ entry of an administrative act into force until the instance when a valid judicial decision or a decision of an administrative body reviewing a complaint is rendered in relation to it. The goal of suspensive effect is not to assign priority to someone; rather, it is to provide legal safeguard against the expected irreparable damage.¹⁷

With the so-called “limited validity theory”, the validity of an administrative act is analogous to the validity of variably invalid deals. Its validity is suspended only temporarily, i.e., until the entry into force, an administrative act is in a “floating” state. If it takes legal force following a complaint or an appeal, the counting of the term of validity will commence from the day of presentation.¹⁸ According to this theory, an act will be deemed valid from the instance of final refusal to a remedy – valid from the beginning (it has retroactive force).¹⁹

According to the enforcement theory, suspensive effect suspends just the applicability of an act and from the instance of final refusal to a remedy – the enforcement becomes retroactive. The enforcement theory is the most common. They distinguish also the so-called interim theory, according to which a suspensive effect is temporary suspension of the validity of an act.²⁰

3.2 Suspending an Individual Administrative-legal Act in Case of Filing an Administrative Complaint

Pursuant to Article 80(1) of the Federal Republic of Germany Code of Administrative Court Procedure: “An objection and a rescissory action shall have suspensive effect. This shall also apply to constitutive and declaratory administrative acts, as well as to administrative acts with a double effect (an administrative act is conferring for one party, while limiting for the other). Unlike the Georgian model, in German legislation a temporary action in case of an administrative complaint and an administrative appeal is regulated together.²¹ Article 184 of the General Administrative Code of Georgia sets forth the rule for suspending an appealed act, and, according to its Paragraph 1, “Unless prescribed otherwise under the law or a sub-legal act passed based on the law, the validity of an appealed act is suspended from the instance an administrative complaint is registered. An administrative body passes an individual administrative-legal act about this.” Usually, appealing an act shall automatically cause the suspension of its applicability. This very content is included in the first sentence of the referenced provision. Although, according to the second sentence, an administrative body issues an individual administrative-legal act about this. If the legislator declares a principle that it recognizes the suspension of an act in case

¹⁴ *Sioridze G.*, Suspensive Effect in General and Procedure Administrative Law of Georgia; drawbacks and prospects of double regulation, current issues of Georgian Administrative Law, David Batonishvili Institute of Law, Tbilisi, 2016, 43 (in Georgian).

¹⁵ *Ibid*, 44-45.

¹⁶ The term „administrative act“ is a term used by an author (G. Sioridze, Suspensive Effect in General and Administrative Procedure Law of Georgia). For the purposes of this paper it is used with the meaning of an individual administrative-legal act.

¹⁷ *Ibid*, 45.

¹⁸ *Ibid*, 45.

¹⁹ *Tsiklauri B.*, Preliminary Remedies in Administrative Law, “Students Law Journal“, 2011, 16 (in Georgian).

²⁰ *Ibid*, 16.

²¹ *Ibid*, 10.

it is appealed automatically, then the meaning of this sentence is unclear. What will happen if a body does not issue an act with such content, will such an action result in the failure of an act to take force? A team of authors notes on the above-mentioned issue that article 184 of the General Administrative Code of Georgia sets forth a suspensive effect of a complaint; this implies automatic suspension of an appealed act and this is not dependent on an administrative authority decision.²² Suspensive effect emerges from the instance of the registration of a complaint. The passing of an individual administrative-legal act about this is declaratory and an administrative body does not have a discretionary authority to pass it.²³ The above-mentioned dubious sentence may cause just misunderstanding, it leaves to an authority certain room for arbitrariness, especially that it is not a regular individual administrative-legal act, which would have to be presented to a party in order to take force.

3.3 Suspending an Individual Administrative-Legal Act in Case of Appealing in Court

Legal remedy envisaged under Article 29 of the Georgia Administrative Procedure Code is aimed at ensuring effective execution of justice. Suspensive effect of an appeal stipulated in Article 29 serves the very temporary safeguarding of this right, which is aimed at protecting a party against the effects of activities of authorities until the decision is taken on the subject of dispute in the course of administrative proceedings.²⁴ Pursuant to Paragraph 1 of this Article, accepting an appeal in court suspends an appealed individual administrative-legal act. Unlike Article 184(1) of the General Administrative Code of Georgia, here no additional decision is taken about suspending an individual administrative-legal act. The applicability of an appealed act²⁵ is suspended by accepting an appeal by court, automatically, and this is not dependent on a court or party will. The presence of such a provision indicates to high degree of securing an administrative complaint. The suspension of an administrative act based on law commences from the instance a judicial ruling about the acceptance of an appeal into proceedings is taken. This should not be interpreted as if the suspension of an administrative act is effected based on court decision. The applicability of an administrative act is suspended based on the law, automatically, and not based on a judicial decision.²⁶

Similar to Article 184(2) of the General Administrative Code of Georgia, Article 29 of the Administrative Procedure Code also contains the cases when the applicability of an appealed act is not suspended. The applicability of an act shall not be suspended if: a) this is related to the payment of state or local taxes, fees or other charges; b) delaying enforcement will result in considerable material damage, or will pose considerable threat to public order or security; c) it has been issued during emergency or martial law declared based on a relevant law; d) an administrative body has taken justified decision about immediate enforcement, in the presence of the necessity of immediate enforcement; e) an individual administrative-legal act has been enforced or it is a conferring act and its suspension will inflict considerable harm to the legitimate right or interests of another party; f) it is envisaged by law. It appears that there are certain differences in suspending individual administrative-legal acts in cases of filing a complaint and an appeal. For example, Article 184(2) of the General Administrative Code does not envisage extending the validity of an act in cases stipulated under Article 29(2)(a) and (d) of the Administrative Procedure Code, considerable difference is found in other paragraphs as well. The above-mentioned

²² *Turava P., Tskepladze N.*, Handbook of General Administrative Law 2nd ed., Tbilisi, 2013, 202 (in Georgian).

²³ *Sioridze G.*, Suspensive Effect in General and Procedure Administrative Law of Georgia; Gaps and Prospects of Dual Regulation, Current Issues of the Administrative Law of Georgia, David Batonishvili Institute of Law, Tbilisi, 2016, 49 (in Georgian).

²⁴ *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P.*, Administrative Procedure Law Handbook, Tbilisi, 2008, 386 (in Georgian).

²⁵ The term „an administrative act“ is used by the authors (*Vachadze M., Todria I., Turava P., Tskepladze N.*, Commentary to the Administrative Procedure Code of Georgia, Tbilisi, 2005); for the purposes of this Paper, it has the meaning of an individual administrative-legal act.

²⁶ *Vachadze M., Todria I., Turava P., Tskepladze N.*, Commentary to the Administrative Procedure Code of Georgia, Tbilisi, 2005, 160 (in Georgian).

approach is not expedient, it is better to establish a unified standard, a listing of cases when the applicability of an act appealed at a higher administrative body or in court, is not suspended. For example, it is unclear why, in one case, an act is extended if an appeal is filed – in relation to individual administrative-legal acts concerning the payment of state or local taxes, fees or other charges; while, if an administrative complaint on the same issue is filed with a higher administrative body – it does not result in extending its validity. The above-mentioned problem is more vivid in cases when an interested party has the choice of where to appeal an individual administrative-legal act. Let us continue with the same example: according to Article 305(1) of the Georgia Tax Code, “in case the Revenue Service takes a decision that is not desirable for a complainant, such complainant is authorized to appeal a decision within 20 days from its serving at the Dispute Resolution Board or in court.” As can be seen, in one case, if an interested party decides to take to court and file an appeal – in relation to an individual administrative-legal act related to the payment of state or local taxes, fees or other charges, then the applicability of such act will not be suspended, while if the party decides to file an administrative complaint to a higher administrative body, Dispute Resolution Board – this will give rise to the suspension of an appealed act. The mentioned example once again showcases the currency of this problem and the need to resolve it.

Pursuant to Article 29(3) of the Administrative Procedure Code of Georgia, based on a request from a party, court may suspend an individual administrative-legal act or its part in case envisaged under Paragraph 2 of this Article, in case there is justified doubt about the legitimacy of an individual administrative-legal act or its immediate enforcement inflicts substantial damage to a party or renders it impossible to protect his/her legitimate right or interest. In such case, a legislator, based on the interest of an interested party, leaves such party certain “opportunity” to manage to suspend the applicability of such act, which has to be assessed as positive. The discretionary role of court increases here and it is allowed to, on a case by case basis, resolve the issue of suspending an act or refusal to suspend it. In each specific case of suspending an administrative act, the necessity for applying such measure should be clear. A request from a party to suspend an appealed administrative act shall contain reference to factual circumstances due to which its immediate enforcement inflicts substantial damage thereof or renders it impossible to protect its legitimate right or interest, as well as to justify the suspicion concerning the legality of an administrative act.²⁷

Pursuant to Article 29(4) of the Administrative Procedure Code, based on the demand from a party, court may, in cases envisaged under Paragraph 1 of this Article, revoke the suspension an individual administrative-legal act or its part, provided there is the necessity of urgent enforcement of an individual administrative-legal act or its part that is associated with significant (substantial) harm or limits a legitimate right or interest of a party. At the opinion of a group of authors, such legislative amendment effectively cancels a legal, suspensive effect of an administrative-legal act that has been appealed in court. Based on this provision, court is authorized to revoke the suspension of an administrative-legal act prescribed by law through its decision.²⁸ This provision truly diminishes the suspensive effect. Even the more, the mentioned stipulation renders redundant not only first part, but also the second part, pursuant to which an act is not suspended only in exceptional cases. While, Paragraph 4 overlooks such cases and an act may be extended in any case.

4. Conclusion

The specificities of the entry into force and suspension of individual administrative-legal act have been reviewed in the Paper.

The following circumstances have been identified during the study of the issue: some administrative authorities connect the entry of administrative-legal acts into force with signing thereof. In such case, legislative stipulation which connects the entry into force of an act with its presentation to an addressee, cannot be fulfilled and respectively, despite such a provision, it cannot take legal force; official presentation of an individual ad-

²⁷ Ibid, 167.

²⁸ Ibid.

ministrative-legal act is not only a criterion for the legitimacy of an individual administrative-legal act, but also a precondition for its existence.

It has been identified that when an individual administrative-legal act has been issued but has not been served to an addressee pursuant to a law prescribed rule, it simply does not exist; it comes into existence only following official presentation, while, prior to then exists something that will become an administrative act later. Based on the judicial practice, two additional criteria for final entry into force of an individual administrative-legal act have been identified – expiration of the term for appealing an act and in case of appealing an act – leaving it unaltered. During the study of the issue of the entry into force of individual administrative-legal acts with additional stipulation, the advisability of its introduction in the legislation has been identified.

It has been identified over the course of the analysis of suspending an individual administrative-legal act that in case of an administrative complaint and appeal, there are various preconditions set for suspending an individual administrative-legal act, which is not expedient, since it may cause misunderstanding; hence, it is advisable to establish a unified standard, a listing of the same cases when the applicability of an act appealed either at a higher administrative body or in court, does not cease.

The paper showcases certain gaps in the area of the entry into force of an individual administrative-legal act and its suspension, provides comments and specific recommendations for the improvement of these legal institutions and their better perception.

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