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The Issue about the Provision for Damage Inflicted by Preventive Security Measures upon Adjudicating the Dispute over Legality of Enabling Individual Administrative-legal Acts

The Constitutional Court of Georgia considers the constitutional submission of Tbilisi Court of Appeals requesting to establish the constitutionality of inadmissibility of the reversal of provision upon applying the preventive security measures in the administrative process.

The idea of admitting the reversal of provisional measures in the administrative proceedings of civil procedure standards aims at the maintenance of balance between the private interests of participants in the administrative process. However, it is impossible to speak about the methods and prospects of its implementation without the joint understanding of the enabling individual administrative-legal act as the essence of examining the result of conflict of interests, the legitimacy of state administration, the principle of legal trust and the major function of administrative justice at the stage of preventive security.

The goal of this paper is to present certain viewpoints on the problematic aspects of admissibility of the reversal of civil security in administrative proceedings and their solutions pursuant to the principle of their legal trust.

Keywords: *provisional measures, preventive security, damage, conflict of private interests, legal trust.*

1. 1ntroduction

Upon the constitutional submission[1] of Tbilisi Court of Appeals of April 07, 2021, with respect to the 1st part of Article 19 and the 1st part of Article 31 of the Constitution of Georgia the Constitutional Court was requested to establish the constitutionality of the normative content of the 3rd part of Article 29 (only upon applying "e" sub-paragraph of the 2nd part of article 29, in the section of enabling act) and Article 31 (only upon the conflict of interests of subjects of private law) of the Administrative Procedures Code of Georgia, pursuant to which the provision of security envisaged by Civil Procedure Code and/or the rule on the compensation of damage caused by the provisional measures are not applied upon using the above-mentioned norms.

The constitutional submission was made about the legality of construction permit within the adjudication of administrative dispute, in which under the 3rd part of Article 29[2] of the Administrative

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1 Constitutional submission of Tbilisi Court of Appeals of 30.03.21, <https://constcourt.ge/ka/judicial-acts?legal=11044> [12.01.2022].

2 Under the 3rd part of Article 29 of the Administrative Procedure Code of Georgia, at the request of a party the court may suspend the validity of the individual administrative-legal act or of its part, if the

Procedure Code of Georgia the first instance of administrative court of Georgia suspended the construction permit as the validity of individual administrative-legal act[3] envisaged by "e" subparagraph of the 2nd part of Article 29 of the same Code. The third person entitled to the permit of suspended construction requested to impose the provision for compensatory damage caused by the suspension of construction permit upon the plaintiff.

It is ambiguous, how the administrative courts should resolve the issue about the provision of compensatory damages laid down in "e" sub-paragraph of the 2nd part of Article 29 of the Code of Administrative Procedures upon adjudicating the dispute on the legality of enabling act, when the right to preventive security measures is exercised in the sphere of conflict of two various private interests with respect to the individual administrative-legal act. The legality of individual administrative-legal acts including construction permits are frequently made the subject of judicial disputes. The interests of persons entitled to the permit, among them that of real-estate developers, are in conflict with the interests of natural persons (health, safety, environmental, etc.) and cause the resistance of population living in building site. Obviously, the satisfaction of many -thousand demands with the suspension of administrative-legal basis of large-scale investment projects will cause the restriction[4] of access to legal remedies for the protection of potential victims' rights with "wealth effect", that is in contradiction with the essence of Constitutional State and the principle of rule of law. On the other hand, the addressees of suspended construction permit turn to the property right, the components of adversarial fair trial and the equality of parties which have effect in case of civil legal "reversal of provision".

The Supreme Court of Georgia, except for some exceptions, deems it inadmissible[5] to take the security measures for civil legal claims in administrative proceedings and accordingly, to apply its reversal mechanism envisaged by Article 199 of Civil Procedure Code. The court of cassation has not extended its position related to the inadmissibility of administrative procedural analogue of providing the security for damage caused by a particular provisional measure. Neither the direct legislative regulation exists concerning this issue.

Occasioned by the mentioned, the common courts are certainly faced with the issue about changing the established practice and reality, which are created by the insufficiency of regulatory laws, by way of constitutional submission. The position, which is reflected in the constitutional

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substantiated suspicion about legality of the individual administrative-legal act exists or if its urgent enforcement substantially prejudices the party or makes it impossible to protect its legal right or interest.

3 The justification of security from suspensive effect by the private interest of the addressee of enabling act is enshrined only in "e" sub-paragraph of the 2nd part of Article 29 of the Code of Administrative Procedures. Hence, upon applying the preventive measures, prescribed by the 3rd part of Article 29 of protection of rights, towards it the conflict of private interests between the plaintiff and addressee of the act will be arisen.

4 It is hard to imagine, that the statistical (average) citizen, the foundation of whose house may be demolished due to the construction of a building in the neighborhood, will be able to deposit many thousands of money which is demanded by the builder in the form of compensation of damage caused by the suspension of construction permit. In this case, if not maintaining the preventive remedy for protection of the right, there is no point in filing a revocable or confessional lawsuit in court.

5 Judgment of 09 January, 2019 on the case № bs-1562(us-18) of the Chamber of administrative cases of the Supreme Court of Georgia<http://prg.supremecourt.ge> [12.01.2022] (in Georgian).

submission of Tbilisi Court of Appeals and suggests that the divergent degree of protection of private interests in various proceedings breaches the constitutionally protected right to property and fair trial as well as the adversarial component of the right to fair trial enshrined in Article 6 of European Convention on Human Rights, is definitely worth sharing. However, the main thing is, that in order to balance the mentioned private interests, to what extent the introduction of civil procedural standard into the administrative proceedings and the imposition of damages caused by the suspension of enabling individual administrative- legal act upon the party prejudiced by this act will be justified, that practically, would deprive the latter of the opportunity for protection of the right in court. Upon considering the administrative dispute on declaring the individual administrative-legal act as null or void, it is impossible to pass the judgment on the issue of admissibility of the reversal of preventive security measures without determining the liable person for the damages, when the validity of the appealed enabling administrative- legal act is suspended by the court on grounds of the substantiated suspicion of its legality or the threat of significant damage to the plaintiff's right or interest. The necessity for the development of reasoning exactly in this direction became the source of inspiration for this paper.

The participants of administrative justice have been in agreement about the necessity for reforms and independent development of Administrative Procedures Law of Georgia for a long time. The outcomes of discussions about constitutional submission, in the sphere of preventive security measures, will apparently be the step forward on the way of this development. In the paper, for our part, we will try to focus our attention on several problematic aspects of administrative procedural analogy with the reversal of provisional measures and seek for their solutions.

By the example of construction permit, only within the revocable and confessional claims, we will refer to the issue about the compensation of damages caused by the suspension of enabling act enshrined in "e" sub-paragraph of 2nd part of Article 29e of the Code of Administrative Procedures. As concerns the temporary judgment regulated by Article 31, in contrast to article 29, it is applied when the active regulation of individual administrative- legal act does not exist. Accordingly, considering the circumstances of the case, a larger spectrum of conflicts of rights and interests may stand trial, where the prevelance of private interests is also admissible and may be deemed to be the analogue with civil legal security measures[6].

The considerable part of the paper is dedicated to defining the essence of individual administrative- legal act (by the example of construction permit) as a consequence of conflict of interests (2), which leads to understanding the significance of the emerge of third persons' interests to be protected by the institute of so called "reversal of provision" from the principles of legal trust in the administrative process (3). We will review the legal reality existing today in terms of abolishing the

[6] The case, when preventive security measure envisaged by Article 31 of the Code of Administrative Procedures is applied within the revocable or confessional claims, for instance, in the dispute about the legality of the decision of National Agency of Public Register, the demand for abolition of alienation/encumbrance of real estate, occasioned by its consequences, has the effect of suspension of the decision on the registration and the same regulation shall apply thereto as the suspension of the validity of the act.

reversal of revocable/ confessional administrative claims (1). In addition, we will refer to the analogous legislative regulations in France and Germany (4).

2. The Essence of Suspending the Validity of Appealed Enabling Individual Administrative-legal Act as a Prohibition of the Reversal of Provisional Measures

In the administrative process, within the revocable (the claim on declaring the annulment or invalidation of the administrative-legal act envisaged by Article 22 of the Code of Administrative Procedures) and confessional (the action for acknowledgement of the absence of an act, envisaged by Article 25 of the Code of Administrative Procedures) claims, the preventive remedy of the right protection is regulated by Article 29 of the Code of Administrative Procedures. Under the 3rd part of the mentioned Article the court is entitled to suspend the validity of the individual administrative-legal act, to which the suspensive effect of a claim is not applied pursuant to the 2nd part of the same Article. In accordance with the "e" subparagraph of the 2nd part of Article 29 the enabling individual administrative-legal act is secured from the suspensive effect of a claim, that implies that the priority of interest of the addressee of enabling act – the third party is recognized by the rule on administrative procedure with regard to the preventive protection of a plaintiff's right. This starting priority is related to the goal[7] of procedural implementation of subjective public-legal right of the third parties entitled exactly to the individual administrative-legal act. The protection of the addressee of enabling act may be violated as an exception upon the existence of preconditions for applying the 3rd part of Article 29 of the Code of Administrative Procedures if: 1. the substantiated suspicion for the legality of individual administrative legal act exists or 2. its urgent execution significantly prejudice the party or makes it impossible to protect his legal right or interest.

The guarantee of compensatory damage caused by the provisional measures regulated by the Code of Civil Procedures is not applied in administrative proceedings. Due to the absence of legislative regulation on this issue, the administrative courts are guided by the judgement of the Supreme Court of January 09, 2019, under which carrying out the provision of security enshrined in Articles 57 and 199 of the Code of Civil Procedures of Georgia in administrative proceedings is inadmissible, except for the cases when the provisional measures stipulated by the Code of Civil Procedures is in force, the application of which in administrative proceedings are admitted only in the exceptional cases by the Supreme Court.

The separation of the preliminary remedies for the protection of rights according to administrative and civil proceedings and the establishment of the priority of their application ensure the smooth management of administrative process, as the remedy for the enforcement of the right to fair trial. The 3rd part of Article 29 and Article 31 of the Code of Administrative Procedures create the proper opportunity for protection of the right for all the types of claims and the maintenance of their autonomy represents the perfect precondition for the legality of the process of preliminary protection of the right. However, it is quite another thing, when the matter of fact concerns the provision of

[7] *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P. (Ed.)*, Administrative Procedural Law Guide, Tbilisi, 2008, 232 (in Georgian).

compensatory damages inflicted by the preventive security measures in administrative proceedings. The position about the inadmissibility of applying the provision for damages caused by security measures in administrative proceedings, which is reflected in the ruling of the Supreme Court from January 09, 2019, does not include the sufficient substantiation in respect to the rights of the third person participating in the administrative process, that leads to certain ambiguities upon reviewing the demands for the application of reversal of provision in courts of lower instances. Especially, if taking into account that the participation of the interests of a plaintiff and addressee of enabling act in the dispute on legality of enabling act at the stage of preventive protection creates the kind of illusion about the conflict of rights, when the administrative court has to review the issue related to the application of reversal of provision on the basis of conflict of private interests, and the liability of the creator of dispute – the administrative body issuing the disputed act stays at a distance from the trial.

The large scale of using the Code of Civil Procedures in administrative proceedings often leads the divergence between these procedural orders down to the degree of inquisition and the attention is not focused on its primary source – the fundamental distinctive mark of administrative justice that is expressed in the control of legitimacy of public administration. The inquisitive nature of administrative process is derived from the function of having control over the public legitimacy. This function is performed at the stage of resolving the issue about taking the preventive security measures as well as in the whole administrative process. The discussion on the issue about the admissibility of reversal of provisional measures in the administrative process must be held taking into account the basic context of exactly judicial control over the legitimacy of public administration.

The institute of provisional measures is the substantive dimension of the right to fair trial, through which the objective of implementing the results of court hearing on the maintenance of violated right and its restoration is achieved. As it is noted in a number of judgments, including those enacted against Georgia, of European Court of Human Rights, the right to fair trial would not be authentic without the enforceability of court ruling[8]. In civil process the objective of enforceability of court ruling is related to the goal of ensuring the stability of civil circulation, and in the administrative process the primary aim is to eradicate the illegal governing activities that will not be limited only to the conflict of interests of natural persons. Thus, in the dispute about the legality of administrative act, the attribution of private legal logics to the preventive protection of right, which is occasioned only by the horizontal conflict of interests, will clear it from the autonomous content of administrative justice and transform it into the identical tool of civil provisional measures, which will create the reality incompatible with the basic function of administrative justice.

Upon rendering the decision on the application of civil legal provisional measures the court relies on the entirely hypothetic supposition, whereas upon reviewing the suspension of disputable individual administrative-legal act by the administrative court the incomplete, but still, preventive inspection of its legality is employed. In the literature, the standard of "substantiated suspicion" to be used upon reviewing the mediation about the suspension of application of individual administrative-legal act, with high probability, is associated with the assumption prescribed in the 3rd part of Article

[8] Judgment of 27 September, 2005 of European Court of Human Rights on the case Iza LTD and Makrakhidze v Georgia, §42 (in Georgian).

29 of the Code of Administrative Procedures about the existence of circumstances, which represents the basis for the request to employ the preventive security measures[9]; In this case, the prospect of claims may be inspected more thoroughly than in the civil process, where the implementation of provisional measures is based on the simple assumption of claim satisfaction, however, this action of court must not be transformed into the substantive investigation for the justification of a claim[10].

Pursuant to the content laid down in the 3rd part of Article 29 of the Code of Administrative Procedures, at the plaintiff's request the appealed individual administrative legal act undergoes the test on preventive security and the case about the suspension of its validity shall be resolved according to the test results. In particular, 1. in the part referring to the existence of substantiated suspicion on its legality or 2. in the part referring to the infliction of damage to the legal right or interest of a party. Occasioned by the content of the aforesaid norm, in the administration process the initial goal of preventive measure of the protection of right is the exclusion of validity of illegal regulatory act, and the confirmation of the preconditions reflected in it can be deemed as a preventive judicial control over the legitimacy of public administration, due to which in the administrative proceedings the measure for suspension of validity of the appealed act pursuant to the 3rd part of Article 29 cannot be identified with the civil procedural provisional measure having even the similar protective effect.

In the administrative dispute about legality of the enabling individual administrative- legal act the Constitutional Court shall render the decision on the issue about the application of civil procedural standard for the reversal of provision with the motivation of protecting both adversarial private interests upon suspending the enabling act envisaged by "e" subparagraph of the 2nd part of Article 29 ("the suspension of which will considerably prejudice another party's right and interest"). However, in order to exclude the attribution of regulation opposing the principle of superficial and administrative-legal safety to this issue, it is necessary to understand the essence of participation of public and private interests, as a genetic compiler, in the issuance of the enabling individual-legal act- in this case a construction permit, not to say anything about the threat of restricting the access to the right to fair trial with wealthy effect against the potential third persons (future plaintiffs) prejudiced by the enabling act, as it will be practically impossible for them to place the amount of compensation for damages inflicted by the suspension of large construction projects on deposit and to defend themselves from the potential irreversible damage in the process of considering the claim.

3. The Individual Administrative-legal Act as the Consequence of Conflict of Interests (by the Example of Construction Permit)

The construction permit, like other individual administrative-legal acts, can cause the complex conflict of interests. The demands for its abolition, as a rule, for the part of administrative body are based on the potential violation of enterprise- legal function of a construction permit. The lawsuit is

[9] *Abuseridze G.,* The preventive security measures in administrative law, Jour. "Justice and law", #2(62)'19, 2019, 5-19, <https://www.supremecourt.ge/files/upload-file/pdf/martlmsajuleba-da-kanoni-2019w-n2.pdf> (in Georgian).

[10] *Kopaleishvili M., Skhirtladze N., Kardava E., Turava P. (ed.),* Administrative Procedural Law Guide, Tbilisi, 2008, 390 (in Georgian).

filed for the negligence in the legally protected public interest on the part of the administrative body by the party, which implies the protection of its private interest. Accordingly, the court also has to inspect the issue about the legality of developing the public interests to be protected within the framework of implementation of spatial planning and the public-legal entitlement to the urban planning made by the administrative body via the private interest.

The construction permit is the result of implementing the complex proceedings that implies the counterweight and balance between all the salient public and private interests[11]." Otherwise, this process can be called the subjectivism of interests, which is the phenomenon characteristic of the flexible model of the modern, legal, social state. "From the contextual viewpoint, the public interest encompasses the private interest as well: it either facilitates the realization of the private interest or comes into conflict over it[12]. It is true, that the diffusion between public and private interests remains the significant sign of forming public administration, but the interactive processes between them make this limit more dynamically interpretable." The particular factual combination of public goods has assumed the pluralistic and procedural nature. The Constitution of a democratic state refuses to provide the specific definition of content of public interest, public goods and makes it subordinated to the dynamics of development of pluralistic society[13]." The public interests participating in the process of issuance of construction permit is stipulated by the 2nd part of Article 2 of Georgian Code of Spatial Planning, Architectural and Construction Activities, including:

"b) Creating the decent environment for the life and activities of a human, the protection of human health, environment, natural resources and cultural heritage in the process of spatial planning, urban planning and construction;

g) Ensuring the effective participation of the society in the process of spatial planning and urban planning;

z) Ensuring the safe urban construction for human's health and life, establishing the best practice of building activities and raising the quality of construction;"

The public interests reflected in the above mentioned objectives combine the private interests, which the residents of building area may have in relation to the construction. The enterprise – legal function of the construction permit implies the balance between the private interest of a seeker for the permit and subjectivized public interests (which in this case represents the private interests of population, neighbors as well) resulted from the administrative proceedings as well as the establishment of such a determination that will exclude the occurrence of well-grounded conflict

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11 The 2nd part of Article 9 of the Spatial Planning, Architectural and Construction Code of Georgia, The legislative Herald of Georgia, 3213-rs, 13/08/2018 <https://matsne.gov.ge/document/view/4276845?publication=10> [01.11.2022] (in Georgian).

12 *Kalichava K.*, The subject of administrative science, in the collection: Administrative science guide, *Khubua G. Kalichava K. (eds.),* The Institute of Administrative Sciences, TSU, 2018, Ch. II. 69, <http://lawlibrary.info/ge/books/2018giz-ge-administraciuli_mecnierebis_saxelmdzgvanelo.pdf> [01.11.2022] (in Georgian).

13 *Izoria L.,* Modern State- Modern Administration, Publishing house "Siesta", Tbilisi, 2009, 139, <https://www.tsu.ge/data/file_db/faculty-law-public/L[1].Izoria-Tanamedrove%20saxelmwifo.pdf>[11.01.2022] (in Georgian).

between the legal interest/right of various persons towards the construction. This can be achieved by practical implementation of the objectives prescribed by the Code. And the failure in accomplishment of these objectives, in its turn, gives rise to disputes pertaining to the legality of construction permits. Hence, the dispute over the construction permit may be initiated by the conflict of interests between natural persons, but the source of conflict always represents the failure in implementation of that public interest on the part of administrative body, which implies the absolute conflict of adversarial interests and the provision of legality of choice in behalf of any of the interests. "The decisions rendered by public administrative bodies shall ensure the regulation of conflict of interest existing in the society and follow the course of the daily life of the country determined by the political power of a state[14]." In the process of the issuance of construction permit the regulation of conflict of interests may be frequently hindered by the fact, that the obligation to ensure the participation of the person concerned with the permit proceedings, which is the key factor for raising the legality of this proceeding, is neglected[15].

In the Doctrine of Administrative Law, the significance of realizing the content of principles for the implementation of public administration is recognized in administrative proceedings as in the function. "The principles of administrative proceedings are the ideas, which must be shared by all the administrative bodies and official persons in the process of implementation of management, their content expressed in various norms shall be complied with and followed by them. Since the principles of administrative law represents the guidelines, which the whole process of management should be saturated with, they shall apply not only to the activities performed within the administrative proceedings in the administrative body, but their content shall be reflected in the implementation of all the management activities which are performed within the activities of public administration…"[16]

Occasioned by the aforesaid, based on the substantive enterprise – legal function, the individual enabling acts (including construction permit) are entitled to the presumption of achieving the agreement and balance between the public and private interests, which is one of the manifestations of legality of the act and the salient aspect of functioning the rule of law, which, in its turn, represents the consequence of unwavering defense of principles for implementing the public administration. "Principle of proportionality, principle of equality before law, principle of legality, principle of impartiality in judgment, principle of transparency (openness), principle of legal trust – these are the guidelines without which the public administration, as the crucial function of a state, is impossible to implement. Based on the above mentioned, whichever form the performance of the function – public administration may take, the compliance with these principles is essential and unconditional for any person performing the function."[17]

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14 *Turava P.,* General Administrative Law, Publishing house "World of Lawyers", Tbilisi, 2016, 44 (in Georgian).

15 *Churghulia D*., Construction Permit Administrative Proceedings as a Mechanism for Implementing Construction Safety, Journal of Law, (2), 180-201, <https://doi.org/10.48614/jlaw.2.2020.180-201> [18.01.2022] (in Georgian).

16 *Turava P., Pirtskhalashvili A., Kardava E.,* Administrative Proceedings in Public Service, Tbilisi, 2020, 40 (in Georgian).

17 Ibid, 41 (in Georgian).

The above mentioned presumption is violated by making the legality of administrative-legal act disputable, that leads to the imposition of burden of proof for the legality of an appealed act upon the administrative body[18]. The degree of violation of presumption is increasing, when the court at the stage of preventive protection considers, that some foundations for the suspension of validity of the appealed act prescribed by Article 29.3 exists[19].

Hence, pursuant to the presumed legality of management in the Constitutional State and the combination of the 3rd part of Article 29 and the 2nd part of Article 17 of the Code of Administrative Procedures, through applying the systemic-teleological method and under the conditions of providing the definition through the unified and genetic principles[20], it is inadmissible to worsen the situation of the plaintiff by imposing thereto the provision for compensatory damages prejudiced as a result of violating the presumption of legality of the appealed act within the application of preventive security measures of rights, and to leave the administrative body issuing the act beyond the limits of liability.

The seeker for the construction permit involved in the process of obtaining the act, which has public legal functions, is subordinated to the relevant legal regulation at the stage of administrative as well as legal proceedings, which implies, that in case of failure of reaching the compromise between his/her interests and those of his neighbors and having regard with the possible negative results, the person holding the permit agrees to "replace" the authority issuing the permit by himself in both internal and external control during inspecting the legality of the permit and apply the outcomes to himself. And upon issuing the permit the administrative body, for its part, assumes liability to meet not only the essential but the preventive standards of its legality established by the 3rd part of Article 29 of the Code of Administrative Procedures as well.

Based on this, upon hearing the case of even preventive procedural measures of the suspension of validity of administrative-legal act, the grounds for the application of private-legal procedural logic to the subject of dispute must not be considered to be only the conflict of interests of natural persons by the court. By our example, the adversarial private interests of construction permit are those interests which under the construction applicable law are protected by the public objectives of the state both at the stage of administrative and legal proceedings. Besides, in contrast to the civil trial, at the stage of preventive protection of the right, the administrative court preventively inspects the suspicion of legality of the appealed act and the degree of the breach of right, which implies the summary examination of legal situation[21]. The confirmation of any grounds (the substantiated suspicion about legality or substantive prejudice to the plaintiff's interest or right) for the suspension of construction permit appealed in court implies that the administrative body issuing the construction permit could not

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18 The 2nd part of Article 17 of The Administrative Procedures Code of Georgia, The Legislative Herald of Georgia, <https://matsne.gov.ge/ka/document/view/16492?publication=84> [11.01.2022] (in Georgian).

19 According to the enforcement theory the presumption of legality violated by suspensive effect is expressed in the validity of an act and not in the suspension of authenticity

20 On the principles of definition of a norm see the Resolution of 09 July, 2020 on the case № bs – 10 (k-20) of Chamber of Administrative Cases of Supreme Court of Georgia, <http://prg.supremecourt.ge/Default.aspx> [11.01.2022] (in Georgian).

21 *Kopaleishvili., Skhirtlade N., Kardava E., Turava P. (eds.),* Administrative Procedural Law Guide, Publishing house "World of Lawyers", Tbilisi, 2008, 390 (in Georgian).

provide the act to overcome the preventive examination stage of legality (among them the performance of function of conflict of interests). The potential damage inflicted to the third person entitled to the suspension of validity of such an enabling act will be caused not by the plaintiff's request to suspend the act, but by the negligence of enterprise – legal function of the appealed act and the standard of preventive legality on the part of administrative body. The suspension of validity of the act is the procedural – legal consequence only of this failure. Occasioned by this, except for the case when the abuse of rights by the plaintiff is proved[22], the person entitled to the construction permit should seek for the way of providing the potential compensatory damage caused by the suspension of the permit, first of all, in the sphere of protection of legal trust towards the permit and, accordingly, of the liability of administrative body issuing the act.

4. The Legal Defense Trust of an Addressee of the Suspended Enabling Administrative-legal Act and the Liability of Administrative Body Issuing the Act

The issue about the existence of legal defense, as a rule, is not adjudicated in courts within the dispute about the legality of individual administrative-legal act. The aforesaid may become the subject of judicial investigation in case of issuing the request for the compensation of damage on the part of the addressee prejudiced by recognizing the annulment/invalidation of the enabling act. However, the well-grounded solution of the issue about the provision of damage inflicted by the suspension of individual administrative-legal act is impossible to be made without entailing the issue about legal trust.

As mentioned above, in the revocable and confessional administrative dispute the case of compensation for damage inflicted by the preventive security measures of the right – the suspension of validity of the act must be subordinated to administrative-legal foundations and not be redirected in the private legal procedural space to the plaintiffs prejudiced by the constructions. However, it should be highlighted, that the existence of the right of addressee of the act to self-defense is beyond any doubt. The main point is, that in contrast to the civil process, in the administrative process the subjective public-legal right of the addressee of the enabling act is based not on the adversarial principle of the process or equality of parties, but it is occasioned by the principle of legal trust of the addressee towards the suspended administrative act, that is implemented by the liability of the body issuing the act on the provision for damage caused by any fault related to the legality of the act.

Under these circumstances, the legal trust is revealed as the integral hypostasis of legal security, which, it is true, represents the subjective dimension of legal security, but it is tightly linked to and occasioned by the stability of management in the constitutional state as well as the presumption of legality (objective legal security) and in case of delaying the validity of the act the legal trust ensures the protection of interests of its addressee.

According to the literal definition of the 5th and 6th parts of Article 60^1 of the General Administrative Code, the scopes of legal defense trust applies only to the abolition of enabling

[22] In such a case, the plaintiff's demand for the damages is possible by general foundations.

administrative-legal act and is expressed in the obligation for compensation of damage on the part of administrative body. Neither enterprise – legal, nor direct procedural regulations pertaining to the damage inflicted by the suspension of the effect of enabling act possessing the power of legal trust can be encountered.

If we follow the admission of logic of reversal of provision in the administrative process, one of the ways of exercising the right of the addressee of enabling act may be the integration of legal trust in solving the issue about the application of preventive security measure, when the provision for damage caused by suspension of the act is imposed on the administrative body issuing this act, which necessitates the relevant amendments to be made to the Code of Administrative Procedures. However, thenceforth this way seems unpromising due to conflicting with the public interests of functioning of its administrative bodies.

The second alternative way of the right protection may be the employment of remedy for the protection of rights envisaged by the 6th part of Article 60^1 of General Administrative Code by the addressee of the suspended act as well as the request of administrative body for the compensation of damage caused by the suspension of its enabling act, when the issue related to the definition[23] of *Praeter legem* of the 6th part of Article 60^1 will be laid before the Administrative Court – in particular, whether the legal defense trust applies to the right to compensation of damage caused by the suspension of the validity of the act. In this case, the alternative of legislative change is deemed to be the opportunity for development of judicial law.

In order to be aware of the scopes of liability of an administrative body, the interest is evinced in the fact, that Georgian legislation considers only the wrongdoing of the addressee as the circumstance excluding the legal trust towards the enabling act. However, it is noteworthy, to what extent the 5th part of 60^1 of General Administrative Code allows to provide the broader definition of the "addressee's wrongdoing" based on the type of addressee's activities and economic status. This particularly concerns large construction developers, who obtain the construction permits within their usual activities and they are imposed the duty of prudence, good faith, compliance with requirements, among them, in relation to the third persons as well. Hence, it is expedient to determine the sphere of legal defense trust in the dispute on the compensation of damage inflicted by the disapproval of the legal trust act considering the role of prudent economic operator[24] like the practice of Court of Justice of European Union.

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[23] When defining « Praeter legem (Lat. "outside the law") it is true, that the definition of the norm neither corresponds to nor matches the literal meaning of the law, but it does not contradict it either. At this time, the law is somehow "silent" about the problem, which necessitates the legal solution, but the judge has to update the content of the norm and adapt it to the changed social relationships. *Khubua G.,* Definition Contra Legem, Jour, Methods of Law, № 2, Prince David Institute for Law, 2018, 1-20. <https://www.sabauni.edu.ge/library/samarTlis-meTodebi.-%e2%84%962.-1600250691.pdf> [11.01.2022] (in Georgian).

[24] Arrêt du 30 novembre 2017, Red Bull / EUIPO – Optimum Mark (Combinaison des couleurs bleue et argent) (T-101/15 et T-102/15) (cf. points 125-127) <https://eurlex.europa.eu/legalcontent/FR/TXT/?uri=CELEX:62015TJ0101> [11.01.2022].

5. Preventive Security in the Administrative Process of France and Germany

In the dispute about the abrogation of administrative-legal act the mechanism for suspension of the act is applied more or less differently in the legal order of the leading and interesting for Georgian reality countries of Continental law, such as France and German.

The Code of Administrative Law of the Republic of France[25] considers the application of suspensive effect to the appealed administrative-legal act by the rule of court to be admissible, if it is required by urgent interest of the right protection and, at the same time, the legality of the act is attached the considerable suspicion. As we see, the preconditions for the application of preventive security measures of the right are similar in French and Georgian administrative process, however, there is the significant difference between them – in contrast to the 3rd part of Article 29 of the Code of Administrative Procedures of Georgia, in French Code the two preconditions for suspending the act is administered in the cumulative form. In order to render a decision about suspension of the act, French judge requires the necessity of urgent protection of the right in line with the substantiated suspicion about its legality.

As regards the German regulation, the general regulation for the application of provisional measures in the administrative process is prescribed in Article 123 of the Law of Federal Republic of Germany on "The Administrative Judicial Order"[26], and the suspension of the act is regulated by Articles 80 and 80a of the same law. The precondition for the employment of security measure is only the existence of substantive threat to the implementation of a plaintiff's right.

It is interesting, that Georgian Code of Administrative Procedures considers the analogous norms of regulations of both countries, however, it still diverges from each of them. In particular, in contrast to German order, according to Georgian Administrative Law, apart from the threat of eradication of the right, the substantiated suspicion about the legality of the act is also accepted to be the precondition for suspension of the act, whereas in contrast to French regulation, one out of these two existing conditions suffices to suspend the act. This position provides the Georgian administrative judge with comparatively freer space in the process of preventive protection of the right in contrast to his/her French or German colleagues.

The mechanism for the compensation of damage caused by the suspensive measure of the act is not considered in the form of reversal of provision in French administrative process[27]. As regards the German administrative process, the reversal of provision is generally accepted here, however, it is explicitly excluded within the scopes of considering the claims pertaining to the legality of administrative acts as enshrined in Article 123(5) of Law of Federal Republic of Germany on the "Administrative Judicial Order"

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[25] The Code of Administrative Law of the Republic of France, Article L. 521 <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070933/> [11.01.2022].

[26] Law of Federal Republic of Germany on the "Administrative Judicial Order" <http://www.gesetze-im-internet.de/englisch_vwgo/ > [11.01.2022].

[27] Under Article L. 600-7 of the Code of Urbanization of the Republic of France, the claims on the abuse of crime are used as the means of defense from damage, through which the addressee of construction permit may apply to court and demand for compensation upon existing the proper foundations.

As we see, the rule of reversal of preventive security measures in the disputes related to the legality of administrative-legal acts is not accepted in either of two European countries having the various traditions of administrative justice, and the grounds thereof should be found in the essence and fundamental function of the administrative justice, which presents the administrative process as a tool of control of the legality of management activities in the mentioned countries and the employment of all the administrative procedural means are subordinated to the primary interest of achieving this goal.

6. Conclusion

The preventive measures of protecting the right represents the salient mechanism for realization of the right to fair trial, which should be implemented through proper attention, understanding its essence and functions as well as through the in-depth determination of its legal foundations. Due to the substantive divergence between the administrative and civil provisional measures, their interaction and the introduction of civil legal logic in the dispute about the legality of administrative-legal acts at the stage of preventive security will fundamentally violate the essence of administrative procedural order and the principle of fair trial. The necessity of such separation can be seen by the example of European countries having the rich tradition of administrative process.

On the other hand, the rights of the addresses of enabling individual administrative-legal acts, which are suspended in the administrative process, must not be left without protection and the foundations of their provision should be based not on the horizontal conflict of interests, but on the legal trust of the addresses towards the suspended enabling act as the public management measure. Utilizing this approach enables the maintenance of the means of compensation of the damage caused by the suspended act both at the stage of preventive protection of the right upon introducing the liability of administrative body and in case of filing a separate lawsuit demanding for the damages against the body issuing the act.

The progress of regulation of remedies of preventive protection of rights in the administrative proceedings will be significantly depended on the resolution adopted as a consequence of reviewing the constitutional submission of the Court of Appeals of Tbilisi. The solution of the issue raised by the constitutional submission of Tbilisi Court of Appeals, in any case, will more clarify the process of preventive protection, that will be the prerequisite for elimination of the delay in functioning and proceedings of administrative courts. Having regard to the significance of topic and the expectation of its future activation, the goal of this paper is to make contribution to the development of reasoning. In this work we tried to present the key points, the consideration of which is deemed necessary for reviewing the admission of the reversal of provision in administrative process. We hope, that the debates on the mentioned topic will become more active and comprehensive that will definitely foster the development of Administrative Procedural law.

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