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THE MODULATION OVER TIME OF THE EFFETS OF ITS DECISIONS BY THE FRENCH COUNCIL OF STATE: THE SEARCH OF A BALANCE BETWEEN LEGALITY AND CERTAINTY

N. MATHIEU^{a,b}

^aPantheon-Assas University,
19 Place du Panthéon, Paris 75005, France

^bUniversity of Paris-Est (Paris 12),
61 Avenue du Général de Gaulle, Créteil 94000, France

Traditionally the annulment of an administrative act by the Council of State, the highest administrative court in France, has a retroactive effect: the act is considered as having never existed. This construction is consistent with the requirements of the principle of legality, aimed to guarantee the overall coherence of the legal system. On the other hand, it might conflict with the need of stability of legal relations, and thus raise a problem of legal certainty. In 2004, the Council of State acknowledged for the first time its own power to modulate the temporal effects of its decisions. Since then, the administrative courts decide on a case-by-case basis how their decisions take effect over time. This article first purposes to present the case-law developments in this area, in order to then discuss the implications of this principle of legal certainty over the court's jurisdiction and the nature of the litigation.

Keywords: French law; administrative law; case law; legal certainty; principle of legality; legal effects over time.

МОДУЛЯЦИЯ ВО ВРЕМЕНИ ПРАВОВЫХ ПОСЛЕДСТВИЙ РЕШЕНИЙ ГОСУДАРСТВЕННОГО СОВЕТА ФРАНЦИИ: ПОИСК БАЛАНСА МЕЖДУ ЗАКОННОСТЬЮ И УВЕРЕННОСТЬЮ

Н. МАТЬЕ^{1),2)}

¹⁾Университет Пантеон-Ассас,
пл. Пантеона, 19, 75005, г. Париж, Франция

²⁾Университет Восточного Парижа,
авеню генерала де Голля, 61, 94000, г. Кретеи Франция

Традиционно аннулирование административного акта Государственным советом – высшим административным судом Франции – имеет эффект обратной силы: данный акт считается никогда ранее не существовавшим. Эта конструкция соответствует требованиям принципа законности, направленного на обеспечение общей согласованности правовой системы. С другой стороны, такая ситуация может вступать в противоречие с необходимостью стабильности правовых отношений и таким образом поднимать проблему правовой определенности. В 2004 г. Государственный совет Франции впервые признал за собой полномочие модулировать во времени правовые последствия своих решений. С тех пор административные суды в каждом конкретном случае принимают решение о том, когда их решения вступают в силу.

Ключевые слова: французское право; административное право; прецедентное право; юридическая определенность; принцип законности; правовые последствия во времени.

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Автор:

Нинон Матье – аспирант факультета права¹⁾, преподаватель²⁾.

Author:

Ninon Mathieu, postgraduate student, faculty of law^a; lecturer^b.
ninon.mth@gmail.com

Introduction

Until recently, it was a well-established principle that the annulment of an act by the administrative courts necessarily had a full retroactive effect. When the administration has exceeded its powers, the act is considered as having never existed. This principle has been strongly affirmed by a ruling from the Council of State in 1925, in the *Rodière* case¹.

This case concerned the situation of public officials who had previously obtained the annulment of the service's advancement list. The issue was then to know which actions were to be taken by the administration to enforce the decision. Starting from the assumption that acts nullified on the grounds of *ultra vires* are deemed to have never existed, the Council concluded that the administration had to retroactively reconstitute the plaintiffs' careers. The illegality of the administrative act leads to the annihilation of all of its legal effects.

This interpretation, based on the legal fiction that the unlawful act never entered into force, allows to fully restore legality and coherence within the legal order. Its effects on the legally constituted situations can however be dramatic, creating a legal vacuum. The requirement of legal certainty indeed incites to preserve the effects of a past regulation, in order to ensure predictability and stability of the law for the citizens. Parliament often addressed this issue by passing «validation laws», which retroactively validate an administrative act annulled by the courts. This practice, considered contrary to the separation of powers, is now strictly constrained by the Constitutional Council², and appears clearly insufficient to preserve the stability of legal relations.

The Council of State, drawing on the lessons of comparative public law³ and European law⁴, overturned its jurisprudence, building an innovative solution aimed to reach a balance between lawfulness and legal certainty.

The progressive recognition of a power to modulate the effects of the annulment decisions over time

Even before the landmark 2004 decision, Association AC!⁵, the Council of State, in a few isolated cases, agreed to derogate from the principle, in order to ensure that the reality prevailed over the legal fiction of retroactivity. The case law regarding the intangibility of legally acquired rights, for instance, guaranteed that the beneficiary of an individual decision that has become final would not be impacted by the annulment of the act on which the individual decision was based on⁶.

Conscious of the need for greater stability of legal norms and relations, the Council of State subsequently developed a more pragmatic case law by taking into account the practical consequences of its decisions. In the *Vassilikiotis* case⁷, the Court enjoined the administration to take a specific measure within a specific period of time, in order to remedy to the partial annulment of the act. Even more notably, in the *Titran* case⁸, the decision of nullifying the act has been made conditional, allowing the administrative authority a period of two months to regularize the unlawful decision.

Without strictly modulating the effects over time, these decisions show that the case law is evolving towards further protection of legal certainty.

The Association AC! decision fall within this range. This is why we can admit that this is «more an evolution [than a] revolution»⁹.

In this case, the legality of the Minister of Labour's decrees was challenged. These regulations, which approved the conventional scheme of the unemployment insurance program, were deemed unlawful on both procedural and substantive grounds. The clauses declared illegal on substantive grounds were annulled, with a classic retroactive effect. Since all of the regulations regarding the program were affected by the procedural errors, all of the system should have similarly been retroactively invalidated. This would have led to a very complex and costly situation, and would have resulted in a legal vacuum, against which the public rapporteur, Christophe Devys, warned the Court. He argued for «an evolution of case law always more concerned with ensuring a balance between the requirement of legality and the requirement of stability of legal situations»¹⁰.

The Council of State supported his view: «Whereas the annulment of an administrative measure implies in principle that this measure is deemed never to have existed; whereas, nevertheless, if it appears that the

¹Conseil d'Etat, 26 decembre 1925. No. 88369. P. 1065.

²Conseil constitutionnel, 29 decembre 2005. No. 2005-531 DC.

³See in particular: *Jouanjan O.* La modulation des effets des décisions des juridictions constitutionnelles et administratives en droit allemand // RFDA. 2004. No. 4. P. 676; *Bon P.* La modulation des effets dans le temps d'une annulation contentieuse. Le cas de l'Espagne // RFDA. 2004. P. 690; *Di Manno T.* La modulation des effets dans le temps des décisions de la Cour constitutionnelle italienne // RFDA. 2004. P. 700.

⁴Art. 264 of Treaty on the Functioning of the European Union signed on 13 December 2007.

⁵Conseil d'Etat, Ass., 11 mai 2004. No. 255886. P. 197.

⁶Conseil d'Etat, Sect., 10 octobre 1997. No. 170341. P. 346.

⁷Conseil d'Etat, Ass., 29 juin 2001. No. 213229. P. 303.

⁸Conseil d'Etat, Ass., 27 juillet 2001, No. 222509. P. 411.

⁹*Bezzina A. C.* 2004–2014: les dix ans de la jurisprudence AC! // RFDA. 2014. P. 735.

¹⁰*Devys C.* Conclusions sous AC «La modulation des effets dans le temps de l'annulation d'une décision administrative» // RFDA. 2004. P. 454.

retroactive effect of this annulment is such that there are obviously excessive consequences due to the effects that this measure has brought about and the situations which could have arisen when it was in force and the general interest that may be linked to the temporary maintenance of its effects, it is the responsibility of the administrative judge – after having received the parties' observations on this point and examined all the grounds of public order or set forth in the court, which could affect the legality of the measure in question – to take into consideration, firstly, the consequences of the retroactive status of the annulment on the various public or private interests concerned, and, secondly, the disadvantages which, with regard to the principle of legality and the litigants' right to an effective appeal, a limit in time of the effects of the annulment would present; whereas it is his duty to assess, by comparing these elements, if they can justify that, exceptionally, a departure should be made from the principle of retroactive effect for the disputed annulments and, if so, to make provision in his annulment that, subject to legal proceedings undertaken on the date thereof against the measures issued on the basis of the measure in question, all or part of the effects of this measure prior to its annulment shall be regarded as final or even, where required, that the annulment should only take effect on a later date that he determines»¹¹.

The retroactive effect of the annulment decision thus remains the principle. The modulation of its effects over time constitutes a derogation from this general principle, legitimized when the balance of the interests at stake so requires.

The transformation of the administrative litigation under the influence of the principle of legal certainty

The two main consequences of this ability to modulate the legal effects over time of a contentious decision are intrinsically linked. The importance attached to the practical impact of the court's decision lead to an individualization of the proceedings. The Court must adapt its decision to the private and public interests at stake, and thus its discretionary authority is being strengthened.

Individualization of the administrative proceedings. Traditionally, the appeal to the administrative courts on grounds of ultra vires is purely objective. The litigation directly concerns the lawfulness of the act, and the court does not rule on the existence of individual rights, as it does in contractual disputes. This is why the court's powers were previously limited to

According to the Council of State, in order to enforce this new possibility, the court must first ponder the consequences of the retroactivity on both the legally constituted situations and the general interest. If it appears to be excessive, it is its duty to balance the disadvantages of a full retroactive annulment with the consequences of a temporal limitation of the annulment's effects, in order to decide if the modulation is justified.

If these conditions are met, the court may either declare that the past effects of the act will not be impacted by its annulment or postpone the date of its enforcement. These two possibilities can be implemented simultaneously, as the decision illustrates.

This case, mostly welcomed by doctrine, has been widely applied by the administrative court, led by the concern for better protection of legal certainty.

The Council of State accepted that such modulation could be applied, not only when the annulment is justified by a breach of procedure, but also when the act is vitiated by a substantial error¹². Furthermore, the effects may be delayed whether the unlawful act is a regulation or an individual decision¹³. Finally, this possibility has been extended to the contractual litigation¹⁴.

It must be highlighted that the highest administrative court also affirmed that, when departing from previous case law, the effects of its decision could be delayed, in order to protect legitimate expectations¹⁵.

These developments show that the supreme administrative court submits itself to the respect of legal certainty. The integration of this new requirement fundamentally alters the court's duty.

a binary option: denial of the application or full annulment of the act.

Having the capacity to derogate from the principle of retroactivity, the administrative court can now temper the potentially negative effects of an unlawful act's annulment. In so doing, it has to take into account the general interest, but also the private interests of the parties. This results in a real individualization of the administrative proceedings, and a greater attention paid by the administrative courts to the practical implications of their rulings.

The judicial review of administrative act has been developed, in order to respond to the specific concerns of the actors. This modification of the nature of the litigation has repercussions on the court's function.

¹¹Conseil d'Etat, Ass., 11 mai 2004. No. 255886. P. 197.

¹²Conseil d'Etat, Sect., 25 février 2005. No. 247866. P. 86.

¹³Conseil d'Etat, 12 décembre 2007. No. 296072. P. 471; Conseil d'Etat, Sect., 30 December 2010. No. 329513. P. 530.

¹⁴Notably in summary proceedings regarding contractual matters (CE, Sect., 1er juin 2011. No. 346405. P. 266) and in an appeal available for the third parties (CE, Ass., 26 juillet 2007. No. 291545. P. 360).

¹⁵CE, Ass., 26 juillet 2007. No. 291545. P. 360.

Strengthening of the jurisdictional discretion. When weighing the different interests at stake, the court has a large margin of appreciation. It is not bound by any precise rule and thus exercises a largely discretionary power.

The choice of the solution to implement is also relatively open, the only restriction being its duty to safeguard the right to an effective remedy. The legal

proceedings undertaken before the date of the judgment must hence be preserved.

This large decision-making power left to the discretion of the judge constitutes an evolution in line with a more general trend towards the extension of the administrative court's powers. This participates to the construction of a more effective administrative justice.

Conclusion

The modulation over time of the effects of its decisions reflects the administrative court's commitment to the constant search for a balance between lawfulness and legal certainty. While contributing to the objective of a better administration of justice, this extension of

the administrative court's power enables a greater protection of both the general interest and private interests. This innovative case law illustrates the ever-growing influence of legal certainty requirements, which introduces substantial changes across legal systems.

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