MOTIVATION OF ADMINISTRATIVE ACTS – GUARANTEE OF GOOD ADMINISTRATION

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Abstract

The present article deals with the aspects of motivating administrative acts, both doctrinaire and practical, of jurisprudence. The duty of the administration to motivate its decisions is submitted in the Charter of Fundamental Rights of the European Union, art. 41. In the current European legal order, the rationale for administrative acts is considered and refers to one of the most important conditions of validity of the administrative act. The Romanian Constitution ensures and emphasizes the motivation, as it is imposed by the Charter. The realization of this fundamental right to motivate administrative acts is possible by calling upon a set of values from the administration, such as transparency, professionalism and the imposition of high quality standards. Motivation is achieved where we have a good administration, and whether citizens are, among other things, respected fundamental rights and freedoms, access to information is guaranteed and motivated their decisions. Although administrative normative acts are motivated by the administration, examples that show that individual ones are unmotivated or incompletely motivated are enough, which made the various employers legally answer for the non-motivation of their decisions to terminate work relationships with several of the employees. The motivation of administrative acts is necessary, mandatory and must be done with rigor. It is highlighted that inadequate, incomplete or vicious reasoning may result in suspension or even annulment of the administrative act by the court.

Keywords: *motivation, administrative acts, essential rights, decision-making, administrative culture.*

1. Introduction. Motivating administrative acts in the context of the operationalization of the concept of the right to good administration.

A first document to which reference can be made in analyzing the concept of good administration is the **Strengthening public administration strategy 2014-2020** and the ambitious objectives contained therein. It is envisaged in a metaphorical expression that *Romania will go through a spiral of confidence* and that it wants to increase the citizen's trust as a beneficiary, in the services provided by the public administration.

It is envisaged in this strategy that the fulfillment of the objectives is done by calling and joining a set of values including transparency and professionalism, both for the civil servants and the contractual staff, by pursuing the needs of the citizens, since the ultimate goal of the administration is precisely meeting the needs of our fellow citizens. This can be achieved by imposing high quality standards.

By the right to good administration, we understand the right of every person, systemically integrated, to see their issues impartially and fairly treated, within a reasonable time, by public authorities and institutions.

In practical terms, we understand through good administration how the institutions work and this is done if citizens have access to information, if their fundamental rights and freedoms are respected and protected, if the administrative acts, their publication and the decisional transparency are ensured, all these concepts forming part of the right to good administration.

At European Union level, the concept of good administration is generally considered to protect citizens' rights against the abuses of the institutions, and in particular a form of procedural protection against such abuses.

The right to good administration can be achieved through 2 very important documents for European citizens and the institutions of the Union, which are part of its legal order:

1. The Charter of Fundamental Rights of the European Union;
2. The European Code of Good Administrative Behaviour.

The right to good administration is also a European law principle of the European law, binding on Member States, and refers to how public administration acts to achieve general interests.

The concepts included in the right to good administration are the performance and the report of the administration with those administered. Performance is characterized by the principles of decision-making efficiency and transparency. The report of the administration with the administered ones is a fundamental right of natural or legal persons, provided by art. 41 of the Charter of Fundamental Rights of the European Union.

The Charter is the document governing all political, social, economic and citizen rights, and according to art. 41, the person is entitled to impartial treatment by public authorities and institutions. This right may be interpreted as the right of any person to be heard before a decision affecting his/her individual

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rights and interests, the right of any person to his/her own file, with respect for the confidentiality of professional, commercial or other data. The last element of content of the right to good administration, with the same importance of the other, is the obligation of the public administration to motivate its decisions in the exercise of its obligations.

The last paragraph of art. 41 is the one referring to the right of any citizen to refer the European Ombudsman in the situation when he/she considers that the Romanian administration does not respect this principle of the right to good administration. The referral is done in accordance with the principle of subsidiarity, which involves solving the problems of those who are aware of the authorities/institutions closest to the citizen: the lawyer of the people or even the institutions of the public authorities under the law of administrative contentious, if it is considered to have been violated a legitimate right or interest.

Regarding the evolution of the right to good administration (efficiency, transparency, motivation), in 2000 the adoption of the Charter of Fundamental Rights of the European Union introduced the right to good administration and the right to refer the European Ombudsman to attack the decisions of a public institution.

Following the adoption of the Charter and the inclusion of the fundamental right to good administration in a European Parliament resolution, the European Code of Good Administrative Behavior, revised in 2013, was adopted in order to explain in detail the content of the right to good administration, setting multiple obligations for those working in the public administration sector. Also, the content of the code explains the attitude it has to adopt in relation to the citizens, the employees of the institutions.

The code contains several principles and rules of effectiveness that need to be respected, and in the introductory part there is a call for an administrative culture of work.

The preamble to the TFEU refers to the Charter of Fundamental Rights of the European Union and the values it has introduced.

We also have the Universal Declaration of Human Rights and the Constitution of Romania that appeal to the right to good administration. This right is fundamental because the document that enshrines it belongs to the category of documents with the same legal force as the treaties.

If we are in the presence of a fundamental right, we must also benefit from guarantees of achievement that will lead and pursue its realization.

In Romania, we have normative acts regulating decision-making transparency, and although administrative acts of an individual and judicial nature are motivated, we find many situations in which the employees have gained a case in law on the ground that the employer has failed to mention which were the reasons behind the termination of the employment contract or the decision to dismiss.

Good administration includes, based on art. 41 of the Charter of Fundamental Rights of the European Union, the following rights:

- the right of any person to be heard before taking any individual measure that could prejudice him in the field of legitimate rights and interests;
- the right of any person to have access to his/her own file, with due regard for the legitimate interests of the administration relating to confidentiality and professional or commercial secrecy;
- the obligation imposed on the administration to motivate its decisions.

Everyone shall be entitled to compensation by the Union for damage caused by its institutions or agencies in the performance of their duties in accordance with the general principles common to the laws of the member states.

Decisional transparency is closely related to the right to good administration, referred to in art. 298 TFEU and art. 42 of the Charter.

2. Content. The administrative act. Characteristics.

The administrative act is the "*main legal form of the activity of public administration bodies, which consists in a unilateral and express manifestation of the will to generate, modify or extinguish rights and obligations, in the realization of the public power, under the main control of the legality of the judiciary courts*"[1].

The constant defining elements of the administrative act and the definition of the concept refer to "*the main legal form of activity of the public administration, which consists in a manifestation of express, unilateral will and subjected to a regime of public power, as well as the control of the lawfulness of the courts, which emanates from administrative authorities or from private persons authorized by them, through which are born, altered or extinguished correlative rights and obligations*."[2]

According to the criterion of the extent of the effects of the administrative act, we have two major categories of administrative acts:

1. Administrative normative acts, which are those acts which contain rules of principle applicable to an indeterminate number of people and which produce *ergaomnes* legal effects. Ex: ministerial orders, instructions issued by the authorities of the specialized public administration, etc.
2. Individual administrative acts – representing the category of acts that produces legal effects with respect to a precisely determined subject of law. Ex: appointment/dismissal decisions.

[1] Antonie Iorgovan, Tratat de drept administrativ, Volume II, Ed. 4, Ed. All Beck, București, 2005, p 25.
[2] Verginia Verdinaș, Drept administrativ, Edition X, revised and updated, Ed. Universul Juridic, București, 2017.

One of the distinctions between the two categories is that the individual administrative acts can never violate the provisions of the normative administrative acts.

The individual administrative acts are also classified as:

- Acts establishing defined rights and obligations for the subjects to which they are addressed, named generic authorizations;
- Acts conferring a personal status, namely rights and obligations for a determined right subject: diplomas, certificates, permits;
- Acts that apply different forms of administrative constraint: contravention minutes, sanctioning decisions;
- Administrative acts of a judicial nature.

1. Acts of an internal character, which are customary to apply within a public authority or institution and produce effects on the staff of that institution. They are also opposed to other subjects of law such as citizens, natural or legal persons who request the services of an authority or institution, when they fall under the provisions of its internal rules. In turn, these administrative acts can be: normative (internal organization and functioning regulation) or individual (appointment decisions).

The legality of administrative acts is analyzed according to certain general conditions:

a) Respecting the supremacy of the Constitution;
b) Respecting the principle of legality in the adoption of the administrative act;
c) The administrative act is issued or adopted by the competent body within the limits of its competence;
d) The form of the administrative act and the issuing procedure shall be those provided by the law.

The form of the administrative act usually includes the written form, except for the warning that can also be expressed orally. This is the case with individual administrative acts.

Regulatory administrative acts always take the written form. Writing language, according to art. 13 of the Constitution, is Romanian. Another external condition related to the form of the act is motivation.

Normative acts, subject to the rule of advertising, are motivated by a substantiation note, a statement of reasons, a report, placed in the form of a preamble before the actual act. The role of this preamble is to focus on the legal and factual elements that legitimize the intervention of the respective legal act.

A particular situation appears at the administrative-judicial acts, which are always motivated.

The authorities resort to the motivation of the administrative acts, as this justifies the reasons for the legality of an administrative act, which is particularly relevant in challenging the legality of an act, and is presented as a guarantee of respect for the law and protection of citizens rights.

The realization of the motivation of all administrative acts has as consequence the reconciliation of administrative practice in Romania with the existence in other states. Prestigious French authors support the thesis that "*all administrative acts must be motivated, that is to say, the reasons of fact and law underlying their issue/adoption must be justified. The motivation of administrative acts refers to the existence of an obligation for the administration to make these reasons known in the decision*"[3].

Complying with the mandatory nature of motivating administrative acts diminishes the risk that the administration will make arbitrary, abusive, and certainly decisions by reference to the beneficiaries' legitimate interests and rights, it will improve the work of the administration.

In this respect, we have in support of the statements *Law 24/2000 regarding the legal technical norms for elaborating normative acts*, including texts regarding motivation of projects of this category of acts (including the administrative ones), in the provisions of art. 30-34.

Over time, it has been considered that the authorities are not obliged to motivate their administrative act unless the law expressly compels them, but the need to act on the grounds is recognized more and more as a guarantee of the legality of the administrative acts.

A reasoned decision sets out the reasons of fact and law for which its authority considered it to be justified, as a condition of the external legality of the act which is the subject of an appreciation in concreto, by its nature and the context of its adoption.

In the case of the administrative normative acts, according to the provisions of art. 31 of Law 24/2000, the motivation must refer to the requirements that justify the adoption of the act, the basic applicable principles and the purpose of the proposed regulation, the social, economic, political, cultural effects, the implications for the regulation in force, as well as the phases in the issuance or adoption of that act.

In the case of individual acts, the reasoning refers mainly to the factual and legal causes which required the adoption of the act in question. The motivation thus arises as a consequence of the exigency that every administrative act, whether normative or individual, has a cause, a reason that can be in fact or rightful. The factual fact consists in the necessary conditions for the public authority to issue the act, and the legal grounds are the legal norms on which the authority is based in the issuing of the administrative act.

From this point of view, the use of the motivation of the administrative act is revealed in several aspects:

- by motivation there is an explanation of the act and thus the conflicts between the administration and the beneficiaries of the services they provide;

[3] Verginia Verdinaș, Drept administrativ, Edition X, revised and updated, Ed. Universul Juridic, București, 2017, p. 341.

- obliges the administration to act in its actions according to the legal norms;
- allows for more rigorous control by all right holders to exercise control, whether by hierarchically superior control, by the court, public opinion or other holder.

A weak practice that draws attention is that, in motivating the issuance of administrative acts, an act in its entirety is invoked and not the provisions of the normative act that are applicable in the issuance or adoption of an administrative act.

The principle of the motivation of administrative acts in European administrative law.

The principle of motivating administrative acts also includes motivating those implementing the "basic acts of the European Union". In accordance with art. 296 TFEU legal acts shall state the reasons on which they are based and shall refer to the proposals, initiatives, recommendations, requests or opinions provided for in the treaties.

The obligation to motivate the EU acts is to indicate clearly and unequivocally the reasoning of the EU authority as the author of the contested act in such a way as to enable the parties concerned to know the justification of the measure adopted in order to defend their rights, and the EU court to exercise its review of legality.

The motivation must be adapted to the nature of the act in question and is appreciated by the circumstances of the case in the content of the act, the nature of the grounds relied on and the interest of the addressees or other persons directly and individually concerned by that act, to be given explanations. It is obligatory for the motivation to specify all the relevant factual and legal elements. To the extent that the issue of the statement of reasons for an act complies with the conditions imposed by Article 296, not only the wording, but also its context, and all the legal rules governing that matter, are appraised.

The obligation on the administration to motivate its decisions derives from the Charter of Fundamental Rights of the European Union, Article 41. This obligation is provided for in the Treaty of Rome[4] by art. 190. The provision was developed by the European Code of Good Administrative Behaviour, art. 18, which states that all decisions of the European institutions which may prejudice rights or private interests must indicate the reasons on which they are based, specifying the relevant facts and the legal basis for the decision.

In this way, officials are urged to avoid making decisions that are based on short or imprecise legal considerations and do not contain individual observations.

If, due to the large number of people on similar decisions, it is impossible to carry out the communication in detail on the grounds of the decision or when the answers are given as standard, the official is obliged to ensure an individual answer to each request.

Motivation is of particular importance in cases where an interested party's request is rejected. In this situation, the motivation must clearly indicate why the arguments submitted by the requested party could not be accepted.

Where there is insufficient reasoning for a regulation, we are in a situation where there is a deficiency in the annulment of the act in question, in breach of an important procedural requirement which may be invoked by way of review of the lawfulness of that regulation before the Court of Justice. The Court will object, on its own initiative, to any lack of motivation.

By sufficient justification of the act issued by an EU institution, the parties are allowed to defend their rights, the European Court of Justice to exercise its control function and the member states and interested citizens to know the conditions under which the institution has applied the Treaty.

In the Romanian legal landscape, there are numerous references to the motivation of decisions and administrative acts through:

- The public procurement law, regarding the reasons for the decisions in the tender selection procedures, the reasons for designating the winner, the reasons for which the contracting authority decided to cancel the award procedure, the reasons for the rejection, etc.
- The tax procedure code of 20 July 2015, complies with the Law no. 207 of 20 July 2015, makes numerous references to the motivation of the authorities' decisions in the reception of administrative acts: extension of the deadlines based on motivated grounds, reasoned deferment of the exercise of certain attributions, motivation of the decisions to engage the liability, motivation of the fiscal administrative act and inclusion in its content of the elements stipulated in the Fiscal Procedure Code, the factual and legal reasons for the results of the tax audit, the motivation of the decision to adopt/remove the precautionary measures, etc.
- The expropriation law no. 33/1994. Motivating the decision of the commission to analyze the complaints that were formulated regarding the expropriation proposal, this being a *sine qua no*n condition of the legality guaranteeing both the transparency of the decisional act and the possibility of its censorship by the court, based on art. 20 of Law 33/1994. In this way, the obligation to state reasons can no longer be regarded merely as a formal condition and must be regarded as a condition of legality which concerns the substance of the administrative act, the

[4] The Treaty of Rome refers to the Treaty establishing the European Economic Community (EEC) and was signed by France, West Germany, the Netherlands, Italy, Belgium and Luxembourg on 25 March 1957.

fulfillment of which depends on the very validity of that act.

Motivation for the administrative act

The Romanian doctrine of administrative law enshrines and supports, by a majority, the recognition of the principle of the motivation of administrative acts as a principle of administrative law, as well as its recognition by jurisprudential law[5].

States with a democratic tradition, such as France, have enshrined this principle of administrative law in the legislative branch, with the 1979 legislation requiring the motivation of all decisions unfavorable to the addressee as a general rule for: building permits, sanctions, decay, prescriptions, etc.[6].

Additionally, it is necessary to motivate the decisions which introduce derogations from the rules established by laws and higher normative acts. Exceptions to the motivation may intervene in the case of decisions that might disclose statutory administrative secrets, medical secrets, decisions taken in extreme or urgent situations, and in the case of implicit refusal by the authorities, but in this case, at the request of the person concerned, the administration is required to motivate its decision within one month.

In the German law, the rationale for the obligation to enforce administrative acts is imposed by a provision of a general nature in the *Code of administrative procedure*.[7] If the contested act is fully reasoned or concerns all matters of fact, the period for bringing an action for annulment is one month after notification of the contested act or from the reply to the administrative appeal, and if the contested act or the reply to the administrative appeal fails contains the required entries, the term is 1 year. Thus, for the incomplete motivation of estimates, the administration is sanctioned by dilating the terms of appeal.

Motivation of individual administrative acts issued on request

In the case of administrative acts issued on request, based on the resolution of a petition, based on some provisions of the Government Ordinance no. 27/2002, the following clarifications are required:

- the motivation established by art. 13 concerns only the legal grounds, which allow the verification of the legality of the issued administrative act;
- the full motivation of the administrative act requires the submission of the factual reasons (in particular in the exercise of the discretionary power), the legal remedies available and the indication of the competent court, the deadline for introducing the finding;

Numerous Romanian authors have supported and supported the need, through de lege ferenda proposals, to regulate the mandatory motivation of administrative acts, in particular through an administrative code, in the following respects: legal grounds, factual reasons, indication of available means of action, the competent court, the deadline for contestation.

The motivation for the refusal to communicate information of public interest to the petitioner is provided by Law no. 544/2001 by art. 22 and circumscribed in Government Ordinance no. 27/2002, being obligatory to include all the elements of the existence of full motivation.

The obligation to state reasons is also found in the case of *judicial administrative acts*, examples of which are: the decisions of the State Office for Inventions and Trademarks, the decisions of the Commission for resolving the expropriations (*Law 33/1994 on expropriation for public utility reasons*).

Motivation of normative administrative acts

The obligation to motivate the regulatory administrative acts is imposed by Law no. 24/2000 regarding the normative technical norms for the elaboration of normative acts

The law stipulates the obligation to draw up *a substantiation note* for the ordinances and government ordinances, which will accompany the normative act in the process of its adoption, after which it will be published with it in the Official Journal of Romania and published on the website of the issuing institution .

In the case of the other administrative acts issued by the central authorities, the draft normative act shall be accompanied by an *approval report*, without any provision regarding the publication of the latter with the normative act.

In accordance with Section 4 of Law 24/2000, the motivation will refer to the following aspects:

- the requirements that suppose regulatory intervention with particular reference to the shortcomings of the regulation in force;
- the existence of legislative inconsistencies or lack of regulation;
- the purpose of the legislative proposal, the basic principles with highlighting the novelties;
- what are the effects, studies, research, evaluations, etc.
- The draft normative acts will, in their motivation, have expressly mentioned in terms of compatibility with European Union law and possible future measures or circumstances regarding the necessary harmonization.

The acts adopted by the local public administration authorities in the preamble must contain a *motivation in law*, in other words, the legal norm of the local public administration Law 215/2001, which is the basis in whose power it was adopted.

Lack of motivation and legal sanction of lack of motivation for the legal act.

[5] Mircea Anghene, , Motivation of administrative acts - a factor for the strengthening of legality and the approach of citizens administration, in "Studies and legal research", no. 3/1972, pag. 504

[6] Jean Rivero, Jean Waline,Droit administratif, 18th edition, Dalloz, Paris, 2000, pag. 106

[7] Hartmut Maurer, Droit administratif allemand, traduit par M.Fromont, Librairie générale de droit et de jurisprudence, Paris, 1994, pag. 246.

In law no. 24/2000 on the normative technical norms for the drafting of normative acts does not provide legal sanctions for the situation in which the motivation is not published simultaneously with the normative act.

The constant Romanian doctrinal solution, applicable to the situation of lack of motivation, lies in considering the act as null in terms of content, if the reasons are illegal interfering absolute nullity, and if motivation is missing, the relative nullity occurs.

The legality control exercised by the administrative litigation court extends to the pleas in law and, if the reasons are required by law, these are legality issues.

The reasons invoked, when the law does not require the reasoning of the respective administrative act, represent elements of appreciation of the opportunity of the administrative decision which are not subject to the control of the administrative court.

Examples from the European Jurisprudence.

1. In **Ireland and Others v./Commission**, the annulled the Commission's decision to exempt the excise duty on mineral oils used as fuel for the production of alumina in certain regions of Ireland, France and Italy, invoking of its own motion a failure to state reasons the reference to the non-classification of this measure in the "existing aid" established by Regulation 658/1999. According to this regulation, art. 1 letter (b) point (V) is deemed to be the aid for which it can be demonstrated that at the time of implementation it was not an aid and that it subsequently became aid due to the evolution of the common market without having been modified by the member state. The Court finds that, in accordance with the community provisions governing the right to excise duty, the exemptions at issue had been authorized and prolonged by several Council decisions adopted on a proposal from the Commission. In those circumstances, the Court considers that, when the Commission excluded the assessment of the aid at issue as existing under the provisions of the Regulation, it wrongly merely stated that that provision was not applicable in the present case[8].
2. In another case, the **Salvat pere et fils and Others v./Commission** clarified the case-law of the Court on the requirement to state reasons for the Commission's decisions on the measures considered by the Commission to be State aid under Art. 87 CE (current 107TFUE). In that judgment, the Court stated that an examination of the conditions for the application of Article 87 CE cannot be regarded as contrary to the obligation to state reasons as long as the measures in question were part of the same action plan[9].
3. On another occasion, in the judgment of the **Department du Loiret v./Commission**, the Court found an insufficient statement of reasons for a Commission decision declaring state aid incompatible with the common market to be unlawfully paid to an undertaking in the form of a transfer to a preferential price of a landscaped plot. The Court stated that that decision did not contain the necessary information on the method of calculating the amount of aid to be recovered, in particular with regard to compound interest, in order to update the initial amount of the subsidy.[10]

National jurisprudence.

Decision no. 2973 dated 10 September 2012, passed on appeal by the Bucharest Court of Appeal - Section VIII Administrative and fiscal litigation having as object the annulment of the decision to dismiss from the public office).

"The Bucharest Court of Appeal ruled that the reasons for an administrative decision cannot be limited to considerations relating to the competence of the issuer or its legal basis, but must also contain factual elements enabling the addressees to know, on the one hand, and to assess the grounds for the decision and, on the other hand, to make possible the exercise of legality control. In this sense, the failure to motivate the decision to release from public office is a cause of its nullity, since the obligation to state the reasons for the administrative act is a requirement of legality, accepted both internally and at community level, as a guarantee against arbitrariness."[11]

Conclusions

Analyzing what has been said shows that the motivation of administrative acts is necessary, mandatory, and must be rigorously carried out. In order to be aware of the importance of the motivation operation for its beneficiaries, we have provided examples of European and national jurisprudence. It is highlighted that inadequate, incomplete or vicious reasoning may result in suspension or even annulment of the administrative act by the court. Civil servants are urged by the legal rules in force to avoid making decisions based on legal or imprecise motives and not containing individual observations.

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