

# ASSESSMENTS REGARDING THE LEGAL NATURE OF AN ACT BETWEEN A LABOR LAW ACT, A NORMATIVE ADMINISTRATIVE ACT OR AN INDIVIDUAL ADMINISTRATIVE ACT

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## Abstract

*This article aims to establish the legal nature of a regulation, using an analysis of the characteristics and specific criteria of each type of act and concluding with the determination of the legal nature of such a regulation, either as a labor law act, a normative administrative act, or an individual administrative act.*

**Keywords:** legal nature, normative act, individual act, labor law act, regulation.

## 1. Introduction

This study aims to analyze the features of the normative administrative acts, individual administrative acts, but also of those belonging to labor law.

Over the time, both the lawmaker and the doctrine have contributed to the shaping of certain criteria for distinguishing between the acts issued by the authorities, so that the qualification of an act as having an administrative nature (either normative or individual), or as belonging to the area of the labor law does not raise interpretation issues.

Notwithstanding the aforementioned, there are situations when the courts face difficulties, so that an uneven practice was reached, the decisions of the High Court of Cassation and Justice which established boundary lines in the interpretation of the legal regulations being completely justified.

Given that the theory has the desired results when combined with a case study, we will refer to a specific case, namely Sentence no. 225/January 30<sup>th</sup>, 2015 ruled by the Court of Appeal Bucharest, Division of Contentious Administrative and Fiscal, published as an extract on site [juridice.ro](http://juridice.ro)<sup>1</sup>.

**2.1.** Therefore, the Financial Supervisory Authority (former National Securities Commission<sup>2</sup>) requested before the courts the annulment of Regulation no. 4/2013. The criticized regulation introduced the right to an indemnity equivalent to 9 net salaries, upon the termination of the membership to the authority, in what concerns the personnel employed within the offices of NSC members.

It should be noted that in order for the aforementioned indemnity to be granted, the employed

personnel was required not to choose to continue the employment relationships with the institution or not to have received another compensation, respectively a receivable right.

Therefore, Regulation no. 4/2013 concerns a certain category of definable persons. They are the persons working within NSC, occupying the functions provided by the organizational chart.

The position of the author of the article is interesting; firstly the author performs an authentic analysis of the criteria for distinguishing between normative administrative acts and individual administrative acts, by getting to admit the existence of the appearance of administrative act of individual nature of the Regulation. Notwithstanding, in the end, the author classifies Regulation no. 4/2013 as being an administrative act of normative nature.

Therefore, on the one hand, we will analyze whether or not the challenged act could belong to the labor area, as well as the considerations which led to the wrong conclusion of the author, in our opinion.

## **2.2. Does the challenged act envisage, by means of its content, the relationships which fall under the scope of the labor law?**

A public authority is not engaged only in administrative law relationships (case in which the respective authority operates as a public authority according to Law no. 554/2004 of the Contentious Administrative<sup>3</sup>), but also in legal relationships belonging to other branches of law, such as labor law. In the latter case, the respective authority falls outside the scope of LCA.

In its turn, the case law of the contentious administrative courts, including of the Supreme Court, includes rulings whereby the administrative nature of

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<sup>1</sup> The article we refer to was published on site [juridice.ro](http://juridice.ro) on December 14th, 2016, with title „The annulment of normative administrative acts on the granting of the bonuses to the NSC members, amounting to 9 times the higher gross month income throughout their term of office, upon the termination of the term of office, regardless of the reason. The proceedings of the Financial Supervisory Authority”, available on: <https://www.juridice.ro/483350/anularea-actelor-administrative-normative-de-acordare-membrilor-cnvm-la-incetarea-mandatului-din-orice-motiv-a-primelor-in-valoare-de-9-ori-venitul-brut-lunar-cel-mai-mare-din-perioada-exercitarii-man.html>, accessed on February 15<sup>th</sup>, 2017.

<sup>2</sup> Hereinafter referred to as the „NSC”.

<sup>3</sup> Hereinafter referred to as „LCA”.

an act issued by a state authority was not acknowledged, whenever it was found that the issuer did not act according to the special public power authorities it was empowered with<sup>4</sup>.

It could be argued that the legal relationships established between NSC and the persons who work within this authority would be labor law relationships, based on the following grounds:

In what concerns the employed personnel art. 15 para. (1) NSC Articles of Organization provides that „NSC personnel shall be employed according to the provisions of Law no. 53/2003 – Labor Code, as further amended and supplemented”.

In what concerns the relationship established between NSC and the member of the authority – even if this relationship is not carried out under an employment agreement – it is interesting to note that it falls under the scope of the employment relationships, under art. 1 para. (2)<sup>5</sup> and art. 278 para. (2)<sup>6</sup> of the Labor Code.

The relationship established between NSC and NSC member fulfills the main features of the employment relationships, as they are provided by the case law and the labor law doctrine:

- a) the legal relationship established between NSC and NSC member is *intuitu personae*, as the designation in this position is performed *intuitu personae*;
- b) NSC member is obviously a natural person;
- c) NSC member is subordinated to the authority, the decisions of the NSC being mandatory for any member, the regulations issued by NSC on the organization and functioning of this institution not being exempted from this rule<sup>7</sup>;
- d) NSC member continuously carries out his activity during his term of office within an institutionalized organizational framework according to the working program established by means of the documents issued by NSC on the functioning of this authority;
- e) NSC member receives a monthly remuneration for the activity carried out in his capacity within NSC; the income gained by the NSC member is considered salary income.

The administrative authority which is served by the NSC member and which the NSC member is subordinated to behaves as the employer of the member. The behavior of NSC institution towards NSC member is similar to the behavior of any employer towards its employees.

In the relation established with the NSC member, the institution acts as any other employer, respectively benefits from the provision of services, organized according to own regulations and procedures, and for this services, the institution pays the NSC member a monthly remuneration / indemnity and other rights established according to own regulations.

Taking into account all the aforementioned, we would be tempted to consider that, in what concerns the NSC member, we would find ourselves in the presence of a labor law relationship.

Although we cannot deny the connection of the labor law with the administrative law, we cannot ignore that these two branches of law are correlated, but in what concerns the settlement of employment disputes, professional reintegration of unemployed persons, as well as their social protection<sup>8</sup>, not being able to extend the nature of act belonging to the labor law to any similar act of the authority.

Therefore, we cannot accept the argument according to which Regulation no. 4/2013 of NSC belongs to the labor law area, this being an administrative act, issued under public power terms, by an administrative authority.

Hereinafter, we will establish the appropriate nature of this administrative act, against the considerations of the Court of Appeal of Bucharest.

### 2.3. The arguments according to which (i) the publication special procedural forms would not have been fulfilled and (ii) the law qualifies an act in a certain way are not standalone.

Indeed, the concept of „publication” of the administrative acts represents the guarantee of the fulfillment of the lawfulness and transparency of the local government authority.

Notwithstanding, we cannot mandatorily extend this concept over all administrative acts. Therefore, it is important to analyze whether the act is normative or individual, by the full analysis of the effects it produces, as well as of the content of the act, therefore by means of the features of each of the two category of acts.

None of the aforementioned issues was analyzed, therefore the grammatical enforcement of the law was not reached. We believe that we cannot conclude on the nature of an administrative act as being normative or individual, only based on the classification provided by the law, without a thorough analysis of the content of the act.

Therefore, as it is well known in what concerns the normative administrative act, publishing<sup>9</sup> is an

<sup>4</sup> In this respect, see Ovidiu Podaru, „Drept administrativ. Practică judiciară comentată. Vol. I. Actul administrativ (II) Un secol de jurisprudență (1909-2009)”, Hamangiu Publishing House, 2010, Bucharest, p. 51-67.

<sup>5</sup> This code also applies to employment relationships regulated by special laws, unless they contain specific derogating provisions.

<sup>6</sup> The provisions of this code are applicable on the common law basis to those legal employment relationships which are not based on an individual employment agreement, unless special regulations are complete and the application thereof is incompatible with the specifications of the respective employment relationships.

<sup>7</sup> As resulting from the provisions of art. 3 para. (8) of the NSC Articles of organization, published in Official Journal no. 226 of Aprilie 4<sup>th</sup>, 2002.

<sup>8</sup> Alexandru Țiclea, „Tratat de dreptul muncii. Legislație. Doctrină. Jurisprudență”, Edition X, updated, Bucharest, 2016, p. 68.

<sup>9</sup> According to art. 11 para. (2) letter b) of Law no. 24/2000 on the legislative technique regulations for the normative acts issuance: „The following shall not be subject to the regime of publication in the Official Journal of Romania: (...) b) normative acts classified according to

essential condition for its validity, unlike the absence of this obligation towards the individual act; the latter only has to be communicated to the recipients, even verbally. The most effective way to communicate an individual act is the handling of the act<sup>10</sup>.

Therefore, an individual administrative act cannot be conditioned, according to its current legal framework, to take a certain form, except the written one, as a principle of the administrative acts. Furthermore, the doctrine<sup>11</sup> provides that *an individual act can rarely have a verbal form*, if the law expressly provides so.

Therefore, the argument according to which certain publishing special procedural forms were not fulfilled must not be applied *ad litteram* and this argument cannot represent a standalone ground for the classification of an administrative act as a normative one.

Such a classification would have been reasonable if the content of the act had been analyzed, in order to find if the features of a normative were met or it was rather about an individual act; all the more so as the fact that the act was published or not has no consequence on the lawfulness of an act and, therefore, it cannot change the nature of individual administrative act.

Despite the fact that the provisions of art. 7 para. (4) of the NSC Articles of organization list the individual acts of the authority, among which the regulations are not present, the court of law should have exercised more caution in the decision-making process. Therefore, the examination of the entire content of the document was required. The automatic application of the law, strictly by analyzing its grammatical regulations, without the content of the challenged act being granted the required attention, can only lead to a mechanical interpretation, denying the unitary nature of the act itself.

In this respect, the case law of the High Court of Cassation and Justice established that the classification of an infra-legislative act in one of the two aforementioned categories CANNOT be performed by „cutting” certain provisions of that act, thus affecting the unitary nature of the act, but by the full examination of its content, in the light of the features of each of the two categories of acts. In this regard, the High Court held that Government Resolution no. 349/2005 on waste storage is a normative one since it contains

general rules, with repeated application, and its recipients are represented by an undetermined number of subjects (...) <sup>12</sup>.

If the content of the act had been analyzed, it would have been noted that Regulation no. 4/2013 met the features of an individual administrative act, and not of a normative act. Therefore, according to the doctrine<sup>13</sup>, the features of a *normative administrative act* are marked by the fact that the act includes *general impersonal rules of conduct with repeated applicability, in order to be applied to an undetermined number of subjects*.

The individual administrative act, on the other hand, shall not meet these features, a confusion between these two types of acts being impossible, if these defining features are taken into account.

Therefore, the extent of the legal effects, the nature of the measures provided by its content, the recipients of the act, and not the name of the act shall be the elements which have to be taken into account when establishing the legal nature of an administrative act<sup>14</sup>.

The normative act includes general and impersonal rules of conducts, as the laws<sup>15</sup>. Instead, the individual act can be addressed to a sole person, as easy as it can consider hundreds, even thousands definable recipients<sup>16</sup>. Therefore, one of the most important criteria for distinguishing between the two types of administrative acts is represented by the definable feature of the persons which it is applied to.

The individual act becomes effective for a limited and determined / definable number of beneficiaries, a manifestation of will which creates, modifies or extinguishes rights and obligations in the benefit of or which are incumbent on its recipients<sup>17</sup>.

Therefore, Regulation no. 4/2013 refers to changes on indemnities, salaries, various allowances, benefits, prizes, bonuses and other emoluments, vacations and additional vacations. All these elements are determined by reference exclusively to the persons employed within NSC, on various functions provided by the organizational chart of this authority.

Therefore, it has an internal nature, being applied only within the institution, in the relationships established between NSC as authority, on the one hand, and the persons activating within it, on the other hand.

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*the law, and the individual nature acts, issued by the independent administrative authorities and by the bodies of the specialized local government authorities”.*

<sup>10</sup> In this respect, see *Decision no. 1718/2013 of the High Court of Cassation and Justice*, available on [www.scj.ro](http://www.scj.ro), accessed on February 15<sup>th</sup>, 2017.

<sup>11</sup> D. A. Tofan, „*Drept administrativ*, vol. II”, ed. 3, C.H. Beck Publishing House, Bucharest, 2015, p. 33.

<sup>12</sup> In this respect, *Decision no. 1718/2013 of the High Court of Cassation and Justice* is relevant and it is available on [www.scj.ro](http://www.scj.ro), accessed on February 15<sup>th</sup>, 2017.

<sup>13</sup> A. Trăilescu, „*Drept administrativ*”, All Beck Publishing House, edition no. 2, Bucharest, 2005, p. 4.

<sup>14</sup> Gabriela Bogasiu, „*Legea contenciosului administrativ*. Ediția a II-a. Comentată și adnotată. Cuprinde legislație, jurisprudență și doctrină”, Universul Juridic Publishing House, Bucharest, 2015, p. 128.

<sup>15</sup> D. A. Tofan, *op. cit.*, p. 21.

<sup>16</sup> O. Podaru, „*Drept administrativ. Vol. Actul administrativ (I) Repere pentru o teorie altfel*”, Hamangiu Publishing House, Bucharest, 2010, p. 61: „(...) *there can be an „individual” act with hundreds of recipients: for instance, the list of candidates who passed / failed the exam for admission to magistracy*”.

<sup>17</sup> In order to substantiate the importance of the criterion on the definable nature of the administrative act recipients, see the following decisions of the High Court of Cassation and Justice: *Decision no. 2110/2012*; *Decision no. 1718/2013*; *Decision no. 6926/2013*.

As a matter of fact, the High Court of Cassation and Justice established the legal nature of individual administrative act in what concerns the acts issued by certain public authorities and institutions. The common feature of these acts is that they contemplate various matters of domestic organization of the respective authorities and produce effects exclusively in connection with the persons who carry out their activity within the authorities.

Therefore, the High Court of Cassation and Justice noted the nature of individual act in the following cases, on different acts, namely: *Decision no. 1367 of March 18<sup>th</sup>, 2014*<sup>18</sup>; *Decision no. 3366 of September 23<sup>rd</sup>, 2014*<sup>19</sup>; *Decision no. 5632 of June 7<sup>th</sup>, 2013*<sup>20</sup>; *Decision no. 3263 of June 3<sup>rd</sup>, 2011*<sup>21</sup>.

Therefore, the challenged regulation took the shape of a regulation that considers determined subjects, produces its effects only in connection with its staff, civil servants or contractual agents, being, basically, an internal act of the authority<sup>22</sup>. Therefore, it should have been qualified as an administrative act with individual nature.

### 3. Conclusions

The challenged regulation does not belong to the area of the labor law and does not meet the aforementioned conditions in order to be deemed a normative act, as follows: it does not establish a general and impersonal rule of conduct, as it has limited applicability, the persons falling under the scope of this regulation being determined.

It can not be claimed that the regulation has general applicability, namely *erga omnes*, as long as the other employees of the other authorities do not benefit from the same rights. Furthermore, as we have already shown, in what concerns the assessment of the legal nature of the administrative act, the effects it produce, the nature of the measures provided by it and the recipients of the acts are the essential elements, and not the form or the name of the act.

Given all the aforementioned, we hereby conclude that Regulation no. 4/2013 of NSC meets the features of an administrative act of individual nature, and it cannot be legally qualified as having another legal nature.

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<sup>18</sup> Order no. 2365/June 30<sup>th</sup>, 2011 and no. 2180/June 3<sup>rd</sup>, 2011 of the President of the National Agency for Fiscal Administration, the following being motivated „it is addressed to a limited and well defined number of law subjects, respectively to civil servants of D.G.F.P (General Directorate of Public Finances)”.

<sup>19</sup> Order no. 2551/C/July 26<sup>th</sup>, 2012 of the Minister of Justice on the organization of the competition or examination for admission to public profession of bailiff by motivating that it is addressed to a determined category of subjects.

<sup>20</sup> Resolution no. 189/2004 of the Superior Council of Magistracy on the establishment of certain divisions within the Court of Appeal of Craiova by motivating that it envisages the internal organization of the institutions to which it relates.

<sup>21</sup> Order no. 2100/2009 for the approval of the Regulation for the organization and functioning of the Ministry of Culture, Religions and National Heritage by motivating that the regulation „concerns the structure and powers of this ministry, it does not establish legal regulations to regulate legal situations of general, impersonal nature”, and that the regulation „produces effects only for a body of the local government” and that „the effects are produces in an area determined and limited by social relationships”.

<sup>22</sup> D. A. Tofan, *op. cit.*, p. 20.