JURISPRUDENTIAL DEVELOPMENTS ON THE REASONING OF THE ADMINISTRATIVE ACT

Elena Emilia ȘTEFAN*

Abstract

The activity of public authorities is subject to the control of legality performed by the administrative courts, according to the law. On the basis of art. 52 of the Constitution, persons aggrieved in their legitimate rights and interests often complain before the courts that the administration fails to give reasoning on the administrative acts. At EU level, the Charter of Fundamental Rights of the European Union stipulates that giving reasons for administrative acts is a component of the right to good administration. In this context, the aim of this paper is to analyze the relevant case-law in order to be able to observe the national administrative contentious judge's opinion on the reasoning of administrative acts, in the sense of whether this formality is mandatory or not for the issuing public authority. In terms of the research methodology, the structure of the paper has two main components, a theoretical one, namely it will describe the state of the legislation applicable to the reasoning of administrative acts, then it will focus on the practical component, in order to understand what problems arise in the work of public administration in this aspect. The proposed subject is topical, practical and of general interest. Using specific legal methods, the conclusion of the paper will be emphasized, namely that the reasoning is a condition for the legality of the administrative act, without which the proper functioning of public administration would be questioned.

Keywords: *legality, reasoning, administrative, contentious administrative, case-law.*

1. Introduction

The research hypothesis of the paper starts from the idea that the activity of public authorities is carried out under the protection of the principle of legality, fundamental principle[1] underlying the theory of administrative acts. It is not conceivable that decision-makers who take measures for citizens break the law, otherwise the rule of law and European values could be defeated. Yet „the state is the main political institution of society[2]". Exceptionally, when damage occurs, those affected seek justice in the courts, because no one can seek justice alone. From this perspective, we consider that public authorities[3] have a permanent duty to ensure respect for fundamental human rights through fair, transparent and public interest-oriented conduct.

In national law, the principle of legality prevails both as regards the conduct of public administration[4] and in the conduct of the administered persons. According to art. 1 para. (5) of the Constitution: „In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory". Furthermore, „public authorities and institutions must comply with the principle of the hierarchy of normative acts, observing both the legal force of each normative act and the competence enshrined in the legal rules of each public authority and institution, which also implies not deviating from the procedure established to be followed for the adoption of any such normative act[5]". From this perspective, „the legal norm requires the acceptance and observance of the prescribed conduct[6]".

---

* Associate Professor, PhD, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: stefanelena@univnt.ro).

[1] For further details on the principles of law, see E. Anghel, General principles of law, Lex ET Scientia International Journal - LESIJ no XXIII vol. 2/2016, pp.120-130, *https://lexetscientia.univnt.ro/download/580_LESIJ_XXIII_2_2016_art.011.pdf*, last consulted on 02.01.2025.

[2] E.L. Cătană, *Drept administrativ (Administrative Law)*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2021, p. 1.

[3] For further details on public authorities, see M.C. Cliza, *Drept administrativ Partea I (Administrative Law, Part I)*, Pro Universitaria Publishing House, Bucharest, 2011, pp. 12-20.

[4] From a conceptual perspective, see R.M. Popescu, *ECJ case-law on the concept of "public administration" used in article 45 paragraph (4) TFEU*, CKS eBook 2017, pp. 528-532, *https://cks.univnt.ro/cks_2017/CKS_2017_Articles.html*, last consulted on 07.01.2025.

[5] S.G. Barbu, A. Domșa, O. Șaramet, *Organizarea controlului administrativ guvernamental în România, Uniunea Europeană și Statele Unite ale Americii (Organization of government administrative control in Romania, the European Union and the United States of America)*, C.H. Beck Publishing House, Bucharest, 2024, p. 14.

[6] N.E. Hegheș, *The non-retroactivity of' new legal norms-fundamental principle of law. Exceptions*, in International Journal of Legal and Social Order no. 1/2022, p. 153, *https://ijlso.ccdsara.ro/index.php/international-journal-of-legal-a/article/view/74/60*, last consulted on 06.01.2025.

This study analyzes the situations where, before a specialized judge[7] as that of contentious administrative[8], a conflict may at some point arise, where an aggrieved person complains that an administrative act has not been given reasons for[9] by an authority or because of unclear legislation. Yet, the legislation is not always clear, it „gives rise to interpretations with consequences that affect (...) the way in which disputes are settled [10]".

2. The reasoning of administrative acts - theoretical and practical guidelines

2.1. The legal framework on the reasoning of the administrative acts

Art. 41 of the Charter of the European Union - „right to good administration" provides „the obligation of the administration to give reasons for its decisions" [para. 2, letter c)]. Therefore, at Union level[11], the obligation of public authorities to give reasons for administrative acts is expressly enshrined. Therefore, state administration cannot take discretionary, illegal decisions without giving reasons in fact and in law, because no one is above the law, as this is clear from art. 16 para. (2) of the Constitution. Yet, „the Constitution commands the whole of law by its content and its position in the legal system"[12]. In this respect, the case-law provided: „the absence of actual reasoning in fact and in law for the administrative act represents a violation of the principle of the rule of law and is in itself harmful"[13].

The motivation is enshrined in the Constitution and is provided for in the case of emergency ordinances. According to art. 115 para. (4) of the Constitution: „The Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and has the obligation to give the reasons for the emergency status within their contents". The Constitutional Court, in its case-law, has held that the expression „extraordinary situations" refers to „the necessity and urgency of regulating a situation which, due to its exceptional circumstances, requires the adoption of a serious interference with the public interest[14]".

The Administrative Code also refers to motivation, such as cases of termination of the mandate of a local or county councilor. Therefore, art. 304 para. (2) provides the following: „the office of local councilor or county councilor shall terminate automatically, before expiry of the normal term of office, in the following cases: absence without good reason from more than 3 consecutive ordinary and/or extraordinary meetings of the Council during a period of three calendar months (letter d.); absence without justification from 3 meetings of the Council convened within 3 calendar months, which makes it impossible to hold ordinary and/or extraordinary meetings in accordance with the law" (letter e).

Another example concerns a civil servant who is temporarily transferred to another vacant or temporarily vacant public office. In this case, art. 508 para. (8) provides that this measure shall be ordered, in the interests of the public authority or institution, by the head of the public authority or institution in a public office at the same level, with due regard for the category, grade and professional grade of the civil servant, for a maximum period of 6 months in any calendar year, stating the reasons on which it is based. The case regulated by 152 para. (5) of the Administrative Code is also interesting in terms of reasoning, as it concerns the dismissal of the

[7] On the role of the judge in restraining the excess of power of public administration, see D. Apostol Tofan, *Puterea discreționară și excesul de putere al autorităților publice (Discretionary power and excess of power of public authorities)*, All Beck Publishing House, Bucharest, 1999, pp. 359-368.

[8] The paper does not explore the constitutionality control of laws, although the case law of the Constitutional Court is invoked in the context of the reasoning of administrative acts. Interesting developments in the first constitutional review of laws in Romania, in work C. Ene-Dinu, *Istoria statului și dreptului românesc (History of Romanian state and law)*, Universul Juridic Publishing House, Bucharest, 2020, pp. 265-266.

[9] The present research focuses only on analyzing the reasoning of administrative acts and does not develop the procedural operations of issuing administrative acts. In this respect, see an interesting study, V. Negruț, I.A. Zorzoană, *Theory of endorsements: legislative and jurisprudential development in Romania and the European Union*, Laws, 2023, 12 (5) 83, *https://doi.org/10.3390/laws12050083*, last consulted on 07.01.2025.

[10] V. Vedinaș, *Drept administrative (Administrative Law)*, 15th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2024, p. 10.

[11] This study does not detail the legal order of the European Union or the policies of the European Union. See in this respect, A. Fuerea, *Manualul Uniunii Europene (European Union Handbook)*, 6th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016, pp. 228-252 or A.-M. Conea, *Politicile Uniunii Europene. Curs universitar (Policies of the European Union. University course)*, Universul Juridic Publishing House, Bucharest, 2020, pp. 10-20.

[12] I. Muraru (coord), A. Muraru, V. Bărbățeanu, D. Big, *Drept constitutional și instituții politice. Caiet de Seminar (Constitutional law and political institutions. Seminar Booklet)*, C.H. Beck Publishing House, Bucharest, 2020, p. 60.

[13] CA Timișoara, s. contentious administrative and fiscal, civ. dec. no. 424/2021, p. 101, *https://www.iccj.ro/wp-content/uploads/2021/07/C-Ap-Timisoara-Trim-I-2021.pdf*, last consulted on 02.01.2025.

[14] CCR dec. no. 65/1995, published in the Official Gazette of Romania no. 129/28.06.1995.

deputy mayor. This may be done by the local council by a decision adopted by secret ballot by a two-thirds majority of the councilors in office, on a duly reasoned proposal by the mayor or by one-third of the local councilors in office.

We find in the Administrative Code the lack of motivation allowed by the legislator in certain substantiated cases: the appointment of a member of the Government by the President of Romania, in case of government reshaping or vacancy of office. Therefore, according to art. 47 para. (4), the President of Romania may refuse, by giving reasons, any proposal delivered by the Prime Minister to appoint a member of the Government, only once, if he/she considers that „the person proposed is not suitable for the office in question or, in respect of that person, the cases of termination of the office of member of the Government, loss of electoral rights following a final judgment, death and criminal conviction by a final judgment, have occurred. In this case, the Prime Minister shall submit to the President a new proposal for the appointment of a member of the Government within 5 days as of the date on which the President has informed him/her of the rejection of the previous proposal[15]".

2.2. Reasoning of administrative acts - examination of judicial practice

Doctrine has held that „the reasoning of the administrative act, the justification of the reasons in fact and in law on which it was based, is a guarantee of respect for the law and the protection of individual rights, a form of protection of the citizen against arbitrary public power (...)"[16]. At national level, disputes concerning the failure to give reasons for administrative acts are contentious administrative litigations. French doctrine outlines that „disputes most often place the administered persons against their administration" (...)[17].

In the HCCJ case-law, we find actual situations analyzed by the division of contentious administrative and fiscal, which are based on a lack of reasoning, such as, for example, a case concerning an inspection protocol drawn up in relation to a building, which ordered the owner to take corrective measures due to the degradation of the building, a commercial company - a third party to the administrative act[18].

CCR, in its case-law[19], noted that the adoption by the GEO no. 136/2008 „was not motivated by the need for regulation in an area in which the primary legislator did not intervene but, on the contrary, by the need to counter a legislative policy measure adopted by Parliament in the area of the salaries of education staff". On another occasion, the Court noted that „What produces legal effects is not the reason for the refusal or the justified nature of the reason for the refusal, but the refusal to countersign the decree. The Constitution does not provide, either expressly or implicitly, for the possibility for the President of Romania to oblige the Prime Minister to countersign a decree conferring a decoration in the event of an initial refusal by the Prime Minister[20]".

With regard to the conditions for giving reasons for an administrative act, HCCJ ruled in a case that: „the extent and detail of the reasoning depend on the nature of the act adopted, and the requirements which the reasoning must meet depend on the circumstances of each case. Therefore, giving reasons is a general obligation applicable to any administrative act (…)[21]".

Furthermore, CA Suceava noted that: „Without denying the need to give reasons for any administrative act issued by a public authority, as set out extensively by the appellants, it is found that the challenged tax decisions in the present case were reasoned in a manner sufficient to enable their legality to be reviewed, with a brief statement of the facts and legal bases[22]". In another case, CA of Suceava noted: „The statements of

[15] EE. Ștefan, *Drept administrativ, Partea I, Curs universitar (Administrative Law, Part I, University course)*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2023, p. 164.

[16] O. Podaru, *Drept administrativ, vol. I, Actul administrativ (I), Repere pentru o teorie altfel (Administrative Law, vol. I, Administrative Act (I), Guidelines for a different theory)*, Hamangiu Publishing House, Legal Division, Bucharest, 2010, p. 147.

[17] C. Barray, P.X. Boyer, *Droit du contentieux administratif*, Ed. Gualino, Lextenso, 2024, Paris, p. 15.

[18] HCCJ, s. contentious administrative and fiscal, dec. no. 3116/28.09.2006, G.V. Bîrsan, L. Sârbu, B. Georgescu, *Jurisprudența Secției de contencios administrativ și fiscal pe anul 2006 (Case-law of the division of contentious administrative and fiscal for 2006), Semester II*, Hamangiu Publishing House, Bucharest, 2007, pp. 20-24 apud R.N. Petrescu, *Drept administrative (Administrative Law)*, Hamangiu Publishing House, Bucharest, 2009, pp. 429-430.

[19] CCR dec. no. 1221/2008, published in the Official Gazette of Romania no. 804/02.12.2008.

[20] CCR dec. no. 285/2014, published in the Official Gazette of Romania no. 478/28.06.2014.

[21] HCCJ, s. contentious administrative and fiscal, dec. no. 1442/2020, *http://www.scj.ro*, last consulted on 28.12.2021, apud E.E. Ștefan, *Drept administrativ Partea a II-a, Curs universitar (Administrative Law Part II, University course)*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2022, p. 51.

[22] CA Suceava, s. contentious administrative and fiscal, civil dec. no. 621/2022, in *Buletinul jurisprudenței 2022*, p. 165, *https://www.iccj.ro/wp-content/uploads/2023/03/CA-Suceava-Buletinul-jurisprudentei-SCAF-2022.pdf*, last consulted on 15.07.2024.

reasons in fact and in law for the tax administrative act are mandatory statements, the mandatory nature of which derives, on the one hand, from the imperative tone of the regulation and, on the other hand, from the principle that the statement of reasons is a condition of the external legality of the act, which is subject to an assessment in concreto, according to its nature and the context of its adoption.[23]".

As to whether or not the public authorities are bound to give reasons for their decisions, Timisoara Court of Appeal rules as follows: „the obligation of the issuing authority to give reasons for the administrative act represents a guarantee against the arbitrary action performed by the public administration and is particularly necessary in the case of acts modifying or abolishing individual and subjective rights or legal situations"[24]. The supreme court considered that „The reasoning of an administrative act serves a dual purpose, namely it fulfills a function of transparency for the advantage of the beneficiaries of the act, who will thus be able to verify whether or not the act is justified and it allows the court to carry out its jurisdictional review, thus ultimately allowing the reconstruction of the reasoning carried out by the author of the act in order to reach its adoption. It must be included in the content of the act and must be performed by its author[25]".

3. Conclusions

This paper analyzes the issue of reasoning of administrative acts. On this occasion, the documentation of the topic covered: doctrine, legislation and case-law. For the cases, data were collected using the computerized method, by studying the websites of the Romanian courts, CCR and HCCJ.

From the selected case-law, settled by the supreme court or other national courts, the divisions of contentious administrative and fiscal, we note that, in interpreting[26] the law, the contentious administrative judge considers that it is mandatory to give reasons for administrative acts.

Furthermore, the reasoning shall include both a detailed statement of the factual reasons which gave rise to the administrative act and a statement of the legal grounds on which it is based, indicating the applicable legal basis. Persons aggrieved by an unjustified administrative act shall be entitled to ask the administrative judge to review the legality of the respective act. In this respect, French doctrine noted that: „when the conduct of public authorities becomes unlawful or harmful, it must be followed as soon as possible by appropriate measures of annulment or remediation under penalty of its legitimacy, being open to doubt and challenge[27]". Doctrine unanimously considers that the reasoning is a substantive condition of the administrative act and the lack of it leads to the annulment of the act and in the case of emergency ordinances of the Government, the Romanian Constitution expressly requires that the reasons be stated.

The final conclusion of the present scientific research is that, in accordance with the provisions of the Charter of Fundamental Rights of the European Union, the reasoning of administrative acts is a component of the right to good administration, which is also reflected in national legislation.

References

- Anghel, E., *General principles of law*, Lex ET Scientia International Journal - LESIJ no. XXIII vol. 2/2016, *https://lexetscientia.univnt.ro/download/580_LESIJ_XXIII_2_2016_art.011.pdf*;
- Apostol Tofan, D., *Puterea discreționară și excesul de putere al autorităților publice (Discretionary power and excess of power of public authorities)*, All Beck Publishing House, Bucharest, 1999;
- Barray, C., Boyer, P.X., *Droit du contentieux administratif,* Gualino, Lextenso, Paris, 2024;
- Barbu, S.G., Domșa, A., Șaramet, O., *Organizarea controlului administrativ guvernamental în România, Uniunea Europeană și Statele Unite ale Americii (Organization of government administrative control in Romania, the European Union and the United States of America),* C.H. Beck Publishing House, Bucharest, 2024;

[23] CA Suceava, s. contentious administrative and fiscal, civ. dec. no. 349/2022, *Buletinul jurisprudenței 2022, op. cit.*, p. 70.

[24] CA Timișoara, s. contentious administrative and fiscal, 1st Quarter, civ. dec. no. 424/2021, p. 89, *https://www.iccj.ro/wp-content/uploads/2021/07/C-Ap-Timisoara-Trim-I-2021.pdf*, last consulted on 02.01.2025.

[25] HCCJ, s. contentious administrative and fiscal, dec. no. 6152/2023, *https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=212035#highlight=##%20motivare%20act%20administrativ*, last consulted on 12.09.2024.

[26] On methods of interpreting the law, see N. Popa (coord.), E. Anghel, C. Ene-Dinu, L.-C. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar (General Theory of Law. Seminar booklet)*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2017, pp. 197-202; M. Bădescu, *Teoria generală a dreptului (General theory of law)*, Sitech Publishing House, Craiova, 2018, pp. 167-187; I. Boghirnea, *The interpretation – obligation for the judge imposed by the application of the law*, in Legal and Administrative Studies no. 2 (19)/2018, pp. 50-57, *https://www.upit.ro/_document/31012/jlas_2_2018_r.pdf*, last consulted on 15.01.2025.

[27] R. Chapus, *Droit du contentieux administratif*, 13th ed., Edition Montchrestien, Paris, 2008, p. 769.

- Bădescu, M., *Teoria generală a dreptului (General theory of law)*, Sitech Publishing House, Craiova, 2018;
- Boghirnea, I., *The interpretation – obligation for the judge imposed by the application of the law*, in Legal and Administrative Studies no. 2 (19)/2018, *https://www.upit.ro/_document/31012/jlas_2_2018_r.pdf*;
- Cătană, E.L., *Drept administrativ (Administrative Law),* 2nd ed., C.H. Beck Publishing House, Bucharest, 2021;
- Cliza, M.C., *Drept administrativ Partea I (Administrative Law, Part I), Pro Universitaria Publishing House, Bucharest),* Pro Universitaria Publishing House, Bucharest, 2011;
- Conea, A.-M., *Politicile Uniunii Europene. Curs universitar (Policies of the European Union. University course),* Universul Juridic Publishing House, Universul Juridic Publishing House, Bucharest, 2020;
- Chapus, R., *Droit du contentieux administratif,* 13th ed., Montchrestien, Paris, 2008;
- Ene-Dinu, C., *Istoria statului și dreptului românesc (History of Romanian state and law),* Universul Juridic Publishing House, Bucharest, 2020;
- Fuerea, A., *Manualul Uniunii Europene (European Union Handbook*), 6th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016;
- Hegheș, N.E., *The non - retroactivity of' new legal norms-fundamental principle of law. Exceptions*, in International Journal of Legal and Social Order no. 1/2022, *https://ijlso.ccdsara.ro/index.php/international-journal-of-legal-a/article/view/74/60*;
- Muraru, I. (coord), Muraru, A., Bărbățeanu, V., Big, D., *Drept constituțional și instituții politice. Caiet de Seminar (Constitutional law and political institutions. Seminar Booklet),* C.H. Beck Publishing House, Bucharest, 2020;
- Negruț, V., Zorzoană, I.A., *Theory of endorsements: legislative and jurisprudential developmentin Romania and the European Union,* Laws, 2023, 12(5)83, *https://doi.org/10.3390/laws12050083*;
- Petrescu, R.N., *Drept administrativ (Administrative Law),* Hamangiu Publishing House, Bucharest, 2009;
- Podaru, O., *Drept administrativ, vol. I, Actul administrativ (I), Repere pentru o teorie altfel (Administrative Law, vol. I, Administrative Act (I), Guidelines for a different theory),* Hamangiu Publishing House, Bucharest, 2010;
- Popa, N. (coord.), Anghel, E., Ene-Dinu, C., Spătaru-Negură, L.-C., *Teoria generală a dreptului. Caiet de seminar (General Theory of Law. Seminar booklet),* 3rd ed., C.H. Beck Publishing House, Bucharest, 2017;
- Popescu, R.M., *ECJ case-law on the concept of „public administration" used in article 45 paragraph (4) TFEU,* CKS eBook, 2017, *https://cks.univnt.ro/cks_2017/CKS_2017_Articles.html*;
- Ștefan, E.E., *Drept administrativ, Partea I, Curs universitar (Administrative Law, Part I, University course),* 4th edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2023;
- Ștefan, E.E., *Drept administrativ Partea a II-a, Curs universitar (Administrative Law, Part II, University course),* 4th edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2022;
- Vedinaș, V., *Drept administrativ (Administrative law),* 15th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2024;
- CCR dec. no. 65/1995, published in the Official Gazette of Romania no. 129/28.06.1995;
- CCR dec. no. 1221/2008, published in the Official Gazette of Romania no. 804/02.12.2008;
- CCR dec. no. 285/2014, published in the Official Gazette of Romania no. 478/28.06.2014;
- HCCJ, s. contentious administrative and fiscal, dec. no. 3116/28.09.2006, in Bîrsan, G.V., Sârbu, L., Georgescu, B., *Jurisprudența Secției de contencios administrativ și fiscal pe anul 2006* (Case-law of the division of contentious administrative and fiscal for 2006), Semester II, Hamangiu Publishing House, Bucharest, 2007;
- HCCJ, s. contentious administrative and fiscal, *https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=212035#highlight=##%20motivare%20act%20administrativ*;
- CA Timișoara, s. contentious administrative and fiscal, *https://www.iccj.ro/wp-content/uploads/2021/07/C-Ap-Timisoara-Trim-I-2021.pdf*;
- CA Suceava, s. contentious administrative and fiscal, *https://www.iccj.ro/wp-content/uploads/2023/03/CA-Suceava-Buletinul-jurisprudentei-SCAF-2022.pdf*;
- *http://www.scj.ro.*