

Legal Requests of the Authority Administrative Act

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Abstract:

The administrative act can be defined as the unilateral and express manifestation of the will of the public authorities realized with the purpose of producing legal effects for the public power.

Besides, the law of the administrative contentious defines the administrative act as being a unilateral one with individual or normative character that is issued by a public authority to execute or organize the law execution and that makes, modifies or terminates judicial relations.

The current material tries to approach in an integrated maner the process of elaborating the administrative act relative to requests of legality as well as the procedures of issuing and enacting them.

Keywords: *administrative authority at, competence, the actuality of the administrative judicial act, the opportunity of the administrative judicial act.*

Introductory considerations

The authority administrative acts represent a category of administrative acts through which the authorities of the public administration exercise most of their attributions. Including a unilateral, imperative will, these acts ensure in the highest degree the organization of the law execution by the issuer of the act.

For the authority administrative act to have this role it is necessary that it meets some legal requests. These requests are mainly about: the competence of adoption or issue, compliance to law and its purpose, the form of the act as well as its actuality and the opportunity of issuing these authority administrative acts [1, 37].

Competence

The competence represents the ensemble of rights and obligations of a public administration authority or of a public servant for the realization of which it also has the ability to adopt or issue judicial administrative acts.

The competence of adopting or issuing administrative acts is given by law and is strictly tied to a certain function. It occurs at the same time with that certain function and exists even if this function is not occupied by a person. It can be: material, territorial and personal.

The material competence usually determines, mostly, the right of a public authority to adopt or issue an administrative act.

The territorial competence determines the authority of the public administration to adopt or issue the authority administrative act. In principle, the local public administration authorities have a territorial competence limited to the administrative-territorial unit in which it functions, according to law, it cannot issue judicial acts of which effects to happen and to be compulsory for legal subjects of other administrative – territorial units.

The personal competence (the person's quality) determines in few cases the competence of the authority of the public administration that adopts or issues the act. This is, for instance, the case of military that have committed a contravention, situation in which the solution of the complaint against the minutes of acknowledging the contravention and the application of the sanction as well as executing it are made by the commander of the military unit not by the court, as in the case of other people.

The competence of adopting or issuing an administrative act being established by law constitutes at the same time a right and an obligation of the one to whom it is offered [2, 205].

On the other hand, exercising some attribution and adopting or issuing, in this purpose, of some administrative acts, while not respecting the competence, usually causes the nullity of those acts. When incompetence is determined by the quality of the person or by the material or territorial competence it usually has the form of misuse of authority and is sanctioned according to the provisions of criminal law besides the sanction of annulment of the administrative act issued while not following the competence rules.

A characteristic of competence is that authorities or public servants that have it cannot usually give it up or give it to another authority or public servant without following the provisions of the law.

Substitution and delegation of competence

Substitution and delegation of competence occurs in exceptional situations when its holder is not able to do it, in order to ensure the continuity of exercising the competence and the well functioning of the public service.

Substitution in the exercise of competence constitutes of replacing its holder with another person while the first one cannot exercise it. This substitution is a legal substitution, the law providing this possibility.

The delegation of competence constitutes in designating by the holder of the competence another authority or person that is to exercise certain attributions of the holder of the competence.

What distinguishes the institution of substitution from the one of delegating the competence mainly regards the sphere of the attributions transferred to another: in the case of substitution this transfer is referring to all the attribution of the holder of the competence while in the case of delegation the transfer refers only to some attributions, expressly established.

Specialized literature also speaks about “the competence contest” in adopting (issuing) of the same administrative act, distinguishing the competence contest “in direct form” and the competence contest “in indirect form”.

The competence contest in direct form occurs when the administrative act is adopted or issued through the agreement of more authorities of public administration of different domains and branches of activity.

The competence contest in indirect form can be made by “assent procedure” by which there is expressed a point of view of an authority of public administration this assent being compulsory for the one who issues the administrative act.

The compliance with law of the issued administrative act

The second condition of legality of the administrative acts is the necessity that their content is in compliance with law. This compliance to law is analyzed in relation to each of the structural elements of the judicial norms included in the act – hypothesis, disposition, sanction.

Noncompliance with the law of the content of the administrative act can regard only one of the structural elements of the judicial norms or all of them. Thus, noncompliance of the administrative act with the hypothesis can consist of the fact that the authority of the public administration competent to adopt or issue that act will not adopt/issue although the conditions provided in the hypothesis of the judicial norm exist.

Noncompliance of the content of the administrative act with the disposition can have certain aspects: the authority of the public administration applies another legal disposition than the one that must be applied or applies the certain disposition but not with its true meaning.

Noncompliance with the sanction can consist of the application by the administrative act of a sanction that is not provided by law.

The compliance of the administrative acts with the purpose of the law

In what concerns the compliance of the administrative acts with the purpose of the law we can see that the purpose of the law is the result that the legislator wants to realize by that certain regulation. The administrative act deriving from law and being issued in order to execute the law cannot have another purpose [3, 127]. If it does not meet this request the administrative act is considered illegal.

The form of the administrative act

Another legal condition of the administrative act regards its form, the manner in which the judicial will of the act is expressed. From this point of view we state that the administrative act is drawn in Romanian and it is usually written.

For the administrative acts with normative character the written form is compulsory being a condition of validity.

For the administrative acts with individual character, although they are usually written, it does not constitute a validity condition apart from the cases established by law.

The conditions of the form that must be met by administrative acts can be divided in two main categories [4, 375]:

- external form conditions which if they are not met they annul the act : not naming the authority of the public administration that adopted or issued the act, not mentioning the date of adoption(issue), not applying the seal of the issuer, the lack of the signature of the leader of the authority that issued the act, not specifying the number of the act
- The technical conditions which if they are not met do not trigger the annulment of the act: ways referring to drawing the act in simple and precise terms, its internal structure.

The actuality and opportunity of the judicial administrative act

The actuality and opportunity represent accordance within law, between the tasks of the authorities of public administration and the provisions of the issued act.

The opportunity implies the right to appreciate of the administrative authority while organizing the execution of the law through which it is ensured the exercise of the legal attributions in optimum time with minimum expenses and using ways that suit best the purpose of the law.

While exercising this right it is possible that it takes an inopportune measure. In this circumstances the administrative act, although legal, will not be actual or it will be inopportune.

For this reason, the administrative acts being submitted to examination can be analyzed both from the point of view of their legality and their opportunity.

The existence of countersign

For some administrative acts the law also provides the condition of countersigning them by those that have the obligation to ensure their execution, not meeting this request leading to the nullity of the act. It is the case of some decrees issued by the President of Romania that must be countersigned by the prime minister as [5, art.100, align (2)] well as the Governmental decisions and ordinance that must be countersigned by ministers who have the obligation to put them into force.

The procedure of issuing the authority administrative act

The administrative act is the result of a rational process that starts from noticing the necessity of its adopting or issuing and continues with collecting, for this purpose, the necessary information, their processing, elaborating some variants and choosing the optimum one and ends with the issue of the act.

The procedure of adopting administrative acts includes a complex of activities developed by the clerks of the public authorities that adopt the act and of other public authorities that collaborate to it. All these activities can be grouped in three stages [6, 93]:

The preparatory activity of adopting the administrative act.

To issue or adopt an administrative act the authorities of public administration fulfill a series of documenting, informing and data and information processing operations meant to found the administrative act.

For adopting the administrative act, especially when it has normative character, a series of operations are made: drawing evidence and statistics, reports, informations, accounts, notice, authorizations etc.

Collecting and processing information practically represents the activity that has the biggest share in developing the preparatory stage of the administrative act because the collected information is the bases of elaborating the solutions included in the act.

When elaborating the administrative act project there must also be regarded the following of some conditions of legislative technique referring to the drawing of the project and its exterior form.

The normative act must organically be integrated in the legislation system. In this purpose the project must be correlated to the provisions of superior normative acts with communitary regulations and with international treaties Romania is a part of.

The projects of normative acts are elaborated by the authorities able to initiate them. The Government, the ministries and other authorities of specialized central public administration, the public authorities that have the initiation right for other normative acts, prefectures, county councils and the General Council of the Bucharest Municipality, through the Ministry of Internal Affairs have the right to initiate projects of normative acts, according to their attributions and activity domains.

The projects of normative acts must be accompanied by the following instruments of presentation and motivation: exposures and reasons (in the case of law projects), substantiation notes (for ordinances, emergency ordinances and Government decisions) approval reports (for other normative acts).

The instruments of presentation and motivation of the normative acts must also include the requests that claim the normative intervention concerned, the principles and finality of the proposed regulation, the effects taken into account, implications, that the new regulation has over the existing regulation, the stages followed in preparing the project and the results. In the case of emergency ordinances there must

be presented objective circumstances that have determined the „extraordinary situations” that substantiates the regulation in this form.

For every project of normative act, the reason must include an express mention regarding its compatibility with the communitarian regulations and, if necessary, the imposed harmonization measures.

When the proposed regulation is elaborated in the execution of a normative act, expressly provided by it, it must include references to the act on the grounds and execution of which it is elaborated.

The normative act project assimilated by the leader of the initiating public authority is simultaneously transmitted, in copy, to the public authorities that are interested in its application regarding the object of the regulation that have the obligation to analyze and communicate to the initiator the possible observations and proposals within a term.

Notices are opinions, points of views of an authority of public administration requested by the authority that initiated a project of normative act to that project.

Notices can be:

- Optinal notices, when the authority that issues the administrative act has the right to decide to ask or not to ask the opinion of another authority and, if it requested it, has the faculty to take it into account or not. The adoption or issue of the act without this notice does not have any effect on its validity.
- The advisory notices, when the authority that issues or adopts the administrative act has the obligation to ask for another organ's opinion but it is not obligated to take it into account. Not asking for this notice leads to the nullity of the administrative act because a request provided by law is not respected.
- Assents, when the authority that issues the administrative act has both the obligation to ask and the obligation to take into account these notices. In this situation the issued administrative act cannot disobey the content of the notice, in return, the authority competent for issuing the act, if it does not agree with the content of the notice can give up the right to issue the certain administrative act.

Notices can be solicited from a subordinate authority or from one that is part of another organ hierarchy and that is at the same level or an inferior or superior one as the soliciting organ.

The optional or advisory notices cannot come from a superior authority. This type of point of view from a superior organ takes the form of an authorization for the subordinate organ.

Notices, regardless of their category, do not cause by themselves judicial effects, although without the assent the administrative act is not valid.

In other cases, for adopting or issuing the administrative act, the law provides the consent of another organ. This consent is a will manifestation of the organ established by law through which it gives consent for adopting or issuing the act, the issuing organ not being able to take action without this consent.

The difference between “preliminary consent” and the optional and advisory notices is that in the case of notices the issuing organ can establish measures contrary to the content of the notice while in the case of “preliminary consent” such measures cannot be established. The “preliminary consent” resembles the content and effect of the assent but it is not confounded with it because this notice, although it precedes the issue of the act does not cause effect on its own. The preliminary consent produces itself judicial effects with the condition that, by its consent, to coincide with the will manifestation of the organ that issues the administrative act.

Usually the organ that gives the preliminary consent is a superior organ to that which adopts or issues the act or it is an organ that is at least equal to the organ that is to adopt or issue the act.

After obtaining the points of view of the public authorities that are to notice, the initiator finalizes the project of normative act.

If after the proposals and observations received from the noticing public authorities have modified the project of normative act the instruments presented and the initial reasons will be reformulated accordingly so as to refer to the final form of the project of normative act that will be submitted to notice.

After finalizing, the original project of normative act, along with the instrument of presentation and motivation, remade according to the operating modifications, is

successively transmitted to notice by the initiator to the noticing public authorities within 3 days from the reception of their points of view. The projects of normative acts that transpose communitarian provisions are submitted to notice to the Ministry of European Integration.

If between the initiator and the public authorities there are different points of view, the project of normative act will be noticed within 3 days from its reception, with objections that will be annexed and presented within the meeting of the Government.

The projects of normative acts are transmitted to the Ministry of Justice in original along with a copy and only after obtaining the notices of the interested public authorities. The Ministry of Justice notices the projects of normative acts exclusively from the point of view of legality, finalizing the succession of the operations of the notice stage.

The notice of the Ministry of Justice is not compulsory in the case of Governmental decisions with individual character that have as objects appointments and revocations of function, establishing some data, as well as approval of technical – economical indicators of investment that are noticed from the point of view of legality by the General Secretariat of the Government.

The projects of normative acts for which, according to law, the notice of the Competition Council are necessary are submitted to issue to the Government only after obtaining this notice. The notice of the Competition Council is obtained by the public authority initiating the certain project of normative act [7].

The projects of normative acts for which, according to law, it is necessary the notice of the Supreme Council of the Defense of our Country is submitted for adoption to the Government only after obtaining this notice.

The projects of normative acts noticed are transmitted by the initiator both in original, stamped on every page, and magnetically to the General Secretariat of the Government.

The General Secretariat of the Government will immediately solicit the following notices:

- the notice of the Legislative Council that is to be issued, according to law, within the term required by the Government that cannot be lower than:

- 24hours for projects of emergency ordinances;
- 2 days for law projects that are to be transmitted to the Parliament with the request of debate in emergency procedure;
- 10 days for other projects of normative acts;
- the notice of the Supreme Council of the Defense of our Country in the case of projects of normative acts for which this notice is necessary;
- the notice of the Economical and Social Council in the case of projects of normative acts that regard the domains provided in art. 5 of Law nr. 109/1997 regarding the organization and functioning of the Economical and Social Council that is to be issued, according to law, within:
 - 10 days from the reception of the request, in the case of decision projects, of ordinances and ordinary laws;
 - 20 days from the reception of the request in the case of projects of organic laws.

The General Secretariat of the Government examines the fulfillment of the form conditions of every project of normative act including the respecting of norms of legislative technique provided by Law no. 24/2000 [8, 225].

Projects that do not meet the form conditions are given back to their initiators by the General Secretariat of the Government in order to be remade.

After covering this stage the General Secretariat of the Government transmits to the initiator, as appropriate, the following documents:

- the notice of the Legislative Council;
- the notice of the Economical and Social Council;
- the note containing its proposals and/or observations.

Based on these documents the specialists collective has the obligation to reanalyze and, as appropriate, to remake the project of the normative act. The remade project of the normative act will be transmitted to the General Secretariat of the Government, stamped on every page, with at least 5 days before the date of the Government meeting on which work agenda it is requested to be written.

If the initiator does not accept, total or partial, the observations and proposals of the notices, it will transmit to the General Secretariat of the Government the form of the project of normative act that is to be submitted for adoption to the Government, along

with a justified note including the arguments that lead to not accepting the observations and/or the proposals [9, 57].

The proper adoption of the administrative act

The adoption of the administrative acts by the deliberate, collegial authorities is made after an analysis within the labor meeting to which must participate usually the majority of the members of that authority. [10, 63] Within the meeting there is presented the Note of substantiation and the project of the act that is submitted to debate. The participant to the debate can agree with the project, can propose its modification or can show that there is no need to regulate the certain problem. Some normative acts include dispositions that establish both the quorum necessary for the deliberations of the collegial organ to be valid and the majority that must be met to adopt the act.

The quorum is the number of members that must be present for adopting the act, reported to the total of the members of the authority that is adopting it. For the unipersonal authorities, when the issue of the administrative act is in the competence of a single person, the problem of the quorum and of the necessary majority does not exist. This problem exists only at the authorities with collegial structures. Usually, for the act to be legally adopted, the presence of the majority of the members is required; in other cases it is provided the presence of $\frac{3}{4}$ of the number of members in what regards the necessary majority for adopting an administrative act, in some cases absolute majority is provided (of the number of those present and in other cases of the total number of the members of the organ) or the qualified majority (two thirds of the number of those present or, in other cases, of the total number of the members of the collegial organ).

The projects of normative acts to which modifications of fond have been brought as a consequence of discussing and adopting them in the Government meeting will be submitted to a new notice of the Legislative Council, of the Supreme Council for the Defense of our Country and of the Economical and Social Council, as appropriate. If, as a consequence to the new notice of these authorities some fond modifications are required or the notice is negative, the project of normative act must be reposted on the work agenda of the Government meeting.

After the deliberate authority analyses the project of administrative act and approves it, the administrative act is considered adopted.

Activities after the adoption of the administrative act

For it to have its judicial effects there are still necessary a series of activities in this regard. They are the following:

- the completion of the adopted normative act based on the form resulted from debate and vote;
- numbering and dating of the normative acts within the calendar year; Government acts have the date of the Government meeting where they have been adopted;
- presenting the adopted normative act to the prime minister in order for him to sign it and the ministers leading the ministries that are to apply that normative act to countersign it. Countersigning a normative act adopted by the Government is obligatory within maximum 24 hours since it has been signed by the prime minister;
- Transmitting it to the General Secretariat of the Deputee Room with the request of its publication in the Official Monitor of Romania of the ordinances and decisions of the Government along with the substantiation notes signed by the initiating minister or ministers. There may not be published decisions with military character that are only communicated to the interested institutions.

The public request of normative acts that have judicial effects for the generically determined subjects is imposed by the principle according to which “no one can invoke in his defense unawareness of the law”.

Sometimes the law provides the publication of some individual acts (for example the acts of administratively changing the name, of granting or renouncing citizenship etc.).

This kind of request is however not relevant to the moment of coming into force of the certain act. It is imposed mostly because of practical necessities, by the impossibility of it being communicated to a large mass of citizens.

Conclusions:

In principle, the administrative acts with individual character are communicated to those interested; in many cases the laws providing that only from the date of their communication there occur certain rights and obligations for the person concerned.

The instruments of presentation and motivation, the variants and the successive forms of the projects of normative acts as well as the original adopted normative act are kept by the General Secretariat of the Government as to ensure the knowledge of the whole elaboration process of the certain normative act.

Throughout the course of elaborating the projects of normative acts it is forbidden to the personnel of the initiating public authorities and the noticing authorities to provide outside those institutions data or information regarding those projects of normative acts.

All these procedural norms regarding the preparation and the adoption of draft laws concerning government apply properly and on the orders, instructions and other norms issued by ministers and other leaders of the specialized organs of the central public administration as well as by prefects [11].

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