The role of the notice as a procedural operation prior to issuing an administrative act

Assoc. Prof. Mihai Cristian APOSTOLACHE, PhD.
Petroleum-Gas University, Ploiesti, Romania
mihaiapostolache5@yahoo.com
Assoc. Prof. Mihaela Adina APOSTOLACHE, PhD.
Petroleum-Gas University, Ploiesti, Romania
mihapostolache@yahoo.com

Abstract:
This paper addresses the issue of the notice, defined as an official written announcement. In matters of administrative documents, the issuance of a notice constitutes a procedural operation prior to issuing an administrative act or it is included in the category of preliminary documents. According to their legal nature, there are three types of notices: facultative, consultative and compliance. Of these, only the consultative notice has a constitutional determination. Control over the previous procedural operations is done only in the subsidiary, under the court control exercised over the administrative act under appeal and solely in connection with it. Notices do not produce legal effects; they do not change, by themselves, the existing juridical reality.
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Introduction

Etymologically, in Romanian, the word “aviz” (notice) comes from the French (“avis”) and the meanings attributed so far are: communication, indication, instruction, prescription, recommendation, assessment, allowance, even consent, agreement or permission.

In plain language, the notice represents the document that communicates an *announcement of official character* and is the result of an administrative operation, the endorsement.

In the Explanatory Dictionary of the Romanian language, the notice is defined as an official written (public) notification. Amongst administrative acts, the notice represents an ***opinion***, *a competent* ***assessment*** *issued by someone*

from the outside, an external authority, over an issue under debate or in the decisional process, or it is regarded as a ***resolution*** *of a competent authority.*

In the literature, notices are also analyzed as *preparatory acts* [1], which fall into the heterogeneous legal category of advisory formalities. In the procedure of drafting administrative acts, the notice is the opinion which is required by an administrative body from another one in a particular area of issues, in order to decide in full awareness [2].

In another opinion, notices are the *prior procedural operations* [3] necessary in the procedure of drafting administrative acts, and are requested as fair solutions to problems needing useful specialized knowledge, referred to in the literature as “recommendations”.

The notice should not be confused with the “prior notice”, which relates to the prior notification of the measure concerning the unilateral dissolution of the labor contract within a certain period inside its entry into force, a period in which the legal work relation remains.

The notice – a procedural operation prior to issuing an administrative act. The typology of the notice

The internal legal order governs, by means of public law, the organization of public powers and their relation to individuals, and, through private law, the relations between individuals [4].

In concrete forms, through which the public administration activity is performed, administrative acts hold the central place. Among the *procedural operations previous to the issuance of the administrative act* – expert surveys, essays, studies, statistics, referral, initiative, proposals, investigations, records, account, public debate, reports etc. – a particular issue is raised by notices and the prior consent. The legal nature of other prior procedural forms – reports, proposals, complaints – places them in the category of technical-administrative operations, which triggers the administrative decisional system, therefore they are part of the strict process of drafting administrative acts [3].

From the very definition of administrative acts as legal acts results a differentiation from previous procedural operations. While administrative acts directly produce legal effects on those they address (effects which are envisaged by the body issuing of the document), previous procedural operations produce no legal effects contemplated by the one committing them, but those produced by the law.

These procedural forms are distinguished through a number of *common features*: they represent prior forms of legal acts; they are issued only at the request of certain bodies; they may be issued by decisional or consultative bodies, by decision-making officials or the ones deprived of this right; following the issuance of the notice, the body is not obliged to issue the legal act for which it requested the notice; the subsequent withdrawal of the notice does not affect the validity of issued administrative act (except where the issuing body of the legal act no longer complies with the conditions initially stipulated in the assent); the legal effects are produced as a result of issuing the legal act, and not as a result of its notice.

The typology of notices

The doctrine in Romania has, almost unanimously, the same classification, according to the manner of compliance of the body requested against the opinion expressed, the three types of notices - *facultative*, *consultative* and *compliance* - without distinguishing the compliance ones in terms of their legal nature, although only the first two categories are considered “genuine consultative formalities” [5].

Notices are *facultative* when the issuing body has the right (faculty) to decide if they request the opinion of another body, and if they do so, it has the faculty to take or not to take this opinion into account. The adoption or issuing of the act without this notice has no consequence for its validity [6]. In other words, for the facultative notice, the issuing body is not obliged to seek the notice or to respect it if requested and obtained.

Notices are *consultative* when the issuing authority is obliged to request the opinions of another body, but it is not obliged to comply with them. Failure to request and failure to obtain the notice result in the nullity of the administrative act, since it does not meet a requirement set by law. Therefore, consultative notices represent the opinions for which the law stipulates the compulsoriness to be obtained and the faculty to be respected or not [6].

Notices are of *compliance* when the body issuing the administrative act has both the obligation to request them, as well as the obligation to comply with those opinions [7]. In this case, the issued administrative act can not be contrary to the content of the notice; however, the body competent to issue the act, if in disagreement with the content of the notice, may give up its right to issue the administrative act in question. Compliance notices are characterized by their obligatory trait, in terms of both request and compliance [8]. It is thus inferred that the administrative body is compelled to ask, to wait for this notice to be issued, to achieve all that is required for its issue, and after obtaining it, to comply with its content.

Another common criterion of classification is according to the subjects from where the notices are requested. According to this criterion, notices are of two types: *internal notices*, coming from the issuing body of the legal act or an internal structure thereof, and *external notices*, emanating from a body different than the one who is to issue the legal act.

Among the categories of notices structured in accordance with their legal nature, only the *consultative notice has a constitutional determination* [8]. As an example, we can mention Article 90 of the Romanian Constitution, devoted to the institution of the referendum, which provides this administrative operation: “The Romanian President, after consultation with the Parliament, may ask the people to express, by referendum, its will on matters of national interest”. Article 95 of the fundamental law, which provides the suspension of the President of Romania, stipulates the consultation of the Constitutional Court. Also, Article 146 letter h of the Constitution expressly provides the consultative notice given by the

Constitutional Court for procedure of suspension from office of the President of Romania.

Both notices and administrative acts are issued by different categories of authorities [8]. The request of a notice may be made at any public administration body, regardless of its material competence – general or special, except for the body superior to the issuer [3]. There are opinions [6] according to which only facultative or consultative notices may not result from a superior authority as its point of view can not be facultative or only consultative for the subordinate body which is obliged to conform to this view. These opinions suggest the idea of the overall control of the activity, which leads to the administrative subordination report, as the specificity of hierarchical relations enforce the superior opinion. As such, notices, including those of compliance, should be regarded as "content elements of the administrative cooperation relations" [3].

The role and importance of notices

Notices represent, in essence, "unilateral manifestations of will that condition, or, according to case, fundament the unilateral manifestation of will of the administrative body"[6].

Seen as previous procedural operations, notices are forms of activity are the opinions of the public administration which do not produce legal effects; they do not change, by themselves, the existing legal reality.

The role of notices consists in contributing to the lawfulness of the administrative act or to the reinforcement of its legitimacy [8]. It has been pointed out that both notices and administrative acts represent *manifestations of will with unilateral character*. Unlike the case of the administrative act where the materialized manifestation of will has the purpose to initiate, modify or abrogate rights and obligations, therefore to produce juridical effects, notices have no such purpose, nor such consequences. Regardless of the category, *notices themselves do not produce legal effects*, although, without the assent, the administrative act is invalid. If the issuance of an administrative act is conditioned

by the existence of a notice, the legality of the respective administrative act is also determined depending on the content of the opinion [3]. One opinion [9] stated that consultative opinions and compliance notices represent a condition of the legality of the act to be issued, and the non-fulfillment of this condition can attract the absolute nullity of the act.

Opinions have no direct effect on the legal relationship in question, they only concern the relations between the one granting notices and the issuant of the act [11], without any direct link to the one it addresses, producing legal effects without requiring the consent of the applicant.

The control over the previous procedural operations is done only in the subsidiary, under the court control exercised over the appealed administrative act and only in connection with it. Thus, if based on a notice, the application for a permit is rejected (for construction, for example), the person dissatisfied can not make a complaint against the notice, which is an administrative procedure, but against the act of dismissing the application. The notices based on which the authorization was issued, have no direct effect on the person who requested the authorization (for construction), the authorization being the one with legal effect upon it. Granting notices does not mean the emergence of a new subject in the relation between the body issuing the authorization and the applicant thereof. The issuer of the notice and the issuer of the authorization appear in this relation as a single subject of law, they are a single manifestation of will in the legal relationship with the authorization applicant.

The High Court of Cassation and Justice ruled on this issue through Decision no. 1923 of 6 April 2012, delivered on appeal by the Administrative and Fiscal Department of the High Court of Cassation and Justice, with the purpose of resolving the objection of illegality of notices issued by the National Chamber of Commerce and the Ministry for Small and Medium Enterprises, Commerce, Tourism and Liberal Professions. Thus, the High Court held that the notice, whether it is consultative, facultative or compliance, is only a procedural operation prior to issuing the administrative act, and not an administrative act,

since it has no legal effects on its own, but only helps to strengthen the legal character of the administrative act. In this regard, the High Court stated that the distinction between an administrative act and a notice (administrative operation) has a practical importance especially in the case of administrative disputes because the court can exercise control only over the administrative acts under appeal, but it can not control, under direct action, distinct from the administrative act, the administrative operations on which that act was issued.

In certain cases, the law provides for the adoption or issuance of the administrative act the *agreement* (prior, simultaneous or subsequent) of another body. This agreement comes as a manifestation of will of the body established by law in which it consents to adopt or issue the document, the issuing body can not act without this consent. Thus, there arises the distinction between the *prior agreement* and *facultative and consultative notices*, in the sense that, for notices, the issuing body may establish measures contrary to the content of the notice, while in the case of the prior agreement such measures can not be established. In terms of content and effects, the prior agreement resembles the assent, but is not to be confused with it since this notice, although preceding the issue of the act, produces no effects. The prior agreement itself produces legal effects, if, by its content, corresponds to the manifestation of will of the body issuing the administrative act [6]. In principle, it requires the prior consent of a body superior to that adopting or issuing the act or of a body with a rank at least similar with the body that will adopt or issue the document.

Conclusions

In our legal system, the doctrine simply states: ***the assent*** is characterized by the fact that it *must be requested*, and *subsequently it must be respected*. As such, it goes without saying that once requested, the assent ought to be *effectively obtained*. In reality, although considered by some authors as a mere feature which consists of a degree of determination that it imprints in the exercise of the competence [10], this form of notice is more than just a simple

consultative procedure. According to what is stated in the French doctrine, in the case of the assent, there would take place the subordination of the jurisdiction of the administrative body to issue the act of the agreement of the notice holder. This implies the fragmentation of the competence of this body in two parts: one that is transmitted by law to the body issuing the notice (the power to assess facts, afterward settling the contents of the document); another kept by the body issuing the actual act (the power to confer a binding force to this content). Thus, the issuer of the notice becomes the co-author of the act to be issued, being able to oppose the issuance of the act. By this, *the assent is more than a rule of procedure, it becomes a rule of competence* [5].

Given that an assent is essentially the content of a future administrative act, it should not be a dull one, purely positive or negative, of the manner “it shall be endorsed favorable/unfavorable the issuance of the act...”, because, contrary to the terminology used, we would find ourselves in the presence of an agreement [5]. The notice, which is a specialized reasoned opinion, must describe the conditions under which an administrative act may be issued.

Starting from its defining characteristics, the ***facultative notice*** can be regarded as a preliminary formality which the author of an administrative act can perform, but with no legal obligation to do so [12]. Considering this, it would seem that a facultative notice can not influence the validity of an administrative act, and the freedom of action of the issuer would be total, and these aspects lead to the idea that this notice would be useless [5]. In reality, however, this notice may affect the validity of an administrative act issued under it, if, on the one hand, has not been issued regularly, and, on the other hand, it can be proved that it has decisively influenced the will of the administration to issue the act concerned.

Regarding the ***consultative notice***, we should take into account its two basic features: on the one hand it must necessarily be requested, on the other, it should not be respected. This could lead to the conclusion that the *consultative notice should not be compulsorily obtained*. Also, it is obvious that there can be no consultative notice without being required by law.

The jurisprudence and the French doctrine have established two rules of interpretation for the legal provisions that require an opinion, rules that would preferably be applied in Romania as well: regrading the obligation to request the notice, when the text of the law is unclear, it must be interpreted in the sense that we are in the presence of a simple faculty, and not an obligation; regarding the obligation to comply with the notice received, the vague text must be interpreted as leaving the administrative agent a maximum of freedom in exercising its jurisdiction.

Another conclusion to be drawn is that, in principle, the administration must exercise their competence unhindered, while the notice, regardless its nature, sometimes represents a hindrance in exercising this competence. It would, therefore, be preferable for legal texts which stipulate the issuance of a notice to be interpreted in the sense that they would hinder as little as possible the exercise of this competence [5], based on the principle of least interference.

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