A NEW POINT OF VIEW WITH REGARD TO THE LEGAL NATURE OF A NOTICE ISSUED BY AN INSTITUTION OR PUBLIC AUTHORITY

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Abstract:
Paradoxically, by making reference to all the classical theories related to the administrative activities known so far, the courts of law started to regard as genuine administrative documents some notices and memoranda issued by various public authorities, a fact which means that they accept such documents to be appealed against in contentious administrative matters.
Our study will attempt to highlight some of the various positions on this matters expressed by the administrative contentious courts from around the country and to emphasize why, to our point of view, such appeals should not be admitted nor given a solution by the above-mentioned courts of law.
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Section I . The direct means of action used by administration

"In any society, be it classical or modern, public administration is essentially an instrument of the state, indispensable in achieving goals, certain major objectives determined by it, to reach the political values determined through various internal regulations, in order to meet the general interest, by the action of the political power". [1]

"The means of action used by public administration are the concrete forms through which public administration fulfils its mission to organize the application and to actually apply law as well as to provide, namely to organise the provision of public services". [2]

These legal means are more than often classified as being direct and indirect, the nucleus of the direct means being represented by the administrative documents, otherwise the main form of activity of the public administration authorities.

In one of the attempts to define it, the administrative act was characterised as being "the unilateral act, the expression of will manifested by a single subject of the legal relation, namely that endowed with public power, issued by public authorities in order to

carry out or organize law, being essentially a legal act which initiates, modifies or terminates legal relations".[3], apud [4].

For instance, "a simple correspondence between a common citizen and the administration whose scope is to interpret legal matters, cannot be characterised as an administrative act" [5]. Therefore, the hypothesis according to which an answer issued by any compartment of the public authorities "with exclusively consultative attributions (i.e. public relations, assisting the tax-payers etc.) leads us to the conclusion that we are looking at a manifestation of will devoid of any legal effects." [6]

Nevertheless, a mere memorandum issued to confirm or infirm a situation resulted from the data stored by any public authority is not an administrative act because it does not produce any legal effects by itself. Such a memorandum is regarded as a means of evidence used in trial where it could have been appealed in line with art. 167-171 Code of Civil Procedure. The means of evidence are analysed by the court outside which they are examined and they cannot be appealed separately [7], apud. [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 [8], apud. [9].

Irrespective of the divergences published in the doctrine, one fact is certain: the role of the administrative procedures is not to produce legal effects by themselves alone, but to prepare the adoption/ issuance of an administrative act meant to produce legal effects.

Although they seem insignificant when compared to the relevance of the administrative act itself, the preparatory acts (prior operations) have the main role of guaranteeing the correctness of the procedure used to adopt the document, as well as it legality, as "the normative act produces effects for a certain period of time, named " the

application scope" that spans from the moment it entries into force to that when its legal effects cease".[10]

Section II. The legal nature of a notice issued by an authority of the central public administrations. Points of view and debates

With regard to the procedure used to draft administrative acts, such a procedure knows many forms, from the simplest to the most complex ones. Sometimes, it is "reduced to a minimum of terms", otherwise, it comprises "a complex of formalities".[11]

Nevertheless, in time, some authors considered that certain procedural forms produce legal effects by themselves while others gave a negative answer to this question. [12].

In one of the works dedicated to preparatory administrative acts, debating upon the possibility of controlling such acts in contentious administrative matters, the author includes prior procedures in this category: "the sub-category of administrative material and legal facts (that do not require typing), the sub-category of administrative forms (that are issued after having been typed) which include, because of their importance, the permits and prior agreements". [13], [11].

So far, various preparatory acts have been issued in the laborious process of issuing acts that were subjected to the analysis of the courts of administrative contentious matters. Moreover, the tendency of the different people who consider themselves injured in their rights or legitimate interests of appealing in administrative contentious courts various unfavourable permits that they receive from legal departments or from the other departments of the institutions or public authorities.

The same debatable circumstances also occur in case of actions formulated in administrative contentious against various reports, accounts, notes and even notices issued in similar conditions by competent public authorities. However, we need to point out the fact that their role is not that of producing any legal effects, but of making sure that the act which is about to come into force is both legal and correct.

Our paper intents to analyse from a theoretical as well as jurisprudential perspective one of the latest solutions practised by the Romanian courts that have repeatedly argued that a part of the notices issued by various public authorities may

produce legal effect and may therefore be annulled by the courts of contentious matters on grounds that the public authority had not issued the document sanctioning a certain individual who considered herself injured, except that particular notice, so that it was the only one that might be subsequently appealed and, therefore, annulled.

Therefore, following a petition registered on the dockets of The Court of Appeal from Galaţi, the petitioner requested in contradiction with the Ministry of Transports, to annul a notice issued by the Medical Service subordinated by the above-mentioned central authority which was apprise, after an assessment performed by the latter, of the fact that the petitioned was withdrawn the right to carry out psychological examinations for the office holders who would compete for a position in transportation safety although, paradoxically, in the past, she had obtained the agreement certificate which extended the right to carry out such expertise for another 3 years.

The sanction was applied to the petitioner by means of a unilateral minutes drafted by someone authorised by The Ministry of Transport which was never communicated and that included no “Remarks” regarding to the measures adopted in the document, so that the petitioned signed the minutes that played the main part in the notification annulled by the court, merely because at that particular moment, there weren’t identified any deficiencies regarding his activity. [14]

The injured part was announced of the sanction thus applied not by means of a photocopy from the minutes drafted before her, as she should have been, but through a notice sent (communicated) by mail.

The defence was mainly based on the fact that such a notice was the only one to injure the activity of the petitioner, who was thus violated in her legitimate, personal, interest, a fact that lead to the conclusion that such a document to be regarded as an individual administrative document, especially in the context in which the procedure of withdrawing the authorisation from petitioner was not done though a prior or even subsequent legal act. [15].

What is more, in its analysis, the court labelled the notice mentioned above as being an administrative act and decided to annul it because “the absence of a working procedure (ascertained by assessing the annual authorisation files or the agreement files) and not communicating the control minutes to the petitioner, with the possibility of

remedying any deficiencies or presenting documents ascertaining the reality of the situation, before the proposal to apply the sanctioned, lead to the conclusion that the litigated administrative act is not legal and may therefore be annulled". [16]

Such solutions are not isolated and are more and more frequently adopted by the Romanian courts mainly because the legislation is inadequate, deficient or due to the fact that there are inadvertences in the statutory documents issued by various public authorities or in the methodological norms used to apply such regulations that do not specifically provide procedures for such situations, nor do they specifically mention which is the specific legal document that may be used in order to apply a series of sanctions (or measures).

With regard to the situation detailed above, we believe that the only document that should have been considered as having the legal character of an administrative act and that could have been annulled was the minutes that was not legally drafted and whose second copy was not handed in to the petitioner, although, paradoxically, laid at the basis of the appealed noticed which had annulled the right to carry out expertise.

The notice itself represents nothing else than a mere procedure subsequent to the drafting of the minutes concluded after having verified the correspondence and that should not have produced any legal effects, but should have been considered nothing else but a communication issued by the authority which had already mentioned its opinion in the foregoing minutes.

According to article 4 paragraph (4) of The Order to approve the Norms regarding the procedure to agree medical and/or psychological units in order to examine transportation personnel with responsibilities in transportation safety as well as for the approval of the Norms regarding to the procedure to control the medical and/or psychological units agreed to perform the examination of the personnel with responsibilities in transportation safety as well as those nominated to perform the examination «the assessment of the unit is followed by the drafting of a minutes for ascertaining the conformity of the unit, whose model is provided in appendix no. 1b. of the Order» [17] .

According to the provisions of article 1 paragraph (5) of the same statutory document "The Ministry of Transport controls the units provided in paragraph (1) with

regard to the compliance with the criteria and agreement requirements, applying the annual visa or prompting the issuance of a warning notice, suspending the agreement certificate for a period of 90 days or to withdrawing the agreement certificate".

This particular legal text, although open to more than one interpretation, will lead us to the conclusion that any notice may only be used to announce the concerned party of the type of sanction since article 8 paragraph (1) of the Order clearly states that the visa may only be awarded or rejected by minutes "Following the assessment carried out, by means of a minutes, the specialty directorate suggest the Ministry of Transport to award/reject the visa or to sanction the unit according to legal provisions".

Therefore, to our point of view, only the minutes could have been appealed and annulled since it is obvious that by interpreting the text of the law mentioned above, due to the fact that the unit may only be sanctioned on its grounds, it is only an individual administrative act and may produce legal effect and by no means a notification.

Section III. Jurisprudence opinions regarding the acts preparing the issuance or the adoption of an administrative act

As mentioned earlier in our paper, it is not infrequent that the documents appealed in contentious administrative courts fall into the category of various memoranda, notices, reports, accounts, permits issued by the public authorities, in the context in which the text of the Law no. 554/2004 stipulates in article 1 paragraph (1) that only the persons "who considers themselves injured in one their rights or legitimate interest, by one of the public authority, through an administrative act or not giving a solution to a petition within the legal deadline" may introduce the action in contentious administrative courts.

At the same time, with regard to the assimilated administrative acts, also subjected to the control of the contentious administrative courts, we may bring into discussion the silence of the administration (which cannot be debated upon in the cases that have already been pointed out, since the authority communicates with the injured party through notices or memoranda) or about the administrative contracts (a theory which cannot be accepted since the notices are only unilateral manifestations of the authority).

The legal nature of the assimilated administrative acts is expressly mentioned in article 2 paragraph (2) of Law no. 554/2004, according to which these hypotheses are

assimilated to unilateral administrative acts, similarly to administrative contracts that are assimilated to the administrative act according to article 2 paragraph (1) point c) second thesis of the law. The legal text also allows this qualification to other categories of contracts that are subjected to the law of contentious administrative. Moreover, in the case of administrative contracts « we note that a new legal framework referring to an important typology (public procurement contracts, sectorial contracts, concession contract, services contracts) was adopted in 2016 ». [18].

Hence, we agree with the defences formulated by the respondent in one of its defence statements according to which « The notice is not an administrative act, its defining elements relate to acknowledgement and default. The notice cannot be assimilated to the administrative act as indicated by to the provisions stipulated in article 2 paragraph I, point c of Law no. 554/2004, as is this case, the notice only represents the manifestation of will regarding the termination of a concession contract". [19]

Furthermore, a very old case, debated in 1932, of The Court of Cassation and Justice, states, after having thoroughly analysed the administrative operations, the fact that only "The administrative act alone that is issued by an authority and is capable of producing legal effects independently, by lifting or modifying rights guaranteed by the law, may be attacked in contentious administrative courts, and not the other preparatory acts, such as accounts, reports and ministerial resolutions which are nothing more than preparatory and non-compulsory acts issued in order to deliver the decreed authority administrative act". [20].

The acts issued by the public authorities must be susceptible of creating, modifying or terminating legal relations, so they need to be able to produce direct legal effects by themselves. Therefore, such is the case of the reports drafted by the respondent the Ministry of Education that could not be annulled in the court of law because they were justly considered "documents that do not have the quality of administrative acts in the sense provided by the law, but mere administrative procedures foregoing the drafting of the administrative act, whereas, whenever they are considered separately, they are not capable of creating, modifying or terminating legal relations". [21]

On the other hand, the specialty literature has recently pointed out opinions in the favour of analysing a findings report issued by National Environmental Guard as a

genuine administrative act. Thus, the court argued that such a note fulfil all the requirements in order to be considered an administrative act with an individual character as "it is issued by a public authority, in a system of public ruling; is issued in order to enforce the law; has created legal relations." [22], [4].

Section IV. Conclusions

As a way of conclusion, we need to point out that there are divergent points of view with regard to the matter under discussion both in the theory, as well as in the practice of the specialized courts of law that treat the matter of the legal nature of such a notice differently.

Irrespective of the opinions recorded herein which were nevertheless selected in order to demonstrate the array of divergences on this matter, we do insist to include these notices in the category of preparatory documents (or procedural operations) that cannot create legal relations, but have the sheer role of informing the interested party of the future legal effects of such an administrative act issued with regard to a legal relations whose purpose it serves.

Despite being activities specific to the public administration authorities, under no circumstance would they constitute "the central nuclei" of such activities. They would be nothing else but mere points of view issued by the former in order to subsequently apply or put into practice the legal provisions by means of administrative acts. .

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