

Motivating administrative acts - doctrinal and jurisprudential issues

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Abstract

The article approaches the topic of administrative acts motivation, analyzed from the doctrinal and jurisprudential perspective. If at first, motivation was considered merely a formal condition of the administrative act, as a result of the national and European, doctrinal and jurisprudential evolution, motivation is now regarded as one of the most important conditions of validity for the administrative act. Motivating administrative acts represents also a manifestation of the right to information, sealed by the Romanian Constitution, and a dimension of the right to a good administration, as stipulated in the Charter of Fundamental Rights of the European Union.

Keywords: motivation, administrative acts, jurisprudence, doctrine, court order

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1. Preliminaries

The administrative act represents the main embodiment of the government, and it is presumed of legality, which, in turn, is based on the presumptions of truthfulness and authenticity, the administrative act itself being a type of enforcement. Based on these characteristics, it is important to emphasize the fact that, through its effects, the administrative act plays a crucial role in the activity of public administration, as one of its legal instruments², producing effects which generate, modify or extinguish correlative rights and obligations. Administrative act's execution of office, that distinguishes administrative acts from the civil ones³, oblige issuing authorities to fully respect the formal and substantial conditions that administrative act must meet in order to comply with the law. One of the conditions required for the administrative act to be legal is its motivation. Hereinafter, we shall analyze the motivation of administrative acts from doctrinal and jurisprudential perspective, bringing into attention several decisions of national and European courts, as well as the opinions of some Romanian and foreign pedants.

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² Gabriela Bogasiu, *Justiția actului administrativ. O abordare biunivocă*, Universul Juridic Printing House, Bucharest, 2013, p.32.

³ Verginia Vedinaș, *Drept administrativ*, 7th edition, revised and updated, Universul Juridic Printing House, Bucharest, 2012, p.113.

2. Doctrinal issues concerning the motivation of administrative acts

Motivation is the administrative operation that exposes the considerations of fact and law which justify the issuance or adoption of an administrative act⁴. In other words, by means of motivation, the authority that issues or adopts the administrative act must present, explicitly and implicitly, the issues of fact and law that determine the solution adopted⁵.

Motivation is a condition of validity of the administrative acts, but also a necessary exercise of the issuing institution⁶. This should be regarded "as one of the most important conditions of validity of the legal act, as by motivation it is defined the content of the act itself, thereby highlighting the measures taken by the administration and the causes that have generated them"⁷, opinion that we rally to. Another author⁸ rightfully argues that the motivation of administrative acts appears as a guarantee of respecting the law and of protecting citizens' rights.

The motivation of administrative acts can be also perceived as a dimension of the right to information enshrined in Article 31 of the Constitution, but also as a component of the right to a good administration, as stipulated by the Charter of Fundamental Rights of the European Union. According to Article 31 paragraph 2 of the Romanian Constitution, "*public authorities, according to their competence, shall provide correct information to citizens on public affairs and matters of personal interest.*" Therefore, motivation ensures the transparency of decision making and accurate, clear and prompt information of the citizens about the reasons which led to the administrative decision, whether it is normative or individual.

The Charter of Fundamental Rights of the European Union, Article 41, entitled "The right to good administration" stipulates, *inter alia*, the obligation of the administration to motivate their decisions.

The obligation to provide reasons for the legal acts at union level may also be found in Article 296 of the Treaty on the Functioning of European Union, the consolidated version, according to which "*legal acts shall be motivated and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the treaties.*" As stated by the doctrine⁹, with the accession to the European Union, the legal patrimony has enriched with new rights and obligations, which are likely to judicial guarantees. These obligations that have as legal source¹⁰ EU

⁴ Ioan Alexandru, Mihaela Cărauşan, Sorin Bucur, *Drept administrativ*, Lumina Lex Printing House, Bucharest, 2005, p. 387.

⁵ Dana Apostol Tofan, *Instituţii administrative europene*, C.H.Beck Printing House, Bucharest, 2006, p. 46.

⁶ Ana Muntean, *Formele controlului de legalitate în Dreptul Uniunii Europene. Proiecţii în dreptul român*, Universul Juridic Printing House, Bucharest, 2013, p. 98.

⁷ *Idem*, p. 99.

⁸ Rodica Narcisa Petrescu, *Drept administrativ*, Hamangiu Printing House, Bucharest, 2009, p. 326.

⁹ Mihaela Adina Apostolache, *Rolul parlamentelor naţionale în elaborarea şi aplicarea dreptului european*, Universul Juridic Printing House, Bucharest, 2013, p. 121.

¹⁰ *Idem*.

treaties generate, at the level of the Member States, the tendency to impose the obligation of public authorities to motivate their acts¹¹. This tendency is natural, because not all Member States have currently the obligation to provide reasons for all the documents issued or adopted by public authorities. For example, in our legal system, there is no general obligation to motivate legal acts in general and administrative provisions in particular. Motivation is mandatory by law¹² for normative administrative acts, but not for the individual ones, except those of a judicial nature. We may consider that it is not appropriate to establish an obligation for public authorities to motivate all their administrative acts, but acts that are detrimental¹³ to individuals and those of judicial nature shall be motivated.

The obligation to motivate administrative acts decreases the risk of arbitrary and unfair decisions, representing therefore a breakthrough for the administration¹⁴. It is considered¹⁵ that motivation allows the recipient to know the reasons that preceded the adoption of the act, and the court to have the opportunity to observe these issues of fact and law which chime with/ are contrary to the principle of legality.

The same author states that a full and proper motivation allows the institutions entitled to seize the issues of illegality, thus giving transparency to the control. Other positive consequences would be that the recipient is provided the information necessary to see if the act is well grounded and to understand its contents, therefore diminishing the contestation rate when it is obviously legal. It also allows an accurate legal description of the act, which is essentially done by taking into account the content and not its form, thus facilitating the correct choice of the appeal, according to the specific nature of the act. Last but not least, motivation is useful for verifying the legality and validity of the measures taken, provided that exposure is sufficiently clear and unambiguous¹⁶. From the foregoing allegations, there result the functions of motivation. These have been summarized in the literature¹⁷, as follows: the function of motivation, the function of information and the function of explanation.

¹¹ Jürgen Schwarze, *Les droit administratif sous l'influence de l'Europe. Une étude sur la convergence des ordres juridiques nationaux dans l'Union européenne*, Nomos Verlagsgesellschaft Baden-Baden, Bruylant Bruxelles, 1996, p. 810.

¹² Law no. 24/2000 regarding the norms of legislative techniques to elaborate legal documents, published in „Monitorul Oficial” of Romania, no. 139/ 31st March 2000, republished in „Monitorul Oficial” no. 777/ 25th August 2004, with subsequent amendments.

¹³ Ovidiu Podaru, *Drept administrativ, vol.I. Actul administrativ. Repere pentru o teorie altfel*, Hamangiu Printing House, Bucharest, 2010, p. 150.

¹⁴ Verginia Vedinaș, *Drept administrativ și instituții politico-administrative, manual practic*, Lumina Lex Printing House, Bucharest, 2002, p. 98.

¹⁵ Ana Muntean, *Formele controlului de legalitate în dreptul Uniunii Europene*, Universul Juridic Printing House, Bucharest, 2013, p. 93.

¹⁶ *Idem*, p. 98.

¹⁷ Mădălina Voican, *Drept administrativ*, Universul Juridic Printing House, Bucharest, 2011, p. 352.

European institutions¹⁸, in their decisions, state that motivation should not be very detailed, but also not too brief, so that it may be sufficiently explicit to achieve its objectives¹⁹.

Regarding the motivation of administrative acts, the Romanian doctrine treated motivation generally as a formal condition of the administrative act. Even though the general trend is to consider motivation as a formal condition of the administrative act, professor Antonie Iorgovan²⁰ appreciates that it is to be discussed whether motivation is still a formal requirement and has not acquired the status of a background, essential condition. This assertion is reinforced today by the European administrative practice and by the European and Romanian jurisprudential optics, motivation exceeding the stage of a mere formal requirement. Recent administrative law doctrine²¹ argues, however, that motivation remains a formal condition and in the support of this idea it is emphasized the need to differentiate the *reason*, as an objective element, *de facto* or legal, that precedes the act and justifies its issuance, from *motivation*, which represents its expression in the act. Motivation is what enables the individual, but also the administrative court, if solicited, to know the reason of the act, analyzing, if the case, any possible abuse of power²².

3. Jurisprudential issues concerning the motivation of the administrative acts

In order to demonstrate the contribution of jurisprudence to increasing the importance of motivating administrative acts and to sensitizing authorities so that they properly inform the citizens, we bring to attention several opinions of national and European courts, opinions that state the need to motivate administrative acts. Lack of motivation or inappropriate motivation of administrative acts represented and they still represent possible grounds for the courts to suspend or cancel administrative acts.

Thus, in a case decision²³ annulling an individual administrative act, it is alleged that the administrative act is affected by the error of not being motivated, which led to its cancellation by the administrative court. The court emphasized, in this case, that *"the motivation of the administrative act, the justification of factual*

¹⁸ Decision from 4 April 2000, Commission/Conseil, Case C-269/97, Rec., p. 2257.

¹⁹ Regarding the motivation of the administrative acts by EU institutions see Cătălin-Silviu Săraaru, *Principiile generale ale dreptului administrativ european*, in Ioan Alexandru (coord.), *Drept administrativ european*, Lumina Lex Printing House, Bucharest, 2005, pp. 171, 172.

²⁰ Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, 4th edition, All Beck Printing House, Bucharest, 2004, pp. 62-63.

²¹ Ovidiu Podaru, *Drept administrativ, Vol.I. Actul administrativ. Repere pentru o teorie altfel*, Hamangiu Printing House, Bucharest, 2010, pp. 150-151.

²² *Idem*, p. 151.

²³ ICCJ Decision no.529/2011, Section of Administrative and Fiscal Legal Department, <http://legeaz.net/spete-contencios-inalta-curte-iccj-2011/decizia-529-2011>, visited on 15 February 2014.

and legal reasons that led to its issuance, represent the guarantee of observing the law and of protecting individual rights, a form of protecting the citizen against the arbitrary of the public power, which under these conditions becomes obvious and can be censored by means of judicial process."

As mentioned before, the motivation of administrative acts ensures the transparency of the administrative procedures for the benefit of citizens who can verify whether the act is founded or not, while allowing the administrative court to exercise judicial control of the administrative acts. Lack of motivation or vicious motivation lead to the conclusion that there is abuse of power, which justifies the sanction materialized in the annulment of the administrative act. The Court of Justice of the European Union also underlines in its jurisprudence²⁴ that insufficient motivation²⁵ or failure to provide reasons trigger the nullity or invalidity of acts. These issues are presented in another decision²⁶ of the High Court of Cassation and Justice of Romania, where it was noted that motivation is a general, constitutional obligation, applicable to any administrative act. It is a condition of external lawfulness of the act, subject to an *in concreto* assessment, according to its nature and to the context of its adoption. The court²⁷ argues that the objective of motivation is to clearly and unequivocally present the judgment of the issuing institution.

The conclusion following the above-mentioned decision is that "*motivation is an essential formality whose absence or insufficiency may trigger the annulment of the act.*" In another case²⁸, in which it was requested the annulment of a decision of a local board, the administrative court annulled the respective administrative act, stating that in its contents there was not stated the motivation of the adopted measures. Lack of reasons and the unforeseen *modus operandi* without any valid justification led to the finding of an abuse of power to be penalized with the annulment of the administrative act.

The necessity to motivate administrative acts is accepted both at national and at European level, the European Court of Justice being the one to ensure the balance between the national and the European laws, by means of jurisprudence²⁹. In terms of motivating administrative acts, the Court of Justice of the European Union pointed out that motivation must be adequate to the issued act and must clearly present the algorithm followed by the institution which adopted the

²⁴ European Court of Justice - Case C41/1969, www.curia.eu, visited on 15 February 2014.

²⁵ Regarding the insufficient or vicious motivation of an administrative act, Ovidiu Podaru considers in his work *Drept administrativ. Practică judiciară comentată*, vol.I, Hamangiu Printing House, Bucharest, 2010, p. 173 that the court must cancel the administrative act, not because of the absence of motivation, but for abuse of power.

²⁶ High Court of Cassation and Justice, Decision no.101/ 15 January 2010 pronounced in file no. 1624/57/2008- unpublished.

²⁷ *Idem*.

²⁸ <http://legeaz.net/spete-contencios/hotarari-ale-consiliului-local-lipsa-3475-2011>, visited on 15 February 2014.

²⁹ Mihaela Adina Apostolache, *Rolul parlamentelor naționale în elaborarea și aplicarea dreptului european*, Universul Juridic Printing House, Bucharest, 2013, p. 122.

contested measure, so as to enable the persons interested to motivate the measures and also to allow courts to conduct the revision of the act. In a similar respect, the Court stated in Case 509/1993 that *"it is necessary to detail reasons even if the issuing institution has a broad appreciation power, as motivation gives transparency to the act, therefore one being able to check if the act is properly grounded"*.

In another case decision³⁰ in which it was solicited the annulment of a dismissal decision, the court pointed that, with respect to its motivation, such an administrative act should have obligatorily included the factual and legal reasons which led to the liberation from office, as only in this way one can exercise the judicial review on the legality of the dismissal measure. The motivation of the act constitutes a condition of its legality, its insufficiency or absence attracting the nullity of the administrative dismissal act. Furthermore, motivation of the administrative act is a guarantee against arbitrary and it imposes especially in case of acts that amend or suppress individual and subjective rights and legal situations.

Motivation of an administrative decision cannot be limited to considerations regarding the competence of the issuer or its legal ground, but must also contain *de facto* elements which allow, on the one hand, the recipients to know and evaluate the decision's grounds, and on the other hand, to make the judicial review possible to exercise.

The mere reference to the law provisions, it is argued in another decision³¹, without making any reference to the existence and nature of the justified situation, does not cover the requirement to provide reasons for the administrative act, as it does not allow checking the dividing line between discretion and arbitrariness. Motivation also allows verifying the proportionality of the measure adopted with the circumstances in which it was established and with the public interest which it is called to protect.

Whenever the court check the existence of a certain injury to a right or legitimate interest, they also analyze the reasons and effects of the administrative decision in the context of its disposal, through the criterion of proportionality between the private interest allegedly harmed and the public interest which the issuing authority is supposed to protect, because the ratio of administrative law is characterized by the primacy of the public interest, as defined in Article 2, paragraph 1, letter r) of Law no. 554/2004. This constitutes the interest which has as targets the rule of law and constitutional democracy, guaranteeing the rights, freedoms and fundamental interests of citizens, as well as satisfying community needs and achieving the competences of public authorities³².

³⁰ Appeal Court, Bucharest, Section VIII - Administrative and Fiscal Legal Department, Civil Decision no. 2973/10 Sept. 2012, File no. 4291/87/2011.

³¹ High Court of Cassation and Justice, Decision no. 2919/6 June 2007, Administrative and Fiscal Legal Department.

³² High Court of Cassation and Justice, Decision no. 1571/ 20 March 2009, Administrative and Fiscal Legal Department.

High Court emphasizes that in the subjective contentious, the role of the court is not limited to examining the formal legality of the administrative act, because the sanction of nullity is conditioned by the existence of an injury produced to a right or legitimate interest of the plaintiff³³.

In another case³⁴, in which it was admitted the action of a person against a decision of the rector of a university, in which the plaintiff was excluded from carrying out the assessment of students, the court considered that the decision was unlawful firstly for not respecting the obligation of motivating the decision. The court also considered that motivation was not complete and accurate, which is equivalent to lack of motivation. It was also stated that the decision of the rector had the character of a sanction against the plaintiff, a measure restricting its legal right to participate in the examination process, interdiction ordered for an indefinite period. Therefore, court assert that the eminent authority of the administrative act did not prove the proportionality of the measure ordered, namely the public interest to be protected by not allowing the plaintiff to examine students on an indefinite period. Finally, the court considers that the contested decision was abusively issued by the defendant and therefore admitted the complaint and cancelled the administrative act as being illegal.

Lack of or vicious motivation of the administrative act led to the suspension of other administrative acts by court decisions. An example is sentence no. 1348/ August 23rd 2012 of Prahova Court, Section II Civil of the Administrative and Fiscal department which suspended the execution of an order issued by the prefect of Prahova county, regulation stating the end of a mayor's term of office.

When motivating the sentence, the court appreciated that from the content of the administrative act there cannot be deducted the fact and law ground that drew primary to ascertaining the termination of the mandate, arguing that any decision which affects the rights and freedoms must be substantiated in fact and law, especially from the perspective of the possibility to assess the legality and validity of the measure and to observe the limits between discretion and arbitrary power. The court also considered that accepting the argument that the public authority issuing the document need not state reasons in fact and law when issuing its administrative act, is equivalent to destroying the essence of democracy, the rule of law based on the principle of legality. The obligation to provide motivation is more necessary for acts which suppress individual rights and legal situations.

The lack of motivation in case of an appealed administrative act, as stated in the sentence³⁵ of Timisoara Court of Appeal, constitutes a violation of the rule of law, the right to good administration and a violation of the constitutional

³³ High Court of Cassation and Justice, Decision no. 1571/20 March 2009, Administrative and Fiscal Legal Department.

³⁴ <http://www.jurisprudenta.com/speta/anulare-act-administrativ-nemotivarea-actului-administrativ-sanc%C5%A3iune-qmmse/>, visited on 15 February 2014.

³⁵ Civil sentence no. 45/27 January 2010 of Timișoara Court of Appeal, Administrative and Fiscal Department in juridex.ro, visited on 15 February 2014.

obligation of the public authorities to provide accurate information to the citizens on the issues of personal interest. Absence of motivation puts into question the very legality of the contested act, as it is a circumstance likely to create serious doubt on the legality of the administrative act in question. A final example regarding the suspension of an administrative act on the grounds of its lack of motivation is the Decision. 649/09 February 2010 of the High Court of Cassation and Justice³⁶, which suspended the execution of an order of the Minister of Public Health, ordering the release of a person from his position as the interim manager of a hospital.

The court called to decide the extent of the temporary protection measure, namely the suspension of executing the administrative act, had to take into account all the circumstances and interests involved, since such measures may be granted especially when the execution of the administrative act is likely to cause serious, difficult to repair damage. This conduct of the court is consistent with Recommendation no. R (89) 8/ 15 September 1989 of the Council of Ministers of the Council of Europe, which states that *"it is desirable to ensure temporary judicial protection of persons, as the immediate and full execution of the contested administrative acts may cause irreparable prejudice, which equity imposes to be avoided as much as possible"*.

When analyzing the appealed order, the court finds that in its preamble there are not indicated the imputable reasons that led to the dismissal of the plaintiff. The motivating of administrative acts is a condition of their validity, as stated by the High Court, the issuer of such act having the obligation to unambiguously indicate the points of law and fact which led to the solution adopted, so that the recipient should know and use them in case of a potential defense, on the one hand, and that the court could exercise effective control of the legality of the act, on the other hand. In this case it is beyond any doubt that the order contested by the plaintiff is unreasonable, so that there is serious doubt about the appearance of legality of the administrative act in question.

4. Conclusions

From the analysis carried out in this paper, there results the conclusion that the motivation of administrative acts must be rigorously performed, especially in situations where it is mandatory. The doctrinal approach of this operation was accompanied by practical examples from national and European courts, in order to acknowledge the importance of motivation when drafting and adopting or issuing administrative acts. It is obvious that lack of motivation or vicious motivation can attract the suspension of the administrative act, when such thing is requested to an administrative claim court, or even the cancellation of the administrative act by the court.

³⁶ Decision no. 649/09 February 2010 of the High Court of Cassation and Justice, <http://www.legalis.ro>, visited on 15 February 2014.

Compliance with the rigours of motivating an administrative act guarantees compliance with the law and protects individual rights. Based on these facts, we consider that it is necessary to extend the obligation to provide reasons for administrative acts to the individual administrative acts causing prejudice to the individual, as well as to judicial administrative acts, in case of normative acts this obligation being already legally stipulated.

Bibliography

1. Ioan Alexandru, Mihaela Cărăușan, Sorin Bucur, *Drept administrativ*, Lumina Lex Publishing House, Bucharest, 2005.
2. Dana Apostol Tofan, *Instituții administrative europene*, C.H.Beck Publishing House, Bucharest, 2006.
3. Cătălin-Silviu Săraru, *Principiile generale ale dreptului administrativ european*, in Ioan Alexandru (coord.), *Drept administrativ european*, Lumina Lex Publishing House, Bucharest, 2005.
4. Mihaela Adina Apostolache, *Rolul parlamentelor naționale în elaborarea și aplicarea dreptului european*, Universul Juridic Publishing House, Bucharest, 2013.
5. Gabriela Bogasiu, *Justiția actului administrativ. O abordare biunivocă*, Universul Juridic Publishing House, Bucharest, 2013.
6. Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, 4th edition, All Beck Publishing House, Bucharest, 2004.
7. Ana Muntean, *Formele controlului de legalitate în Dreptul Uniunii Europene. Proiecții în dreptul român*, Universul Juridic Publishing House, Bucharest, 2013.
8. Rodica Narcisa Petrescu, *Drept administrativ*, Hamangiu Publishing House, Bucharest, 2009.
9. Ovidiu Podaru, *Drept administrativ*, vol.I. *Actul administrativ. Repere pentru o teorie altfel*, Hamangiu Publishing House, Bucharest, 2010.
10. Ovidiu Podaru, *Drept administrativ. Practică judiciară comentată*, vol.I, Hamangiu Publishing House, Bucharest, 2010.
11. Jürgen Schwarze, *Les droit administratif sous l'influence de l'Europe. Une étude sur la convergence des ordres juridiques nationaux dans l'Union européenne*, Nomos Verlagsgesellschaft Baden-Baden, Bruylant Bruxelles, 1996.
12. Verginia Vedinaș, *Drept administrativ*, 7th edition, revised and updated, Universul Juridic Publishing House, Bucharest, 2012.
13. Verginia Vedinaș, *Drept administrativ și instituții politico-administrative, manual practic*, Lumina Lex Publishing House, Bucharest, 2002.
14. Mădălina Voican, *Drept administrativ*, Universul Juridic Publishing House, Bucharest, 2011.
15. Law no. 24/2000 regarding the norms of legislative technique to elaborate legal documents, published in „Monitorul Oficial” of Romania, no. 139/ 31st March 2000, republished in „Monitorul Oficial” no. 777/25th August 2004, with subsequent amendments.