GIVING REASONS FOR ADMINISTRATIVE ACTS – WARRANTY OF A GOOD ADMINISTRATION

Ionela-Alina ZORZOANĂ*

Abstract

This article proposes to analyze the giving reasons for administrative acts, an essential condition of good administration. Starting from art. 41 Charter of Fundamental Rights of the EU providing as the condition of a good administration "the obligation of the administration to give reasons for its decisions", we went on to the domestic legislation that does not define the principle of good administration. In regard to the obligation of public authorities to give reasons for acts they issue, the domestic legislation comprises provisions only on normative acts, Law. 24/2000 on the legal technical norms for the issuance of regulations being applicable. Many problems arise in the case of administrative acts of an individual nature where there is no regulated obligation to motivate them.

Thus, the purpose of this article is to draw attention on the necessity of a legal regulation also in regard to the obligation to give reasons for individual administrative acts. This is necessary, considering that this type of administrative acts often provide obligations on the citizen, who is entitled to be informed about the actual reasons.

Otherwise, we believe that giving reasons for individual administrative acts also results in a relief of the contentious-administrative courts, which are ever more often vested with applications for the annulment of such acts, the main reason being such of the lack of giving reasons.

We also hope that both the Administrative Code, but especially the Administrative Procedure Code solves the issue of giving reasons for individual administrative acts, so as to ensure a balanced and transparent relation between the public authorities and citizens.

Keywords: *the principle of good administration, the regulation at European level, transparency, obligation to give reasons to administrative acts, the regulation in domestic legislation, regulating administrative acts, individual administrative act, de facto and de jure motivation, administrative-jurisdictional act, contentious administrative court*

1. Introduction

This study proposes an analysis of the necessity to observe the obligation of motivating administrative deeds, as a warranty of good administration. The study starts from an analysis of the regulations at European level, where the principle of good administration is regulated in detail and the failure to observe shall result in sanctions upon the Member States of the European Union that do not observe such. The principle of good administration at European level includes among its conditions the motivation of the administrative acts.

If the situation of normative administrative acts does not allow discussions, Law no. 24/2000 expressly providing that such acts must be motivated (being accompanied by certain types of motivational tools, as the case may be), issues arise especially in case of acts administrative, where there is no legal obligation set up.

Taking advantage of this legislative vacuum, in most cases, public authorities issue administrative acts that are motivated only de jure, relying on the principle that no one can invoke the ignorance of the law. However, we cannot accept that it is sufficient to insert only the legal grounds in the preamble of an individual administrative act and thus fulfil the obligation to motivate such. Contrary to the European institutions, in Romania, although the practice of the courts is established, i.e. it obliges national public institutions to motivate the administrative act, they still take small steps in this regard.

Unfortunately in Romania, concurrently with the timid drafting of the two Codes, the Administrative and Administrative Procedure ones, we hope that we shall comply with the European regulations, i.e. there should be an obligation to motivate also individual administrative acts.

However, attention must be drawn to the risks that exist with regard to the express regulation of such an obligation, such of fully motivating all administrative acts. We state this, as it is obvious that in case of individual administrative acts regulating rights granted to a determined person(s) (e.g. study diplomas, various certificates etc.) no vast de facto motivation is necessary. However, issues arise where individual administrative acts impose certain obligations on its recipient(s) and, due to the lack of motivation, they cannot defend themselves before the authority.

2. Content

2.1. The Principle of Good Administration

2.1.1. The regulation of the good administration at European level

1. Charter of Fundamental Rights of the European Union

PhD candidate, Law Faculty, "Nicolae Titulescu" University, (e-mail: alinazorzoana@gmail.com);

The principle of "*good administration*" was mentioned at European level for the first time in the Charter of Fundamental Rights of the European Union. The Charter is a mandatory legal tool for the European citizen to stand before any European court. In October 1999, when the drafting of the Charter of Fundamental Rights of the European Union was under discussion, the European Ombudsman proposed that in the Charter should be mentioned "*the right of citizens to the quality of the services provided by the administration*", claiming even that the 21st century shall have to be the century of good administration. "*The right to a good administration*" occurs first of all in art. 41 from the Charter of Fundamental Rights of the European Union, adopted at the Summit from Nice in December 2000. The right to a good administration according to art. 41 from the Charter of Fundamental Rights of the European Union provides the following: "*(1) Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. (2) This right includes: (a) the right of every person to be heard, before any individual measure, which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c)* ***the obligation of the administration to give reasons for its decisions.*** *(3) Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. (4) Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."* Therefore, at European level, citizens or residents of EU Member States enjoy the right to good administration in relations with the institutions and bodies of the European Union, according to art. 41 of the Charter of Fundamental Rights of the European Union. The Charter also provides for the right of every citizen to complain to the European Ombudsman in the event of maladministration in the work of Community institutions or bodies. Under the Treaty of Lisbon signed on 13 December 2007, amending the Treaty on European Union and the Treaty establishing the European Community, the Charter of Fundamental Rights of the European Union has acquired primary legal force, having the same legal value as the Treaties.

2. The European Ombudsman

In close connection to the right to good administration, the Charter of Fundamental Rights of the European Union provides in Art. 43 the right of every EU citizen or of any natural or legal person residing or having its registered office in the territory of any Member State of the European Union to notify the European Ombudsman in case of maladministration in the activities of the Community institutions or bodies, except the Court of Justice of the European Union and the European Court of First Instance in regard to their jurisdictional attributions.

The European Ombudsman is authorized to receive complaints from any citizen of the Union or from any natural or legal person residing or having its registered office in a Member State concerning cases of maladministration in the work of the Union's institutions, bodies, offices or agencies, except the Court of Justice of the European Union in the exercise of its jurisdictional functions. Where the Ombudsman finds an instance of maladministration, he/she shall refer the matter to the institution, body, office or agency concerned, which has a period of three months to communicate his/her point of view. The Ombudsman then submits a report to the European Parliament and the concerned institution. The complainant is notified about the outcome of the investigations. The European Parliament may also, at the request of a quarter of its constituent members, set up a temporary inquiry commission to examine the alleged breach of the legal regulations or maladministration in the application of Union law, unless the alleged facts are examined by a court and as long as the judicial procedure is not completed. Therefore, preventing and combating maladministration and implicitly promoting good governance are concerns of EU bodies and institutions in order to achieve good European governance.

3. The European Code of Good Conduct

In September 2001, the European Parliament endorsed the European Code of Good Administrative Behaviour[1], which laid down the standards to be observed by the EU institutions and bodies and their employees in their relations with citizens of the European Union. The Code details the provisions of the Charter of Fundamental Rights of the European Union, bringing together material and procedural principles that govern actions taken at the level of European institutions and bodies. This document comprises theoretical provisions, such as: legality, non-discrimination, proportionality and impartiality of actions of officials in EU institutions, prohibition of abuse of power, independence, fairness, amiability and objectivity of employees of EU bodies. Procedural rules on receiving, assessing and sending replies to received requests, rules on hearing people whose interests may be affected by decisions of EU institutions and rules on decision-making regarding a request (reasonable time for decision-making, obligation to motivate decisions and indications of appeals). Since the very beginning of the Code it is provided that "*This Code contains the general principles of good administrative behaviour which apply to all relations of the institutions and their administrations with the public, unless they are governed by specific provisions*"[2]. The Code explains

[1] Reviewed in the year 2013;

[2] The European Mediator of that time, Paraskevas Nikiforos Diamandouros, specified in 2005, in the Foreword to the edition of the Code published on the webpage of the institution that the Code is also "*a useful guide and a resource for civil servants, encouraging the highest*

to citizens the practical significance of this right and what they can expect in a concrete way from the European administration. It is important to mention art. 26 of the Code, which states that any failure of a European institution or official to comply with the principles set out in this Code may be the subject of a complaint to the European Ombudsman. Concurrently with the approval of the Code, the European Parliament also adopted a resolution calling on the European Ombudsman to apply the Code when considering whether a case of maladministration has occurred. As a consequence, the Ombudsman duly refers to the Code in his/her investigations, as well as in his/her proactive furtherance of good administration.

In conclusion, as it results from the above, it can be noticed that at European level, the principle of good administration is well regulated, with the European institutions focusing on the interests of citizen.

With regard to the obligation to motivate the acts issued by the European authorities, the Community case-law noted that the statement of reasons must be appropriate to the issued act and must present in a clear and unequivocal manner the algorithm followed by the institution, which adopted the challenged measure, so as to enable the data subjects to establish the motivation of the measures and also to enable the competent Community Courts of Law to perform the review of the act (Case C-367/1995) and, as the European Court of Justice decided, the extent and detail of the statement of reasons depends on the nature of each case, an insufficient or erroneous motivation is deemed equivalent to a lack of motivation of the acts; moreover, insufficient reasoning or lack of motivation entails the nullity or invalidity of Community acts C-41/1969) and a detailed presentation of the reasons is also necessary where the issuing institution enjoys a wide estimation power, since the statement of reasons provides the act with transparency, as it is possible for individuals to ascertain whether the act is well-founded and concurrently it enables the court to exert the judicial control (Case C- 509/1993)[3].

2.1.2. Regulating the principle of good administration in Romania

4. Normative acts regulating the principle of good administration

In Romania, the principle of good administration is not provided as such in a normative act.

However, starting from art. Article 41 (2) of the Charter of Fundamental Rights of the European Union, quoted in point I.1.1, good administration is the right of every person to be heard before any individual measure which may affect him or her adversely, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, the right of the administration to give reasons for its decisions.

Although the domestic legislation from Romania does not comprise express provisions on good administration, there are normative acts indirectly regulating the elements of the concept of good administration.

One of the normative acts subject to the principle of good administration is Law no. 52/2003 on decisional transparency in public administration. As stated in art. (2), the aim of the normative act is to increase "the degree of responsibility of the public administration towards the citizen as a beneficiary of the administrative decision" and "the active participation of citizens in the process of administrative decision-making and in the process of drafting normative acts". Another normative act in which is reflected the principle of good administration is Law no. 544/2001 on free access to information of public interest [4], providing in art. 1 that " *The free and unrestricted access of the person to any information of public interest, defined by this law, is one of the fundamental principles of the relations between persons and the public authorities".*

A direct reference to the principle of "good administration" is found in Law no. 7/2004 on the Code of Conduct for Civil Servants [5] which, in Art.2, provides that "*The objectives of this Code of Conduct are to ensure the improvement of the quality of the public service, good administration in the accomplishment of the public interest, as well as to contribute to the elimination of bureaucracy and corruption in the public administration*".

From the point of view of the present paper, Law no. 24/2004 is of particular relevance[6] on the norms of legal technique to draft normative acts. The provisions of Government Decision no. 1361/2006 regarding the content of the tool for presentation and motivation of draft normative acts subject to Government approval[7], but also such of Government Decision no. 561/2009 for the approval of the Regulation on the procedures at Government level for the drafting, endorsing and presentation of document drafts of public policies, of normative acts drafts, as well as of other documents in view of adopting/approval are of significance[8].

This latter component of the principle of good administration - the motivation of normative acts (individual acts without express regulation, as will be explained in point II) is part of the subject analyzed in this paper.

5. The Administrative Code and the Administrative Procedure Code

standards of administration. European citizens deserve nothing less" and "*The right to good administration by EU institutions and bodies is a fundamental right* "

[3]https://www.avocatura.com/speta/578490/suspendare-executare-act-administrativ-curtea-de-apel-bucuresti.html

[4] Published in the Official Journal of Romania, Part I, no. 663/23 October 2001

[5] Republished in the Official Journal, Part I no. 525 from 02 August 2007;

[6] Republished in the Official Journal of Romania, Part I, no. 260/21 April 2010

[7] Published in the Official Journal of Romania, Part I, no. 843/12 October 2006

[8] Published in the Official Journal of Romania, Part I, no. 319/14 May 2009

The need for administrative codification was evoked in time, due to the large number of current regulations in the field of public administration. In the explanatory memorandum of the law draft on the Administrative Code, it was mentioned that " *the inflation of the normative acts issued and the frequent changes in the regulations that were necessary in the process of their implementation generated parallelisms, overlaps and implicitly difficulties in implementation in practice*." Furthermore, at European level, this legislative solution is not a novelty.[9]

In the law draft on the Administrative Code, although there is no explicit reference to the notion of good administration, the principle of transparency in public administration is nevertheless provided in Art. 8, i.e.: *(1) In the drafting of normative acts, public authorities and institutions have the obligation to inform and submit to the public consultation and debate the draft normative act, and to allow the citizens access to the administrative decision-making process, as well as to data and information of public interest, within the limits of the law. (2) Beneficiaries of public administration activities have the right to obtain information from public administration authorities and institutions and they have a correlative obligation to set available information to the beneficiaries, ex officio or upon request, within the limits of the law".*

It can be noticed that although the draft normative act comprises some principles of good administration, we can nevertheless find no explicit provision of the concept and, obviously, no definition.

In regard to the motivation of administrative acts, the draft normative act refers to normative acts (which is not a novelty), and regarding individual administrative acts, we refer only to the evaluation procedure of civil servants[10]. We shall see what happens to the draft Law on the Administrative Code, considering that on 6 November 2018, by Decision no. 681, the Constitutional Court admitted the objection of unconstitutionality filed by the President of Romania and declared the draft normative act unconstitutional[11].

On the other hand, there is indeed in an early stage also a draft Code of Administrative Procedure[12]. The draft Code of Administrative Procedure "*provides the pre-procedural, simultaneous and subsequent procedural conditions to issue or adopt the administrative acts, partly defining each operation, the succession of its development, the place and importance of the procedure of the act (endorsements, agreements, quorum and necessary majority, motivation, drafting, signing, approval, confirmation, publication or communication), in close correlation with the general methodology of applicable legislative technique and regulatory and administrative matters.*

Thus, the obligation to state reasons for administrative acts is implemented, consisting of the factual and legal considerations justifying and requiring the adoption of a normative or individual act, ensuring the decisional transparency, strengthening the administrative capacity, simplifying the procedures in the field in regard to the executive citizen report, aiming to eliminate bureaucracy, formalism and corruption in this important segment of public life, concurrently ensuring unrestricted access to information of public interest"[13].

2.2. Motivating administrative acts - a condition for good administration

2.2.1. Motivation - validity condition of the administrative act

The motivation of the administrative act is a condition of its validity, as an external form of manifestation of the authority's will (the written form to which the administrative act being mandatory). On the other hand, as expressly provided by Law no. 24/2000, in case of normative acts is also mandatory the motivation on the merits. As provided in the doctrine, "*the implementation of the mandatory nature of the reasoning of administrative acts, which is already comprised in the theses of the future code of administrative procedure, will reduce the risk that the administration would take arbitrary, abusive decisions and shall ultimately improve the work of the administration."*[14]

The usefulness of the motivation of decisions has a triple interest, namely: informing about the reasons, which means explaining the decision and thus avoiding possible conflicts between the administration and the addressees of the act; the obligation to motivate determines the administration not to make decisions due to reasons that cannot be brought to the attention of public opinion, so that the administration should guide its activity by moral norms; the motivation enables effective hierarchical control over the content of the

[9] The options considered by the European states were the drafting of unique laws in the field (Portugal), field law collections (codices - France) or sectoral codification (France, Germany), but in none of these states there is a law unifying the legislation in several areas of public administration (http://www.cdep.ro/proiecte/2018/300/60/9/em369.pdf)

[10] Article 19 (2) and (3) "(2) *The head of the public authority or institution shall settle the challenge based on the assessment report and the reports prepared by the assessed civil servant, assessor and countersignor, within 10 working days as of the date of expiry of the deadline for filing the appeal. (3) On basis of the documents provided in paragraph (2)* ***with the obligation to state reasons****, the head of the public authority or institution shall reject the reasoned objection or admit it, in which case he/she shall amend the evaluation report accordingly. The result of the challenge shall be communicated to the civil servant within 5 calendar days of its settlement*."

[11] Until the date of this account, the Constitutional Court's decision no. 681 / 06.11.2018 has not been drafted.

[12]The codification process of the normative acts regulating the procedural issues of the public administration was more pronounced during 2008, the actions taken being materialized by the adoption of Government Decision no. 1.360/2008 on the approval of the preliminary theses of the Administrative Procedure Code (Published in the Official Journal of Romania, Part I, No. 734/30 October 2008).

[13]https://drept.ucv.ro/RSJ/images/articole/2006/RSJ2/0219RiciuI.pdf

[14] Verginia Vedinaș, Administrative Law, 10th edition, reviewed and updated, Universul Juridic, Bucharest, 2017, page 341;

decision, as well as rigorous judicial review of the administrative contentious courts[15].

In fact, what is the motivation of the administrative act? Beyond the legal provisions, which are the legal bases on which the administrative act was issued, it is necessary for its addressee/recipients to know the factual reasons which led to the issuance thereof. There have been frequent (unfortunately) practices in the courts, situations where authorities considered "sufficient" the legal motivation, and only the "*conclusion*" should be inserted in the act, without any explanation, the so-called *de facto* motivation of the administrative act. We consider that the *de facto* motivation of the administrative act (and we refer to the individual administrative act) is necessary, so much the more, as it represents a guarantee of the transparency of the issuing authority in relation to the addressee of the act, even if there is no legal obligation for such purpose at this time. However, such conduct of the authority (which is in any case in a superiority relation towards the addressees of its acts), would be proof of good faith and even respect towards the addressees of its acts.

Last but not least, the motivation of all administrative acts would also have a practical purpose, namely to no longer burden contentious- administrative courts with actions in the annulment/suspension of the enforcement of the administrative act, the first invoked reason of which is most of the times "*lack of motivation*." The addressees of the administrative acts are entitled to know the reasons due to which such an act is issued and how the obligation imposed by that act has been reached. There are situations where, in practice, authorities only explain through the procedural documents submitted with the file how and for what reasons such an act was issued, whereas it is obvious that the motivation should be made by the very content of the administrative act and not by acts subsequent to its issuance.

These are probably (besides others) also the reasons due to which in the theses of the future Administrative Procedure Code[16], the motivation of administrative acts is mandatorily provided, regardless of their nature.

Besides, it has been noticed in the practice of courts that " ***In the absence of an explicit motivation of the administrative act, the possibility of challenging in court the concerned act is illusory,*** *since the judge cannot speculate on the reasons which determined the administrative authority to take a certain measure****, and the absence of such reasoning favours the issuance of abusive administrative acts, since the lack of reasoning deprives the judicial control of administrative acts of any effectiveness and therefore the motivation is a general obligation applicable to any administrative act, it is a condition of external legality of the act, which is subject to an in concreto appreciation, by its nature and context and its scope is to clearly and unequivocally present the reasoning of the institution issuing the act and the reasoning of the court, the motivation pursues a dual purpose****; fulfils, first of all, a function of transparency in favour of the beneficiaries of the act, who will thus be able to ascertain whether or not the act is well-founded; also enables the court to exercise its jurisdictional control, so that it ultimately enables the restructuring of the judgment made by the author of the act in order to reach its adoption; of course it should appear in the act itself and be made by its author. Thus the motivation implies the clear informing about the de facto and de jure elements, enabling the understanding and appreciation of its legality, (...) therefore, the motivation should enable the judge to exercise control over the factual and legal elements which have served as basis to exert the assessment power and thus it should be performed in a sufficiently detailed manner, by indicating in the present case the reasons due to which the issuing authority has concluded that it is necessary to ascertain the legal termination of the mayor's mandate, in other words, the motivation was to be effective, complete, precise and circumstantial*."[17]

The High Court also ruled in another decision[18], as to the **necessity for *de facto* and *de jure* motivation**, to a degree sufficient to enable unrestricted exercise of judicial review by the court, that "*the discretionary power rendered to an authority cannot be regarded in a state of law as an absolute and unlimited power, as to exert the assessment right by infringing the fundamental rights and freedoms of citizens provided by the Constitution, or by law, is an* ***excess of power****, in the context in which the Constitution of Romania provides in art. 31 par. 2 the obligation of the public authorities to ensure the correct information of the citizen about public affairs, as well as issues of personal interest. Therefore,* ***any decision likely to have effects on the fundamental rights and freedoms has to be motivated not only in view of the competence to issue that act, but also from the perspective of the individual and society's possibility to assess the legality of the measure and the observation of the boundaries between discretionary power and arbitrariness****. To accept the thesis according to which the authority should not motivate its decisions is equivalent to emptying of content democracy's essence and the rule of law based on the* ***principle of legality"****.*

2.2.2. Motivating the administrative act from the perspective of its legal (individual or normative)

[15] Mihai Oroveanu, Administrative Law, 2nd edition, reviewed and supplemented, Cerma Publishing House, Bucharest, 1998, page 134 and the following;

[16] Approved in Government Decision no. 1.360/2008 on the approval of the theses prior to the Administrative Procedure Code (Published in the Official Journal of Romania, Part I, no. 734/30 October 2008);

[17] ARAD Tribunal Civil Judgement no. 6185/ 29 October 2013;

[18] High Court of Cassation and Justice. Decision no. 1580/11.04.2008;

nature; the particular situation of administrative - judicial acts

From the perspective of the effects they produce, administrative acts are classified into normative and individual.

A fundamental classification on basis of which the difference between the administrative and the individual acts, to which specialists add the internal administrative acts, is the one according to the extension degree of the legal effects. "*The administrative normative act contains such general and impersonal rules of conduct as are the laws"*[19]. Thus, one of the criteria to distinguish between the two types of administrative acts is that of the determinability of the persons to whom such apply. " *The normative act has a general applicability, on an undetermined number of persons*"[20], whereas the individual has its effects on a limited and determined/determinable number of beneficiaries, a manifestation of will creating, modifying or extinguishing rights and obligations for its benefit or on behalf of its recipients.

A definition of the normative act can be found in art. 3 lit. a) of Law no. 52/2003 on the decisional transparency in the public administration, as follows: "*normative act - the act issued or adopted by a public authority, with general applicability*".

Law no. 24/2000 comprises clear provisions establishing the obligation to motivate the normative acts. Thus, Section 4 is entitled - Motivation of draft normative acts. Article 30 itemizes "*Presentation and Motivation Tools*", providing the obligation that "*Drafts of normative acts have to be accompanied by the following supporting documents: a) explanatory statements - in case of draft laws and legislative proposals b) substantiation notes - in case of ordinances and decisions of the Government; ordinances to be submitted to Parliament for approval under the authorizing law and emergency ordinances shall be submitted to the Parliament accompanied by the explanatory statement to the draft law approving them; c) approval reports - for the other normative acts; d) impact studies - in case of draft laws of special importance and complexity and of draft laws approving ordinances issued by the Government under an authorizing law and subject to the approval of the Parliament*."

In para. (2), it is specified that " *Explanatory statements, substantiation notes, approval reports and impact studies represent tools to present and motivate new proposed regulations" and in paragraph (3)" In the case of draft laws for which the Government assumes responsibility, the motivation documents accompanying such projects shall be the explanatory statement and, as the case may be, the report provided in Art. 29"*

Law no. 24/2000 assigns an entire chapter referring to the Content of the motivation in which, at art. 31 lists the elements that this must have, mentioning in paragraph (1) letter a), expressly: the reason for the issuance of the normative act, which represents "*requirements imposing regulatory intervention, with particular reference to the inadequacies and inconsistencies of the applicable regulations; the basic principles and finality of the proposed regulations by highlighting the new elements; the conclusions of studies, research papers, statistical evaluations; references to public policy documents or to normative act for the implementation of which is drafted the project. For emergency ordinances shall be separately presented the objective elements of the extraordinary situation requiring immediate regulation, whereas it shall not be suffice to use the urgent parliamentary procedure, as well as possible consequences that would occur in the absence of the proposed legislative measures".*

Last but not least, it is important to mention art. 32 according to which, "*(1) The motivation documents are drafted in a clear explanatory style, using the terminology of the draft normative act that it presents. (2) The motivation has to refer to the final form of the draft normative act; if certain changes were made to the project as a result of the proposals and remarks received from the endorsement bodies, the initial motivation should be duly reconsidered".*

As it can be noticed in regard to the normative acts, the law provides for the obligation to motivate such by recitals, substantiation notes and approval papers, explaining in each case what it should comprise.

The situation differs for individual administrative acts, where there is no general obligation to motivate such. Although we do not have (yet) a generally valid provision regarding the obligation to motivate individual administrative acts, there are still legal provisions to that effect. For example, Government Ordinance no. 27/2002 regulating the petitions settlement activity expressly states the obligation to indicate in the reply sent to the petitioner the legal basis of the adopted solution, and Law no. 544/2001 on free access to information of public interest provides that the refusal to communicate the requested information is motivated and communicated to the petitioner.

The late Professor Antonie Iorgovan[21] estimated that " *If, prior to the current Constitution of Romania, the motivation was regarded only as a principle of administrative-judicial acts, de lege ferenda, proposing to extend this principle to all administrative acts, it is*

[19] Dana Apostol Tofan**,** *Administrative Law*, vol. II, 3rd edition, C.H. Beck Publishing House, Bucharest, 2015, page 21;

[20] Ovidiu Podaru, *Administrative Law. Vol. Administrative Act (I) Landmarks for a Different Theory*, Hamangiu Publishing House, Bucharest, 2010, page 61: " *there may be an "individual" act that has several hundreds of recipients: e.g., the list of candidates declared admitted/rejected at the magistracy admission exam*".

[21] In the Administrative Law Treaty, vol.II, 4th edition, All Beck Publishing House, Bucharest 2005, page 62, quoted by Dana Apostol Tofan in Administrative Law, volume II, 4th edition, C.H Beck Publishing House, Bucharest, 2017, page 41;

now considered that the necessity to motivate any administrative act is implicitly derived from the provisions of the Constitution, at least from the right to information consecrated in art. 31, representing a correlative obligation of the public administration authorities".

On the other hand, even if in the future Administrative Procedure Code an obligation to motivate all administrative acts (as it results from its previous theses, without having any certainty in regard to the final form of the Code) is established, in the doctrine it was estimated for some types of administrative acts (e.g. diplomas) that "the futility of motivation is obvious".22 Considering that the obligation to motivate administrative acts is a guarantee of good governance, of protecting the recipients of acts against an abuse by the authorities, as well as a guarantee the observance of citizens' right to information, it is unlikely that they will deem illegal a favourable administrative act. As a rule, invoking the lack of motivation or inadequate motivation of an individual administrative act occurs when its content is not favourable to the addressee, e.g. it establishes a payment obligation the amount of which is not defined or creates a refusal of the authority to perform a certain transaction etc.

Although there is no expressly established motivation obligation for individual administrative acts, in many cases " authorities resort to the substantiation of the administrative acts and we support such a procedure, as this is how the legality reasons of an administrative act is substantiated and this is relevant, especially in case of challenging the legality of the administrative act."23

On the other hand, there are often encountered situations when the motivation of the individual administrative act is limited to mentioning the legal grounds, omitting the de facto motivation, which is actually the one of genuine interest for the recipient of that act, a guarantee of the transparency and good faith of the issuing authority. This practice is questionable, as it often leads to the challenging of court acts24.

A category of individual administrative acts that are always motivated by law, are the protocols for the finding and sanctioning of contraventions. Government Ordinance no. 2/2001 on the legal regime of contraventions25 provides in art. 16 para. (1) the elements to be comprised in the contravention protocol " The protocol of finding the contravention shall include: the date and place where it is concluded; the surname, forename, capacity and institution of which the investigating agent is a party; the surname, forename, domicile and personal number of the offender, description of the contravention deed, indicating the date, time and place where it was committed, as well as showing the circumstances that may serve to assess the seriousness of the offense and to evaluate possible damage; indication of the normative act establishing and sanctioning the contravention; indication of the insurance company, if the deed resulted in the occurrence of a traffic accident; the possibility to pay, within 15 days as of the date of handing over or serving the protocol, half of the minimum fine provided by the normative act; the time limit for the appeal and the court to which the complaint is lodged". In art. 17 paragraph (1) is also expressly provided the sanction of absolute nullity for the absence of the following elements: "notes on the surname and forename of the finding agent, the surname and forename of the offender, the personal number for persons who have assigned such a code and, in case of the legal entity, the absence of its name and registered office, the committed deed and the date of its committal or the signature of the assessing agent". Thus, it can be noticed that the law-maker, by establishing the mandatory references to be included in the minutes, aimed at motivating the individual administrative act. In fact, it is the right solution, as long as, through a contravention protocol, a fine is imposed on the offender, including some complementary measures.

Another example is that of the provisions of art. 5 para. (1) from Emergency Ordinance of the Government no. 33 / 2007 on the organization and functioning of the Romanian Energy Regulatory Authority26, according to which the authority issues orders and decisions in the regulatory activity and which mainly refers to: a) granting/modifying/suspending/refusing or withdrawing licenses or authorizations; b) approval of the regulated prices and tariffs and/or their calculation methodologies; c) approval of technical and commercial regulations for the safe and efficient operation of the electric, thermal and natural gas industry; d) approving/endorsing the documents elaborated by the economic operators regulated according to the effective legal provisions. Although the legal nature of the said administrative acts is not only normative, para. (2) of the same article implements the motivation obligation for all these acts "The orders and decisions provided for in para. (1) lit. a)-d), accompanied by the motivation tools, drawn up in compliance with the effective legal provisions".

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[22] Ovidiu Podaru, op.cit., page 149;

[23] Verginia Vedinaș, op.cit., page 341;

[24] Decision no. 4316/30 November 2006, delivered in File no. 21214/2/2005, having as a subject matter the annulment of an individual administrative act, the HCCJ held that both the legal and factual reasons are necessary, regardless of whether the law expresses this obligation or not, being given as an argument, *inter alia*, the existence of the right fundamental to the information provided by Article 31 of the Constitution (see Alexandru-Sorin Ciobanu, Administrative Law, Public Administration Activity, Public Domain, Universul Juridic Publishing House, Bucharest 2015, page 65);

[25] Published in the Official Journal of Romania, Part I, no. 410 from 25 July 2001;

[26] Published in the Official Journal of Romania, Part I, no. 337/18 May 2007, approved with amendments and supplementations by Law no. 160/2012, published in the Official Journal of Romania, Part I, no. 685/ 3 October 2012;

Another example of individual administrative acts for which the law provides for the motivation obligation thereof are the administrative-tax acts. Thus, art. 43 of the Tax Procedure Code provides that " The tax administrative act contains the following elements: a) the name of the issuing tax body; (b) the date on which it was issued and the date as of which it is effective; c) the identification data of the taxpayer or of the person authorized by the taxpayer, as the case may be; d) the object of the tax administrative act; e) the factual reasons; f) the legal basis; g) the name and signature of the authorized persons of the tax body, according to the law; h) the stamp of the issuing tax body; i) the possibility to be challenged, the deadline for filing the appeal and the tax body where the challenge is submitted;

Last but not least should be mentioned the special case of the administrative-judicial act, which is defined by Law no. 554/2004 to art. 2 (1) (d), as " the legal act issued by an administrative authority with jurisdictional powers in the settlement of a conflict, following a procedure based on a contradiction principle and the assurance of the rights of defence". By acting similarly to a court, administrative jurisdictions must motivate the acts they issue. This is the case, for example, of acts issued by the Court of Accounts of Romania, following the resolution of challenges against decisions by which the audit institution ordered measures. Thus, according to item 223 from the Regulation on the organization and carrying out of specific activities of the Court of Accounts, as well as the capitalization of acts resulting from these activities27, " Conclusions issued by boards of appeal, drafted by the secretary of the meeting, have to be mandatorily motivated and the motivation should comprise the following: a) factual reasons, namely: (i) the submission of arguments and reasoning of appeals to fully or partially admit the appeal or to reject such; (ii) the reproduction of each challenged measure and of the evidence/documents on which the measure was based; (iii) the reasons for the appeal made by the head of the verified entity; (iv) the documents submitted by him/her to support the appeal; (v) the reasons due to which the documents submitted by the head of the verified entity were accepted or, on the contrary, were not considered by the board, as such were not relevant; b) the legal reasons - specification of the legal provisions considered by the board of appeal and on which the given solution is based, in the sense of full or partial admission of the appeal or its rejection;(...)".

2.2.3. Penalties for non-compliance with the motivation obligation

In regard to normative acts (laws, ordinances), if the motivation obligation is breached, the Constitutional Court may be notified, both before the promulgation of the act or subsequently, by the exceptions of unconstitutionality raised before the courts of law or arbitration courts.

Although the Constitution of Romania does not provide such an obligation - to motivate the normative acts, I do however appreciate that it is circumscribed to the principles of predictability and clarity of the legal norm, principles resulting from the principle of mandatory observance of the laws, consecrated in Article 1 paragraph 5 of the Constitution.

Obviously, in order to enable the observance by its recipients, normative acts have to meet certain requirements of clarity and predictability so that these recipients should be able to properly adapt their conduct. Recipients of normative acts generally have different levels of culture and obviously different capacities to understand the content of the concerned act. No one can invoke the ignorance of the law, as long as it has been made public, as the Constitutional Court has held in its practice, in a "*natural, in a style and with the means appropriate to the recipients*".[28]

Without insisting too much upon the methods of exercising the constitutionality control of laws before promulgation (*a priori* constitutionality control), it is governed by the provisions of the first sentence of Article 146 lit. (a) thesis one from the Constitution and Articles 15-18 from Law no. 47/1992 on the organization and functioning of the Constitutional Court and is an abstract and direct control, exerted only further to the notification of qualified authors (the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the Ombudsman, at least 50 MPs or at least 25 senators).

On the other hand, the *a posteriori* constitutionality control is regulated by Article 146 lit. (d) from the Constitution and by Articles 29-33 from Law no. 47/1992. At this type of control, the Court decides both on exceptions of unconstitutionality regarding laws and ordinances or a provision of an effective law or ordinance, before a court of law or commercial arbitration court and on exceptions of unconstitutionality raised directly by the Ombudsman. The exception of unconstitutionality may be lifted: by the parties to a dispute, *ex officio* by the court of law or commercial arbitration court; by the prosecutor, before the court of law, in the cases in which he/she participates, directly by the Ombudsman.

In regard to the other normative acts issued by the public authorities, they can be challenged at the administrative contentious court, at any time, considering the provisions of art. 11 para. (4) from Law no. 554/2004[29]. In regard to the deadline for challenging administrative acts of a normative nature, an interesting solution was ruled by the Constitutional Court. Being notified for an exception of

[27] Approved by the Decision of the Plenum of the Court of Accounts no. 155 / 2014, published in the Official Journal of Romania Part I, no. July 547/24 2014;

[28] G.C.Mihai, R.I.Motica, Fundaments of Law. Theory and Philosophy of Law, All Publishing House, Bucharest, 1997, p.144;

[29] Orders or provisions of ordinances that are deemed to be unconstitutional, as well as administrative acts that are considered illegal may be subject to appeal at any time;

unconstitutionality of the provisions from Art. 5 para. (7) EOG no. 33/2007 on the organization and functioning of ANRE according to which "*Orders and decisions issued by the president when exerting his/her duties may be challenged in administrative contentious with the Bucharest Court of Appeal, within 30 days as of the date of their publication in the Official Journal of Romania, Part I, i.e. as of the date on which the interested parties were notified*". By Decision no. 136/08 May 2015, the Constitutional Court noted that " *the above text, which is the subject matter of the unconstitutionality objection, does not distinguish between administrative acts of an individual or normative nature, both categories of acts being subject to the same 30-day limitation period in order to be challenged through administrative dispute. The Court finds that if administrative appeals of individual nature issued by the President of the Romanian Energy Regulatory Authority have not been challenged within this time limit, they may be challenged incidentally, without a time limit, through the illegality objection, as provided by the general law on administrative contentious. On the other hand, administrative acts of a normative nature will be spared of the judicial control, since after the expiration of the 30-day term, no direct action may be taken any longer against them, as by virtue of the "specialia generalibus derogant"-principle, the provisions of the general law may not be applied, if there is a special law expressly stipulating a certain term. Also, as has been shown, this type of act cannot be the subject of an illegality exception, as such is a method of specific challenge of individual administrative acts. As a consequence, orders and decisions issued by the President of the Romanian Energy Regulatory Authority, unilateral administrative acts of normative nature would benefit from the absolute presumption of legality after 30 days as of publication, if in that period no economic operator submits with the Bucharest Court of Appeal an administrative dispute in order to verify their legality in the main action for annulment."* In considering this reasoning, the Constitutional Court admitted the exception of unconstitutionality and established that*" the provisions of art. 5 par. (7) of Emergency Ordinance of the Government no. 33/2007 on the organization and functioning of the Romanian Energy Regulatory Authority, which establishes a deadline to challenge in administrative contentious the administrative normative acts issued by the President of the Romanian Energy Regulatory Authority when exerting his/her attributions, are unconstitutional".*

In regard to individual administrative acts, it is obvious that they can be revoked by the issuer in order to avoid a possible action in court, but it is difficult to assume that once an act is issued, which the issuer considers motivated, it would revoke such. Thus, in most cases, the administrative contentious court is the one deciding whether an individual administrative act is motivated or not. If the lack of motivation is so obvious, the court may even order the suspension of the enforcement of the administrative act (if such a measure was requested), pending the outcome of the action on the merits, or until the final settlement of the case[30]. The High Court of Cassation and Justice stated that " *in order to outline the well-grounded case requiring the suspension of an administrative act, the court should not proceed to analyze the illegality criticisms on which the application for annulment of the administrative act itself is based, but must limit its verification only to those de facto and/or de jure circumstances having the capacity to give rise to a serious doubt on the presumption of legality enjoyed by an administrative act. Such de facto and/or de jure circumstances which are likely to give rise to serious doubts in regard to the legality of an administrative act have been noted by the High Court as: the issuance of an administrative act by an incompetent body or by overriding its jurisdiction, the administrative act issued under legal provisions declared unconstitutional, the failure to motivate the administrative act, the important modification of the administrative act in the administrative appeal.*"[31]

In case of actions for annulment, I appreciate that the solution of the contentious court has a strong subjective side. Thus, it is up to the judge to assess the lack of motivation for an administrative act. Here we include those situations where, even if the act is not very detailed, however, by reference to the capacity of the addressee, the judge may estimate that he/she has the necessary capacity to understand the argumentation underpinning the issuance thereof. It is the professionals who carry out the activity in a certain field and who are obliged to know the entire legislation regulating the concerned field. Thus, in one case, the Bucharest Court of Appeal upheld the applicant's action by partially annulling the Order (…) issued by ANRE regarding the approval of distribution tariffs, an individual administrative act, and noted that " *the defendant authority, in the exercise of its attributions provided by law for such purpose, infringed the plaintiff's legitimate rights by exerting such by abuse of power through the approval of those tariffs without showing transparently the reasons determining such conclusion by depriving the beneficiary of the issued administrative act, the guarantees provided by law to request a genuine verification of this order*"[32]. n the appeal of the respondent authority, the HCCC admitted its appeal, holding in essence that "*Contrary to the court of first instance, the High Court considers that the issued order is motivated, and such relies both upon the report for the approval of the tariffs, and the method of recognizing the investments approved for the period*

[30] Under the provisions of Art. 14 and 15 of Law no. 554/2004 of the administrative contentious, published in the Official Journal of Romania, Part I, no. 1154 of 7 December 2004

[31] Decision no. 442 of the High Court of Cassation and Justice from 30 January 2013;

[32] Civil Judgement no. 3108/23 November 2015;

2014-2018 was presented in the appendix to the approval report"[33]. The High Court also notes in the same decision that " *The respondent-defendant explained in detail why it cannot recognize these costs by reference to the provisions of Art. 58 of the Methodology (...) stating that ANRE may reject those costs that are not prudent (...). It is true that the motivation of the administrative act is a guarantee against the arbitrariness of the public administration, but the standards regarding the extent and the detail of the motivation depend upon the nature of the act and the circumstances of the case, the purpose of motivation being to avoid abuses of the administration by transparently indicating the mechanism of issuing or adopting the administrative decision, to enable recipients to know and evaluate the grounds and effects of the decision and to enable the effective exercise of the legality control*."

A legal institution that has been increasingly used lately is the illegality exception[34], especially in cases where the person interested in challenging the act exceeded the time limit for submitting an action for annulment. Contrary to the action for annulment, the plea of illegality is only a means of defence and, if the court before which it was invoked assesses that the act is unlawful, it cannot annul such, but only solves the case without having regard thereto. Thus, if the plea of illegality is admitted, this solution produces legal effects only in the case in which it was invoked. Most of the time, however, in motivating the objection of illegality, there is a lack of clarity and predictability of the individual administrative act, which, in reality, equates to a lack of motivation.

3. Conclusions

The institution of motivating the administrative acts in aggregate will certainly be subject to many discussions and there will still be pros and cons, some going to the extreme. It is a certain fact that the ordinary citizen is entitled to be informed about the reasons why the public authority has set an obligation in his/her charge or has ordered any measure. It is true that no one can invoke the ignorance of the law, but in a democratic society and a rule of law, the role of the public authorities must be, first of all, to protect citizens, even against their own possible abuses. So much the more so since, due to cultural or educational reasons, the recipients of administrative acts (especially individual ones) do not know that they are entitled to certain legal challenging methods within certain terms that they have to observe.

Concurrently with the implementation of the obligation to motivate also the individual administrative acts, I believe that the relationship between the authorities and the citizens, in their capacity as recipients of administrative acts, could be improved. It is true that, as the doctrine provided (and I mentioned so in the paper), it is preferable not to reach the extreme situation in which any administrative act (including diplomas, certificates, qualification certificates etc.) has to be motivated, but at least those having a negative effect on the citizen. In fact, the solution would also be preferable from the point of view of burdening administrative contentions courts, which would be relieved of the multitude of cases in which the lack of motivation is invoked as the main reason for the nullity of an administrative act.

It remains to be seen whether the future Administrative Code, but especially the Administrative Procedure Code will clarify this concept that is so much debated, but that is also necessary, i.e. the motivation of administrative acts in their aggregate.

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[33] Decision of HCCJ no. 2791/18 June 2018;

[34] Art. 4 from Law no. 554/2004 provides that "*(1) The lawfulness of an administrative act of an individual nature, irrespective of the date of its issue, may be investigated at any time in a lawsuit, by way of exception, ex officio or at the request of the interested party. (2) The court which has the substance of the dispute before relying on the plea of illegality by finding that that the administrative act of individual character depends on the substance of the dispute, it is competent to rule on the exception, either by an interlocutory order or by the judgment it will rule. If the court decides on the plea of illegality by way of interlocutory order, it may be challenged with the merits of the case. (3) If the unlawfulness of the administrative act of an individual nature has been found, the court before which the objection of illegality to settle the case, without taking account of the act whose illegality was found*"

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