GENERAL CONSIDERATIONS ON THE ADMINISTRATIVE ACT (Part II)

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Summary
The administrative act represents one of the forms through which the public authority accomplishes its mission, being the most important of these from a legal point of view. The Administrative Code introduces new concepts and regulates the administrative activity that represents all individual and normative administrative acts, administrative contracts, real acts and administrative operations performed by public authorities in public power, thus making it possible to organize law enforcement and direct law enforcement.

Keywords: administrative act, public power, individual, normative, contract.

Introduction. The analysis of the administrative act is necessary, in the conditions of the modifications operated in this domain and its codification. In the first part of this study „General considerations. Part I”, the administrative act was defined, the categories of administrative acts were identified, being considered necessary to establish the characteristics and content of the administrative act. In the following, we aim to analyze the other characteristics of the administrative act, as well as to highlight the basic features of the administrative contract, as a separate category within the administrative acts.

Purpose of the study. It follows from the need to identify and analyze the characteristics of the administrative act, to establish the content and the scope of the administrative contract.

Materials used and methods applied. The methodology of scientific research is focused on studying the doctrine, the legislation in force, as well as the previous regulations in the field of administrative act. The following methods served as methods of scientific research: systematic, logical, comparative, as well as analysis and synthesis.

Results obtained and discussions. As mentioned in the first part of the study, the characteristic features of the administrative act, based on the regulations of the Administrative Code, but also analyzing the literature in the field, are the following:

a) the administrative act is the main legal form of activity of the public administration;
b) the administrative act represents a manifestation of express will, with external effect, unilateral and subject to a regime of public power;
c) the regime of public power does not exclude the exercise of a control of legality by the courts;
d) the administrative act produces legal effects, which may consist in giving rise to, modifying or extinguishing rights and obligations [7, p.116].

The administrative act represents a manifestation of express will, with external effect, unilateral and subject to a regime of public power. An administrative act represents the expression of the express will of the public authorities, or, it cannot include a request, a finding, an opinion or the expression of a feeling, but only a will. The express character of the
manifestation of will is determined by the regime of public power in which the administrative acts are issued. The legal will is expressly and unequivocally expressed in order to bring about a change in the existing legal reality [2, p. 9]. The unilateral character represents that quality of the administrative act according to which it is issued without the participation or consent of the subjects of law for which it is intended or regarding which it generates rights and obligations. Situations in which administrative acts issued with the participation of several persons (collegiate structures) or those in the issuance of which several legal persons participate, generally two or more administrative authorities or administrative authorities and other non-state structures, raise the issue of unilateral character of the manifestation of legal will. However, what gives this character to the administrative act is not the number of people involved in its issuance. The act is unilateral not because it is the work of a single person or of a single body, but because it gives rise to a single legal will. In the case of the collegiate body, the majority required by law for the issuance of the act is only a procedural form necessary for the issuance of the act. We agree with the opinion of the author Ghencea F., who explains that the wills of the subjects participating in the vote are not legal wills, but procedural modalities that compete to express in legal conditions a single legal will that belongs only to the issuing body [6, p. 3].

The Administrative Code, in Article 6, defining the administrative procedure, also identifies a legal character specific to the administrative act, namely - the external effect [5]. A condition for an act to be administrative is that the act aims to create external legal consequences. First, it means that these consequences are the direct result of the measure. For example, a grant or a refusal to grant permission to build a building has direct legal consequences and is therefore an administrative act. But an inspector’s report, on which such a decision is based, is not an administrative act, as it is not aimed at creating and does not, in fact, create immediate legal consequences. Similarly, a direction (in the sense of indication, order) of a higher authority over its subordinate is not in itself an administrative act, although an administrative act can be taken on its basis.

The administrative act must, by its objective content, give rise to rights or obligations in respect of «administrations» (citizens) or persons outside the administrative authority issuing it. This does not apply to service instructions (interiordienstliche Weisungen) concerning the organization and operation of the service. We consider it opportune to highlight the opinion of the author Autexier Ch., who analyzed the German concept of the administrative act, the example of Germany served as basis for the codification of administrative law in the Republic of Moldova. Therefore, the author explains that there will be an external effect of the administrative act, if an internal measure affects a person in office, not as an administrator, but in a personal situation, such as: appointment, transfer, dismissal of a civil servant, admission of a student into a public school or his promotion to a higher grade, the announcement of the result of the examination. At the same time, there is no external effect when an administrative authority gives instructions to another authority of the same administrative institution, nor when an authority of the state (central) administration gives instructions to a municipal (local) authority in the context of delegated tasks [4].

This direction can acquire the character of an administrative act if, instead of being an interdepartmental instruction, it is issued to a subordinate, who is not in his official but personal capacity or if it does not affect the professional operating conditions, but the basic legal relations, such as salary or dismissal.
Moreover, the measure must affect outsiders and should not be a purely internal matter of the departmental administration or organization. Unless the authority intends to give external legal effect to its measure, the aspects of the purely internal department will not turn into an administrative act, even if the measure has certain external implications.

There are also problems with the so-called organizational acts. It was considered that the change of municipal territories, the setting of new prices for the telephone network, as well as the closure of a school in the exercise of administrative organizational power is an administrative measure with external legal effects, while simply transferring an officer from a post or place to another is an internal organizational act that has certain external implications [10, p. 35].

The regime of public power does not exclude the exercise by the courts of a control of legality. In accordance with art. 189 of the Administrative Code «Any person who claims the violation of his right through the administrative activity of a public authority may file an action in administrative litigation» [5]. The courts resolve all actions in administrative litigation, except in cases falling within the jurisdiction of the Courts of Appeal - actions in administrative litigation against administrative acts, which are not subject to constitutional review; Chisinau Court of Appeal - actions in administrative litigation against the decisions of the Superior Council of Magistracy, of the Superior Council of Prosecutors, actions in administrative litigation assigned in its competence by the Electoral Code (art. 191) [5]. At the same time, the Administrative Code (art. 190) expressly indicates on the administrative acts exempted from the judicial control, these being:

a) exclusively political acts of the Parliament, of the President of the Republic of Moldova and of the Government;

b) administrative acts of a diplomatic nature related to the foreign policy of the Republic of Moldova;

c) military command documents [5].

By the Decision of the Superior Council of Magistracy of January 1, 2019, the Chisinau Court gave a specialized status to the courts; the Chisinau court in the Rascani headquarters being specialized in administrative litigation [9].

The motivation of the normative administrative act represents a general obligation of the public authority, applicable to any administrative act, being necessary to ensure the transparency for the recipient of the act. He/she will be able to check whether or not the act is well-founded in his/her opinion and to comply, whether he/she considers it correct, or to sue if he/she considers it harmful. The role of the motivation of the administrative act is, at the same time, that of giving an effective tool in order to achieve judicial control to the contentious administrative court, thus having the possibility to verify the factual and legal conditions that were taken into account by the public institution that issued / adopted the act [1, p. 10].

The administrative act produces legal effects, which may consist in giving rise to, modifying or extinguishing rights and obligations: the administrative act of individual character, as opposed to the normative one, represents a manifestation of will that creates, modifies or extinguishes rights and obligations for the benefit or burden of a particular person.

The law of administrative contentious (repealed) assimilated the administrative contract with the administrative act. French literature distinguishes between the administrative act of authority and the administrative act of management, and the administrative contract is considered an administrative act of management [3, p. 46].
The administrative contract regulated by art. 13 of the Administrative Code, is the contract that can give rise to, modify or extinguish a legal relationship under public law, unless the law provides otherwise [5]. Referring to French literature, the authors Goriuc S. and Crasnobaev A. note the existence of an administrative contract when one of the parties is a public authority, and the contract contains provisions derogating from the common rules of private law - the so-called exorbitant clauses, which have the role of ensuring a superior position of public authority. Such clauses confer on the public authorities a right of control over the performance of the contract; confer prerogatives on these authorities to apply sanctions in case of non-compliance with the contract; admit to the public contracting authority the possibility to unilaterally modify or terminate the contract, when the public interest so requires, while, at the same time, the other party is compensated for the damages suffered, without having any fault (ensuring the economic balance of the contract); establish the distribution of the possible risks between the contract partners so that the public interest is not affected [7, p. 57].

In the opinion of Prof. Prisăcaru Valentin, the «administrative contract» includes two notions that have their own characteristics that distinguish them. Thus, the notion of contract presupposes, inter alia, the equality of the parties in establishing the essential elements of the rights and obligations assumed by each contracting party, while the notion of administrative implies the right of command of that public administration body, from which the act is issued, or participates in its conclusion. Thus, only with much indulgence, we could accept the notion of administrative contract by which we understand that contract, which is concluded by a public administration body with an individual and in which the one, who decides the essential elements of the contract, is the public administration body; the individual, only insofar as it voluntarily adheres to these elements, can conclude the administrative contract, which can be concluded for a variety of aspects of the concrete accomplishment of the tasks and attributions of the public administration ”[12, p.187].

The authors Guceac I. and Balmuş V. consider that the administrative contract represents:

a) a legal instrument by which some public authorities, bodies, institutions within the public administration exercise their attributions provided by law, together with the administrative act;

b) an administrative act with a special legal regime, intended to satisfy a general interest, which differs from other administrative acts in that it is a bilateral administrative legal act:

- which, although characterized by the inequality of the parties, requires their agreement of will or the prescription of a normative act of the public authority at conclusion [8, p.4].

The administrative contract is in written form.

The administrative code expressly regulates the types of administrative contracts, which are:

- the reconciliation contract;
- the exchange contract.

In specialized literature, contracts are classified according to:

a) the legal power of the normative act that provides for the conclusion of the contract: legislative act; normative act of the Government, normative act of the specialized bodies of the central public administration or of other central administrative authorities; normative act of the local public administration authorities, of the public authorities of national interest;

b) the object of the contract: of constitution; for work; public procurement; concession; investment; delegation of competence; delimitation of competence; association (collaboration); fiduciary administration; lease; mortgage;
c) the legal status of the subjects of the contract and their number: between at least two public authorities or public institutions; between public authorities and legal persons under private law; between public authorities and individuals;

d) the territorial principle:
   - internal: contracts, agreements, conventions;
   - international: agreements, conventions, treaties;

e) the way of choosing the parties: competition (auction), request for price offers, direct negotiations;

f) the type of public domain that is contracted: state, local;

g) duration: determined, unspecified [8, p. 9].

The administrative code defines the real acts as the acts regarding the administrative activity of public law that do not aim at a concrete or abstract regulation, but a real result. They are real acts, in particular, information, warnings or recommendations of public authorities and the actions taken by them [5].

Real acts are those acts of administrative authorities, which concern factual results, rather than legal consequences, as in the case of an administrative act. The administration performs numerous and varied types of such acts. They can refer to the internal relations of the administration or to its relations with the citizens. The latter are those taken into account by the administrative law. They are also classified into explanatory documents (Wissenserkliirungen) and documents in the form of «factual» functions (Verrichtungen) [4].

The first category includes acts such as information, warning, reporting, expert opinion, etc., while the second category includes money payment documents, official vehicle travel, road cleaning, construction of an administrative building, transmission of instructions, construction and maintenance of transport routes, etc.

This classification, however, has no legal significance. The distinction between private and public acts is of legal importance. Administrative law refers to the latter acts and they are those acts of the administration that fall within the field of public law or implement the functions assigned to public law.

Since real acts do not aim at legal result, they have much less legal interest. But that doesn't mean they don't make sense or are irrelevant. The legality requirement is equally applicable to other activities of the administration, and they must be in accordance with the law and, insofar as they interfere with a person's rights, they must also be based on certain laws.

The administrative authority is obliged to annul or eliminate the facts created by a real illegal act and to restore the status quo ante as far as possible and reasonable.

The citizen, whose rights have been violated by a real illegal act, has the right to remove the facts of such an act and to restore his original position by bringing an action (allgemeine Leistungsklage) in an appropriate administrative court. In addition, he may also seek compensation for any damage caused to him by a real illegal act [10, p. 35].

The lack of consistency in the elaboration of normative acts is permanently reflected on the practitioner, who, lacking the legal means necessary to establish an administrative practice, based on the above mentioned principles, will not be able to evolve in his profession. [13, p. 32]

To the extent that the provisions of the Administrative Code do not contain mandatory regulations, the provisions on individual administrative acts shall apply accordingly to the real acts, unless this is excluded on the basis of the differences between the individual administrative act and the real act [5].
Returning to the classification of administrative acts into: administrative act of management and administrative act of authority, Prof. Mircea Preda explains the criteria by which these two types of acts differ, so that the administrative act of authority is unilateral, being issued by an administrative body, while the administrative act of management is a bilateral act, concluded between two parties by their free will;

- the administrative acts of management include rights and obligations for both parties in opposition to the acts of authority of the administration that give rise to, modify or extinguish a legal relationship or establish or modify rights for individuals;

- the criminal clause and the compensations provided in the administrative acts of management determine their execution, while the execution of the administrative acts of authority is ensured with the help of the legal sanctions provided by law;

- administrative acts of authority may be amended or revoked unilaterally, while administrative acts of management are amended or revoked under the conditions established by the parties, requiring, in principle, their consent [11, p. 196-197].

The distinction between an administrative and a civil contract depends on the object of the contract. An administrative contract establishes, modifies or revokes a legal relationship in the field of public law. While a private contract does the same in the field of private law. Consequently, if a legal relationship established, amended or revoked by a contract can be attributed to public law, it is an administrative or public contract. Being an act of public law, the normative administrative act has a legal force superior to the acts specific of private law, a characteristic that stands out through the feature of ex officio act.

In the opinion of the authors I. Guceac, V. Balmuş, the essential distinction between administrative contracts and civil contracts lies, in particular, in the privileged position of public authorities in the case of the first type of contacts and in the equal conditions of any natural or legal person in case of the second type of contract. At the same time, both types of contracts are concluded on the basis of an agreement of will, generator of rights and obligations for the contracting parties [8, p. 4].

Article 5 of the administrative code of the Republic of Moldova defines the administrative activity and differentiates between the individual and normative act and the administrative contract, the real acts and the administrative operations. The assimilation of the administrative act with the administrative contract is no longer present, as was expressly indicated in the Law on Administrative Litigation (repealed), so that room for interpretation is left regarding the legal nature of the administrative contract, whether or not it is an administrative legal act in the full sense of this term or remains to be qualified as a legal act of public, special law.

**Conclusion.** Administrative acts, in the wording of the new Administrative Code, represent the main legal instrument for carrying out administrative activity and represent a current research topic due to the innovations introduced and the fact that the application by public authorities of legal provisions related to the administrative act will allow further evaluation of practice in the field, identification of gaps and interpretation of terms used by issuing public authorities.

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