THE RIGHT TO GOOD ADMINISTRATION. A SPECIAL VIEW ON THE ADMINISTRATION'S OBLIGATION TO PROVIDE REASONS FOR ITS DECISIONS

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ABSTRACT

In 2009, through the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union became legally binding, being given a legal value equal to that of the E.U. Treaties, and the Union recognized the rights, freedoms and the principles laid down therein. It is the administration's responsibility to substantiate its decisions, as provided for in art. 41 of the said Charter and, in the E.U. legal order, it is considered one of the foremost imperative prerequisites of legitimacy of the administrative act. In Romania, art.148 of the Constitution expressly states that as a result of joining the European Union, the provisions of the E.U. constituent treaties, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. As a result, as mandated by the Charter, the motivation is emphasized. The present study refers to the motivation of the administrative acts as a prerequisite for an effective right to a good administration, as highlighted by the doctrine and the case-law of the Romanian courts.

KEYWORDS: *Charter of Fundamental Rights of the European Union, good administration, impartiality, judicial practice, motivation.*

1. INTRODUCTION

Just as we have stated with other occasions (Titirișcă, 2018), in 2009, through the Treaty of Lisbon, ratified by Romania by Law no. 13/2008 and published in the Official Gazette of Romania, Part I, no.107 of 12 February 2008, the Charter of Fundamental Rights of the European Union (hereinafter "the E.U. Charter") became legally binding, being given a legal value equal to that of the E.U. Treaties, and the Union recognized the rights, freedoms and the principles laid down therein. Thus, art. 6 par. (1) of the Treaty on European Union, the consolidated version of which was published in the Official Journal of the European Union series C no. 202 of the 7 June 2016, provides that the Union recognizes the rights, freedoms and principles enshrined in the E.U. Charter , which will have the same legal force as the Treaties; the provisions of the E.U. Charter shall not in any way extend the Union's competences as defined in the Treaties; the E.U. Charter's rights, freedoms and principles are to be interpreted in accordance with the general provisions in Title VII of the E.U. Charter governing their interpretation and application as well as with due regard for the explanations referred to in the E.U. Charter, which set out the sources of those provisions.

The text of the E.U. Charter was signed on December 7th, 2000, in Nice, as a reaffirmation of the conviction of the signatories that respect for human rights and fundamental values is the essential rule on which the cooperation of the European states is based upon, but, until 2009, it has functioned at a declarative level, even though the Court of Justice of the European Union (CJEU) has used it as a source of interpretation (CJEU, Judgment of 23 October 2003, par. 38; CJEU, Judgment of 12 May

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2005, par. 118; CJEU, Judgment of 27 June 2006, par. 38). In fact, the special significance of this document, but also the contents of its provisions have led, even since that time, for some specialists to see in its adoption a step towards the drawing up of the E.U. Constitution (Duculescu, 2001).
The E.U. Charter is a legally binding instrument that the European citizen can prevail over any European court (Titirişcă, 2015). The E.U. Charter is a „veritable catalogue of rights that all European citizens should benefit from before all EU institutions and before Member States when the latter enforce EU legislation" (Tănăsescu, 2010). It is established on the constitutional traditions shared by all Member States, as well as on The European Convention on Human Rights, but remains the European Union's own creation, which also includes certain rights explicitly stated for the first time in the latter, such as: the social rights of workers, data protection, bio-ethics and, not in the least, the right to good administration. Thus, article 41 of the E.U. Charter, establishes the right of every individual to an impartial, fair and within a reasonable time frame treatment of one's affairs by the E.U.'s institutions, bodies, offices and agencies. This includes the right to be heard, the right to have access to one's file and "the obligation of the administration to give reasons for its decisions". The first two are not unconditional, but subsumed to the possibility of an adverse individual measure to be taken and to the observance of the confidentiality, as well as professional and commercial secrecy. Also, if European institutions or servants, while performing their duties damage the interests of an individual, this person has the right to a compensation for the damage, as provided for by the legislation of the Member States. Last, but not least, in the correspondence between a petitioner and the Union's institution, the same language must be used, this obviously being one of the Treaties' languages.
At European level, the concept of good administration has been established and developed through the E.U. Court of Justice's recognition and application of the Member States' general principles of law , when and if the European Union legislation had insufficient legal regulations to address specific causes concerning the European public administration. Given the fact that the jurisprudence of the Luxembourg Courtregarding the compatibility of actions of the Member States of the European Union to the fundamental rights, is consistent in upholding the human rights as principles of the European law, the doctrine argues that the fundamental rights covered by the E.U. Charter are directly applicable within national law (Craig and de Búrca, 2009). Therefore, the right to good administration is also directly applicable within national law. The binding character of the E.U. Charter stresses out, once again, that the right under scrutiny has become one of the fundamental rights of E.U. citizens (Duţu and Duţu, 2010).
Another important legal instrument of the European Union concerning the right to good administration is the European Code of Good Administrative Behaviour, developed by the European Ombudsman and approved by resolution of the European Parliament on September 6th, 2001. It lays down general principles of good administration (lawfulness, non-discrimination and equal treatment, proportionality, consistency), guidelines for good administrative behaviour (objectivity and impartiality, the request for information regarding administrative proceedings), elements of transparency (hearing all parties directly concerned, the obligation to state reasons for decisions, the obligation to indicate the legal recourses). From a procedural standpoint, the European Code of Good Administrative Behaviour enshrines provisions on the timeframe when the author of a request or complaint should be informed about the receiving of his/her message, on the duty to pass on the correspondence to the relevant department to solve it, on the responsibility for the citizen to be heard and to have his/her observations examined when the administrative decision determines the consequences affecting his/her rights or legitimate interests and the obligation to give reasons for the decisions which affect the rights or the legal interests of a natural or a private legal person and to specify the legal recourses for an appeal.
While other research on the subject concentrate mainly on a legislative point of view for the motivation of an act which is administrative in nature (Zăgărin, 2018), the present paper focuses on

a more practical approach, namely from the standpoint of Romanian and European courts, which is presented in the following part.

2. THE STATEMENT OF REASONS OF THE DECISIONS OF THE ADMINISTRATION. ELEMENTS OF JUDICIAL PRACTICE

What interests us for the purpose of this study is the duty of the administration to give reasons for its decisions, as a part of the right to good administration. At the outset, it should be stressed out that most of the Romanian administrative doctrine, as well as the case-law of the common courts recognize the principle of motivation of the decisions of the administration as a principle of administrative law (Anghene, 1972 apud Marinică, 2011).

As early as 2012, the Bucharest Court of Appeal held that the reasons for an administrative decision cannot be limited to considerations relating to the competence of the issuer or its legal basis, but must also contain factual elements enabling, on the one hand, the addressees to know and to assess the grounds for the decision and, on the other hand, to make possible the exercise of legality control (the Bucharest Court of Appeal – the VIIIth Administrative and Tax Litigations Chamber, Decision no.2973 of September 10th, 2012).

In recent years, the judicial practice (the Iași Tribunal – the IInd Civil, Administrative and Tax Litigations Chamber, Sentence no.56 of February 2nd, 2016), whose reasons we shall present, in part, from hereon, stressed out, as a principle, that, on the need to state the reasons in fact and in law, to an sufficient extent so as to enable, subsequently, the unrestrained exercise of the judicial review by the courts, ruled the High Court of Cassation and Justice (HCCJ – the Administrative and Tax Litigations Chamber, Decision no.1580 of April 11th, 2008), pointing out that the discretionary power granted to an authority cannot be viewed, under the rule of law, as an absolute and unlimited power, since the exercise of the right of discretion by violating the fundamental rights and freedoms of the citizens, provided for by the Constitution or by law, constitutes an excess of power, in the context in which the Constitution of Romania provides, in article 31 paragraph (2), the responsibility of the authorities to offer accurate information to the people in public activities as well as matters of private interest.

As a result, any decision having effects on fundamental rights and freedoms must be motivated, not only from the point of view of the power to issue that act, but also from the perspective of the individual and society's ability to assess the legality of the measure, the boundaries between discretionary power and arbitrariness, because accepting the thesis that the authority' decisions should not be motivated is equivalent to depriving the democracy and the rule of law of their core, since they are founded on the principle of legality. In other words, given that the authorities are bound to ensure that citizens are properly informed about their personal interests and, given that the decisions of these authorities are subject to judicial review by means of administrative litigation, it cannot be upheld that the absence of an explicit statement of reasons for the contested administrative act is acceptable. Without the explicit motivation of the administrative act, the possibility to challenge before the court the act in question is unreal, since the judge cannot speculate on the reasons which led the administrative authority to take a certain measure and the lack of this motivation favours the issuing of abusive administrative acts, whereas the absence of this motivation leads to the lacking of any efficiency of the judicial control of the administrative acts. Therefore, the statement of reasons is a general requirement, applicable to any administrative act, representing a condition for the external lawfulness of the act, subject to an assessment in concreto, according to its nature and the context of its adoption, while its goal is to present in a clear and unequivocal manner the institution's arguments for issuing the act.

The statement of reasons thus aims at a twofold purpose: primarily fulfilling a function regarding the transparency for the benefit of the recipient of the act, which can thus check whether or not the act is well founded, and, secondly, it also allows the court to achieve its jurisdictional control, so as to

eventually, allow the reconstitution of the motivation made by the issuer of the act in order to reach its adoption. Of course, it must appear in the act itself and be made by its author.
Thus, the statement of reasons involves making clear the facts and the law which make it possible to understand and to assess the legality of the act, while the importance of that requirement depends considerably on the nature of the act, the legal context in which it occurs and the interest which the addressee of the act might have in receiving these explanations. Therefore, the motivation should enable the judge to review the facts and the law which served as a basis for the exercise of the discretionary power and, as such, it must be carried out in a sufficiently detailed manner, indicating, in particular, the reasons why the issuing authority has established the issuing of the act. In other words, the motivation should have been effective, respectively complete, precise and circumstantial. Indeed, the European case-law recognizes that the statement of reasons has to be suitable to the issued act and has to present, in a clear and unequivocal manner, the algorithm which allowed the institution to adopt the contested measure, in order for the persons concerned to be able to establish the reasons for the measures and to also grant the competent European courts the possibility to carry out the review of the act (CJEU, Decision of the Court of 2 April 1998). Just as the Court of Justice of the European Union has decided, the extent and the detail of the statement of reasons depend on the nature of the adopted act, and the prerequisites for the statement of reasons vary depending on the merits of each case, an insufficient or wrong reasoning being considered to be equivalent to a lack of motivation of documents; moreover, insufficient motivation or lack of motivation leads to the annulment or invalidity of the European acts (CJEU, Decision of 15 July 1970). A detailed explanation of the reasons is also necessary where the issuing institution enjoys a wide discretionary power, since the statement of reasons gives transparency to the act, while the individuals are able to verify whether the act is properly substantiated and, at the same time, it allows the courts to exercise the judicial review (CJEU, Decision of 8 November 2000).
Also according to the case-law of our supreme court, it was stated, also, by several judgements, that the duty of the issuing authority to motivate the administrative act constitutes a guarantee against arbitrariness and is particularly necessary in the case of acts abolishing individual rights or legal situations, such as the one in which an individual administrative act refers to a situation stated generically, as required by art. 31 par. (2) of the Constitution, in the sense that it does not ensure correct information on the analysed issue of personal interest (HCCJ, Decision no.2732/2008).
From the perspective of a court (HCCJ – the Administrative and Tax Litigations Chamber, Decision no.1153 of 19 March 2008), motivation is decisive to make the demarcation between the administrative act adopted within the discretionary power conferred by law and the one adopted by abuse of power, as that term is defined in art. 2 para. (1) letter n) of the Law on the administrative contentious no. 554/2004, published in the Official Gazette of Romania, Part I, no.1154 of 7 December 2004, as subsequently amended and supplemented, respectively defined as the exercising of the discretionary powers of the public authorities by violating the limits of the jurisdiction prescribed by law or by violating the rights and freedoms of the citizens. Thus, the statement of reasons of the administrative act is meant to avoid the acquirement by the authority of a discretionary power, as well as to ensure the exercise, by the subject of law, which is addressed, of the right to defence and the right to a fair trial, regulated by art. 6 of the European Convention on Human Rights, a condition whose disregard leads to the annulment of the act (HCCJ, Decision no.1384/2008). Continuing the matters shown above regarding the right to a fair trial of the person to whom the administrative act is addressed, the court also pointed out that, in the case-law of the Strasbourg Court, the fundamental principle of the pre-eminence of the right is constantly emphasized, as early as the Sunday Times judgment of April 26, 1979, in the context in which it is unanimously accepted that "every person" is a beneficiary of the guarantees on which art. 6 of the Convention stipulates (ECHR, Decision of 26 April 1979).
Therefore, the absence of a statement of reasons for the administrative act constitutes a violation of the principle of ensuring that all persons are properly informed of problems of their own personal

interest as well as of public affairs. A contrary conclusion would also be likely to defeat the provisions of art. 41 of the E.U. Charter, which enshrines the "right to good administration". Obviously, this cannot be accepted. Moreover, this would be misconstruing the principle of "equality of arms", which entails for "each party to such a process […] to receive a reasonable opportunity to submit its case to the court, under such conditions as to not significantly disadvantage this party against the opposite side" (ECHR, Decision of 27 October 1993, ECHR, Decision of 29 May 1997), but also the one of the presumption of innocence, as the duty to respect the presumption of innocence rests not only with the judge but with all state authorities (ECHR, Decision of 10 February 1995, ECHR, Decision of 10 October 2000).

3. CONCLUSIONS

The inadequate, incomplete or vitiated statement of reasons may result in their suspension or even their annulment by the courts of law. Therefore, given that "the lack of motivation constitutes a defect of formality (relative nullity), and if the reasons are illegal, the act will be considered null on the merits (nullity of substance, absolute)", we affiliate ourselves with the opinion expressed by the doctrine (Drăganu, 1959 apud Marinică, 2011), that the motivation of administrative acts is in fact an improvement in the quality of the said administrative act, which seeks, on the one hand, to protect the rights of the citizens and, on the other hand, to reduce the disputes brought before administrative courts.

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