

Public Interest – Essential Concept of Administrative Law

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ABSTRACT: One of the greatest challenges of the public administration is undoubtedly to adopt adequate measures for the population in order to carry out the work of enforcing laws and providing public services in such a way as to ensure the necessary balance between the public interest and the private interest. In this respect, public authorities, when issuing administrative acts, may infringe legitimate rights or interests. Given that the issue of upholding fundamental rights remains an increasingly important concern for both citizens and public entities, it demands considerable attention, particularly from legal experts. From this point of view, the scope of this paper is to provide knowledge of the general legal framework regarding the regulation in Romanian law of the right of a person aggrieved by a public authority. In order to achieve the proposed scope, the paper is organized into three parts. Part I presents a brief introduction to the general theme of the topic. Part II investigates the practical importance of the distinction between public and private interest in administrative law. Part III focuses on analysis of the public interest motivation in the European Ombudsman's case law.

KEYWORDS: Constitution, public administration, public interest, contentious administrative, European Ombudsman

1. Introduction

The assumption from which we start our analysis is that, in its daily work, public administration is dominated by the regime of public power, i.e., the legal regime in which the public interest takes precedence over the private interest. According to the doctrine: “In public administration, day-to-day activity takes place in a certain dynamic and cannot be deemed as a static activity, even though it can often be the result of a civil servant's inaction or even a natural event, both of which produce legal effects” (Ștefan 2022, 12).

One of the general principles applicable to public administration is the principle of satisfying public interest (Administrative Code, art. 10). As Tudor Drăganu pointed out: “whereas strict observance of the laws in the performance of the executive activity of the state is likely to bring about not only disturbances in its proper operation, thus generating conflicts of jurisdiction, overlapping of activities, unnecessary expenses (...) but also infringements (...) of the rights and interests of citizens, one of the main tasks of the rule of law is to provide them with justified means, namely the most effective means of restoring the violated legal order” (Drăganu 1992, 153). One of these legal levers is the contentious administrative and our paperwork will develop one of the conditions for the promotion of legal action: “the violation of the legitimate right or interest”, with particular reference to the concept of legitimate interest.

From this perspective, by using methods specific to law, the paperwork will emphasize the conclusion that, the specific of the public administration is the fact that public authorities, in their work, are bound to give priority to the satisfaction of the public interest, observing the rights and interests of citizens, according to the law. The scientific research methodology includes the analysis of the proposed topic from a legal, doctrinal and jurisprudential perspective.

2. The practical importance of the distinction between public and private interest in administrative law

To begin with, our analysis starts by explaining that the constitutional grounds of the actions filed in contentious administrative are substantiated on art. 52 called - *Right of a person aggrieved by a public authority*. According to this article: “Any person aggrieved in his/her legitimate rights or interests by a public authority, by means of an administrative act or by the failure of a public authority to solve his/her application within the lawful time limit, is entitled to the acknowledgement of his/her claimed right or legitimate interest, the annulment of the act and reparation for the damage” (art. 52 para.1 of the Constitution). According to the doctrine: “nowadays, the interests of leaders at the highest level in states today are huge and long-term, involving future generations, namely: identifying solutions and mechanisms to increase public confidence in state authorities” (Ștefan 2017, 96). Therefore, the contentious administrative is specifically created by the legislator to verify the legality of measures taken by the administration.

In our perspective, in analyzing the meanings of the concepts of: *legitimate interest*, *public authority* or *public administration*, we start from the constitutional text and move on to the specific legislation consisting of Law no. 554/2004 of the contentious administrative and the Administrative Code. Public authority is defined as follows: “*body of the state or of the territorial and administrative divisions, acting in the capacity of public authority, for satisfying a legitimate public interest*” (Law no. 554/2004 of the contentious administrative, art. 1 para. 1 letter b) and public administration shall mean: “*body of the state or of the territorial and administrative divisions, acting in the capacity of public authority, for satisfying a public interest*” (Administrative Code, art. 5 letter k).

Returning to the constitutional text, we point out that it refers to the concept of *legitimate interest*. By analyzing the specific legislation on administrative law and the doctrine, we note that legitimate interest is classified into two categories: public and private (Cliza 2020, 88).

Legitimate private interest is: “*the possibility of claiming a certain conduct in consideration of the realization of a subjective, future and foreseeable, prefigured right*” (Law no. 554/2004 of the contentious administrative, art. 2 para. (1) letter p). Legitimate public interest is: “*interest relating to the rule of law and constitutional democracy, guaranteeing the fundamental rights, freedoms and duties of citizens, meeting the needs of the community and fulfilling the powers of public authorities*” (Law no. 554/2004 of the contentious administrative, art. 2 para. (1) letter r).

With regard to the practical importance of the delimitation of the legitimate interest into public or private, we must know that the doctrine has classified the contentious administrative into subjective and objective.

“*Subjective contentious administrative* exists when the plaintiff, by means of the action brought, asks the court to settle an issue relating to a subjective right or legitimate personal interest, in the sense of investigating whether a typical or similar administrative act has prejudiced a subjective legal situation” (Vedinaș 2023, 423).

“*Objective contentious administrative* exists when the plaintiff, by the action through which the judge was invested, seeks to defend an objective right or a legitimate public interest in ascertaining whether rights which constitute the content of a legal situation of a general and impersonal nature have been infringed and whether a general rule of law has been infringed” (Ibidem).

From this perspective, by analyzing the case-law of the High Court of Cassation and Justice we note that: “based on art. 52 of the Constitution of Romania, which regulates in matter of positive national law, as a general rule, Law no. 554/2004 maintained the subjective contentious administrative as a general rule, and only, by way of exception, established limited

cases of objective contentious administrative: the prefect, the authority issuing the challenged act, the Public Ministry, the National Agency for Civil Servants (Decision no. 8/2020, published in Official Journal no. 580 of 2 July 2020, para. 85)". Furthermore, "*Natural persons and legal entities governed by private law can bring head of claims in defense of a legitimate public interest only subsidiarily, in so far as the prejudice brought to a legitimate public interest follows logically from the infringement of the subjective right or of the legitimate private interest*" (Law no. 554/2004 of the contentious administrative, art. 8 para. 1').

By interpreting the legal norm, we note that the actions in contentious administrative substantiated on the prejudice brought to a legitimate public interest are filed by public authorities. "The purpose of the interpretation is to explain the provisions of the legal norm" (Popa et al. 2014, 195). Notwithstanding, the Constitutional Court decided in its case-law the following: "in some cases, namely in consideration of the realization of a fundamental right which is exercised collectively, or, as the case may be, in consideration of the defense of a public interest (...) natural persons may bring an administrative action in defense of a legitimate public interest, especially where a regulatory administrative act is concerned" (Decision no. 256/2006 published in Official Journal no. 341 of 17 April 2006.). Essentially, as the doctrine has rightly pointed out: "The essential role of the Constitutional Court is to guarantee the supremacy of the Constitution" (Barbu et al. 2021, 17).

3. Public interest motivation in European Ombudsman cases

The legal framework for applications regarding public access to documents relating to the European institutions is Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents published in OJ L 145, 31.05.2001). As pointed out: "Regulations have general applicability" (Fuerea 2010, 141).

The Preamble of this normative act provides: "*In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions* (par.11). Furthermore: "*In order to ensure that the right of access is fully respected, a two-stage administrative procedure should apply, with the additional possibility of court proceedings or complaints to the Ombudsman* (par. 13)".

According to art. 2 para. (1) of the Regulation: "*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation*". The Regulation defines what document means: "*any content whatever its medium (...) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*". We do not want to develop more in this paper on the problems that may arise in practice in relation to the digitization of public administration and citizens' interaction with the administration in this way. It has recently been stated that "Regulating the digital domain (...) implies the formation of new paradigms in the legal space" (Conea 2020, 11).

At European level, in order to respect the right to good administration (Article 41 - Charter of Fundamental Rights of the European Union), the right to complain to the European Ombudsman is recognized. Further on, after setting out the applicable legal framework, our paper mirrors two specially selected cases which have come to the attention of the European Ombudsman and which have raised the question of whether or not there has been maladministration.

The first case concerns a request for public access to documents addressed to the European Commission. The complaint addressed to the European Ombudsman concerned the refusal of the European Commission to grant access to documents containing the positions

taken by Member States in a committee dealing with the risk assessment of how pesticides affect bees. In this case, the Ombudsman's investigation found maladministration.

Briefly, the details of the case are the following: “The complainant, an environmental NGO, made in September 2018 a request for public access to documents containing the positions taken by Member States in a committee dealing with the risk assessment of how pesticides affect bees. The Commission refused access to the documents. It argued that its rules of procedure require that the positions of individual Member States not be disclosed and that public disclosure of Member States’ positions would prevent Member States from frankly expressing their views” (Decision in case 2142/2018/EWM on the European Commission’s refusal to grant access to Member State positions on a guidance document concerning the risk assessment of pesticides on bees, pronounced on 03.12.2019).

The Ombudsman inquired into the issue and found that the Commission was wrong to refuse access to the documents. She considered that the documents, should benefit from the wider public access granted to ‘legislative documents’ (Idem). Moreover, she considered that wider public access was needed as the documents contain environmental information. She thus recommended that the Commission disclose the documents. The Ombudsman confirms that the Commission’s continued refusal to grant the complainant access to the requested documents constitutes maladministration” (Idem).

We note from the grounds of the case: “Given the critical importance of bees for the environment, the decline in bee numbers and colony losses in recent years, the relevance of the draft bee guidance in this respect and the fact that Member States have not been able to come to an agreement for the past five years, the Ombudsman considers that there is a clear overriding public interest in disclosing the requested documents (para 35)”.

The second case concerns a request of public access to documents addressed to the European Data Protection Board. The complaint addressed to the European Ombudsman concerned the refusal of the European Data Protection Board to give public access to preparatory documents regarding its statement on international agreements. Following the investigation, the Ombudsman found no maladministration.

Briefly, the case concerns a request for public access to documents held by the European External Action Service (EEAS). Therefore, “The complainant, an NGO, filed the complaint in March 2021. EEAS refused to disclose the documents, arguing that disclosure could compromise the public interest in military and defense matters and the international relations of EU Member States” (Recommendation on the European Data Protection Board’s refusal to grant public access to the preparatory documents for its statement on international agreements). The Ombudsman found that “the EEAS decision to deny public access is reasonable and that the EEAS has provided the complainant with sufficient explanations. The Ombudsman thus closed the inquiry, finding that there was no maladministration” (Idem).

We note from the grounds of the case: “The Ombudsman understands the complainant's argument that disclosure of documents is in the public interest, namely that disclosure is necessary to hold the European Union and Member States accountable for their actions. However, she notes that under EU law on public access to documents, the protection of the public interest in international relations cannot be overridden by any other public interest”.

4. Conclusions

The analysis carried out revealed how the legislator regulated the right of a person aggrieved by a public authority. Following the analysis carried out, it has emerged that it is constitutionally and legally enshrined. Therefore, article 52 of the Romanian Constitution regulates the right of a person aggrieved by a public authority, the legal framework being supplemented by Law no. 554/2004 of the contentious administrative and the Administrative Code.

Furthermore, we have learned that one of the conditions for filing an action in contentious administrative is the violation of a right and of a legitimate interest, with the clarification that the legitimate interest is classified in two categories: public and private. From the point of view of the practical importance of knowing whether the legitimate interest is public or private, the contentious administrative falls into two categories: subjective and objective, depending on the type of the violation brought to the right or to the legitimate interest. In objective contentious, the legal action is filed, as a rule, by public authorities such as: prefect, the authority issuing the challenged act, the Public Ministry, the National Agency for Civil Servants and exceptionally by natural persons.

Finally, in our opinion a scientific research is not complete if it does not include case-law, therefore, we have also focused on this component of research, as it is well known that “the role of case law is to interpret and apply the law to actual cases” (Popescu 2011, 23). With regard to the public interest motivation, the paperwork presented two cases from the European Ombudsman's case-law. What they have in common is that the subject matter of the complaints concerned the denial of public access to documents. The cases differ in that in the investigation carried out, although the reasoning concerned the public interest, the outcome was different, in the first case it was found to be maladministration and in the second, maladministration was not ascertained.

The final conclusion of our paperwork is that the specific of the public administration is the fact that public authorities, in their work, are bound to give priority to the satisfaction of the public interest, observing the rights and interests of citizens, according to the law. Otherwise, one of the legal levers created by the legislator to verify the legality of the measures taken by the administration is the contentious administrative.

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