Jurnalul de Studii Juridice

Year XIII, No. 3-4, December, 2018, pp. 47-55

ADMINISTRATIVE OPERATIONS CONCEPT. CLASSIFICATION. LEGAL EFFECTS

Dan Constantin MÂȚĂ

DOI: <https://doi.org/10.18662/jls/33>

Covered in:

CEEOL, CrossRef, CrossCheck, Index
Copernicus, Ideas RePeC, EconPapers,
Socionet

ADMINISTRATIVE OPERATIONS CONCEPT. CLASSIFICATION. LEGAL EFFECTS

Dan Constantin MĂȚĂ¹

Abstract

Administrative operations are one of the types of activity of the public administration. They are widely spread in the context of this activity and usually represent mandatory procedures for the preparation, issuance, or execution of an administrative act. They are not expressions of will intended to give birth to, modify, or terminate legal relationships, therefore administrative operations do not produce legal effects by themselves. The most important characteristic of the legal regime of administration operations is that the administrative court cannot verify the legality of an administrative operation by way of direct action. The administrative court may request the administrative body to perform a specific administrative operation when facing unjustified refusal.

This article analyses the aspects regarding the concept, classification, and effects of the administrative operations relating to the jurisprudential orientations and the main principles expressed by the doctrine.

Keywords:

Administrative operations, administrative act, preparatory act, planning certificate.

Introduction

Public administration activity is a complex activity that can be performed in several ways. Any of these forms are administrative decisions, but not all of them generate direct legal effects.

¹ Ph.D. Lecturer, Faculty of Law, „Alexandru Ioan Cuza” University of Iași, România, e-mail: danmata@uaic.ro

In the current doctrine of the administrative law, the main classification of the type of activities of the public administration bodies is made according to the applicable law regime (Măță, 2018: 8-9). This criterion was used to separate two main categories of actual activity forms (Iorgovan, 2008: 8): a) “forms to which the power administrative regime is applied (exclusively or accompanied by other legal regime)”: 1) administrative act; 2) administrative contract; 3) administrative operation; b) “forms to which the power administrative regime is not applied”: 1) legal actions performed by the public administration bodies by virtue of the civil legal competence; 2) technical and administrative operations; 3) directly-productive operations.

In the overall activity of a public administration body, administrative operations are predominant because they are carried out with a view to drawing up, adopting or executing administrative acts. The names of these operations are very diverse depending on the procedural stage corresponding to the decision-making mechanism that ends with the execution of the administrative act.

This diversity was reflected in the doctrine in the form of the existence of several names of these forms of activity of the public administration bodies. In the interwar legal literature, administrative operations were called material actions, material facts, assistive acts or preparatory acts (Chiriac, 2011: 5). At present, the majority of authors use the notion of administrative operations but the names of technical-material operations, material-technical operations or technical-administrative operations can also be met (Chiriac, 2011: 5); (Trăilescu, 2017: 33).

In the current doctrine, administrative operations were defined as "activities performed by civil servants to carry out the tasks of the administration in the general context of legality" (Parlagi, 2011: 274-275). In a narrow sense, administrative operations are “measures, procedures, works, tools, controls necessary for the preparation, adoption and execution of administrative acts and contracts” (Parlagi, 2011 :275).

The Contentious Administrative Law no. 554/2004, published in the “Official Gazette of Romania” no. 1154 of December 7, 2004, as amended and supplemented, uses the concept of “administrative operation” without defining it in Art. 2 (*Meaning of terms*), as it did with other notions and institutions of the administrative law. The Draft of the Administrative Code of Romania defines the “administrative operation” in Art. 5 letter oo) in the following terms: "a material fact, usually in the form of a written document, performed by an authority or institution of the public administration,

without legal effects in itself and that usually intervenes in the process of issuing and executing administrative acts" (Vedinaş, 2018: 20).

Classification of administrative operations

In a post-war doctrine reference, administrative operations were classified into two main categories: a) operations preceding the issuance of the administrative law act, which are called "preparatory acts"; b) activities after the issuance of the act of administrative law and which are fulfilled for its enforcement (Drăganu, 1959: 44). Other authors also acknowledge the existence of "preparatory acts" as administrative operations that precede the adoption or issuance of administrative acts. From this point of view, the preparatory acts must be distinguished from the technical-material operations, the latter representing material works in the absence of which the administrative act could not be issued or adopted or could not produce the legal effects for which it was issued or adopted (Prisacaru, 1996) : 274-281).

Some authors have highlighted the intellectual component of certain administrative operations thus reaching the following classification: a) operations that are predominantly intellectual in the sense that they represent an act of will; b) operations that produce transformations in the material world without the necessity of any manifestation of will (Petrescu, 2009 :296).

We consider that the main classification of the administrative operations should start from the procedural phases corresponding to the drafting, issuance, adoption or enforcement of an administrative act (Măţă, 2018: 12-13). Three types of administrative operations can be distinguished from this perspective (Săraru, 2016: 181): a) administrative operations specific to the preparation phase of the issuance or adoption of the administrative act (minutes, reports, approvals, agreements, projects); b) administrative operations specific to the issuing or adoption phase of the administrative act (convocation of the collegiate administrative bodies, setting the agenda, drawing up of the minutes of the meeting, stamping, dating, registration of the act); c) administrative operations specific to the implementation phase of the administrative act (communication of individual administrative acts, publication, display of the act).

It should be noted that the latest classification has in view only the category of administrative operations whose legality can be verified

by the administrative contentious court along with the administrative act that they have prepared or enforced. Apart from this category, that can be considered as the main one, the draft of the Administrative Procedure Code (launched in public debate in 2007) provided also the following two categories: a) operations consisting of acts/documents establishing administrative facts, declarative or recognizable (certificates); b) operations that consist of actual implementation of lawful attributions by the public authorities (Ciobanu, 2015: 34).

Legal effects of administrative operations

Administrative operations do not produce legal effects in themselves, but together with the administrative act they have prepared, issued, enacted or enforced. The essence of the public administration's activity is the fact that the administrative act is the manifestation of will made with the intent to produce legal effects, namely to give birth, to modify or to quit legal relations. Therefore, the purpose of the operations is to prepare the issuance or adoption of an administrative act or to facilitate its enforcement (Măță, 2018: 12).

This fact must not lead to the conclusion that administrative operations are legally irrelevant. As pointed out in the doctrine, the legal effects of administrative operations appear as a result of the will of the law, which provided for their possibility or, as the case may be, for their necessity (Iorgovan, 2005 :12). In addition, it was underlined that some administrative operations “are of a very complex nature and they involve a great deal of time, expertise and effort” as is the case with the preparation of a grant application for European funding for a project (Voican, 2018: 25).

The Contentious Administrative Law no. 554/2004 does not make it possible to verify the lawfulness of administrative proceedings either through the direct action or by the plea of illegality. The administrative court has the competence to rule on the lawfulness of the administrative operations given by the administrative act which preceded it, except when the public authority issuing a unilateral administrative act requests the court to cancel it because it can no longer be revoked, given that it has entered into the legal order producing legal effects (Bogasiu, 2018: 131). This possibility was interpreted as “a variant of indirect control of legality, but also an activity of assessing the evidence with documents, invoked and filed by the parties to the trial, which, if unlawful, the court will not take into account for that they have no probative force” (Trăilescu, 2017: 353).

The correlation of Art. 8 par. (1), Art. 8 par. (12) and Art. 18 par. (1) of the Law no. 554/2004 shows that the person who considers himself/herself to be the aggrieved party regarding a right or a legitimate interest by refusing to carry out an administrative operation may address directly to the administrative court for demanding the public authority to carry out the administrative operation (Măță, 2018: 14). The refusal to perform a particular administrative operation can be considered as a form of unjustified refusal to deal with an application that has the object of carrying out that operation (Iorgovan et al., 2008: 311). For example, a decision of the Supreme Court stated that “the refusal to issue the approval that was expressly requested in the planning certificate for the issuance of a demolition permit may be directly challenged in the administrative court, 8 par. (1) second thesis of Law no. 554/2004, amended and completed. The law does not demand from the disagreeable party to make a preliminary complaint or an administrative appeal. The time limit for bringing an action to the administrative court is calculated from the date of receipt of the response refusing to issue the approval”(Decision of the High Court of Cassation and Justice [hereinafter HCCJ] No. 3440 of September 25, 2014 (Bogasiu, 2018: 281).

In the practice of the administrative courts it is sometimes difficult to distinguish between the administrative operations and the administrative acts when the legislator is not sufficiently rigorous with the used terminology. Therefore, the legal nature of a document belonging to a public authority is not determined solely on the basis of its name, but one should take into consideration if the manifestation of will produces legal effects or not (Săraru, 2016 :470), (Trăilescu, 2017: 34). In this context, attention has also been paid to the existence of “administrative acts or operations preparatory to the issuance of the final administrative act whereby subjective rights or legitimate interests are harmed, and to which the law confers the status of administrative acts that can be directly challenged in administrative court, and not only with the final administrative act” (Puie, 2015: 296).

An important clarification on the legal effects of the administrative operations in general, and on the legal status of the urbanism certificate, in particular, was brought by the Decision of the HCCJ no. 25/2017 - The competent panel to judge the appeal in the interest of the law, published in the “Official Gazette of Romania” no. 194 of 2 March 2018.

Implications of the Decisions of HCCJ no. 25/2017 on the legal effects of administrative operations

According to Art. 6 par. (1) of the Law no. 50/1991 on the authorization of construction works, republished in the “Official Gazette of Romania” no. 933 of October 13, 2004, as amended and supplemented, the planning certificate is an “act of information” through which the issuing authorities (the president of the county council, the mayor or the institutions of the defence system, public order and national security) realize the following: a) make available to the applicant the information on the legal, economic and technical regime of land and buildings existing at the date of application; b) determine the town planning requirements to be met according to the specificity of the site; c) establish the list of the necessary permits or agreements for authorization; d) notify the applicant on the obligation to contract the competent authority for environmental protection in order to obtain the point of view or the administrative act for authorization.

To the same effect, Art. 29 par. (1) of the Law no. 350/2001 on land management and planning, published in the Official Gazette no. 373 of July 10, 2001, as amended and supplemented, regulates the urbanism certificate as “the obligatory information act by which the county or local public administration authorities are confronted with the legal, economic and technical regime of the buildings and the conditions necessary for making some investments, real estate transactions or other real estate operations, according to the law”.

In view of these legal provisions, most of the authors have classified the planning certificate as an administrative operation, since it can only be subjected to judicial review by administrative proceedings only with the administrative act under which they are based (Bischin, 2018 :105).

The opinion was also expressed that the planning certificate is “an administrative act before the building permit and given the constitutionality of the freedom of access to justice provided for in Article 21 of the Romanian Constitution, it may be contested in accordance with the administrative litigation procedure, regulated by the Law No. 554/2004” (Moldoveanu, 2009 : 120). In a close but more nuanced view, it was shown that the urbanism certificate cannot be considered a “simple technical-administrative operation”, but an “autonomous administrative act, with which the procedure for authorizing the execution of constructions, issued for the execution of the works construction, in order to obtain, in the end,

the building permit” (Duțu, 2018: 116). Therefore, the possibility of exercising the control of legality by the administrative court would arise from “the status of a specific individual administrative act, operable in terms of urbanism, and not as an exigency of access to justice, imperatively necessary for a democratic society (Duțu, 2018: 120).

The diversity of views on the legal nature of the planning certificate can also be identified in the practice of the administrative courts. Some courts have considered that the planning certificate “does not possess the qualities of an administrative act within the meaning of Art. 2 par. (1) lett. c) of the Contentious Administrative Law no. 554/2004, and therefore it does not in itself give rise to legal effects which may harm a person in a right recognized by law, or in a legitimate interest, liable to be attacked by means of administrative litigation; and therefore as an act underlying the issuance of a building permit, an administrative act producing legal effects, the planning certificate can be attacked in administrative trials only together with the latter, when the aggravating effect produced is considered to be caused by the existing irregularities in the preparatory act” (Bischin, 2018:125). Instead, other courts have assessed the admissibility of the administrative litigation action when the construction restriction or other limitations are imposed by the planning certificate.

Under such circumstances, the High Court of Cassation and Justice - the panel with a competence to judge the appeal in the interest of the law, accepted the complaint filed by the General Prosecutor of the Prosecutor's Office attached to the HCCJ and, by Decision no. 25/2017 it was established that “for the interpretation and implementation of Art. 6 par. (1) and Art. 7 par. (1) of Law no. 50/1991 on the authorization of the construction works, republished, as amended and supplemented, with reference to Art. 2 par. (1) lett. c) and Art. 8 par. (1) of the Contentious Administrative Law no. 554/2004, as amended and supplemented, the legality control is possible, separately, on the planning certificate stating the interdiction of building housing, or other restrictions”.

In the recitals of this decision, the Supreme Court considered as correct the interpretation of the courts that “allowed separate control of legality of the planning certificate prohibiting the construction works or containing other restrictions. “At the same time, HCCJ has acknowledged an important distinction between the legal nature of the planning certificate which is followed by the issue of a building permit, and the legal nature of the planning certificate which is not susceptible to the issue of such an administrative act. In the first case, the action requesting the cancellation of

the planning certificate is inadmissible because the legal effects of the certificate are found in the effects generated by the building permit. On the other hand, in the second hypothesis the action is admissible; the planning certificate has the legal nature of an administrative act because in this case “it is no longer a simple step in the decision-making process, as is the case with the preparatory acts, but it puts an end to this process, possibly damaging the petitioner's legitimate rights or interests, having its source in that specific planning certificate”.

Conclusions

The importance of administrative operations in the overall activity of public administration bodies is unequivocally apparent from their diversity and controversy generated in administrative and judicial practice with regard to their name and legal status. This situation further highlights the need for a thorough regulation of the legal regime of administrative operations in special normative acts or in an Administrative Procedure Code. Such a regulation would be useful both in terms of clarifying the nature and the legal status of administrative operations, and strengthening the legal regime of the administrative act as the main form of activity of the public administration bodies. By Decision no. 25/2017 of HCCJ, the legal regime of administrative operations does not essentially change, but an important nuance is introduced regarding the legal nature of the preparatory acts depending on whether or not they are followed by the issuance of an administrative act.

References

- Bischin, R. (2018). Certificatul de urbanism, act administrativ sau act de informare, București: Universul Juridic.
- Bogasiu, G. (2018). Legea contenciosului administrativ, Comentata si adnotata, Editia a IV-a, revazuta si adaugita. Bucuresti: Universul Juridic.
- Chiriac, L. (2011). Drept administrativ. Activitatea autoritatilor administratiei publice, București: Editura Hamangiu.
- Ciobanu, Al.-S. (2015). Drept administrativ. Activitatea administratiei publice. Domeniul public, București: Universul Juridic.

- Draganu, T. (1959). Actele de drept administrativ, Bucuresti: Editura Stiintifica.
- Dutu, M. (2018). Despre natura si regimul juridic ale certificatului de urbanism. Pe marginea unei decizii a Inaltei Curti de Casatie și Justitie, pronunțate in soluționarea unui recurs în interesul legii (nr. 25 din 6 noiembrie 2017), in „Dreptul” nr. 5(2018).
- Iorgovan, A. (2005). Tratat de drept administrativ, Vol. II. Forme de realizare a administratiei publice. Domeniul public și serviciul public. Raspunderea in dreptul administrativ. Contenciosul administrativ, București: Editura All Beck.
- Iorgovan, A., Visan, L., Ciobanu, Al.-S., Pasare, D.I. (2008). Legea contenciosului administrativ (cu modificările si completarile la zi). Comentariu și jurisprudența, Bucuresti: Editura Universul Juridic.
- Mata, D.C. (2018). Drept administrativ, Vol. II. Activitatea administratiei publice. Domeniul public. Contenciosul administrativ. Raspunderea administrativ-contravenționala, Bucuresti: Editura Universul Juridic.
- Moldoveanu, R.A. (2009). Certificatul de urbanism, in „Dreptul”, Nr. 8 (2009).
- Parlagi, A.P. (2011). Dictionar de administratie publica, Editia a 3-a, București: Editura C.H. Beck.
- Petrescu, R.N. (2009). Drept administrativ, Bucuresti: Editura Hamangiu.
- Prisacaru, V.I. (1996). Tratat de drept administrativ roman, Partea generala, Bucuresti: Editura All Beck.
- Puie, O. (2015). Tratat teoretic si practic de contencios administrativ, vol. I, București: Editura Universul Juridic.
- Sararu, C.-S. (2016). Drept administrativ. Probleme fundamentale ale dreptului public, București: Editura C.H. Beck.
- Trailescu, A. (2017). Legea contenciosului administrativ. Comentarii și explicatii, Editia 3, Bucuresti: Editura C.H. Beck.
- Vedinas, V. (2018). Tratat teoretic și practic de drept administrativ, vol. II, București: Universul Juridic.
- Voican, M. (2018). Actul administrativ. The ultimate theory, Craiova: Editura Universitara.