

Competence determined strictly by the law and the discretionary power of public administration¹

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Abstract

Competence related to public administration occurs when, in the presence of a given situation, the administrative authority enjoys no margin of freedom, being forced to act in a strictly determined by law. Sometimes the law may allow public authorities a wider or narrower margin of appreciation on a concrete situation. The article analyzes the conditions under which government can exercise discretionary power within the law.

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1. Introductory considerations

Competence related to public administration occurs when, in the presence of a given situation, the administrative authority enjoys no margin of freedom, being forced to act in a strictly determined by law³.

Sometimes the law may allow public authorities a wider or narrower margin of appreciation on a concrete situation. The law may allow public authorities to have the opportunity to choose the decision they will take (eg. after examining the ability to drive a motor vehicle on public roads, the police has the opportunity to assess whether to grant or deny license driving), to choose the means that will be used to achieve the result prescribed by law (for example in taking measures police when demonstrations which disturb public peace) or choose when to be issued an administrative act. We are in this case in the presence of a discretion or exercised discretion to the extent permitted by law by public authorities. Therefore, discretion is nothing else than the margin of freedom of the

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³ See Dana Apostol Tofan, *Puterea discreționară și excesul de putere al autorităților publice*, All Beck, 1999, Bucharest, p. 65.

public authority, within the law⁴, which allows him to appreciate the way in which will serve the general interests of society.

For example, for issuing a permit for movement law stipulates a number of conditions. Based on the laws, some of these conditions such as age limit, the fee will be found directly by the competent public administration to issue the act, in this case it is about exercising linked. Other conditions, such as the ability to drive a motor vehicle on public roads will be at the discretion of the police authority, in this case it is about the exercise of discretion.

Also for the entrance examination enrollment in an institution of higher education law strictly it provides that documents must be included in the registration file of the candidate. University will exercise therefore on the registration of candidates at the entrance examination, competence related to accepting or rejecting registration files depending on whether or not they include all documents required by law. But in terms of assessing the candidate's knowledge, it is left to the discretion of law examiners, involving the exercise of discretion in determining topics and scales corrections.

2. Limits the discretion of the public administration

The doctrine, along with the notion of discretion, and the notion of opportunity is used to denote no discretion to public authorities within the legal limits⁵. When government has a discretion (opportunity) allowed by the letter of the law it will be performed in compliance with the cumulative number of conditions:

- Compliance with government action spirit of the law⁶, ie the legislator will as evidenced by the systematic interpretation of enactment

- General principles of functioning of public administration⁷ (good administration, the principle of legitimate expectations in government action, the foreseeability action administration, the principle of proportionality, the principle of impartiality and professional independence of civil servants, the principle of openness and transparency of public administration, the principle motivation of

⁴ See Prosper Weil, *Le droit administratif*, 15^e édition, Presses Universitaires de France, Paris, 1992, p. 89.

⁵ Meaning that the two are synonymous see Dacian Cosmin Dragoș, *Discuții privind posibilitatea anulării unui act administrativ pe motiv de inoportunitate*, „Revista Transilvană de Științe Administrative”, no. 1(10), 2004, p. 31, footnote. 2, where it states that the opportunity is called "discretionary power".

⁶ See Verginia Vedinaș, *Drept administrativ*, 9th edition revised and updated, Universul Juridic, Bucharest, 2015, p. 103.

⁷ On the general principles of functioning of public administration see Cătălin-Silviu Sărașu, *Principiile generale ale dreptului administrativ european* în Ioan Alexandru, Cătălin-Silviu Sărașu a.o., *Drept administrativ european*, Lumina Lex, București, 2005, p. 156-177; Cătălin-Silviu Sărașu, *Considerații cu privire la principiile spațiului administrativ european și la necesitatea includerii lor în proiectul Codului administrativ român*, Caietul Științific ISAR no. 7/2005, Section for legal and administrative sciences, p. 12-41.

administrative decisions the principle of government accountability for its actions etc.)

- Using the most modern public management techniques to achieve in terms of efficiency and effectiveness of social requirements which correspond to the public interest. The effectiveness of the relationship between the result and the objective to be achieved. The efficacy requires, on the one hand, the definition of a lens in advance and, on the other hand, the measurement result obtained⁸. Effectiveness of safety lies in the fact that government is moving towards performance goals, solving public problems legally. It is necessary to carry out an analysis and evaluation of public policies permanent, to ensure that they are properly implemented by public administration and civil servants. Efficiency is the ratio of the result and the means employed (the ratio between output and input). Innovation management as a way to increase efficiency seems to be often restricted by legal limits of government action. In reality it is achieved reform and development company, is in fact the engine management remodeling right administration⁹. Always regulatory and administrative acts will integrate existing values in society after their adoption, being a phenomenon conservation realities and traditions. Managerial innovations which discovers new techniques for achieving efficiency and effectiveness in terms of increased needs of society can determine proposals to amend public policies and strategies that resulted in legislative changes. From the perspective of efficiency and effectiveness of administrative action opportunity can be defined as the realization by government tasks and legal duties, the preferred term with the minimum expenditure of labor resources, material and spiritual, and choosing the most appropriate means to achieve purpose of the law¹⁰.

The doctrine were deducted several criteria for assessing the appropriateness of administrative acts¹¹:

a) criteria adopted timing of an administrative act. Where the law leaves it to the public authority choosing when to adopt an administrative act, it must choose the right time, avoiding the act to be adopted early or late. Choosing the timing for adoption of administrative act will take into account the conditions for the exercise of discretion (opportunity) mentioned above. Such a decision is premature suspension of a university course after detecting a sure case of contagious disease. It's late decision to introduce electricity in a mountain village after it was completely depopulated inhabitants voluntarily due to lack this essential element of civilization.

b) the criterion and conditions that will apply concrete administrative act. Construction of a football pitch with 10,000 seats in a town with 5,000 inhabitants

⁸ See Lucica Matei, *Management public*, Economica, Bucharest, 2001, p. 195.

⁹ See Ioan Alexandru, *Dreptul și managementul. Dihotomie sau complementaritate. Impactul informatizării*, All Beck, Bucharest, 2004, p. 43-47.

¹⁰ See Ilie Iovănaș, *Dreptul administrativ și elemente ale științei administrației*, Publisher didactic and pedagogic, Bucharest, 1977, p. 240.

¹¹ *Idem*, p. 240-242.

which has no football team performance can be inappropriate. Also building a tourist information center in a village before taking measures to enhance the sightseeing in the area is inappropriate. Regarding the specific conditions under which it will apply an administrative act, certainly implement a decision to asphalt a road while the road is covered with snow that is inappropriate; it is also inappropriate conduct repairs of the highway linking Bucharest to the Black Sea resorts in the middle of summer when they meet the highest traffic values.

c) criterion resources (goods, people, resources, time, etc.) involved in the adoption and application of the administrative act. Decision to involve significant financial resources and staff to create an accounting software where there are similar software on the market and can be purchased at a moderate price is inappropriate.

d) usefulness criterion, compliance with social requirements specific administrative act in the place where it will be applied. A city hall decision to build housing for young people may be undesirable given that most young people in their residence locality in search of jobs.

The doctrine was raised whether the opportunity to be seen as a distinct condition for the validity or appropriateness of the administrative act is an element of the condition of legality. This issue has been addressed differently in administrative law in two schools of thought represented the school in Cluj and Bucharest School.

School in Cluj believes that the opportunity is a distinct condition for the validity of administrative acts¹². It was considered that the breach of the conditions of legality entails the cancellation or revocation of acts, while failure results in the condition of opportunity revocation or repeal¹³.

School in Bucharest has designed the opportunity as an element of legality and not as a condition of validity of the act on its own, saying that optical approach has the opportunity to view the School of Cluj can not be accepted on the ground that it gives the impression that there is a limit to the validity of administrative acts "beyond" the limits of legality¹⁴. Thus, in the view of the Bucharest School timeliness conditions arise as a subsystem of legal conditions in the broad sense of the term¹⁵.

3. Conclusion

We see that the vision is a dimension of legality opportunity creates an objective framework for analysis of discretion, including by courts, preventing the arbitrary exercise thereof¹⁶. When public authorities exercising the right of

¹² *Ibidem*, p. 240-242.

¹³ *Ibidem*, p. 231.

¹⁴ See Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, 4 ed., All Beck, Bucharest, 2005, p. 42.

¹⁵ *Idem*, p. 49.

¹⁶ See Cătălin-Silviu Săraru in Ioan Alexandru, Cătălin-Silviu Săraru a.o., *op. cit. (Drept administrativ european)*, 2005, p. 157.

discretion in violation of competence limits prescribed by law or violation of rights and freedoms of citizens we face excess power according to Art. 2 (1) letter n) of Law no. 554/2004 *on administrative contentious*. Administrative acts performed with excess power can be appealed to the administrative court, as provided by Law no. 554/2004 *on administrative contentious*.

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