Issuance of administrative acts by Bulgarian authorities – requirements of the procedure regarding participation of the general public in the process and common violations as seen by national courts

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Abstract:

The work of the administration should resemble the interests of the affected parties and the public interest. That very need for proportionate and reasonable actions of the administration has led to establishing one of the basic principles in the process of issuing administrative acts – the participation of the interested parties in the procedure before the administrative authority. This is achieved by the requirement that, before issuing the act, the authority is to gather the opinions and statements of the members of the public who will be affected by the act and to reflect them in the final act. The guarantee that the members of the public will be allowed to participate in the procedure and influence on the final content of the act is the judicial review of the act of the administration.

Key words: administrative activity, public interest, individual administrative act, general administrative act, normative administrative act, participation of members of public

The rule of law in any state requires principles when it comes to regulating matters through administrative activity. The effective governance is at place when the administrative authorities, in the process of issuing acts, achieve the balance between the interests of the authority and the interests of the community or the private parties. As a rule, the administrative bodies resemble the interests of the general public and therefore the acts issued by these authorities should be aimed to protect the public interest without severe interference in the life and activity of private parties. It is not a rare situation, however, when the community’s interest and the interests of members of the public pull at different directions thus making it difficult for the public authority to draw the line and find the balance between the public and private interest. That very need for proportionate and reasonable actions of the administration has led to establishing one of the basic principles in the process of issuing administrative acts – the participation of the interested parties in the procedure before the administrative authority. This is achieved by the requirement that, before issuing the act, the authority is to gather the opinions and statements of the members of the public who will be affected by the act.

This raises the questions what are the legal guarantees that the public is allowed to give opinion on the content and consequences of the administrative act before its issuance and are these guarantees applied in practice and not only in law. The present paper will analyze the rules for participation of the public in the activity of the administrative authorities, both with respect to individual administrative acts and administrative acts of normative nature as well as how the participation of the public has an impact over the content and legal implications of the act.

1. **Basic principles in administrative activity concerning the participation of the public in the issuance of administrative acts**

The guarantees for participation of the members of the public before administrative bodies in Bulgaria stem from the Constitution of the Republic of Bulgaria and are regulated in details with specific rules in a number of statues and legislative acts.

1. *Constitution of the Republic of Bulgaria*

The Constitution of the Republic of Bulgaria[[1]](#footnote-1) sets forth the rule for judicial control over the acts of the administration thus guaranteeing that the principle for participation of the public before the administrative authority is observed. According to Article 120, Paragraph 1 of the Constitution the courts in the state conduct a review for legality of acts and the actions of the administrative authorities; according to Paragraph 2 of the same article any natural person or legal entity is entitled to challenge the acts and or actions of the administration unless the judicial review is excluded by a statutory rule. As a result of the above rules, if the administrative authority has deprived any interested party from the possibility to take part in the issuance of the administrative acts, the legality of the act will be reviewed in the light of the arguments raised by the interested parties.

1. *Code of Administrative Procedure*

The Code of Administrative Procedure[[2]](#footnote-2) contains the basic principles concerning the administrative activity and the issuance of acts, such as independence and impartiality of the administration, acting within the competence determined in law, publicity and transparency as well as proportionality and predictability. The Code of Administrative Procedure also specifies in details the procedure and requirements for issuance of the three types of administrative acts – individual, general and normative. In particular, Articles 26 and 35 of the Code of Administrative Procedure set forth the specific rules to be followed by the administrative authority as regards the participation of the interested parties before issuance of the individual administrative act, whereas Article 66 and Article 77 thereof regulate the same with respect to issuance of general and normative administrative acts.

1. *Normative Acts Law*

The procedure and requirements set forth in the Normative Acts Law[[3]](#footnote-3) are applicable for issuance of all administrative acts except for the individual administrative acts. The rules of the Normative Acts Law are applied in parallel with the rules set forth in the Code of Administrative Procedure, especially given the fact that the Normative Acts Law specifies in details stages to be followed by the administrative authority. In particular, Article 26 and 28 thereof specify the terms for public consultations that should be held before the adoptions of the act and the requirements to the content of the draft act and the motives to it which is directly linked to the general public becoming acquainted with the reasons for adoption of the act and submitting statements or objections.

1. **Participation of the members of the public in the process of issuance of individual administrative acts**

As a rule, the range of the participants in the process of issuance of individual administrative acts is rather limited compared to the procedures for issuance of administrative acts of normative nature, mainly because the circle of interests concerned is narrowed to the applicant and the persons directly affected by the consequences of the act (who are not its addressees). Nevertheless, the administrative authority is not released from the responsibility and obligation to notify and request the opinion of all interested parties that may be affected by the administrative act which is to be issued – this includes both the potential addressees and other persons who are not the addressees of the act but their legal standing or rights are affected by the latter. As a rule, the more the administrative authority is diligent in allowing the potential affected persons to participate by filing statements or objections to the content of the administrative act, the bigger the chances that such an act will withstand potential challenge and judicial review.

This is so, because the procedure for issuance of administrative acts is thus regulated in Bulgaria that even if the interested parties have been deprived of the possibility to submit their objections or statements to the administrative body before the issuance of administrative act, they are entitled to challenge the act before the administrative courts in the country. Therefore, they have the right to present their position or objections to the court and the latter will review them in the light of the issued act. The members of the public directly affected by an issued administrative act are parties in the judicial review, even if their participation has been ignored by the administrative body, based on Article 120 of the Constitution of the Republic Bulgaria – any act which is not excluded from judicial review by law, is subject to challenge. It should be noted that very few administrative acts are excluded from judicial review in Bulgaria and they are mainly related to the national security and similar because of the prevailing interest of the state interests as opposed to the general public. Therefore, the participation of affected members of the public in the course of issuance of acts is practically unavoidable – if the administrative body has failed to consider their statements or has excluded for some reason their participation, the court will review their considerations, thus affecting the final outcome of the administrative act for them and the rest of the interested parties.

The rule of Article 35 in relation to Article 26 of the Code of Administrative Procedure is the guarantee for participation of both the person to whom the act is addressed and the public in the process of its issuance. Article 26 of Code of Administrative Procedure sets forth that upon initiating the administrative procedure the administrative authority is obliged to inform the addressee as well as the known members of the public that may be affected by the act regarding the initiated procedure. In addition, Article 35 of the Conde of Administrative Procedure requires the administrative authority to consider all facts and circumstance related to the case, which includes review of statements or objections submitted by the addressee of the act and interested parties.

The lack of such notification as a rule leads to lack of participation of the interested parties in the administrative procedure and lack of full view of the authority on the facts and circumstances that should be taken into consideration before deciding on the matter. The omission to let the public participate in the process is considered as insignificant only when the interested parties do not have any new evidence or information that is relevant for the matter, so the administrative act would have the same content, irrespective of their participation – as per motives of Decision 9327 of 27.06.2012 г., case 10300/2011, Cassation Panel of the Supreme Administrative Court of Bulgaria “Given the relevant facts and the competence of the administrative authority, the appellant would not have been able to present any fact or evidence, different from the ones reviewed by the administrative authority. This is confirmed by the fact that the appellant has not presented any new evidence or statements in the course of the judicial appeal of the administrative act before two court instances.”[[4]](#footnote-4).

In contrast to the above, in majority of cases the Supreme Administrative Court has taken the view that depriving the addressee or potential affected persons from their right to submit objections or statements on the matter is substantial violation of the procedure and thus – a ground for repeal of the administrative act. Such are the conclusions of the court in a case where an administrative measure of compulsion “prohibition to leave the country” was reviewed following a complaint from the addressee of the act[[5]](#footnote-5): “Without being notified about the initiation of the procedure for issuance of an act, which in its essence directly affects his legally guaranteed right (of free movement), the addressee cannot effectively exercise his right to defense.”

When imposing a compulsory administrative measure, the authority is obliged to consider all facts and circumstances related to the specific case and by depriving the addressee from the possibility to state his position, the authority has in practice issued an act without motives. The lack of motives, in turn, prevents the court from full judicial review of the legally of the administrative act, i.e. whether the compulsory measure was affected according to the conditions set in law and whether the principle for proportionality has been followed.

The requirement for proportionality in the administrative activity is one of the principal rules that guarantee the balance between the interests of the addressee of the act and the interest of the general public (in whose interest the administrative body acts by default). The principle for proportionality as per Article 6 of the Code of Administrative Procedure encompasses several aspects: the authorities should exercise their powers in good faith and in favor of justice; the administrative act and its enforcement cannot affect rights and legally bound interests more than what is most necessary for achieving the purpose of the act; when the administrative act is to affect rights and legally bound interests of the parties, the administrative authority is required to choose the measures that are most favorable for the persons affected by the act. On the matter of proportionality, the Constitutional Court of the Republic of Bulgaria in its Decision No. 2 of 31.03.2011 stated that, when it comes to imposing administrative measures of compulsion, automatic and indefinite in terms of time application of measures such as prohibition to leave the country significantly restricts the right to a free movement of the addressee and therefore is excessive and inappropriate measure for achieving the purposes set in law. The European Court of Human Rights in a number cases against Bulgaria[[6]](#footnote-6) has also declared that administrative authorities not always observe strictly the principle of proportionality when applying compulsory administrative measures – “The Court considers that the “automatic” nature of the travel ban ran contrary to the authorities’ duty under Article 2 of Protocol No. 4 to take appropriate care that any interference with the right to leave one’s country should be justified and proportionate throughout its duration, in the individual circumstances of the case…Regardless of the approach chosen, the principle of the proportionality must apply, in law and in practice.”[[7]](#footnote-7)

If we go back to the case with the Bulgarian citizen with the prohibition to leave the country, the lack of notification by the administrative authority about the initiated procedure has led to the impossibility of the person affected to present evidence and information in his defense and thus to affect the final outcome of the act. In the particular case the prohibition to leave the country was imposed on the Bulgarian citizen because he was sentenced by a Serbian court to imprisonment for 9 months for illegal smuggling of drugs. The administrative measure of compulsion was applied by the administrative body (Department of the Ministry of Inferior) when exercising its operative discretion, without the Serbian state requesting expulsion other measures in respect of the sentenced Bulgarian citizen. In these circumstances, by depriving the addressee of the act from the right to participate in the procedure before the administrative body, the latter failed to consider the particular behavior of the addressee of the act and to apply the principle of proportionality. Thus, the administrative body imposed restrictions on the citizen’s right to free movement as basic right as per Article 21 of the Treaty on the Functioning of the European Union without clear purpose and for the sake of general prevention only, which in turn implied excessiveness of the measure.

Had the administrative authority allowed for the addressee of the act to participate in the procedure, the outcome of the procedure might have been different. Allowing the addressees of the act to submit statements to the administrative authority before the issuance of the act means observance of their right of defense since from the very beginning of the procedure. Thus, insofar as the right of defense is protected as per Article 46 and 47 of the Charter of the Fundamental Rights of the European Union, the rule of Article 26 in relation to Article 35 of the Code of Administrative Procedure is practically aimed at observing the basic principles of EU law.

1. **Participation of the members of the public in the process of issuance of administrative acts of normative nature**

Before making the analysis, a note should be made with respect of the nature of the administrative acts issued by Bulgarian authorities and addressed to indefinite number of parties: There is legal classification of the administrative acts, depending on their application in time and with respect to the persons affected.

The first type are the administrative acts of normative nature where the act applies to indefinite number of addressees and it is applied without limitation in time (until is repeal)[[8]](#footnote-8). Such acts are various ordinance issued by the Council of Ministers and the ministers; instructions; the National Framework Contract, issued by National Health Insurance Fund regarding the terms and conditions for delivery of medical services, etc.

The second type of administrative act are the “general administrative acts”[[9]](#footnote-9) where the act applies to indefinite, but subject to determination, number of addressees and the act has one-off effect as to its legal consequences (i.e. the rights or obligations originate from the act and the addressees should comply with them for certain period of time). Indefinite but subject to determination number of addresses means that the addresses could be identified by characteristics specified in the act so that the legal effect of the act is limited only to the persons who qualify as per these characteristics. For instance, general administrative acts are various orders of mayors of municipalities in Bulgaria that impose certain restrictions or specific rules for the residents of the municipality, the town or the village; a construction supervision authority’s prohibition to build for certain period of time and for certain area (i.e. during the winter season at Bulgarian ski resorts); various instructions of the police and fire departments regarding organization of traffic and safety procedures. As a rule, these acts apply for a period of time which is specified in the act itself. There are few general administrative acts which, by operation of law, are applied indefinitely in time until their repeal (explicit or by issuance of new act dealing with the same matter) – i.e. certain the decisions of the Bulgarian Communications Regulations Commission with respect to the regulation of electronic communications services on various markets or acts of the Bulgarian National Bank concerning specific obligations of the financial institutions subject to supervision.

Both normative and general administrative acts and the procedure for their issuance is dealt with in the present section of the paper since the rules guaranteeing the participation of the general public are the same; they are applied in the same way by Bulgarian courts and violation of these rules are equally considered violations of the procedure, which are significant enough to reason a repeal of the act.

In contrast to the procedure for issuance of individual administrative acts where the numbers of addressees or interested parties is limited to a particular case, the circle of affected persons by general and normative administrative acts is by default significantly wider. This requires setting a procedure where both the public is given the possibility to participate in the process of issuance of the act and thus to be able to influence on its content. At the same time the administrative authority should be relieved from the obligation to notify individually any of the potentially affected persons and parties simply because in most cases the authority would not be able to identify them in a comprehensive manner.

The above is achieved through the rule of Article 26 of the Normative Acts Law which sets forth that in the course of issuance of normative administrative act public consultations with the natural persons and organizations are carried out. For that purpose the administrative authority publishes the draft of the administrative act, together with motives, report and the preliminary assessment on the results from application of the act on the Internet site of the authority. If the administrative authority is part of the executive power, all drafts of administrative acts are to be published at the Public Consultations Portal which is supported by the Council of Ministers. The Public Consultations Portal is available online at: <http://www.strategy.bg/> and its aim is to provide united database for all pending procedures for issuance of administrative acts so that the interested parties can find easily potential administrative acts concerning them. The drafts are also published on the Internet site of the respective issuing authority (irrespective of the publication at the Internet site of the Public Consultations Portal). The Public Consolations Portal is not applicable to authorities outside the executive power in Bulgaria, i.e. mayors and municipal councils – in this case the draft act is published only at the Internet site of the respective municipality.

As regards general administrative acts, Article 77 of the Code of Administrative Procedure further details that, apart from publishing the draft on the Internet site, the administrative authority could also publish the materials in mass media or could send the draft to known organizations or persons who may be affected by the act. Following the publication of the draft, the members of the general public which are potential addressees or affected parties by the application of the act, are allowed to submit statements, objections and even proposals for amending the wording of the provisions of the act. Following the expiration of the term for public consultations, the authority reviews the statements and proposals for amendments of the act and adopts a final draft of the act which is to be published at the State Gazette.

The rule of Article 26 of the Normative Acts Law seems easy to be complied with, however, its violation is one of the most constant reasons for repeal of normative and general administrative acts in Bulgaria. The most common violations of the administrative authorities are related to failure to publish all enclosures (motives, report, etc.) to the draft act; or the authority publishes a draft with motives however, the motives simply repeat the provisions of the draft and do not give specific information about the reasons for adoption of the act and the purposes that are pursued with the act; the authority adopts the act making significant amendments to the initially published draft without publishing the amended draft for public consultations. All of the abovementioned omissions of the administrative authorities are considered as significant violations because they effectively limit the possibilities of the interested parties to influence on the final content of the act, i.e. their participation is only formally allowed by the administrative authority.

An example for a public consultations procedure that is only formally followed is when the authority publishes a draft of administrative act with report and motives and the motives simply repeat the provisions of the act. The guarantee for the members of the public to be able to understand the exact reasons for adoption of an act is provided in Article 28 of the Normative Acts Law. In particular, the motives to the draft act have to include: the reasons that require adoption of the administrative act; the purposes which are pursued with the act; financial and other funds and materials necessary for application of the act; expected results; analysis of the compatibility of the provisions of the act with the EU law. If the motives do not fulfill any or all of the above requirements, then in practice the draft act is not accompanied with motives. To this regard the reasoning of the court in Decision 7707 of 25.06.2015, case 1132/2015 of Cassation Panel of the Supreme Administrative Court [[10]](#footnote-10): “The requirements to the content of the motives to a normative administrative act are not for their own sake. These requirements are the instrument and the guarantee that the basic principles for issuance of administrative act are followed – the principles for grounded act, stability, transparency and stability. The lack of the statutory required content makes the motives, apart from being formally not compliant with Article 28 of the Normative Acts Law, refrains the court from the possibility to analyze if the adoption of the act has been made in accordance with the abovementioned principles.”

Another requirement that is relatively often ignored and thus violated by the administrative authorities is that the purpose of the public consultations is to give the general public the possibility to get acquainted with the content of the act as it is to be published in the State Gazette. Therefore, if after the initial publication for public consultations the act has been amended (as a result of the statements and proposals of the interested parties or by initiative of the administrative authority), then the administrative authority should publish the amended draft of the act for another round of public consultations. Otherwise, the second draft would be enforced without the participation of the public in its issuance of the act. As per motives of Decision 78 of 06.01.2014, case 8815/2013, Cassation Panel of Supreme Administrative Court[[11]](#footnote-11): “The circumstances of the case show that following the first publication for public discussion, the municipal council has approved amendment of a provision of the ordinance which was not provided in the initial draft of the act. The procedure for adoption of normative administrative act is provided in law in the interest of the general public therefore the omission is a substantial violation of the procedure for adoption of administrative acts. Compliance with the imperative rules regarding the issuance of administrative act is a responsibility of the administration vested with executive powers where the latter should be guided by the principles of rule of law, equality, accessibility, publicity and transparency as per Articles 4, 8 and 12 of the Code of Administrative Procedure.”

As evident from the above, the authorities are obliged to observe the principles of administrative activity as per the Code of Administrative Procedure without any exception. What is more, Article 26, Para 1 of the Normative Acts Law binds the administration to further follow the principles of necessity, reasonableness, predictability, transparency, subsidiarity, proportionality and stability in the process of issuing administrative acts. It follows from the above that only when the procedure concerning the public consultations is effectively followed, the principles of administrative activity could be complied with and therefore the public interest – protected.

To summarize the above, the work of the administration should always be carried out in favor of the parties affected by that activity. When issuing individual administrative acts, the authorities should take account of the interests of the addressee and the parties potentially affected by the act, and when issuing general and normative administrative the administration should take account of the interests of the general public. In both cases this can be achieved only through allowing the members of the public to participate in the decision-making process through submitting their positions or objections prior to issuance of the final administrative act. Whereas the guarantee for the proper and diligent work of the administration is the participation of the public in its activity, the guarantee that the administration will not ignore this requirement is the constitutional principle that, except for a limited number of cases, all acts and actions of the administration are subject to judicial review.

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