

Decision-Making Transparency in Public Administration

Elena Emilia Ștefan

Associate Professor, PhD, „Nicolae Titulescu” University, Bucharest, Romania,
stefanelena@univnt.ro

ABSTRACT: Nowadays, increasing citizens' trust in the authorities that govern us is crucial for the proper functioning of the state. People who are temporarily in public office must serve the public interest. Transparency is an ethical value but also a legal concept, subject to legal rules. In its activity, the European Ombudsman has often been called upon to give an opinion on whether European citizens' public access to documents was observed. In this context, in the present study, we aim to analyze the legal framework applicable to decision-making transparency in public administration, starting from the specificity of the public power regime governing the public sector activity, meaning that the public interest takes precedence over the private interest. From this point of view, we consider the topic to be of general interest, as it provides information not only for law specialists but also for private individuals who need to know their rights in relation to public authorities. The paper is divided into three sections: section I provides a brief introduction to the subject, section II investigates the national legislation on transparency in the public administration activity, and section III examines transparency in decision-making at European level through the case law of the European Ombudsman.

KEYWORDS: European Ombudsman, Constitution, public authority, decision-making transparency, Administrative Code

1. Introduction

According to the Explanatory Dictionary of the Romanian Language (Dexonline n.d.), *transparency* means: “way of working, principle of some leaders or governing bodies to make their entire activity known to the public at all times”. This analysis starts from the absolute need to observe the law, both by citizens and by the authorities, as laid down in Article 1 para. (5) of the Romanian Constitution, as revised: “*In Romania, respect for the Constitution, its supremacy and the laws is mandatory*”. The Constitution regulates several rights that can shape the broad framework of citizens' access to information of public interest: the right to information, the right of a person aggrieved by a public authority, free access to

justice, or the right to petition. We are interested in Article 31 on the *right to information*: para. (1) “*The right of a person to have access to any information of public interest may not be restricted*” and para. (2) “*The public authorities, in accordance with their powers, are obliged to ensure that citizens are properly informed about public affairs (...)*”. Otherwise, for the violation of their rights or legitimate interests by a public authority, injured parties have recourse to administrative due process. In fact, “*human coexistence is increasingly feeling the need of security, clarity and order in its internal relations*” (Popa 2008, 63).

This paper analyses the legislation applicable to the transparency of the work of public authorities, starting from the idea that “*the current stakes for the leaders at the highest level in states are huge and on the long-term (...): identifying solutions and mechanisms to increase public trust in state authorities (...)*” (Ștefan 2017, 96).

At the same time, in the documentary analysis that we will carry out, the paper will also include references to the case law of the European Ombudsman on the right to good administration. In this respect, research methods such as the comparative method, the logical deductive method and others will be used to combine theoretical and practical information.

2. The obligation of public authorities to ensure transparency in public administration

At national level, the legal framework applicable to public administration activity is mainly regulated by the Romanian Constitution and the Administrative Code (Government Emergency Ordinance no. 57/2019), to which other normative acts are added. Title III of the Administrative Code - *General Principles Applicable to Public Administration* regulates eight principles, of which we note: the principle of transparency and the principle of satisfying the public interest (Articles 8 and 10). Doctrine has pointed out that “*it is for the first time that a normative act regulates rules having the value of general principles that apply to the entire public administration, both central and local*” (Vedinaș 2021, 38). The principle of transparency is laid down in Article 10 of the Administrative Code:

“Paragraph (1) In the process of drafting normative acts, public authorities and institutions have the obligation to inform and submit drafts of normative acts to public consultation and debate and to allow citizens access to the administrative decision-making process, as well as to data and information of public interest, within the limits of the law.

Paragraph (2) The beneficiaries of public administration activities have the right to obtain information from public administration authorities and institutions, and they have the correlative obligation to provide the beneficiaries with information *ex officio* or upon request, within the limits of the law”.

According to the doctrine, “*at the legislative level, this principle is already implemented, prior to the adoption of the Administrative Code, by Law no.*

52/2003 on decision-making transparency in public administration” (Ștefan 2023, 65). Law no. 52/2003 “establishes the minimum procedural rules applicable to ensure decision-making transparency in central and local public administration authorities, elected or appointed, as well as other public institutions using public financial resources (...)” (Ibidem).

Another law that complements the legislation applicable to transparency in decision-making is Law no. 161/2003 on some measures to ensure transparency in the exercise of public office, public functions and in the business environment, prevention and sanctioning of corruption (published in Official Gazette no. 279 of April 21, 2023). “The civil servant is considered to be the legal institution of public law in general and administrative law in particular” (Buzatu 2011, 182). According to the doctrine, “the Administrative Code does not contain any novelties regarding the regime of incompatibilities and conflict of interest applicable to the function of member of the Government, but refers to the provisions of Law no. 161/2003 (...)” (Ștefan 2023, 213-214).

Related to the subject under analysis is also Law no. 544/2001 on free access to information of public interest, which in its Article 1 provides for free and unrestricted access of the individual to any information of public interest (published in the Official Gazette no. 663 of October 23, 2001).

With reference to Article 52 of the Constitution (the right of the person injured by a public authority), Law no. 554/2004 on administrative due process (published in Official Gazette no. 1154 of December 7, 2004) develops the legal framework applicable to administrative dispute actions for refusal of access to information of public interest.

3. Decision-making transparency at European level - the European Ombudsman’s case law

According to the doctrine “the European Union’s policy issues cover a broad spectrum of areas” (Conea 2020, 9). At the European level, public access to documents was regulated by Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of May 30, 2001 regarding public access to European Parliament, Council and Commission documents (published in OJ L 145, 2001). At the same time, “states are those that participate in international relations, but not anyway, but as legally equal subjects of international law” (Popescu 2023, 9).

In its Article 2 para. (1), the European legal act provides that: “*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*”. At the same time: “*in order to allow citizens to exercise their rights under this Regulation effectively, each institution shall grant public access to a register of documents*” (Article 11). Article 8 para. (3) specifies that: “*failure by the institution to reply within the prescribed time*

limit shall be considered as a negative reply and shall entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman in accordance with the relevant provisions of the EC Treaty”.

According to the doctrine, “the European Code of Good Administrative Behaviour or Code of Good Administration contains principles of good administration and rules that must govern the administrative decisions, such as: legality, equality, proportionality (...), transparency” (Carp 2010, 4). In order to see the practical applicability of the European act, we will now present two cases settled by the European Ombudsman.

In a recent case, *the Ombudsman found maladministration*. In short, the applicant “requested public access to the positions adopted by the Member States on an implementing regulation laying down eco-design requirements for electronic displays. The Ombudsman considered that the Commission’s decision to refuse access to the requested documents was unfounded and that the refusal to grant access to the audio recordings and e-mail constituted maladministration”. (Decision in case 1944/2019/DL on the transparency of Member States’ positions on a European Commission proposal for a Regulation implementing the Ecodesign Directive).

In another case, *the Ombudsman found no maladministration*. In short, the applicant “requested public access to documents relating to ongoing negotiations on the taxation of digital services. The Council identified 53 documents, of which it granted access to 24 documents, refused access to 10 documents and granted partial access to the remaining documents. On the basis of the investigation, the Ombudsman closed the case as there was no maladministration on the part of the Council in refusing access to the 10 documents in question (...) on the basis of the need to protect the international relations and the financial policy (...) of the EU or its Member States” (Decision in case 1703/2021/AMF on the refusal of the EU Council to grant public access to documents relating to the ongoing negotiations on the taxation of digital services).

4. Conclusions

This analysis has revealed the legislation applicable to the transparency of the work of public authorities, so that we can draw some conclusions below. In this respect, the paper has outlined the legal framework applicable at both national and European level. If at national level the legislation is made up of the Constitution and other normative acts, such as Law no. 52/2003 on the transparency of decision-making in public administration, the Administrative Code, etc., at European level there is EC Regulation no. 1049/2001 of the European Parliament and of the Council of May 30, 2001 regarding public access to European Parliament, Council and Commission documents. “Regulations have general applicability” (Fuerea 2010, 141) and according to the Constitution, this European normative act is part of national law and must be observed.

From this perspective, at national level, persons who have been harmed in a legitimate right or interest by a public authority have recourse to administrative due process to complain to the judge. The Administrative Code provides that one of the basic principles applicable to public administration is the principle of transparency.

At European level, the European Ombudsman is the public authority called upon to deal, ex officio or on referral, with complaints concerning infringements of European citizens' right to good administration. At the same time, in order to see how the concept of transparency works in practice, the selected case studies focused on the finding of maladministration in relation to public access to documents.

References

- Buzatu, Nicoleta-Elena. 2011. "The public officer - the active subject of a crime." In *CKS E-Book 2011*: 182. Bucharest: Pro Universitaria Publishing House.
- Carp, Radu. 2010. „În direcția unui drept administrativ european? Buna administrare potrivit normelor cu și fără forță constrângătoare ale Consiliului Europei și Uniunii Europene” [Towards a European administrative law? Good administration according to the binding and non-binding rules of the Council of Europe and the European Union]. In *Public Law Magazine* no (4), 4.
- Conea, Alina. 2020. *Politicile Uniunii Europene [European Union Policies]*. Bucharest: Universul Juridic Publishing House.
- Dexonline. n.d. Retrieved from: <https://dexonline.ro/definitie/transparen%C8%9B%C4%83>.
- European Ombudsman, Decision in case 1703/2021/AMF concerning the refusal of the EU Council to grant public access to documents relating to the ongoing negotiations on the taxation of digital services. Retrieved from: <https://www.ombudsman.europa.eu/ro/decision/ro/156596>.
- European Ombudsman, Decision in case 1944/2019/DL on the transparency of Member States' positions on a European Commission proposal for a Regulation implementing the Ecodesign Directive. Retrieved from: <https://www.ombudsman.europa.eu/ro/decision/ro/137975>.
- Fuerea, Augustin. 2010. *Manualul Uniunii Europene [The European Union Handbook]* 6th edition, revised and supplemented. Bucharest: Universul Juridic Publishing House.
- GEO no. 57/2019 on the Administrative Code, *Official Journal* no. 555 of July 5, 2019.
- Law no. 52/2003 on decision-making transparency in public administration, *Official Gazette* no. 70 of February 3, 2003.
- Law no. 544/2001 on free access to information of public interest, *Official Gazette* no. 663 of October 23, 2001.
- Law no. 554/2004 of the administrative due process. *Official Journal* no. 1154 of December 7, 2004.
- Popa, Nicolae. 2008. *Teoria generală a dreptului, [General theory of law]*, 3rd edition. Bucharest: C.H. Beck Publishing House.
- Popescu, R.-M. 2023. *Drept internațional public [International public law]*. Bucharest: Universul Juridic Publishing House.
- 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 (OJ L 145, 31.05.2001).
- Ștefan, Elena Emilia. 2017. "Legalitate și moralitate în activitatea autorităților publice" [Legality and morality in the work of public authorities]. In *Public Law Magazine* no (4), 96.
- Ștefan, Elena Emilia. 2023. *Drept administrativ Partea I [Administrative Law Part I]*, 4th revised and supplemented edition, Bucharest: Universul Juridic Publishing House.
- The revised Constitution of Romania.
- Vedinaș, Verginia. 2021. *Codul administrativ adnotat. Nouăți. Examinare comparativă. Note explicative [Annotated Administrative Code. Novelties. Comparative Examination. Explanatory Notes]*, 3rd edition, revised and supplemented, Bucharest: Universul Juridic Publishing House.