

ABOUT ESSENTIAL FEATURES OF THE NOTION OF «ADMINISTRATIVE ACT»

This article presents the results of a study devoted to determination of the essential features of an administrative act and their possible fixation in the Ukrainian legislation, based on review and synthesis of available in scientific literature views as to the definition of an administrative act, practice of its fixing in the law of the European Union member-states and a number of recommendations of the Committee of Ministers of Council of Europe concerning the scope of public administration activity. The article delineated the notions of a normative, administrative and managerial acts, proposed a definition of modern and fundamentally important approaches for development of legal regulation regarding administrative procedures for public administration activity and individual decision-making, based on the analysis of the generalized signs of an administrative act was made an attempt to suggest the author's definition of this concept.

Key words: administrative act, administrative legislation, features of an administrative act, administrative procedure, administrative reform.

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The public administration is specially created and empowered to perform the executive functions of the state. At present, it is necessary to develop a detailed legal regulation of all areas of public administration activity, especially in the part relating to their interaction with citizens and entities (the so-called external forms of administrative activity), in order to prevent abuse of transmitted to them authority. This is justified by the need to overcome negative tendencies of decreasing quality performance of the subjects, delaying the process of individual administrative decision-making, unreasonable refusals of granting permits, licenses and so on.

The relevance of this study is to determine the need of modern and fundamentally important areas of legal regulation of administrative procedures for public administration affairs.

The purpose of this study is to determine the essential features of an administrative act and possible consolidation of Ukrainian legislation, a review of the scientific literature views on the definition of an administrative

act, comparing it with the definition proposed in the draft Administrative Procedure Code of Ukraine (the second edition), and with similar definitions set out in the relevant laws of European countries. Need in definition of administrative act is clear distinction from other acts of public administration. Special attention is paid to individual administrative acts as they relate to the rights and interests of individuals and / or legal entities of public law sphere. In this regard, there is also a problem of a distinction between legislative, administrative and managerial acts.

Due to the outlined purpose were set the following objectives:

– determine the essential features of an administrative act by studying the definitions set out in European legislation, proposed by domestic and foreign scholars;

– suggest ways of fixing the most important essential features of an administrative act in the national legislation.

The study of administrative procedures and problems of implementation of administrative acts was performed in the works of famous local scientists and researchers: V. Aver'yanov, I. Koliushko, V. Tymoshchuk, N. Tishchenko, R. Kuibida, A. Shkolyk, and foreign scientists, including: D. J. Hallihan, J. Ziller, V. Kyuhel, B. Lazarev, A. Lyuhterhrandt and others.

To date, we can generalize the definition of an administrative act through enumeration of its main features:

1) Directed on the realization of the rights of individuals, legal entities, collective entities;

2) Taken by public administration under the authority specified in law;

3) Taken within the jurisdiction of public administration;

4) In some cases taken within the discretionary powers;

5) Meets the requirements of the law as to the form and essence;

6) Should be taken in accordance with the procedural standards (in certain cases with the obligatory participation of citizens in decision-making);

7) Taken within a reasonable time;

8) Must be properly motivated;

9) Published in installed (provided) way;

10) Can be reviewed by a judicial body or other independent body.

The Resolution (77) 31 of the Committee of Ministers of the Council of Europe understands the term «administrative act» as «a decision» [1, p. 469–479]. This definition is general and requires interpretation. «Measure» actually covers a number of actions of the public administration which appear in examination and solution in individual administrative proceedings, as well as oral or conclusive action of authorized individuals.

Noteworthy is a definition that was given in the dissenting opinion of the judge of the Constitutional Court of Ukraine M. Savenko, «act» (Latin *actus* – «action»; *actum* – «document») means action, deed and the document issued (adopted) by a public authority, local governments and their officials» [1, p. 480–493]. Such determination can be quite a clear guide for understanding this definition of an administrative act in terms of the forms of its manifestations.

Normative act is an act, which contains certain rules of conduct (law). B. Lazarev notes that «according to the

prescriptions recorded in the act there are normative and individual acts» [2, p. 33].

However, a significant number of publications instruction, rules, regulations, etc. require a necessary level of specificity of understanding of certain issues. In fact, in this case, executive authorities undertake law-drafting powers. Note that the above examples of normative acts and those that determine the competence of the authorities have more technical nature and are not regulated beyond the rules outlined in the law; they are aimed at creating a common reference points (goals, objectives, policies) of public administration in their respective industries. Thus, under normative we understand an act, which contains mandatory rules of behaviour – a norm.

When we talk about an individual act, we mean the acts of governance (public administration) that since their adoption generate, modify or terminate the legal relationship between clearly defined ranges of subjects [2, p. 33].

It is difficult to agree with the above position of B. Lazarev in view of the following: the adjective «individual» usually refers to a single person (or small group of people), but we can note a widespread use of such public administration's decision-making as adoption of acts, extended to all subjects, including regulations and orders of the Cabinet of Ministers of Ukraine. Thus, the following acts of the Cabinet of Ministers of Ukraine can not be attributed either to the normative or to the individual, even though they actually belong to the administrative acts.

In foreign countries, there are different approaches to the definition of «admini-

strative act». For example in France used a broad approach for outlining the content of this term, which refer to all acts of administration, so it includes individual acts of public administration and administrative agreements and normative acts. Another approach set out in the German law «About administrative procedure», according to which an administrative act appears in manifestations of the administrative activity related to the settlement of an individual issue in the public sphere.

There is no definition of «administrative act» in domestic law, but this definition was used in the draft Code of Administrative Procedure of Ukraine, understanding this term as a decision (a legal act, document, mark in the document) of individual action taken by the administrative authority as a result of the review of administrative proceedings in accordance with this Code, aimed at the acquisition, modification or termination of the rights and obligations of individual or legal entity(s) [3].

However, this definition needs revision, it is therefore necessary to make a clear analysis of the essential features of the noticed above definition in terms of assessing its compliance with certain signs. The result of this analysis will be proposed below.

D. Hallihan notes that all administrative actions can be divided into two groups:

1) related to the development of policies that presents a high degree of generalization character, which specifies only the general goals and objectives;

2) related to the specific case of a person or a wide range of people [4].

This division is more appropriate, it eliminates the conventional criterion

of division as the number of subjects on which the act extends its action (because of the impossibility of clear differentiation for this indicator).

B. Lazarev notes that the act of governance is the result of combining in one document management solutions and powerful expression of public administration [2, p. 199]. It is difficult to agree with this statement in the current development of public administration.

Considering development of the institute of public administration in the European countries, there is a possibility in future of giving similar powers to individual professionals – agents of public administration. The powers and jurisdiction of such entities must have clearly defined boundaries in order to protect the rights and interests of individuals and legal entities to limit the interference of such entities in private and personal life, to regulate their activities.

A separate Recommendation № R(80) 2 of the Committee of Ministers of the Council of Europe member states on the exercise of discretionary powers by administrative authorities on March 11, 1980 is devoted to discretionary powers. According to the provisions of the above act discretion body's authority is understood as providing that a degree of freedom in deciding what actually means the ability to choose between multiple most appropriate solutions [2, p. 170].

In Ukrainian legislation we can also find definition of the phenomenon. «Discretionary powers – a set of rights and responsibilities of state and local governments, persons authorized to perform the functions of the state or local government, providing an oppor-

tunity to determine their own discretion in whole or in part the type and content management solutions, received, or a choice at the discretion of one of several options for management decisions provided by draft legal instrument» [5] that is not materially different from the proposed definition the level of the European Union.

Provisions on such broad powers of public administration are necessary to fix appropriate safeguards to promote the rights and interests of citizens and legal entities, prevent abuse or otherwise improper use of discretionary powers, as an administrative authority must not only comply with the laws, but also act properly [1, p. 470]. Public administration performing discretionary powers must also comply with the objectives (goals) for which such powers were granted. Otherwise, the acts shall be void.

Under such a feature of an administrative act as a commitment in the implementation of public power we need to understand the following: first of all, it is a result of a body empowered to take certain actions. Secondly, this activity is a form of public administration activity, that the interaction of these bodies with the public and/or entities. This feature allows us to identify other participants of legal relations that arise when an administrative act – they are the individuals and / or entities.

As for the specific expressions of administrative acts, the traditional forms are written, oral, email, and other required by law. The most promising is an electronic form of administrative acts, given the ease of adoption, easy way to bring to the notice, to correct, and low-

est cost. However, even electronic form shall be complied with requirements to acts' details: signatures of responsible individuals. Thus, we can equate the value of the written and electronic form because the latter is actually a modification of the first.

Compliance with the standards of procedural acts is a manifestation of the requirements for the form of such acts, and is closely related to the competence of administrative authorities. That is, public administration, taking certain decisions or committing certain measures shall strictly adhere to the noticed above procedures, operating simultaneously within its powers. Such rules should get their fixation in the form of uniform rules for public administration at the level of a special law or code. This level of regulation is conditioned due to the specific meaning of this act (the creation of rights and obligations for individuals and / or entities, violating such rules can lead to nullity of the act.

According to the provisions of Principles of Good Administration In the Member States of the European Union [6] one of the most important principles is the right of person who applies to the competent authority, obtain administrative services or to hear a case within a reasonable (sufficient) time. A sense of national Administrative Procedural Code of Ukraine (Article 3) a reasonable time – a reasonable term and resolution of proceedings, sufficient to provide timely (without undue delay) judicial protection of violated rights, freedoms and interests in public relations [7].

There is also a differentiation in terms depending on a kind of administrative activity performed. The imple-

mentation of similar grading will increase the number of services provided, as well as meet the interests of society and perform another mechanism for preventing acts of corruption.

It is important to underline value of the Recommendation № R (80) 2 of the Committee of Ministers of Council of Europe member states regarding exercise of discretionary powers by administrative authorities [8]. We should also pay attention to the fact that non-compliance with the terms of the case could lead to review of decision, or to being able to believe the decision.

Thus, the act must be taken within a specified reasonable time under the law, as is intended, first, to the rights of citizens and legal entities.

The requirement of motivation can be understood as an indication of the main factual and legal grounds that acted as a prerequisite for decision-making in a case [1, p. 372]. Of course, each time pointing fully motivated act by relevant body of the public administration, citing the grounds of individual administrative proceedings, as well as a link to existing legislation will lead to delays in decision making, slowing the work of public administration. Therefore, there should be a number of exceptions, where motivation of relevant decision may be not given, for example, if the publication of the act is a common practice of administrative authority, carried out on direct orders from the law, when the act is issued at the request of one person and does not affect the rights of the others.

This feature of validity of the administrative act must be one of the conditions of the act to enter into legal force. It is closely related to the requirements

as to the form of administrative acts discussed above.

As for such feature of providing persons participation in the decision-making process we should understand it as a procedure of consideration of individual administrative case a person must be given an opportunity to explain the matters of case, because it is a citizen or legal entity, rather than state authorities, more aware of the content of the case and in order to save time for activities of authorized persons of public administration, should participate in decision-making that in the future will affect their rights and responsibilities. It should be noted that the participation of citizens in decision-making should be their right, not an obligation. In case, when the administrative decision will make interference with the rights and obligations of a large number of subjects, the procedure of the case in general should be organized in public, with the aim to ensure the availability of consideration of this case, persons to whom this decision will have a corresponding impact. Failure to comply with this warranty does not result in the recognition of an act void, but creates grounds for challenging the relevant decision of public administration.

When we talk about such a characteristic of administrative act as its promulgation in accordance with the law, it is necessary to stress the special importance of this position. There is a general rule that an individual administrative act enters into force from the moment of informing about solution in individual administrative case is properly represented to a citizen or a legal entity. It should start with the following: a way to inform a person about the result of its ad-

ministrative case based on the concepts of accessibility and convenience of appropriate means of communication. The decision is not necessarily has to be brought to the attention by explaining in person the contents of the relevant decision. It is sufficient to send a notification by mail (or other pre-agreed way/mode). As for administrative acts, there is a message need to be made in an official way by publication in the prescribed in the legislation source – the media, the use of telecommunications. However, with the development of internet technology, we should not throw away the opportunity in the future solving the issue of promulgation by sending a collective message, posting relevant information on the web-portals etc.

The sign of possibility to review an administrative act is one of the safeguards for rights and interests of private persons. In fact, at the moment the main ways to appeal administrative acts are: internal administrative review (appeal taken by the act of refusing admission to a higher authority or official within the system of public administration), the response to the appeal of the specialized agencies, to non-judiciary system and the proper judicial review.

Above we have noted the definition of administrative act that was suggested in the draft of Administrative Procedure Code of Ukraine. Now we can analyze its compliance with the outlined signs. This definition does not cover the content of such a multidimensional phenomenon as an administrative act. First, there was not taken into account the following forms of administrative act as an action of public administration, which greatly narrows the scope of the rele-

vant provisions of law. Secondly, it does not indicate the fact that the relevant decision (action) should be motivated, unless otherwise provided by law, created with a guaranteed possibility for individuals and/or legal entities to participate in decision-making made public or brought to the attention of the subjects in the manner provided by law or contracted parties and one that can be challenged in order internal administrative appeal or in court.

Further research should be aimed at determining precisely informative features of the definition of «administrative act», the study of its place among other legislative acts and acts of administration.

Thus, the results of the research propose the following amendments to the national legislation:

1) adopt a special law «About administrative procedures « where should be fixed a definition of administrative act, the administrative procedure for the consideration of the individual case and the decision rules as well as their performance and appeal;

2) give a definition of an administrative act as act or a measure of administrative authority, public administration, aimed at realization of the rights of, adopted after consideration of individual cases within the public powers (as well as the order of the discretionary) of interaction of individuals and / or legal entities, motivated and appropriately justified (unless otherwise provided by law), adopted within a reasonable time, in accordance with the procedure laid down in legislation standards and requirements of the public administration, brought to the subjects on which the act

distributes its effect in the manner and form prescribed by law or by agreement, and that can be appealed to the procedure of internal administrative appeal or to the court;

3) the above-mentioned essential features of an administrative act must obtain fixation not only by the definition of an administrative act, but also to receive fixation in the legal norms defining administrative proceeding.

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Ященко Т. В. Про основні ознаки поняття «адміністративний акт».

У статті наводяться результати дослідження щодо визначення істотних ознак адміністративного акта та можливих шляхів їх закріплення в українському законодавстві, які є результатом узагальнення наявних у науковій літературі поглядів щодо визначення поняття адміністративного акта, практики закріплення такого поняття в законодавстві країн Європейського Союзу та низки рекомендацій Комітету Міністрів Ради Європи, що стосуються сфери діяльності органів публічної адміністрації. У статті розмежовуються поняття нормативного, адміністративного та управлінського актів, запропоновано визначення сучасних і принципово важливих напрямків правового регулювання процедури розгляду адміністративних справ органами публічної адміністрації та прийняття індивідуальних рішень і через аналіз узагальнених ознак адміністративного акта зроблено спробу запропонувати авторське визначення цього поняття.

Ключові слова: адміністративний акт, адміністративне законодавство, ознаки адміністративного акта, адміністративна процедура, адміністративна реформа.

Ященко Т. В. Об основных признаках понятия «административный акт».

В статье приводятся результаты исследования по определению существенных признаков административного акта и возможных путей их закрепления в украинском законодательстве, которые являются результатом обобщения имеющихся в научной литературе взглядов относительно определения понятия административного акта, практики закрепления такого понятия в законодательстве стран Европейского Союза и ряда рекомендаций Комитета Министров Совета Европы, касающихся сферы деятельности органов публичной администрации. В статье разграничиваются понятия нормативного, административного и управленческого актов, предложено определение современных и принципиально важных направлений правового регулирования процедуры рассмотрения административных дел органами публичной администрации и принятия индивидуальных решений и через анализ обобщенных признаков административного акта сделана попытка предложить авторское определение данного понятия.

Ключевые слова: административный акт, административное законодательство, признаки административного акта, административная процедура, административная реформа.

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