

The Process of Evidencing (Offer of Proof) at Administrative Procedure

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Abstract

The investigatory procedure carried out by an administrative organ during administrative proceedings is indispensable. There is no doubt that "*lex specialis*", in several cases, tend to detail this process, however, it needs a "*lex generalis*" act which will regulated principally all the important elements of the investigatory procedure. The Code of Administrative Procedure is an act, which naturally poses its problematic, however it is very important for prescribing such institute of administrative proceedings. Due to such significance, the analysis of judicial means being available to an organ of public administration for evaluating complexly the totality of facts and proofs and certainly for identifying present problems, is the central pillar of this report.

Keywords: administrative proceeding, proofs, interested parties (litigants)

1. Introduction

Decision-making of public administrative organs very often has made us think that it would have been differently and less expensive if in its total complexity the process of evidencing (offer of proofs) would not have been considered trespassing. Really, for an incorrect decision, including also illegitimacy and irregularities in decision-making, it would be easier for each of us to blame personally a physical person, an individual or group of individuals, who exercise their rights on behalf of the organ, but on the other hand, it would be more professional if emphasis is laid on that which stands at the core of each decision, credibility of proofs in the action or inaction of the public administrative organ. In other words, the totality of entire acts, facts or actions, through which evidences are collected and evaluated preliminarily, interests or actual situation where administrative act is to be applied¹, is conceived as investigatory procedure, an extremely important stage of administrative proceedings.

Certainly, the objective of this report is to analyze the judicial means being available to an organ of public administration to evaluate complexly the totality of proofs and facts and certainly identifying problematic being present, which constrain the effective and complete realization of this phase.

¹ Irelli V.C., "Corso di diritto amministrativo", G.Giappichelli Editore, Torino, 1997, page 439

2. The meaning of investigatory procedure as a stage of administrative proceeding

With investigatory procedure, in the jurisdiction of our administrative law, it means all actions undertaken by the competent organ, including the process of searching and finding all necessary facts for taking the final decision². Therefore, this is really a proceeding phase which carries in itself a complex process that must be identified by the organ and it must really select those facts which are of first importance and then, while their scope cannot be exhaustible, certain situations might be emerged during proceedings which are to be proved.

Indispensability of investigatory procedure derives from the fact that the decision-making organ must indispensably evaluate all legal and factual elements of a real situation from which the necessity for proceedings has emerged. It should certainly go even further; it should estimate the environment in which the delivered act is to be applied. In other words, in order to deliver a legal act, the organ, that is to make the decision, must be allowed to evaluate completely all public, collective or private interests, which are in play in the concrete situation, while, on the other side, it should deliver a correct act, i.e. it should evaluate how such act, action or inaction, complies with expectancies and if it will surely bring forth that output which law "wishes" to be produced³.

Actually, the Code of Administrative Procedures⁴ pays special attention to this phase, certainly with its identified problems, which undoubtedly does not diminish the value of this very important act for disciplining administrative performance.

3. The process of evidencing during administrative proceedings,

3.1 Subjects of investigatory proceedings

Referring to the Code of Administrative Procedure (CAP), the right to carry out investigatory proceedings belongs precisely to the organ which has the authority to take the final decision⁵. However, not all acts or actions, which are parts of investigatory procedures, are fulfilled by the latter. Our law entitles the said organ to delegate the right for carrying out investigatory proceedings to its subordinate organ, except the cases when such delegation is prohibited by law.

Having a clear idea regarding the aims of the institute of delegation, and precisely the increase of efficiency for carrying out a function, our positive right allows the organ

² Article 81 of the Code of Administrative Procedure

³ See: Sadushi S, "Administrative Law", Tirana, 2009.

⁴ The Code of Administrative Procedures

⁵ See Article 80 of the Code of Administrative Procedures

to delegate its competencies to its subordinate organ⁶ for the purpose of carrying out an investigatory procedure. In the actual case, delegation intends to realize more accurate and quicker investigatory proceedings.

In such a case, the object of delegation might be the entire investigatory proceedings or several specific duties determined by the competent organ itself. This is a regulation which is applied for monocratic organs, because in cases when the competent organ is a collegial one, the alternative for delegating investigatory proceedings or some elements of investigatory procedure, there can be certain members of this organ for specific investigatory tasks⁷.

Situation presented so far is not most a most with the institute of delegation. This is because there is no exercise of competences in one of the forms of administrative activity, but we have to do with collection of facts, verification of investigation object determined preliminarily by the organ. Thus, it is entirely accurate that in such a case we are within the juridical concept of delegating the rights, but it is a type of specific and limited delegation. In this case, the organ delegated under specific duties is carrying out rather more specific duties which have not to do with the analysis or evaluation of obtained proofs than with their fixation⁸.

However, notwithstanding we are before two different cases, even when the subordinate organ has the authority to carry out the whole investigatory proceedings and not some special tasks falling within the entire investigatory activities, it is the competent administrative organ which will ultimately evaluate obtained proofs before the delivery of the administrative act. Thus, although in both cases we are before delegation, however, the difference lays on the fact that if the subordinate organ is delegated the competence to be independent for specifying the investigative fields and actions to be carried out, or as it is in the second case when the organ has outline itself the duties to be performed in support of carrying out investigations as fully as possible and for the aim of performing it better, entitles the organ to carry out some of them.

However, it should be pointed out that the whole investigatory procedure is arranged and conducted by the competent administrative organ. At the moment of the beginning of the investigatory proceedings by the investigative organ, the investigative object should be clear for the latter. In other words it means that portion of the reality before which the administrative organ will exercise its activity in order its acts to be considered legal⁹.

⁶ See Commentary on the Code of Administrative Procedures, page 178

⁷ See Article 80, point 4, of the Code of Administrative Procedure

⁸ See Commentary on the Code of Administrative Procedures, page 179

⁹ Casetta E., "Manuale del Diritto Amministrativo", Giuffrè Editore, 1999, page 394

Certainly, this matter cannot have only one solution, because in doctrinal level there are two opposite alternatives. The first prescribes that during investigatory proceedings the administrative organ should collect as many facts as possible intending to get to a complete recognition of factual reality, and the second alternative requires that the only circumstances to be proved are facts and circumstances explicitly specified by the lawmaker.

The first alternative tends to burden mostly the performance of administration, and, on the other hand, we cannot leave without mentioning that the complete recognition of the reality is practically and legally impossible and unrealistic. While the second tends to reduce in maximum the scope of selection by administration, and above all it disregards that facts often are determined by law and only through administrative activity their indetermination can be overcome¹⁰.

However, for the solution of the problem related to the limits of administrative investigatory activities, it should be taken into account and be clearly reviewed what evidences provides the concrete norm, based on which the act will be released.

Therefore, if the norm determines exactly the actual situation, or the category of facts related to the issue, the administrative performance should verify the compliance of the concrete situation with that shown under the norm. But, if the norm shows generally only the public interest which is required to be defended, investigation should consist in the justification how much an actual situation complies or achieves the public interest required explicitly under the norm.

Like in legislations of other countries, in our legislation is also noticed the cladding of administration with a discrete power with regard to the selection that each organ has to make between above-mentioned alternatives.

According to our law, at the beginning of the investigatory procedure, the administrative proceeding organ should become familiar with the reality in which the administrative activity will be carried out. Above all, collection of facts, which are necessary for taking the final decision, is in the forefront.

Thus, on one side, the organ requires to become familiar with the actual reality, which certainly should comply with the public interest, and on the other side, the latter is dedicated to collection of facts, which are required for the concrete decision.

We can say as a conclusion that the proper and complete specification of the investigation object is closely connected with the realization of more accurate investigatory procedures and subsequently the release of an act as right and opportune as possible.

¹⁰ See Casseta E, "Le manifestayioni di interessi nei procedimenti amministrativo", I. Rimini, 1983, page 45.

3.2 Verification of proofs and the inquisitorial principle

The investigatory procedure carried out by an administrative organ might be simple, and that is in cases when evaluation of a simple fact can be required, but it might be complicated in cases when there is a complex of investigations or of subjects involved in relevant proceedings required for issuing the act.

During the investigatory proceedings the administration has the obligation to carry out investigation specified explicitly under law. However, the Code of Administrative Procedure, exactly Articles 80-92 provide another structuring. Therefore, according to this Code, the investigatory procedure is structured in such a way that administration is allowed to carry out all actions that it considers reasonable and within legal limits for establishing a complete picture of the reality where the act released by it is to be applied. The competent organ, unlike from the court at a civil lawsuit, has got a double role; it seeks and becomes familiar with all facts which are necessary for taking the final decision. This twofold role is naturally linked with the inquisitorial principle, which results to be sanctioned under the provisions of this Code. Therefore, the organ, *ex officio*, can order the acquisition of proofs for certifying the required facts and on the other side, become familiar with all evidences provided by the parties. If we will try to draw a parallel with the civil procedure, we would point out that even our law on civil procedure prescribes several *ex officio* competences for the courts at a civil process which are related to the acquisition of proofs from third parties, or that specified under Article 225 of the Code of Civil Procedure for appointment of experts¹¹.

Another component of the inquisitorial principle is the right of the organ to extend investigation, which is a distinctive element of administrative investigatory procedure¹². The inquisitorial principle entitles the administrative organ to be based, on its own initiative, on every means of evidence which it considers reasonable. It is a true fact that such principle is not explicitly prescribed in our law¹³, however, the active role clothed to the proceeding organ during investigatory procedure shows clearly that this principle is directly implemented under the provisions of the Code of Administrative Procedure.

3.3. Burden of proof at the administrative investigatory procedure

Burden of proof means the duty of each party in a suit to provide evidences and prove the facts on an alleged issue. During investigatory proceedings, like in judicial

¹¹ See Simoni S, Sadushi S, Çomo S., "A Comparative Glance at Civil Procedure", Tirana 2006, page 208, Publishing House, Kristalhinë-Kh", Tirana.

¹² Caia G, Caputi Jambrenghi V, Domenicheli V, Follieri F, Greco G, Marrama R., Mazzaroli L., Mignone C., Morbidelle G., Pericu, Romano A., Romano Tassone A., Roversi Monaco F.A, Scoca F.G., Villata R., "Diritto Amministrativo II", Terza Edizione, Monduz i Editore, Bologna, 2001, page 1295.

¹³ See the Commentary on the Code of Administrative Procedures, page 183.

proceedings, administrative organ should attain to distinct which subject carries the burden of proof, dependent on the facts put forward¹⁴.

The Code of Administrative Procedure prescribes that burden of proofs for alleged facts rests on interested parties, even though the proceeding organ seeks and becomes familiar with all facts, which are necessary for drawing up the final decision, the interested party which pretends to have the right, has the obligation to prove the facts, on which its allegation is based.

However, notwithstanding interested parties has the burden of proofs for substantiation of alleged facts, this doesn't diminish the active role of the organ at the trial process. The objective for carrying out investigatory procedures by the administrative organ is that the administrative act fulfills the public interest and naturally the organ can be sufficient with the facts brought by parties at the law suit, excluding here also the other fact in cases when the competent organ, with its own initiative, starts an administrative prosecution against an individual or a subject that has committed an offence, it has got the right also and the obligation to carry out verification of evidences, proofs and facts because they will comprise a part of justification in the final decision¹⁵.

4. Evidences (proving means) at an administrative procedure

4.1. The meaning and the types of evidences (proving means)

At an administrative procedure, with evidences it means the entirety of acts, facts or actions undertaken by the organ or the parties in order to enable the creation of a clearer picture of the juridical and actual reality.

Verification of facts in an investigatory procedure consists in presentation of the reality objectively presumable¹⁶.

Verification can be achieved in different ways like: by the testimony of the parties, by queries or cross-examination of witnesses, by experts' advices, by the weight of documentary evidences, etc. Most of these means are specified under the provisions of this Code. In spite of the fact that the Code doesn't provide any details for the other means, it is understandable that administrative organ will apply analogically those general rules which are specified under civil law procedures and which are applicable also for the administrative proceedings¹⁷.

¹⁴ S. Çeço, Lectures on the subject of "The Civil Procedural Law in the People's Republic of Albania", Tirana, 1983, page

¹⁵ See the Commentary on the Code of Administrative Procedures, page 183

¹⁶ Caia G, Caputi Jambrenghi V, Domenicheli V, Follieri F, Greco G, Marrama R., Mazzaroli L., Mignone C., Morbidelle G., Pericu, Romano A., Romano Tassone A., Roversi Monaco F.A, Scoca F.G., Villata R., "Dirito Amministrativo II", Terza Edizione, Monduzi Editore, Bologna, 2001, page 1295

¹⁷ See the Commentary on the Code of Administrative Procedures, page 182

In further analysis of rules of evidence, it is important to identify that our law is based on the principle of offer of proofs by the interested parties. Thus, it is noticed that there are also elements of the offer of proofs under the order of the competent organ. And in this context the question is raised: Are *ex officio* competences of the administration organ limited there? While during a judicial action these competences are restricted, during an administrative proceeding the organ has no limitation in obtaining *ex officio* proofs, however, there is an “obstacle” in this case, which is related to the contents of information provided by evidence or has to do with the properties of the subject that carries forth such information, i.e. when there are limitations prescribed by law in providing information.

Once the object of investigation is settled, the organ determines also the facts, which are necessary to take the final decision. However, facts presented by the parties and also those obtained by the organ, are subject to the process of evidencing for proving their truth, which, according to our legislation, can be realized through rules of evidence allowed by law¹⁸.

The object of investigation in the civil procedural doctrine is an object of proof. Proofs are evidences obtained from sources prescribed by law, which are acquired according to relevant rules of evidence and which approve or disapprove the requests or claims of the parties in the trial¹⁹.

Let's analyze below these means of evidence and what is the impact of each of them at the administrative procedure.

4.2 Documentary evidence

While during investigatory procedure the organ searches for and seeks to get familiar with, it is clear that the first step to be made by the organ is the demand, i.e., it requests from interested parties to provide and present information, documents and certainly objects which can be subjected to examination. Later, during or at the end of the process, it naturally familiarizes in details about the proofs.

Presentation of documents, on which the claimant establishes his allegation, is essential in the process of decision-making. Although there is no provision in the Code of Administrative Procedure, it is obvious that the party should submit specimens of relevant documentations.

In the totality of documentation, in order to understand their importance and, secondly, the way of their presentation or evaluation by the relevant organ, we must

¹⁸ See Article 81, point 1, in the Code of Administrative Procedure.

¹⁹ S. Çeço, Lectures on the subject of “The Civil Procedural Law in the People’s Republic of Albania”, Tirana, 1983, page 44

refer to the distinction prescribed in the Code of Civil Procedure between official acts and private letters²⁰.

Formal acts constitute full evidence of events recorded by public officers, and which have occurred in their presence. When there is allegation that the written document is counterfeit, the contrast is allowed to be proved. In Albanian system, the burden of proof for counterfeit written instruments rests on the party that alleges its falsity.

Our law specifies the category of evidences that the interested part may introduce; they might be “documents” or “information”, which are called documentary evidence. While speaking of documents, we certainly mean official and private documents.

In contrast to the definition on formal acts, while in a judicial process the weight of evidence of a private letter is determined by the court and remains on its discretionary evaluation, in administrative proceedings this issue is still disputable. This is because, unlike public documents, private letters are not presumed to be authentic. If their authenticity is challenged by the party against which the document is filed, the party that has presented this document carries the burden of evidence²¹. Despite questionable situation, in the circumstances when the Code of Administrative Procedures doesn't state anything specifically, we can run into conclusion that, during administrative proceedings, the decision-making organ may examine the

private instrument in the complexity of submitted evidence based on the same rules and principles like in civil law suits. However, in the event of an administrative proceeding, the organ itself may prove its authenticity, if the object falls into the activity of the organ or has to do with matters which have been previously known by the organ.

Meanwhile, in the totality of documents which are introduced at a trial, it is obvious that the acts released while the organ is exercising its function are easily perceived and the process of proving their truth is easier for the administrative proceeding organ. In the range of facts which are known by the organ while exercising its functions, the code prescribes the possibility of the organ not to drag along the process for a further verification, and on the other side, it obligates the organ to make sure their employment at the relevant proceeding²².

²⁰ Based on Articles 253-255 of the Code of Civil Procedures, “...official acts are those acts which are compiled by the public officials or persons who exercise public functions, within the scope of their competences and according to the determined format”

²¹ See Simoni S, Sadushi S, Çomo S., “A Comparative Glance at Civil Procedure”, Tirana 2006, page 208, Publishing House, Kristalhina-Kh”, Tirana.

²² See Article 81 of the Code of Administrative Procedures

4.3 Testimony of witness

Referring to the provisions of the Code of Administrative Procedure, literal testimonies of witnesses are not identified as evidence at an administrative proceeding. However, they could not be strictly excluded from being proving means. In such present dilemma, we should identify some issues in order to run into acceptable conclusions. It has to do with the fact that are there cases which allow employment of witnesses as proving means and what is the reason of prevalence of written evidence from those obtained by testimonies of witnesses?

In order to get better understandings of the impact of the testimony of witnesses at an administrative proceeding, firstly, we should have a clear idea what a witness is. Based on the doctrine of the civil procedural law, witnesses are persons judicially uninterested in the closure of a law suit, who are summoned by the court to testify their facts, which are important for solving the dispute between the parties. Taking into account the fact that an administrative proceeding intends to meet the public interest, and while there is not always a conflict between the parties, naturally the issue is solved through other evidences.

But there are also cases when the proceeding organ is holding proceedings involving conflicting parties and when its final solution has an impact on the public interest which the organ is responsible to defend. However, these are exceptional cases.

During an administrative proceeding, like in a civil law suit, evidence of witness, when they are obtained, they should be evaluated in harmony between them and supported by other evidences received at administrative proceedings. Surely, if law or by-laws issued within its framework require documentary evidence to prove the truth, the testimony of witness is not admissible.

4.4. Examinations and other means

Examinations, reports, expert evidence, are the most important proofs at a certain proceeding. This is valid for both, civil and administrative procedure. For verifying the truth of facts, which are naturally not included in the category of ordinary facts, law entitles the organ which has to carry out examinations, reports or evaluation²³. The Code of Administrative Procedure prescribes 'examinations' to be carried out by specialized experts.

Specialized technical examinations are compiled statements, which analyze the fact in all its technical components, whether it has to do with a concrete case or an existing phenomenon or with something that will occur in the future. A phenomenon is analyzed for its causes and what are its forecasted developments in the future, based

²³ See Article 89 of the Code of Administrative Procedures

always on specific technical evidences. Technical examinations cannot be done by the proceeding organ; however, the latter may require it from specialized administrative bodies. The organizational administrative structure of every state comprises organs which provide specialized opinions that might be used by all administrative organs during their activities. For instance, we may mention INSTAT, various public agencies such as universities, which academic staff may play this role, etc. However, if required technical and specialized examinations are not subjects of the activity of an organization or public agency, then such administrative organ is authorized to hire one or more external experts.

Our legislation states that the ways for hiring these experts and their remunerations are governed by law²⁴. However, it is ascertained that there is no legal prescription for this matter. Legislation of other countries has regulated it by the signature of a contract between the proceeding organ and relevant expert, where the rights and obligations of both parties are stipulated.

A peculiar feature is noticed for hiring experts, which has to do with the fact that the interested party may appoint the same number of experts like those hired by administration²⁵. This fact may bring face to face before the administrative organ the professional opinions of specialists, which is something significant.

Whether specialized opinion is given by a public organ or by a private individual, it has the same value in the entirety of collected documentations and it will be assessed by the organ at the closure of the act. Thus, the opinion of the expert is not obligatory, however it should be considered by the competent organ while issuing an act.

Based on the Code of Administrative Procedure, if proceeding organ considers that specialized opinion is needed for proving the truth of certain facts, and then, in its discretion, the proceeding organ decides to carry out examinations. The decision specifies the objective of examination and the expert(s) to be hired by administration. This decision is made known to interested parties²⁶ 10 days before the date set for examination and other actions. When such measures have to do with secret and confidential issues, the obligation of notification by the organ carrying out investigatory proceeding is avoided.

Notification on hiring expertise served by the administration to the interested party is also related to the fact that the latter will hire its experts in the same number with those employed by administration. These experts are accepted by the proceeding organ based on its decision, and, at the same time, it prepares and administers questions and other requirements, which are the tasks and duties of the experts for giving their

²⁴ See Article 89 of the Code of Administrative Procedures

²⁵ Ibid. Article 91

²⁶ Ibid. Article 90

opinions on certain issues²⁷. The organ carrying out investigatory procedure has the obligation to put forth such questions that have not to do with the legal solution of the law suit²⁸ because it is a competence of the administrative organ. The only restriction to the interested party for putting forward questions rests on the fact when these questions imply secret and confidential issues²⁹, which are refused by the proceeding organ.

5. Conclusions

The process of evidencing at an administrative proceeding is of great importance and is directly related to the validity of an administrative act. However, this process, as it results from this analysis, poses some deficiencies, either of procedural character related to the methods for obtaining or recording them, or substantial deficiencies, which show the proper level of evaluation in proportion to the act which is to be released. Therefore, amendments to the provisions of the Code of Administrative Procedure are required, which is the fundamental act for governing the principle standards of the administrative procedure.

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²⁷ Ibid. Article 92

²⁸ See the Commentary on the Code of Administrative Procedures

²⁹ See Article 92, point 2, of the Code of Administrative Procedures

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