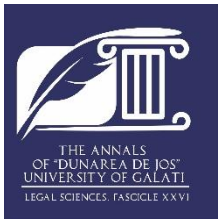

Identifying the Limits of the Discretionary Right of the Customs Authority in the Process of Applying Administrative Liability to Participants in External Economic Relations

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Abstract: In the article, based on the analysis of the administrative legislation, the materials from the practice of the activity of the Customs Service of the Republic of Moldova, scientific sources, the limits of the application of the discretionary right in the activity of the customs authority as well as of the customs official in external economic relations as well as the crossing of the customs border are analyzed. The request for justice, equity, reasonableness, dignity, humanism, balance of interests, public order, protection of the person in the process of carrying out import-export operations, crossing customs borders by natural and legal persons must also have the appropriate offer, according to expectations both of the simple man and of society as a whole. One of these offers is "discretionary right" - a necessity through which the demand of the categories listed as general human values is covered.

Keywords: Customs Service; central public authority; administrative court; discretionary administrative act; legality; validity

The doctor makes a mistake - a patient suffers,
the teacher makes a mistake - a class suffers,
the jurist makes a mistake - the judicial system suffers.

In any country, an integral part of the statutory competence of the public administration is represented by discretionary powers, namely the power to issue administrative acts (to make decisions, to undertake actions or to refrain from undertaking them or to execute them) with varying degrees of discretion. For the purposes of this research, administrative discretion in general can be defined as a choice by the public authority, within the limits established by normative legal acts,

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of the optimal option, in its opinion, for solving a certain management problem in the situation where the rules legal documents do not exhaustively define the grounds, conditions, content, form, order (procedure), terms and (or) subjects of making such a decision. Consequently, an administrative act issued in such a situation is called discretionary.

Discretion is a construction of law. It is the authority attributed to decision-makers to choose between different alternatives to the concretization of legal norms in order to pursue previously defined goals.

Discretion is not created by law alone; it is the ability to make a choice that best embodies the normative programs that political processes have transformed into legal norms, to choose the options that best fulfill the legally protected public interests, in accordance with the founding values and the legal principles that are the basis of the legal order of which they are a part.

Legal systems, usualy, distinguish between law, fact and discretion for purposes of judiciar review. The nature of these distinguishing criteria may be controversial. There are different point of views, for example, as to the criteria for considering a matter to be one of law as opposed to one of fact. This is a problem specific to all legal systems, and the criteria found in any legal system are not necessarily applied consistently by the courts. The criteria for distinguishing between law and fact or between law and discretion may also differ from one legal system to another.

The idea of "discretionary law" in the Republic of Moldova represents a relatively recent approach, being unusual not only within the administrative science in the country, but even in the context of the Romanian-German legal system, legislative codification which is based on. This conception has its origins in the Anglo-Saxon system and is applied even by the European Court of Human Rights, whose jurisprudence is binding, according to the agreements to which the Republic of Moldova is part.

In order to ensure the legality and fairness of the decisions taken, this concept must be put into practice by legal professionals, including customs officials who have discretionary powers in the activity related to the crossing of customs borders as well as the improvement of import-export operations.

It is considered that certain aspects of this legal concept that require deeper investigation from researchers as well as from other theorists, academics and scientific institutions with expertise in the legal field. This is due to the fact that "discretionary law" as a legal entity actively influences the activity of all branches of state power and all state bodies responsible for the implementation and enforcement of the law. It is necessary to elaborate the specifics and particularities of the discretionary application of legal norms for each of these bodies.

The conception of discretion as a construct of law and as an embodiment of law (in a broad sense), does not annihilate the ability to make a choice which is the core of discretionary power, nor the autonomy of administration. The public interests that, by legal judicial decision, should be protected, weighed and pursued in each court are defined at a high level of abstraction (even if they can be made concrete by the criteria of action that are legally defined). The value judgments that legal norms enshrine can be subject of different interpretations and justify different solutions depending on the factual circumstances that require regulation.

By the **discretionary power of the administration**, we mean the competence that the state grants to it to choose between several possible solutions, applicable to the concrete case, the most successful to serve the public interest.

We support the statement of the researchers from the Republic of Moldova, who state that the material legal norm must admit a margin of freedom when making the decision, and the enforcement agent of this norm must have discretionary powers. In other words, the discretionary application of the law, the particularities of this application, depend on the content and form of the substantive law (Avornic & Postovan, 2015).

In the Republic of Moldova, the discretionary right is mostly regulated in art. 16 of the Administrative Code, which establishes that the discretionary right of the public authority represents its possibility to choose between several possible solutions corresponding to the purpose of the law when applying a legal provision (The administrative code of the Republic of Moldova no. 116 of 19.07.2018, 17.08.2018).

Thus, we observe that the legislator restricts civil servants in selecting the necessary solution, tying them in choosing the most successful option to the goal pursued.

In the same article, on p.2, the legislator mentions that the exercise of the discretionary right does not allow the carrying out of an arbitrary administrative activity (The administrative code of the Republic of Moldova no. 116 of 19.07.2018, 17.08.2018).

So, it can be noted that, in addition to the fact that in p.1 the legislator grants a "freedom" in choosing the best solution, in p.2 he expressly mentions that, however, the activity cannot be arbitrary.

As Gh. Avornic and D. Postovan state in their research, necessity and chance are legal phenomena, legal realities. Necessity absorbs chance and excludes abuse of right. It does so by applying "discretionary right" (Avornic & Postovan, 2015).

Natural persons have the widest freedom and possibility in the sense of "discretionary right", who are allowed everything that is not forbidden to them: they can choose from where and from what; how to behave, how to execute, how to use

his rights, limited only by prohibitive norms. The margin of freedom of the customs authority, of the customs officials, is considerably limited: they can choose, act, make decisions only within the boundaries that are expressly allowed to them, according to the competence, established in the Customs Code, the Law on the Customs Service, etc. In order to adopt legal, fair decisions corresponding to the intended purpose, the finality of the law, these legal subjects have discretionary powers provided by both material and procedural norms. The essence of "discretionary right" is the freedom and the possibility of choosing by legal subjects the rules of conduct, the most appropriate, rational behavior in the process of realizing subjective rights, taking in this sense the most optimal variant, decision, without leaving the legal field (Avornic & Postovan, 2015).

As much as the activity of public services in the Republic of Moldova (including the Customs Service) is not regulated, there is always an area that is not "covered" by legal regulations. In such situations, the need to apply the provisions of the "discretionary right" intervenes. Even if in section 3 of the current Customs Code, called Customs Decisions, we find an exhaustive regulation of the decisions that can be adopted by the customs authority, still in daily activity there are a lot of options that can and are applied by the customs authority in the purpose of identifying the most optimal solution.

The responsibility for the decisions adopted by the customs officials, including the discretionary decisions, returns with the customs official as well as the customs authority in solidarity, because, as A. Negoiță expressed, the joint liability of the public authority, together with the public official, resides in the fault it has in the non-rigorous election of that official (culpa in eligendo) or in the improper supervision of his activity (culpa in vigilendo) (Negoița, 1981, p. 110), The customs authority is obviously responsible for the effective selection of future customs officials.

As the scholar Gh.Costachi stated, the inauguration, as a rule, is related to obtaining various material and non-material benefits. This fact cannot fail to influence the personal qualities of civil servants, whose "taste for power" atrophies over time, and then the position they hold can generate a reverse process: the will of the state is transformed into personal, the power of the state is assumed by the official and is used to achieve his own interests. As a result, the official does not serve society, but serves himself, his personal interest will becoming the will of the state, he gives it tone, directing it in wrong, even in criminal directions. In such cases, the function can be compared to a role, and the financier - with an actor, who plays well or badly the role/script written for him (Costachi, 2019, p. 476).

The employment of persons in the Customs Service, according to the Law on the Customs Service, is carried out on the basis of a competition in II stages: the written

test, and the oral test, which allows the customs authority to conduct a genuine selection of candidates for the posts of customs officer. The criteria is regarding a good reputation, professional training, as well as moral and social principles, have they kept their value over time, are they being currently relevant in the hiring procedure of a customs official.

From here it becomes clear that the process of employement as a customs official represents a set of social, ethical and moral principles (which actually outline a standard) that society imposes on the appointed person, which must otherwise be strictly respected during the activity in the customs service, their category includes: equity, humanity, honesty, conscientiousness, impartiality, incorruptibility, etc. Thus, in order to legitimize the trust given by society to his actions to achieve a fair balance in the application and interpretation of legal norms, the customs official must respect social, moral and legal principles, and in the exercise of his duties he must show good faith. Moreover, in case of breaking this principle, presumed until proven otherwise, it becomes liable to criminal, administrative-disciplinary, administrative-property or moral sanction, depending on the consequences.

The discretionary power emerges from the tasks and powers of the customs authority as well as the decision-maker of the customs authority and is applied as necessary, depending on the circumstances. Once allowed, it is considered legal, when it is applied, having its boundaries and limits.

When the rules governing the activity of the customs official are clear, precise and binding, he has no freedom to make subjective decisions, being forced to strictly comply with the established rule. In cases where the rules are not so rigid, the customs officer can choose between several options and alternative solutions to choose the most correct decision. This freedom of choice is the essence of "discretionary right". However, the fact that he can choose does not impose the obligation to make a particular choice. The choice is left to the discretion of the customs officer, who is guided by the legal provisions, the circumstances of the specific case and his own conviction, which, as a whole, determines the decision taken, considering the purpose pursued. This purpose is defined by the objectives of the law, the spirit of the customs legislation and the economic interest of the state, based on the principle of social equity. In any case, the discretionary decision must satisfy the legitimate requirements of the participants in foreign economic relations, not violate the rights and freedoms guaranteed by the Customs Code, and be in favor of the individual, without harming his legitimate interests.

We propose that the use by a customs official of his official powers **contrary to the interests of the service** should be understood as the commission of such acts which, although not directly connected with the exercise by the official of his rights and duties, were not caused by official necessity and objectively contravene both the

duties and general requirements imposed the state apparatus and the local administration, as well as the goals and objectives for the achievement of which the official was vested with the respective powers.

The "discretionary" power of the customs authority is not unlimited. First of all, the attributions of a public authority are provided in a normative act (law, government decision, etc.), latter having to be in line with the Constitution of the Republic of Moldova or with other acts of higher legal force. In order to comply with legality in the framework of executive activity, there are several legal control instruments.

However, we stop at the jurisdictional control of the legality of the activity of the customs authority. The importance of this type of control was emphasized in the Constitution of the Republic of Moldova, which regulates it in the following way, in art. 58(1): "The person injured in his right by a public authority, through an administrative act or through the failure to resolve within the legal term of a request, it is entitled to obtain the recognition of the claimed right, the annulment of the act and the reparation of the damage."

The identification of such freedom of appreciation, available to the administration of the Customs Service, more precisely to the customs official called to apply the law, allowed in the doctrine the development of the theory of the discretionary power of the administration, beyond which one reaches an excess of power. The right of appreciation or discretionary power represents that margin of freedom left to the free appreciation of an authority so that, in order to achieve the goal indicated by the legislator, it can resort to any means of action within the limits of its competence. Beyond these limits, the respective authority will act with an excess of power that can be censured in court.

One of the main and basic authorities, which are empowered by law to verify the legal limits of discretionary acts, adopted by public authorities (including the customs authority) in the Republic of Moldova are courts (administrative litigious).

As professor A. Arseni stated in the work Constitutional law and public institutions, the act of justice is carried out on the basis of science and conscience guided by reason, an activity exercised independently and impartially. Revenge removes these desires and puts into action always subjective and negative emotions intended, actions totally foreign to the exercise of judiciar power in the process of carrying out the act of justice (Arseni, 2024).

Thus, for a discretionary administrative act to be recognized by the court as legal and justified, it must necessarily correspond to the "legal purpose", i.e. the purpose provided by law. Definitions fit the intended purpose, quite reasonable, practically useful overall constitutes only the meaning of the word "opportune". And therefore, the judicial control of the legality and validity of a discretionary administrative act

cannot abstract from finding out its appropriateness, understood as the compliance of the administrative act with the legitimate purpose.

According to point 114 of the Law of the Federal Republic of Germany, entitled "Judicial review of an administrative act adopted at the discretion of an administrative body" if an administrative authority is entitled to exercise its discretionary power, it is forced to exercise it in accordance with purpose of the powers conferred and to respect the statutory limits of the discretionary power". Based on these legal precepts, German legal doctrine forbids the courts to examine "whether the decision chosen by the administrative authority was the best and the most appropriate"

In some countries there are explicit legislative prohibitions on reviewing the adequacy of administrative acts. For example, Article 3 of the Law on Administrative Procedures of the Republic of Lithuania (1999) states that "the court shall not assess the contested administrative act (or inaction) from the point of view of political or economic expediency, but only determine whether, in a particular case, the law or another legal act has been violated, if the subject of the administration has not exceeded its powers and if the act (act) does not contradict the purposes and objectives for which him was established and vested with the relevant powers .

Several authors rightly point out that judges have the widest discretionary power when solving concrete cases. And this is because the decisions taken, arising from quite concrete situations, should be fair, human rights ensured, restored. It should be noted that due to this discretionary power, judges often commit the abuse of law, a phenomenon that can be avoided with the correct application of the "discretionary right" (Cozma, 2019, p. 73).

We can affirm that an effective judiciar control of discretionary administrative acts is inconceivable without a test of their adequacy, which is verified with the help of criteria such as: whether the act fulfills a legitimate purpose, the requirements of reasonableness, impartiality, good faith, rationality , proportionality and appropriateness, i.e. the transparent parameters for the exercise of administrative discretion that the European Court of Human Rights insists on respecting. However, as the Advisory Council of European Judges points out, the judiciary has a duty to be aware that there are limits to judiciar and legitimate interference in political decisions made by legislative and executive bodies. All courts must be careful not to exceed the statutory limits of judiciar powers. From this point of view, the term "opportunity" itself cannot be recognized as a good one, since both in ordinary consciousness and in law enforcement practice, as already mentioned, it has traditionally been endowed with a very broad content, including non-legal concepts such as political, economic opportunity, utility, efficiency, etc. This is one of the

reasons why the courts avoid clarifying the appropriateness of the contested administrative discretionary act.

The opportunity is found according to a thesis based on the Western administrative doctrine, even in the discretionary power available to the administration, understood as that margin of freedom, of appreciation left to the discretion of the civil servant to choose between several possible paths to follow in order to reach the goal established by the legislator.

As far as we are concerned, we come to the conclusion that, the judge in administrative litigation, when he examines the the **limits of discretionary power** issuing an administrative act subject to judicial control, inevitably sometimes reaches the control of opportunity.

When analyzing an administrative case challenging the decisions, actions (inaction) of state authorities, local self-government bodies, other bodies, organizations vested with certain state public powers or other powers, officials, state and municipal employees, adopted and carried out by them within the limits of their power of appreciation in accordance with the competence granted by the law or other regulatory legal act, the court ascertains whether the contested decision was taken, whether the contested action (inaction) was carried out: for the purposes for which the corresponding state. or other public powers have been granted; justified, that is, taking into account all the relevant circumstances for the adoption of the contested decision, the performance of the contested action (inaction); unbiased (without prejudice); in good faith; reasonably; respecting the principle of equality before the law; proportionate, i.e. maintaining the necessary balance between the possible negative consequences on the rights, freedoms, legitimate interests of citizens, the rights and goals aimed at achieving the contested decision, the contested action (inaction); taking into account the right of the applicant or the persons, in defense of the rights, freedoms and legitimate interests whose rights, freedoms and legitimate interests have been formulated an appropriate administrative request, to participate in the process of making an contested decision, performing an contested action (inaction); in a timely manner, i.e. within a reasonable period of time. The court does not check the appropriateness of such decisions, actions (inactions).

Thus, the court has the right and the obligation to verify the appropriateness of discretionary administrative acts, understood as the compliance of the act with the legitimate purpose, with the requirements of reasonableness, impartiality, good faith, thoroughness, proportionality and opportunity.

Therefore, we can deduce that "discretionary right" is a necessity in the daily activity of civil servants within the customs authority in decision-making, offering a way to cover the demands of participants in external economic relations, while respecting general human values.

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