

11_The Administrative Contract Essence and Applicability_16_KY[english]

In the domain of civil law, the contract is an agreement by and between two or more persons which is concluded to establish, settle or cancel a legal relationship between them. The parties to the contract are equitable legal entities. The freedom of contract is the underlying principle. It means that the parties are free to choose their contractual counterparts and to determine the content of the contract, the only restriction being the requirement for the contract not to contravene the imperative provisions of the law and the good morals. Contracts have binding legal effect on the parties. They may be amended, terminated, cancelled or invalidated only at the mutual consent of the parties or in the cases prescribed by the law.

The development of societal relations has brought into existence contracts also in the domain of administrative law. The German law recognizes the existence of what is referred to as public law contracts[1],[2] which are used in lieu of individual administrative acts. In accordance with the French legal doctrine, the administrative contract does not come as a substitute for the individual administrative act. It may be concluded also in cases in which an administrative act cannot be issued.

Generally speaking, there are three schools[3] of thought with regard to contracts to which the public administration is a party. Some authors believe that whenever the public administration enters into contractual relationships, the latter are of private law nature. Other authors claim that such cases are of mixed nature, comprising both the issuance of an administrative act and the conclusion of a civil law transaction. Still others are of the opinion that the administrative contract is a legal institute sui generis. Although it is referred to as a contract, it is very different from a contract in the sphere of civil law.

In accordance with the Code of Administrative Procedure, the administrative contract is an agreement given in writing by and between an administrative authority, of the one part, and individual citizens or organizations, of the other part, by force of which rights and obligations are generated, modified or terminated. At least one of the parties to an administrative contract has to be vested with public authority. The administrative contract is formal and its subject-matter covers issues of material public interest. Therefore its content may not be

negotiated freely by the parties as it has to comply with some imperative provisions of the law. Although the wills of the two contracting parties concur, one of the parties (unless both are public law entities) is entitled to use its authority to manage the conclusion and implementation of the contract, to impose sanctions and to amend or terminate the contract unilaterally. After the conclusion of the contract, if either party is not in a position to implement it due to substantial change of circumstances under which the contract was concluded, this party may request revision of the contractual clauses in line with the changed circumstances. Where this proves impossible or the other party does not give it consent, this party may terminate the contract.

The administrative authority may act unilaterally with a notice given in writing to terminate the contract for the purposes of preventing or eliminating severe consequences affecting the public interest. It is again with a view to protecting the public interest that a preliminary implementation clause may be included in the administrative contract. The preliminary implementation may be challenged in court.

The administrative contract is considered invalid on the same grounds which apply to the invalidity of an administrative act, i.e. ultra vires, non-compliance with the prescribed form, material breach of administrative procedural rules, contravention to substantive legal provisions, or divergence from the objectives of the law. Where the cause of invalidity affects only a part of the contract which is inessential to the public interest, the contract can be maintained if it could be assumed that it would have been concluded without the vitiated part.

The administrative contract may be challenged in court but this will not stay its implementation.

The administrative contract is substantially different from the agreement concluded in accordance with the Code of Administrative Procedure. The agreement is a possible but non-binding stage of the administrative procedure. Insofar as it does not contravene the law, the agreement may be concluded in the course of proceedings before administrative authorities. The agreement may be concluded between the parties or between the administrative authority and the parties. The purpose of the agreement is to replace the administrative act.

Therefore it has to meet the legality requirements which are applicable to administrative acts. The agreement can be viewed as a means to resolve a dispute which has some public law feature.[4] Therefore the administrative act becomes void upon the conclusion or the approval of the agreement.

Unlike agreements, administrative contracts are not concluded in the course of administrative proceedings but after these proceedings are completed. The administrative contract is widely applicable in many spheres in which the public interest is involved, e.g. in the privatization process, the management and allocation of the European structural and investment funds (ESIF), concessions, public procurement, public-private partnerships and others.[5]

Thus the grants under the ESIF Management Act can be provided on the basis of an administrative contract. The definition of the term is set out in §1(1) of the above mentioned Act, which reads that an administrative contract is an express statement of the head of the managing authority to grant financial support from ESIF resources by force of which and with the consent of the beneficiary thereof rights and obligations are established for the beneficiary to implement the approved project. The administrative contract is in the form of an agreement given in writing between the head of the managing authority and the beneficiary, which is signed in lieu of an administrative act.

For the time being, it is only the Code of Administrative Procedure and the ESIF Management Act that contain explicit legal provisions on administrative contracts.

Nevertheless, concession contracts and public procurement contracts, as well as the contracts in the field of public-private partnerships, are administrative contracts in their essence. The recognition of this type of contracts and their wide use in practice are expected to facilitate the resolution of issues involving essential public interests through contractual mechanisms that will become increasingly common in the practices of the public administration.

[1] Lazarov, Kino, and Ivan Todorov. The Administrative Contract after Its Introduction in the Code of Administrative Procedure. *Judicial World Journal*, 2016.

[2] Sivkov, Tsvetan. Agreements under the Code of Administrative Procedure. Ciela Publishing House, 2012, p.137.

[3] Buchkova, Pamela. The Administrative Contract. Substantive, Procedural and Comparative Legal Aspects. Phenea Publishing House, 2012, p.21-22.

[4] Marev, Matei. Out-of-court Settlement of Administrative Disputes. Ciela Publishing House, 2016, p.103.

[5] Buchkova, Pamela. The Administrative Contract. Substantive, Procedural and Comparative Legal Aspects. Phenea Publishing House, 2012, p.102.

Bibliography:

1. Buchkova, Pamela. The Administrative Contract. Substantive, Procedural and Comparative Legal Aspects. Phenea Publishing House, 2012.
2. Lazarov, Kino, and Ivan Todorov. The Administrative Contract after Its Introduction in the Code of Administrative Procedure. Judicial World Journal, 2016.
3. Marev, Matei. Out-of-court Settlement of Administrative Disputes. Ciela Publishing House, 2016.
4. Sivkov, Tsvetan. Agreements under the Code of Administrative Procedure. Ciela Publishing House, 2012.