THE TOPICALITY AND THE IMPORTANCE OF THE ADMINISTRATIVE AGREEMENT WITHIN THE ROMANIAN LAW

Elena Emilia ŞTEFAN[*]

Abstract

The administrative agreement as a legal institution challenged a series of controversies within the legal literature. Nowadays, we observe that the activity of the public administration authorities also includes this legal category, so that we can assert that it has an increasingly share in areas such as delegation of public utilities services, public acquisitions, transport and others.

Romanian legislation in the field of administrative law stands out through the lack of codification, which complicates such a scientific approach having as scope the analysis of the administrative agreements, similar to the civil law, for example. As we shall prove in this analysis, administrative agreements are distinguished by the rule of the priority of the public interest as against the contractual freedom.

Keywords: *public interest, administrative agreement, public service, legal fiction, Constitution.*

I. Introduction

The theory of the administrative agreements was founded starting from the idea that the administration, having a double character, concludes two types of agreements: administrative agreements and private law agreements[1]. Being an agreement by which the administration conducts part of its duties, the legal regime applicable to the administrative agreement is an exorbitant one, in particular of public law, also having negotiated clauses that confer it a mixed regime of public and private law[2].

Nowadays, under the national law, the agreements concluded by the administration with individuals are: the concession of public services, the concession of public domain, public works agreements and public acquisition agreements. It should be noted that by special law there may be provided other categories of administrative agreements, in various fields of activity. The applicable legislation includes among others: Law no. 554/2004[3] of the contentious-administrative but also the Government Emergency Ordinance no. 34/2006 on the assignment of public acquisition agreements, of the agreements of public works concession and of the agreements of services concession[4] or the law no. 51/2006[5] of the community services of public utilities.

As shown in the doctrine, the conclusion of the administrative agreements is performed by public authorities or institutions by virtue of the prerogatives of public powers

[*] Assistant, PhD, The Faculty of Law, "*Nicolae Titulescu"* University of Bucharest (email:stefanelena@gmail.com).

[1] V.Vedinaş, *Drept administrativ* (Administrative Law), 4th edition, Ed.Universul Juridic, Bucharest,2009, p.125.

[2] I.Corbeanu, *Drept administrativ (Administrative Law),* Ed.Lumina Lex, Bucharest, 2010, p.123.

[3] Law no. 554/2004 of the contentious published in the Official Gazette no. 1154/2004.

[4] Government Emergency Ordinance no. 34/2006 on the assignment of public aquisition agreements, of the agreements of public works concession and of the agreements of services concession, published in the Official Gazette no.418/2006.

[5] Law no. 51/2006 of the community services of public facilities, published in the Official Gazette no. 254/2006.

at their disposal, to the extent of legal competence[6]. The capacity of administrative law is the possibility of participating as an independent subject within administrative law relationships to achieve their competence[7]. The philosophy of the administrative agreements requires that the consent of the parties to be subordinated to the public interest[8].

II. The administrative agreements reflected in the Romanian legislation

According to Ioan Santai, *the administrative agreement* represents the legal act concluded between an administrative entity and another natural or legal person seeking the achievement of a general (public) interest for an amount of money paid by the provider or incurred by the beneficiary, as the case may be[9].

After passing the law no. 554/2004 of the contentious-administrative, as further amended and supplemented, for the first time the legislator, by a legal fiction, has assimilated the administrative agreement to the unilateral administrative act, the contracting parties being on the legal position of inequality, unlike the civil agreement where the parties are on the legal position of equality[10]. Therefore, according to art. 2 paragraph 1 item c of the second study of the contentious-administrative law, the agreements concluded by the public authorities seeking to enhance the public property are also assimilated to the administrative acts, under this law.

It is beyond any doubt that the concept of administrative agreements, that finally receives a legal consecration, concerns the individualized agreements in art. 2, paragraph 1, item c, second study, namely the agreements concluded with the public authorities seeking to enhance the public property, in order to provide public services to perform public works or those that aim public acquisitions[11]. As shown in the recent jurisprudence, in other words the concession agreements that represent a legal instrument for the enhancement of the property owned by the state or of the territorial administrative units, shall be assimilated to the administrative act for the purpose of the aforementioned legal norm and shall be subject by way of consequence to a legal regime of administrative law only to the extent that its scope aims exclusively the enhancement of the public property[12].

An issue that has challenged discussions in practice refers to the situation where the prefect under its right of administrative trustee may attack the administrative agreements concluded by the local public administration authorities by way of the contentious-administrative. There may be noted in one opinion the fact that only unilateral administrative acts issued by the local prefect may be challenged by the prefect, which results from the grammatical analysis of the legal provisions as well as from the fact that the text excepting the actions brought by the prefect from the formulation of the prior complaint is placed immediately after the paragraphs dealing with the regime of this complaint for the unilateral administrative acts, thus excluding the administrative agreements.[13]

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[6] C.S. Săraru, *Capacitatea autorităţilor sau instituţiilor publice de a încheia contracte administrative* (The ability of public authorities or institutions to conclude administrative agreements), Law no. 1/2010, p.117.

[8] A. Iorgovan, L. Vişan, A. S. Ciobanu, D. I. Pasăre, *Legea contenciosului administrativ.Comentariu şi jurisprudenţă* (Contentious law. Comment and jurisprudence), Ed. Universul juridic, Bucharest,2008, p.189.

[9] I.Santai, *Drept administrativ şi ştiinţa administraţiei* (Administrative Law and science administration), vol.II, Ed. Alma Mater,Sibiu,2009, p.221.

[10] O. Puie, Aspecte privind soluționarea unor litigii derivând din contractele administrative și alte tipuri de contracte încheiate de autoritățile publice (Issues concerning the settlement of disputes arising from the administrative agreements and other type of agreements concluded by the public authorities) Romanian Pandects no.7/2008, pp.32-33.

[11] A. Iorgovan, L.Vişan, A. S. Ciobanu, A. I. Pasăre, *op.cit.*, 2008, p.188.

[12] High Court of Cassation and Justice, the Department of administrative and fiscal contentious, decision no. 6/2001, in Ionescu Maria, *Contencios administrativ.Practică judiciară 2010-2011*, (Contentious-administrative, Judicial Practice, 2010-2011), Ed.Moroşan, Bucharest, 2012, p.79.

[13] A.Iorgovan, L.Vişan, A.S Ciobanu, A.I Pasăre, *op cit*., p.116.

Following the logic of the doctrine[14] expressed during the enforcement period of the former law no. 69/1991, repealed by law no. 215/2001[15], according to which the reference to the administrative acts of art. 110 paragraph 1 represent an unconstitutional restriction owing to the fact that it eliminates the category of administrative agreements from the legal control of the prefect, it can be argued nowadays that given the current provisions of art. 3 paragraph 1 of law no.554/2004 and of art.123 paragraph 5 of the Constitution that refer to the acts issued and to the administrative acts, in the category of which also fall the administrative agreements as assimilated acts of the administrative acts, all the more the administrative agreements may be included in the domain of the administrative guardianship performed by the prefect. In our opinion, as far as the administrative agreement is considered assimilated administrative act, there is nothing to prevent the prefect to attack by way of contentious-administrative this type of act of the local authorities, exercising the right of administrative guardianship, as representative of the government in the territory.

In the Romanian legal doctrine, in the paper entitled "Ficțiunile juridice", (The legal fictions), the author Ion Deleanu[16] stated that, "the new law of the contentious-administrative offers us another legal fiction, namely that the agreements are assimilated to the administrative acts (...)". In this paper the author identifies several legal fictions in the field of the administrative law, such as the tacit approval, in fact the office and the officer, the unjustified refusal of an administrative authority, the administrative silent and asks a rhetorical question: "are the fictions essential for the law?" In what concerns the agreements, we are interested in what the authors says, namely that by assimilating the administrative agreement with the administrative act, the assimilation amounts to a legal fiction not only owing to the fact that distorts the legal concept of the agreement, but rather owing to the fact that it ignores it in fully.

In what concerns the object of the activity within the contentious-administrative, according to art. 8 paragraph 3 of Law no. 554/2004 the court of the contentious-administrative has the jurisdiction in case of the disputes related to the conclusion of the administrative agreements, including those concerning the stages prior to their conclusion, as well as any other disputes related to the amendment, execution, interpretation and termination of the administrative agreement. Any legal system or scientific construction should relate to principles that guarantee or establish[17]. The principle that the contentious-administrative judge has to comply with when solving a dispute having as scope an administrative agreement is the priority of the public interest. Also the Government Emergency Ordinance consecrated the principle of transparency in the process of assignment of the public acquisition agreements, of public works concession and of the agreements of service concession.[18]

However, we should mention that the provisions of art. 8 paragraph 3 of law no. 554/2004 were subject to an unconstitutional exception that was rejected. Therefore, the Constitutional Court appreciated that:"these provisions are constitutional in relation to art. 52 paragraph 1 of the Constitution, as the rule established in the text of the law refers only to the disputes related to the application and execution of the administrative agreement and does not mean the placing of the public authority on a preferential trial position, because not the

[14] Iuliana Râciu, *Procedura contenciosului administrativ (*The procedure of the contentious-administrative) Ed.Hamangiu, Bucharest,2009, pp.140-141,apud. C.L.Popescu, *Autonomia locală și integrarea europeană* (Local autonomy and European , Ed.All Beck, Bucharest,1999, pp.244-245.

[15] Law no .215/2001 of the local public administration, published in the Official Gazette no. 204/2001.

[16] Ion Deleanu, *Ficțiunile juridice (Legal fictions)* Ed. All Beck, Bucharest, 2005, p.207.

[17] I. Boghirnea, *Teoria Generală a Dreptului* (General Theory of Law), 3rd edition, reviewed and updated, Ed.Sitech, Craiova, 2013, p.101.

[18] C.S.Săraru,*Contractele administrative* (Administrative Agreements), Ed.C.H,Bucharest, 2009, p.146.

quality of the party shall be the one considered by the court that settles the dispute, but the principle of the priority of the public interest[19]".

Another issue that caused discussions both in the Romanian law and in the French law refers to the possibility of incorporating the arbitration clause within the administrative agreements. The arbitration clause is usually used within the commercial agreements. One opinion shows that the possibility of inserting the arbitration clause within the matter of the administrative agreements is expressly provided by article 55 of the Government Decision no. 71/2007 by which the Methodological Norms of applying the Government Emergency Ordinance no. 34/2006 were approved, but the possibility of settlement of a possible dispute related to these agreements, by way of arbitration procedure, is only limited to negotiable clauses in these agreements[20]. Moreover, neither in the French doctrine the administration may introduce within its agreements a compromise clauses to entrust the settlement of the disputes to an arbitrator on the grounds of the legal prohibition to compromise, namely the use of the arbitration affecting the public person, except for certain categories of industrial and commercial public establishments which list has to be set by decree[21].

The community services of public facilities as defined by the provisions of art. 1 of Law no. 51/2006 represents the total activities of utility and general public interest conducted in communes, cities, municipalities or counties, under the coordination and responsibility of the authorities of the public local authority in order to meet the requirements of the local communities providing the following facilities: water supply, sewage and wastewater treatment; production, transmission and distribution of heat; local public transport; public lighting etc.

III. The administrative agreements in the French doctrine

The theory of the administrative agreements was created in the French law owing to the jurisprudence of the State Council, which was systematized by the doctrine.[22] Therefore, the contentious-administrative courts in France, first of all the State Council, qualified through their jurisprudence as administrative agreements only those agreements that apart from the mere participation of a public administration, another purpose is also observed – to ensure the functioning of a public service, namely a certain legal regime of public law[23]. As shown in the French doctrine, in order to prior situate all the agreements within the administrative action we have to remember that all public actions are settled by two types of acts: normative acts and administrative and intellectual operations.[24]

French literature is very rich in what concerns this matter, the theory of the administrative agreements being taken over in many foreign countries[25]. Major infrastructure of France from that time and until now is closely related to the theory of the administrative agreements, in case of railways, roads, electricity, gas and water supply etc., but the administrative agreements were also present in the scope of the social area, for example the convention between the National Health Insurance Company and the national organizations of

[19] The Decision of the Romanian Constitutional Court no.464/2006, published in the Official Gazette no. 604/2006, apud. I.Râciu, *Procedura contenciosului administrativ. Aspecte teoretice şi repere jurisprudenţiale* (The procedure of the contentious-administrative. Theoretical aspects and jurisprudential marks), E.Hamangiu, Bucharest, 2012, pp.240-241.
[20] O. Puie, *op.cit.*, Romanian Pandects no. 7/2008, p.47.
[21] J. Rivero, J. Waline, *Droit administratif*, Dalloz,Paris,1996, p.107, apud. O.Puie, *op.cit.*, p.47.
[22] R. N.Petrescu, *Drept administrativ* (Administrative Law), Ed.Hamangiu, Bucharest,2009, p.358.
[23] A. Iorgovan, *Drept administrativ* (Administrative Law), 2nd volume, Ed.Atlas Lex, Bucharest,1994, p.104 apud. Jean Rouviere, *Les contracts administratifs*, Paris,Dalloz,1930, pp.5-10
[24] George Dupuis, M-J Guedon, P. Chretien, Droit administratif, 10 edition, Ed.Dalloz, Paris, 2007, p. 420.
[25] M. Orlov, *Curs de contencios administrative* (Contentious-administrative course), Kishinev, 2009, p.29.

physicians being considered an administrative agreement, for which purpose the State Council passed the law of 1974.[26]

During the inter-war French doctrine, Gaston Jeze was the one devoted to identify the elements bounding the administrative agreements that could not be considered private law agreements, by its paper called: *Les principes generaux de droit administratif* (...) printed in six volumes between 1925-1936, of which the last three are dedicated to the administrative agreements.[27]

Both complex and controversial legal nature of the administrative agreement succeeded in being claimed by the specialists both of the public and of the private law, from this point of view being part of the legal institutions category which are between the two branches of the law, at the border between the unilateral act and the agreement, as a French author entitles his paper dedicated to this institution.[28] In conclusion, Gaston Jeze considers that the existence of an administrative agreement requires the following conditions[29]:

- ✓ An agreement of wills between the administration and individuals;
- ✓ The agreement of will has to aim to create a legal obligation to provide material works or personal services for remuneration;
- ✓ The performance has to be designed to ensure the functioning of a public service;
- ✓ The parties are required to obey the public law regime by an express provision, by the form of the agreement, by the type of collaboration required to the agreement or by any other manifestation of will;
- ✓ Inequality of the contracting parties;
- ✓ Extensive interpretation of the agreement. In what concerns the administrative agreements, the individual has to sacrifice its private interest in favor of the public interest of the contracting administration, having the right to compensation;
- ✓ The right to take unilateral enforceable measures. In what concerns the administrative agreements, the public administration seeking the achievement of a public interest and having beside the capacity of contracting party the one of public authority, is entitled to take some enforceable measures during the performance of the agreement or on the occasion of termination the agreement, without apply to justice;

Under the conditions of joining the E.U, member states undertaken to integrate their own legal order of the E.U. regulations[30]. National legal order of each country is influenced by the supranational legal systems, showing a trend of globalization of the world, without being denied the influence and the interdependence of the states law, while the state, in its capacity of signatory of international conventions has certain obligations to meet, including in what concerns the plan of enforcing internal legal regulations.[31]

IV. Conclusions

As the title of this study suggests, the administrative agreements are not only topical, but also in our opinion, at this moment there can not be conceived that the activity of the public administration authorities in general to be performed without them.

Therefore, the administrative agreement does not represent itself a purpose, as the civil or the commercial agreement: the administrative agreement as well as the unilateral

[26] A. Iorgovan, *Tratat de drept administrativ* (Administrative Law Treaty), vol II, Ed.All Beck, Bucharest, 2002, pp.99-100.
[27] C.S. Săraru, *Contractele administrative. Reglementare,doctrină,jurisprudenţă* (Administrative Agreements. Regulation, doctrine, jurisprudence), Ed.C.H. Beck, Bucharest,2009, p.33
[28] V. Vedinaş, op.cit.,2009, apud Y. Madiot, Aux frontieres du contract et de l´acte unilateral: recherches sur la notion d´acte mixte en droit public francais, L.G.D.J, Paris, 1971, 390p.
[29] G. Jeze, Les contracts administratifs de l`Etat, des departaments, des communes et des etablissementes public, Ed. Girard, Paris, 1927, vol. I, p.16, apud. C.S Săraru, op.cit., p.34.
[30] R. M. Popescu, *lntroducere în dreptul Uniunii Europene*, Ed.Universul Juridic, Bucureşti, 2011, p.197.
[31] L. Vişan, Necesitatea codificării normelor de procedură administrativă, Revista de Drept Public nr. 2/2005, p.48

administrative act represents a legal mean by which the public administration is performed, either in the form of law enforcement in specific cases or by the provisions of public services, in the board sense of the term and to the extent of the law.[32]

During the researching of this study, we noticed that the main weakness of the Romanian legislation is the lack of administrative coding[33], which entitles us to assert that the enforcement of the Administrative Procedure Code is a necessity.

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[32]A.Iorgovan, L.Vișan, A.S Ciobanu, A.I Pasăre, *op cit.,* p.189.

[33] For details about the integration of the E.U. regulations within the internal law and the state liability for the failure to comply with the obligations, see R. M. Popescu, *op.cit.,* p.198 and the following.

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