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CERTAIN ISSUES OF PUBLIS CONTRACTS AND ADMINISTRATIVE CONTRACTS

Introduction

Similarly to developed countries, the Hungarian state is also incapable to fully satisfy criteria of state tasks, therefore, involvement of the representatives of the civil sphere is steadily growing in importance. From many aspects, the implementation of the statutory provisions on the relations of the state organisations and of the entities voluntarily or partially voluntarily taking over state tasks is a rather interesting field. Namely, there is no unified and meticulously drafted dogmatic system on the agreements and legal relations connected to state tasks. In itself, the judicial term of the instrument shows no unity, whereas, some refer to public law contracts, whilst others insist to use the term of public contract or administrative contract, and the affiliation of this institution to the branches of law is rather contradictory as well.

Examining statutory provisions on the relations of the state and the non-governmental sphere in this study I shall attempt to review the civil and administrative law aspects of these legal relations, trying to find an answer to the question whether the relations of the state and the non-governmental sphere should fall under civil law or administrative law competences.

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Public contract – administrative contract

Due to the lack of a unified legal regulatory system, separate branches of law – primarily civil and administrative law – prescribe provisions that provide only a few orientation points or guidance on these legal relations. Due to the lack of specific regulation, neither civil law, nor administrative law could manage to categorise or classify the characteristics and allocate unified definitions for these regulatory forms appearing on different levels and effecting several different legal relations on a scientific scale.

For my part, I shall separate public contracts from administrative contracts hereto and take public contracts as a broader category into my consideration, a category that includes administrative contracts as agreements concluded by governmental institutions.

Civil law contracts or acts of authorities

Actually, this is the most fundamental question related to public contracts. To make a judgement on this question is impossible without a multi-level analysis of the legal institution.

Both the legal instruments of the public and administrative contracts are known in Hungary.

However, legal literature either uses these terms as synonyms of each other or with different content, hence there is no unified system of definitions or approaches.

This discrepancy originates in the different development lines of the legal institution in each legal system on the one hand, and on the other hand, the public contracts are significantly different due to different historical, economic and political characteristics of the countries and also due to differences in the

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actual relations regulated. These issues result in discrepancies and difficulties in determination and comparison of the legal instrument.

Development models of public contracts

As for development models, there are three major approaches in Europe: the French, the English and the German models. [2 p. 18]

The French approach

The fundamentals of public contracts have been incorporated in the Hungarian legal literature upon the French development. The contract types we consider as the predecessors of the administrative agreement have first appeared in the operations of the French administration in the 18th century. These agreements were related to state and military commissions, public works and public transportation.

From the 19th century public services were delegated to private organisations, for example, large private (monopole) companies have taken care of the public utility networks. Provided to protect public interest local governmental commissions were allocated under the supervision of the territorial government [3 p. 173-182]. As stated by *István Balázs*. On the one hand, the French regulations aimed to protect social welfare against enterprises that might not follow competitive provisions, whereas the buyer was the public sphere. On the other hand they sought protection against public officers with less business experience in order to make sure that they shall choose the most appropriate contracting partner serving the public interest the best.'[9] In the conduct of governmental tasks the independence of both the governmental and private sectors was preserved and the goal of the statutory provisions was to determine and regulate the relation of these sectors. [3 p. 173-182]

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The English model

Implementation of the special category of public contracts took quite a long time in England. Court procedures were not structured in consideration with the branches of public law and civil law, thus judges could proceed in both public and civil law cases. Without prejudice to the nature of the parties contracts fell under the same legal interpretation in general in England. [4 p. 73]

Structuring public service measures was first implemented during the era of liberal-capitalism. Public service obligations of state tasks for example development and maintenance of urban infrastructure were carried out by strong public corporations owned by local government bodies. From the 1970-ies the competition of private enterprises for state orders started to blossom. At the same time the system of regulatory authorities was developed, setting up minimum public interests and balancing market competition with tender regulations. These contracts were purely civil law agreements, whereas the state only participated as the owner and not as the actor of public authority. The tasks of controlling market conditions and enforcing public interest was delegated to regulatory authorities, which were partially independent from the government. [3 p. 173-182]

The German approach

Judicial development in Germany represented an intermediary approach between the French and English model. Strong state intervention in the economy has characterised the German model. According to the German approach the state can not be in a subsidiary position. The state was always represented by an individual legal entity – the fiscus – in any and all relations where the issues of subsidiarity or equality have been raised. [5 p. 22-25] Accordingly, court procedures were held against the fiscus and not against the state itself. [2 p. 18] Even in the second half of the 19th century the problems emerging alongside the

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development of public service systems were solved on the grounds of state authority. (For example concession was clearly considered as the act of public / state authority.) Nevertheless, for business activities of the local governmental bodies in public services the provisions of civil law applied accordingly.

First statutory implementation of administrative contracts took place in 1976. The German law does not approach public contracts as public law relations, on the contrary, the provisions of civil law shall apply to public contracts by analogy, supplemented by elements of the administrative law (for example, keeping state authority in these contractual relations).

As for public services, the traditional German model was the public utility form – ‘budgetary factory’ – firmly controlled by the municipalities. The local authorities influenced public services by practicing their ownership rights, conducting state control as actors of the market upon their incorporeal interests.[3 p. 173-182]

The Hungarian evolution

Historically embedded in German law, the Hungarian legal development was mainly influenced by the principals of the German model. In general, the German principal of fiscus (treasury)-based approach was approved until the 19th century. [2 p. 18] Both theory and legal practice accepted the fact that certain aspects of civil law are present in the acts of governmental bodies, yet, the system of definitions has not been implemented.

Similarly, the evolution of public services started with a delay in Hungary. However, certain legal institutions on the borderline of public and civil law were known (for example, public utilities). Our legal literature did acknowledge certain types of public contracts – such as public transportation, public services, public utilities, etc. – by partial regulations [7 p. 247, 450, 502], nevertheless,

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there was no comprehensive legal regulatory system and the nature of the contracts remained undefined.[7 p. 247, 450, 502]

At the early stages of the socialist era and centralised planned socialist economy contractual relations faded into the background, instead, companies concluded contracts upon the orders of the controlling authorities and in accordance with contractual obligations. [8 p. 460]

As the result of the reforms of the socialist economy (The reforms initiated from January 1, 1968 aimed at the implementation of a limited market economy in Hungary) contractual obligations were pushed into the background, statutory provisions regulated upon the characteristics of the given sales relations, however, the review whether the commissions of budgetary institutions and their contractual relations needed special regulations has failed to be completed.

Itemised legal provisions of different public agreements were implemented from the 1990-ies, and their actual existence and role in satisfying public needs is beyond question (for example, waste management public utility agreements, public education agreements, public safety agreements between the municipalities and police forces, etc.)

The image of the European Union on public contracts and administrative contracts is changing periodically. The statutory provisions were first influenced by the new public management that implemented the idea of neo-liberal government emphasising the priority of the market conditions, however, due to (economic) crises it has been proved that recent nationalisation of the formerly outsourced services is required by members states. [9 p. 65] In fact, this process has modified the judgement of the public contracts, nevertheless, it did not result in resolving controversies of the legal institution.

The relevant ruling of the European Court of Justice do not provide further clarification on the definition, whereas the judicial review of the EC Court of

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Justice may only effect administrative contracts on a case-by-case basis. Primarily, rulings of the EC Court of Justice effect public procurements and economic services of general means, otherwise the implementation of detailed rules is the sovereign competence of the member states. In line with the ruling obligation, the Hungarian legal practice attempts to determine the general terms and legal interpretation of the instrument and reveal the nature of the institution, but such attempts may only be detected at certain types of administrative contracts (for example, rulings of the Court of Appeal related to contracts on subsidies). [10]

Legal status of administrative contracts in the Hungarian legislation

The principals of administrative contracts are rather obsolete and outdated, whereas present dogmatics is based upon the dogmatics of the 19th century and the itemised determination of the administrative contract's definition is still a theory.[13 p. 653]

Nevertheless, a bill has been completed to implement unified statutory rules of the public contracts. [11] According to this concept, the future statutory act should be a so-called 'frame-law' that would give abstract definition of the general rules of the public agreements and would provide an appropriate court body for legal disputes in accordance with the French model. According to the bill, two types of public contracts are to be implemented: the so called public service (public) contracts related to public services and the so called development public contracts on developments and investments (enlisting different types of contracts in particular).

According to the bill, the future act would define the objects covered – enlisting the obligations of the governmental bodies and public officers and the line of public services -, however, the statutory provisions would allow each sectors to implement separate regulations in order to determine special

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provisions provided to establish and conduct public services related to each sector. [11] With regards to administrative contracts the concept implied that – without prejudice to civil law nature of such agreements – certain elements of public law must be enforced, nevertheless, the Hungarian judicial practice shall consider these agreements as civil law relations, whereas certain limitations of public law stipulated in separate statutory provisions shall apply. [12] In accordance with the bill the purpose of the public contract is ‘performing governmental tasks without the act of the public authority’. In accordance with the bill, the legal relationship established by the administrative agreement is taken into consideration as administrative (governmental) legal relation with regards to the rights and obligations stipulated, whereas its contents are often ruled by obligatory statutory regulations. The governmental institution shall partially give up its public authorities, nevertheless, it may still exercise such powers in order to control fulfilment of the contractual obligations or if necessary to enforce performance or in case of breach of the contract.

The concept of 2006 made it clear that determination of the relation of the public contract and civil law measures is inevitably necessary. However, the bill of 2006 has not been incorporated and the later civil law jurisdiction could not solve the problems either. Neither the old civil codex (Act IV of 1959), nor the new civil codex (Act V of 2013 on the Civil Code) regulated public contracts, not even on the level of definition. Similarly, Act CXL of 2004 on the General Rules of Administrative Proceedings and Services has missed to implement any statutory provisions on the matter (except for authority contracts).

In the lack of itemised definition of the institution, legal science conducts several different specifications on the definition, objectives and subject of the public law contracts, administrative contracts and public contracts. [13] Also, there are significant alterations among the authors on the subject of the administrative agreements. According to the most commonly approved

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classification the main subjects of the administrative agreements are the association agreements of local governments, agreements on overtaking authorities in accordance with the provisions of the Hungarian Act on Local Governments (Mötv) [14], authority contracts and agreements related to subsidies to the charge of the central budget or state monetary funds. Agreements of concession and public procurement (public works and procurement market) are generally governed by civil law, with public law derogations. [15 p. 20] However, other authors insist to use different classifications.

Actually, it is a yes/no question whether the nature of the administrative contract is defined as an act of a state authority legal institution with civil law characteristics or it is an agreement governed by the civil law with public law derogations.

Surely, the answer is not evident. The contractual nature of these agreements can not be questioned, whereas the agreement of the parties is actual and factual, but on the other hand, it is still a question how classic principles of contractual law may prevail.

Public contracts show significant alterations from civil law agreements regarding the course of concluding the agreement and performance, furthermore, in relation with the freedom of contract, and finally, regarding rights and obligations of the parties.

These contracts do imply general characteristics of contracts, however, they have administrative (governmental) means as well, provided that they are connected to state and governmental institutions in order to conduct public service obligations. They establish legal relations, whereas the elements of public and civil law are connected. [16]

‘State aspects’ of the contract

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The entity of the governmental institution involved as contracting party is inseparable from the nature of the state authority, state policies and tasks. The administrative contract shall become public contract upon the fact that its conclusion and content is firmly attached to the activities and operations of governmental institutions and to acts of public authority.

Persons covered in administrative contracts on the 'side of the state' are rather difficult to classify and categorize. (Even more so, some authors doubt if the persons covered can be unified under a frame definition.)

The definition of public legal person is not specified in the Hungarian jurisdiction, and judicial findings of legal entities are only stipulated on the grounds of civil law and not of public law. Act V of 2013 on the Civil Code (Ptk.) specifies that legal persons are capable, they may have rights and obligations and their capability covers every right and obligation that may not only be connected to natural person by nature. However, the Act does not specify any significant alterations between the legal entity of the state or governmental institutions and other legal entities (for example in case of public contracts), moreover, it does not imply to any differences at all. Seemingly, there is no difference between the state and other entities' legal personality or entity, thus, governmental bodies do not enjoy privileges as contracting parties. De facto, there are significant differences between the parties regarding the nature, content and limitations related. The contents, frames and limitations of legal entities depend on the actions, powers of the state and on state policies.

As for administrative contracts the contracting party representing the state must have appropriate competence and authority, thus its public legal entity is assumed thereto. Nevertheless, due to its autonomous power the state is entitled or might be entitled to exercise rights upon which it may establish powers to itself in its contractual relations with other actors, while it may also have the power to oblige other entities. Principally, it is still possible even if the state

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decides not to utilize such powers. Therefore, these agreements may only be taken into consideration as civil law contracts if the state remains in the civil law position as contracting party – under appropriate guarantees – without any privileges.

State authority and dominance covertly appear in administrative contracts due to the public legal entity of the government.

Freedom of contractual intent

Further concern is whether the freedom of contractual intention of the party concluding a contract with a governmental institution can be considered as de facto freedom of contractual intent in accordance with the classic principle, how the freedom of contractual intention is limited in public law relations and how this intent is protected under the provisions of law.

Freedom of contract – especially the actual freedom of contractual intention – is an issue not only related to private parties, but to the public legal entities as well. Freedom of contract of the governmental institutions or contracting public legal entities is not without limitations, nor it is absolute, due to the fact that the acts of administrative bodies are connected to public service obligations. Firm and rigorous statutory provisions rule the proceedings, authorities, competences, rights and obligations of the administrative bodies. Their procedural freedom may only be exercised within these statutory boundaries. Moreover, the contradictory conditions of governmental bodies are further enhanced by ‘quasi contracting obligations’ in several cases, where the administrative institution acts as a contracting party.

Notwithstanding to the fact that such contracting obligation is (usually) not specified in the statutory provisions, it can not be denied on political level. For example, upon constitutional requirements police forces must co-operate with local governments and home guard associations in order to secure public safety.

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Furthermore, administrative bodies must conduct their tasks from state budget sources, yet, these sources are not eligible to satisfy public service criteria. By these means the obligations to complete governmental tasks give rise to a secondary compulsion to involve other persons in the execution of the duties, by concluding civil law agreements to establish conditions necessary to complete the tasks or by transferring sources or duties to other actors.

Involvement of another party is conducted upon civil law measures and in compliance with statutory provisions on rules, procedures and conditions. Part of these provisions are of public law nature (for example, in-house procedures, defining tasks), while other specifications are governed by civil law (for example, public procurement, tenders, etc.).

Despite of all these alterations, the typical hierarchy of governmental actions shall not apply to legal relations based on administrative agreements. Specifically, parties are co-ordinate during the conclusion of the agreement and in the course of lawful performance without prejudice to the administrative nature of the legal relationship. Governmental institutions usually decline (or may decline) their hierarchical (state authority) privileges.

Further speciality of these contracts is that the above declination is not final, as this right of state authority may revive in case of eventual breach of contract or default for certain types of agreements.

Therefore the co-ordinate relation of the parties is conditional, as the breach of contract revives the hierarchic privileges of the governmental institution.

Furthermore, the conditions of intervention into the contract by the governmental institution are expressly stipulated, and only allowed in case of default of the other contracting party.

In order to avoid misappropriation of the authority, private parties are granted with additional guarantees as measures of legal protection, such as

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procedural rules limiting the powers of the authority, legal remedy of court appeal and the publicity of the contractual guarantees.

Breach of contract is a cardinal issue in awarding administrative contracts, whereas the classic principals of civil law shall not apply, due to the fact that the parties have different rights, therefore the legal consequences of breach are different between contracting parties.

For certain types of contracts hierarchic relations shall be reinstated in case of breach of contract, and co-ordinate relationship of the parties shall be terminated. Public authority nature of both the governmental institution and the administrative contract shall come to the fore. The governmental institution shall be entitled to take direct sanctions in accordance with its state authority position, while in case breach of contract by the administrative body the other party may only be entitled to turn to the appeal court for legal remedy.

The above detailed characteristics of administrative contracts shall not apply to every type of administrative agreements, whereas the authority has different rights in case of breach of a subsidy agreement by a private party than in case of breach of an agreement on transferring duties of a local government. The aspects of regulated relations, the identity of the contracting parties and the subject of the contract result in significant differences in each types of administrative contracts.

Final remarks

The analysis of different types of public contracts – amongst them the administrative contracts – leads us to different consequences and allows specification of different definitions. Significant differences between certain types of contracts obstructed the determination of a unified system of definitions and comprehensive regulatory system over the entire field of law. The lack of statutory regulations puts an extremely demanding task on courts, whereas by

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their legal interpretation courts are forced to act as quasi legislators. These measures oppose the constitutional principle of checks and balances, therefore, urgent revision is required.

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Hargitai V.

Деякі питання державних контрактів і адміністративних договорів

Адміністративний договір знаходиться на межі між цивільним та адміністративним правом. У цьому дослідженні автор прагне привернути увагу до проблем, пов'язаних з цими договорами, підкреслюючи недоліки та проблеми законодавства. Автор звертає увагу на характеристики цих

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угод, що відбуваються в їхній суміжній природі, а також виявляє суперечності, пов'язані з цими правовими інститутами.

Ключові слова: адміністративний договір, свобода договору, особи публічного права, договірні характеристики, завдання держави (завдань державної служби).

Hargitai V.

Некоторые вопросы государственных контрактов и административных договоров

Административный договор находится на границе между гражданским и административным правом. В этом исследовании автор стремится привлечь внимание к проблемам, связанным с этими договорами, подчеркивая недостатки и проблемы законодательства. Автор обращает внимание на характеристики этих соглашений, происходящие в их смежной природе, а также указывает на противоречия, связанные с этими правовыми институтами.

Ключевые слова: административный договор, свобода договора, лица публичного права, договорные характеристики, задачи государства (задачи государственной службы).

Hargitai V.

Certain issues of public contracts and administrative contracts

The administrative contract is a borderline instrument between civil law and administrative law. In this study I aim to draw attention to the problems related to these contracts, highlighting the deficiencies and challenges of the statutory regulations. I attempt to imply the characteristics of these agreements originating in their borderline nature, furthermore, I also try to reveal the contradictions related to these legal institutions.

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Key words: administrative contract, freedom of contract, public law entities, contractual characteristics, tasks of the state (public service tasks).

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