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ADMINISTRATIVE CONTRACTS IN COMPARATIVE LAW

-abstract-

Administrative contracts, as a type of contract concluded by the state, not for the purpose of performing its primary functions, but for the purpose of achieving generally useful goals, both for the society and the state, travel a long way from their origin to eventual final acceptance in all legal systems. In this paper, the author explains the administrative contracts in France- the country where the institute "administrative contract" is established, versus the legal systems of Germany and Austria. Even though in the common law countries, such as Great Britain and United States of America the administrative contract is not present as known as in the French legal system, there is a certain type of contract where different rules apply than those of private law and in which one contractual party is a public authority. These contracts in the common law can be found under the name "public contracts", "government contracts" or "state contracts". It is emphasized that the administrative contract does not have to be regulated and legalized in order to function and be legitimate. Emphasis is placed on the legal nature of these contracts and on the similarities and differences that exist in different legal systems.

Key words: administrative contracts, public contracts, public administration, public law, jurisdiction.

I. INTRODUCTION

The administrative contract is of great importance in the study of administrative rights in different legal systems. Administrative contracts have elements from both administrative and civil law, which is why there is a need to distinguish between administrative contracts, that are very important for the realization of the public interest, and private contracts, whose purpose is to achieve economic effects.

The creation of the administrative contract is the result of the historical and political circumstances in France, and today administrative contracts exist as a legal institute in other countries that derive from the European continental legal system. After all, the European Union has also adopted Directives for the regulation of public contracts that are binding on all member states. [1]

The term "administrative contract" itself shows the contradiction of this legal act and it is clear that it combines elements that are usually considered incompatible. Namely, the administration is based on orders, and the contract is based on agreement; ordering and agreeing do not go together and are mutually exclusive. The opposite view is held by those authors who consider that the comparison of administration and administrative law with the exercise of power belongs to the

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[1] For example: Directive on the award of concession contracts, European Parliament no. 2014/23/EK, of 26 February, 2014; Directive on public procurement and repealing, European Parliament no. 2014/24/EK, of 26 February 2014.

past. These authors believe that modern administration does not mean only ordering, on the contrary, the performance of administrative tasks also implies the conclusion of contracts, which are regulated by laws in the field of administrative law.
The term "administrative contract" (contrat administratif) is of French origin. In French law, it denotes a special type of contract concluded by the administration, for which the regime of administrative law is applied and the disputes arising from that contract are resolved before the administrative courts. The particularity of its legal regime makes the administrative contract stand out among the numerous contracts concluded by the administration.

II. ADMINISTRATIVE CONTRACTS IN EUROPEAN-CONTINENTAL COUNTRIES

i. The French model of administrative contract

The administrative contracts acquired the meaning they have today within the framework of the French administrative law. This institute was created in France at the end of the 19th and the beginning of the 20th century by the members of the Conseil d'Etat (Council of State). [2]
Historically, the administrative contract appeard in France as an expression of the political tendency for the public administration in the economic relations with individuals not to be served exclusively by authoritative acts, such as unilateral administrative acts, but neither by the civil contract. [3]
Consequently over the years, two types of administrative contracts have been created in France: those that are provided for by law and those that are considered administrative contracts according to their own nature; the first are created by the legislator, and the latter by judicial practice.[4]
Administrative contracts that are created in practice are based on several criteria, on the basis of which they differ from the contracts provided for in the laws. The first criterion refers to the contracting parties; in accordance with established practice, for the existence of an administrative agreement, at least one of the contracting parties is required to be a subject of public law. [5]
The other contracting party can be a public legal entity, but also a private person. But taking into account that the subjects of public law can also conclude private-law contracts, this condition is considered necessary, but not sufficient for the existence of administrative contracts.
When determining whether the contract can be considered administrative or not, it is necessary to apply additional criteria related to the subject of the contract and special clauses. The criteria of the subject of the contract refers to the connection between the administrative contract and the public service. In this manner, those contracts concluded for the performance of a public service are considered administrative contracts. [6]
However, this is not always enough, because the contracts concluded for the performance of public service do not always have an administrative character. Therefore the legal theory considers that

[2] Unlike other legal systems of the European-continental type, French administrative law developed to a lesser extent through the actions of the legislator, and to a greater extent through the practice of the Council of State - the highest administrative court..
[3] Давитковски Б., Павловска- Данева А., Управни договори, Скопје, 2009, p.59
[4] Langrod, G.„*Administrative Contracts: a Comparative Study",* The American Journal of Comparative Law, 1955, p. 330
[5] Under the term subjects of public law at that moment in France is meant the state, territorial collectivities and public institutions.
[6] Келзен Х., Општа теорија права и државе, Београд, 1951, p. 197-198.

it is necessary the relationship between the contract and the public service to be immediate and that the contract refers to the performance of the public service itself.
The development of judicial practice in France indicates that over time the importance of certain criteria as necessary for the existence of the administrative contract has changed. Starting at first only from the contractual parties and the public service, so that over time the specific clauses in the administrative contracts, where rules different from the rules of private law are seen, became more important.[7]
The French administrative contract *(Le contrat administratif)* is an institute of administrative law, a homogeneous category, mainly under a special legal regime and separated from the set of contracts that the administration concludes according to the rules of general or civil law. [8]
In the initial stages of the modern development of French law, two types of administrative contracts were known: the entrepreneurial contract or the contract for performing public service (marche de travaux publics) and the contract for public procurement, i.e. procurement for functioning of public services (marche de fourniture).
According to the current level of development of French law, contracts for transportation of persons and things of public importance are also considered administrative contracts; contracts for concessioned public services; contracts for registration of public loans and etc.[9]
Although all the above contracts are interconnected with certain common characteristics, the contract for performing public service is taken as the basic model of the theory.[10] The contracting party in these contracts is always a public legal entity, and considering that the subject of the contract is the protection of public interest or the achievement of public benefit, it is in a special privileged position in relation to the other contracting party. The public interest, on the other hand, for the public authority means greater responsibility and obligations, with strictly established rules for the selection of the contractor.
This contract is always aimed at achieving public interest and is always concluded in order to ensure the performance of a public service, under the authority of the contracting authority. A characteristic of this contract (as with all administrative contracts) is the existence of a derogatory clause by which the contracting parties accept the application of private law, but with certain major concessions. [11]

ii. Administrative contracts under German law

While French jurisprudence began to regulate the legal regime of the administrative contract at the beginning of the 20th century, the dilemmas about the existence of this act of administration in Germany were removed much later, that is, in the second half of the 20th century. Until then, in the German legal system, the notion of administrative contract was the subject of theoretical discussions based on the arguments of Otto Mayer and Paul Labanda.[12]
The dilemmas were resolved only in 1976 with the passing of the federal Law on Administrative Procedure. This law provides provisions that regulate the legal regime of these specific types of

[7] Langrod, Georges, op.cit. pp.325-328
[8] Давитковски Б., Павловска- Данева А., op.cit., p.69
[9] Ibid, p.72
[10] This contract is characterized by frequent changes and additions to it, through annexes and provisions for which the other party does not have the right to give its proposals and/or opinions, but can only accept them or not.
[11] Ibid, pp.71-73
[12] Theorists who followed the opinion of Otto Mayer believed that the administrative contract could not exist; others, who became more and more numerous over time, claimed the opposite. Thus, for almost a century in the German legal system, the administrative contract was seen only as a theoretical construction - possible or not.

administrative acts called public law contracts. [13] The provisions on public legal contracts are only valid if it concerns areas in which this law is applied, and do not apply in cases where the application of the Law on Administrative Procedure is excluded, such as the case of social service rights or tax law. In these specific areas, provisions for public law contracts should be sought in special laws or derived from general principles of administrative law. [14]

German law takes a very narrow position regarding public law contracts. This is exclusively about contracts whose subject is of a public law or administrative nature, provided that the subject can be negotiated and which does not have to be decided unilaterally through an administrative act. [15]

According to the Law on Administrative Procedure, a public law contract is defined as a contract that creates, changes or terminates a legal relationship in the field of public law. [16]

If this legal definition is analyzed, its terminological impreciseness is immediately noticed, especially if one considers that the terms of public legal contract and public law by themselves, taken literally, have a much wider meaning than the one that defines the administrative contract.

By defining the public contract solely on the basis of its subject[17], the legislator relied on the objective criterion, and the subjective representations of the contracting parties are not authoritative in determining the legal nature of the contract. In order for the contract to be public law, it is necessary that the subject of the contract refers to a situation that is considered public law, that the contract, for example, serves to execute public legal norms; that it contains an obligation to adopt an administrative act or perform an official act; to refer to public legal powers and obligations of citizens. [18]

In disputed cases, judicial practice relies on the principle of dominance, according to which a public legal contract exists when public legal elements make up the content of the contract and relationships prevail over private legal elements. If these parts are not directly and mutually related, the principle of separation is applied: the public law and private law parts of the contract are separated and legally valued differently.

In each specific case, it is especially important how to determine whether the subject of the contractual relationship has a public legal direction or not. In order to have the answer, the character of the consequences derived from the purpose of the contract (public law or private law) is taken into account. Hence, the German law applies the theory of interest when distinguishing public law and private law contracts. [19]

A problem in determining the legal nature of a contract especially occurs when the subject of the contract is of a "neutral" nature, such as the obligation to pay a certain amount of money which in itself is neither public law nor private law. In such cases, the purpose of the subject and the overall character of the contract are taken into account. [20]

In a certain number of cases, the use of an administrative contract is expressly determined by law, but the Law on Administrative Procedure accepts that a public legal entity can use an

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[13] In German legal theory and law, the term "public contract" is used for the term administrative contract.

[14] Maurer H., Allgemeines Verwaltungsrecht, München, 2011, pp. 371-372

[15] Давитковски Б., Павловска- Данева А., op.cit., p.145

[16] Law on administrative procedure in the version published on January 23, 2003 (Federal Law Gazette I p. 102), which was last amended by Article 11 paragraph 2 of the law of July 18, 2017 (Federal Law Gazette I p. 2745).

[17] The definition given in this way, where the starting element for determining the public legal character of the contract is its subject, results in a large number of dilemmas and various interpretations in theory and in practice when determining a certain contract as administrative or not.

[18] Maurer H., op. cit., pp. 380-382

[19] Давитковски Б., Павловска- Данева А., op.cit., p.145

[20] Maurer H., op. cit., p. 382.

administrative contract whenever its application is in accordance with the public powers it has, except when the law prohibits the use of administrative contract, ordering the authority to act with a unilateral act.[21]
The final conclusion about the concept of the administrative contract in German law would be that it lags behind the French construction both in terms of its legal independence, but also in terms of theoretical persuasiveness. [22]

iii. Administrative contracts in Austria

Contrary to German law, in the legal system of Austria the administrative contract is not expressly provided by law. There is no legal definition of the administrative contract, nor is the legal regime of this specific type of administrative act regulated in a general way. The existence of the administrative contract is discussed only in the circle of specific areas of administrative law. In judicial practice and legal theory, the existence of administrative legal contracts in certain administrative areas is accepted, with various attempts to bring them under the regime of legal protection for administrative law.
Historically, the judicial control of individual administrative acts in Austrian law has long been related exclusively to decisions (administrative acts). Thus, the sovereign administration was reduced to an authoritative representation, which in individual situations is expressed through decision-making. Whenever the state does not make a decision - as a means of expressing its superiority over individuals, it acts as a private legal entity in external relations.[23]
The consequences of this distinction in Austrian law clearly showed that there is no room for contracts within the framework of administrative law and sovereign administration. Contracts were considered exclusively for the private law, and disputes from contractual relations were resolved before regular courts.
The problem arose when the legislator in a series of tax laws provided for the possibility of concluding a contract between the tax authority and the taxpayer.[24]
Consequently, disputes from the contractual relationship cannot be resolved before regular courts and the courts of public law were not competent either.
In terms of the judicial control of the administration, a legal gap has arisen that is contrary to the principle of legality of the administration and the constitutional legal guarantee of legal protection. The lack of legal protection inevitably led to the question of the permissibility of concluding such contracts. The Constitutional Court accepted the existence of administrative legal contracts, but under certain conditions.[25]
Unlike Germany, in Austria the strictly stipulated principle of legality applies to the entire sovereign administration, and not only to those activities that authoritatively encroach on the sphere of the rights and freedoms of individuals. While in Germany it is sufficient that the conclusion of the public legal contract is not contrary to the law, in Austria it is required that the conclusion of the public contract to be expressly provided for by law.

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[21] Unlike French law, in German law, administrative contracts for the procurement of goods and services do not have the character of administrative contracts.
[22] Давитковски Б., Павловска- Данева А., op.cit., pp.146-147
[23] Langrod G., op.cit., p. 351
[24] Starting from the fact that the tax area is one of the classic areas of sovereign administration and that the subject of this type of contract has a public legal character, they can no longer be considered as private legal acts.
[25] Administrative legal contracts are allowed only when there is an explicit legal basis for their conclusion; another condition is that it deals with cases in which it is foreseen that the disputed issues of the contractual relationship should be resolved by a decision, which gives the administrative contract the character of an "independent source of law".

The reform of the Austrian system of judicial control of the administration began in 1988 with the creation of the so-called independent administrative councils that were part of the administrative authority, to finally end in 2012 through the creation of a large number of administrative courts.[26] With the amendments of 2012, the provisions of the Federal Constitutional Law stipulate that the administrative courts shall decide on the legality of decisions and certain instructions, on the legality of exercising direct authority with orders and coercion, as well as in the case of silence of the administration. [27]

Apart from these explicitly stated cases, the jurisdiction of the administrative courts can also be provided by a special law for deciding on the following issues: on the legality of the actions of the administrative bodies in the execution of the laws, on the legality of the actions of the contracting authority when awarding public contracts and for disputes on official matters. [28]

III. ADMINISTRATIVE CONTRACTS IN COMMON LAW COUNTRIES

In the countries of the common law legal systems, there is no specific system of administrative justice, as is the case in the European-continental countries, nor there is such a pronounced division of a system of private and public law, with specific rules for public law.

In these countries, disputes arising from administrative acts and falling within the sphere of public law are resolved according to the rules of private law as generally accepted rules, regardless of the subjectivity of the parties (whether one of the parties is a state authority).

Although in the common law countries the term "administrative contract" is not known in the sense that it has in French law, nevertheless in the judicial practice and legal doctrine a certain type of contract appears where different rules apply than those of private law and in which one contractual party is a public authority, that is, a body of the state administration.[29]

If it is necessary to make a comparison with the meaning that the administrative contract has in the European-continental legal systems, it can be said that the most similar contract in the common law systems is the so-called "public procurement contract", which refers to public purchases, public performances/works and public services.

In this paper, an analysis will be made of the term "public procurement contract" as a contract which, in terms of its characteristics and specifics, is closest to the French marchee publics and the term administrative contract in French legislation. [30]

i. The English legal system

In the law of Great Britain the rules of the common law apply both to the contracts of public collectivities and to the contracts concluded by individuals. The concept of the French institute of the administrative contract remained unknown to English doctrine and English jurisprudence, but

[26] The old administrative court, which until that moment was the only one, got a place at the top in the new organization of the administrative judiciary.

[27] Радошевић, Р.,Организација управног судства, Зборник радова Правног факултета у Новом Саду, 3/2014, pp. 414-415.

[28] Bundes-Verfassungsgesetz (BGBl. Nr. 1/1930), zuletzt geändert durch das Bundesgesetz BGBl. I Nr. 22/2018 – B-VG, Art. 130, Abs. 1.

[29] Langrod G., „Administrative Contracts: a Comparative Study“, The American Journal of Comparative Law, 1955, p. 328

[30] Давитковски Б., Павловска- Данева А., op.cit., p.153

this did not prevent the administration from gaining an impetus in its development, which is as significant as on the continent.
Although English law does not know institute similar to the administrative contract in French law, some authors consider that practically the same results can be achieved because, as a rule, ministries conclude contracts on the basis of well-defined standard rules and conditions.
The control activities on the conclusion of these contracts are aimed at limiting the subject of the contract, i.e. whether certain services should remain in the administration itself or can be the subject of a contract with a private entity, as well as the adoption of specific regulations for the form in which the contract shall be concluded.
In the mid-1970s in the United Kingdom, there was a great distrust of citizens in the ability of the public sector to provide quality public services, which is why the government of Margaret Thatcher began a reform of the public sector, aimed primarily at the efficiency of the administration through devalued budgeting, value for money audit, contracting out and development of the management of public services.
In this manner, the administration was encouraged to transfer certain functions to external entities by means of an contract, with the aim of more efficient and economical operation of the public service. The general trend of the reforms undertaken in the eighties until the mid-nineties was to transfer as many activities as possible from the bureaucracy to other categories. [31]
The process of reforming the United Kingdom and establishing the existence and implementation of public contracts, moved from long-term planning and negotiations to the conclusion of short-term public contracts.[32] Starting from the "value for money" concept, rules and procedures for concluding and awarding public contracts have been established in the United Kingdom, similar to those governing the procedure for concluding administrative contracts in French legislation.
In terms of judicial control over public contracts in the United Kingdom, the courts have taken the position that they will not review the decisions of competent authorities when they contain elements of public law.[33] However, there are exceptions when the court intervened in public contracts, especially in matters where it considered that the administration was using its prerogatives in a way that represented procedural unfairness or a violation of justice. [34]
Taking into account all the rules for the procedure for concluding contracts in the United Kingdom, it can be concluded that despite the absence of administrative contracts in this legal system, the Anglo-Saxon law still applies many solutions that apply to the conclusion of classic administrative contracts.

ii. Public contracts in the United Stated of America

In the legal system of the United States, as we have already stated in the introduction, the institute administrative contract is not known with the meaning it has in French jurisprudence, but the term public contracts appears, which refers to the contracts concluded by the administration, that is, the federal administration of the United States.[35]

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[31] Public contracts appeared as the best option, specially considering the position of the state as a party in the relationship, which has the control and power to implement mechanisms for the proper implementation of services, thus achieving the goal - to increase the efficiency of the public sector.
[32] Ibid., p.161
[33] Such a position is, for example, taken in the case of the unilateral termination of contractual licenses for market stalls or the awarding of television franchises.
[34] Ibid., pp.166-167
[35] In the US, all federal government contracts are subject to general contract law, and there are certain standard clauses whose presence in the public contracts is mandatory.

The federal procurement regulation in the USA is a uniform legal regulation that is valid only at the level of the federation, and public contracts concluded by each federal state separately or by local authorities are subject to separate and different legal rules. [36]
Hence the differences with the system of the European Union are obvious, where the Directives regulating public procurement apply equally to all signatory states.
In the current legal system of the United States, public procurement contracts are regulated by the Code of Federal Regulations[37], where there is a special section that refers to public procurement-Federal Acquisition Regulation. [38]
The administration's control over the performance of public contracts is ensured by the so-called standard clauses, and in certain cases through legal provisions provided by the Code of Federal Regulations.
In the USA the administration as a contracting party in a public contract has the right to unilaterally terminate the contract due to a violation of the contract by the private person *(termination for default clauses)* and the right to unilateral termination at its own discretion *(termination for convenience)*. [39]
Under the provisions of the FAR, most fixed-price government contracts are required to contain a convenience clause. A contract termination clause allows the Government to terminate the contract in whole or in part if the public officer determines that termination is in the Government's interest. Generally, when the Government terminates the contract at its own discretion, the contractor is entitled to claim only the costs incurred for the early work, the profit from those costs and the costs of settling claims from subcontractors. [40]
For resolving the disputes arising from public contracts is applied the general principle of out-of-court negotiation, that is, settlement through the resolution of disputes issued with the government official. [41] Against the decision of the government official, the dissatisfied party has the right to appeal to the Board of Contract Appeals or the right to file a lawsuit to the Court of Claims.

IV. CONCLUSION

The administrative contract is a complex legal institute - a contract with a public legal character. The establishment of the administrative contract begins in France in the case law of the French Conseil d' Etat and later in the French legislation.
The creation of the administrative contract is the result of the historical and political circumstances in France, and today the administrative contract is accepted as a legal institute in other states of European continental law. In Germany it is defined in the Law on Administrative Procedure as a contract that creates, changes or terminates a legal relationship in the field of public law. Contrary to German law, in the Austrian legal system the administrative contract is not expressly provided by law and there is no legal definition of the administrative contract, nor is the legal regime of this specific type of administrative act regulated in a general way.

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[36] Ibid, pp.173
[37] Historically, public procurement in the United States was originally regulated by the Armed Services Procurement Regulation of 1947 and the Federal Property and Administrative Services Act of 1949.
[38] Leventhal Harold, American Bar Association Journal, Vol.52, No.11 January, 1966, pp.35-41
[39] Давитковски Б., Павловска- Данева А., op.cit., p.174
[40] Pederson Marc A., *Rethinking the Termination for Convenience Clause in Federal Contracts*, Public Contract Law Journal, Vol.31, No.1, 2011, pp.83-100
[41] Leventhal H., *op.cit., pp.35-41*

In the common law countries the term "administrative contract" is not known in the meaning it has in French law, but in the judicial practice and legal doctrine a certain type of contract appears where different rules apply than those of private law. This type of contract can be found under the name of "public contracts", "government contracts" or "state contracts".

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