

Administrative Agreement: Critical Gap of Georgian Administrative Law (Personal scientific analysis of the legal norm)

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Abstract

General Administrative Code (GAC) of Georgia contains article upon which any agreement, concluded by public agency is a civil contract. We think that one and the same agreement cannot be recognized both as administrative and civil. Author tries to distinguish above-mentioned agreements from each other by their objectives, identity and interests of the parties of agreement and types of rules which govern them. On the ground of analysis of different administrative cases author offers own versions of relevant provisions of GAC of Georgia.

Keywords: administrative code, administrative law, civil law, legal entity, natural person, public law, private law, public official, public and private interests

Introduction

The key function of statutory law of any country is to govern social relations according to the interests of the state and society. This pattern is exclusively important for public law, which is based on imperative rules and applies compulsion, as method of governing. Administrative law of Georgia is one of the branches of public law which deals with relationships between public agencies and citizens. Application of different forms of compulsion is routine practice of public agencies, so, legal sources of administrative law should be free of legal defects. Unfortunately, Administrative Codes of Georgia are characterized with a lot of legal issues and the topic of this article is theoretical problems of definition of "Administrative Agreement," stipulated in the General Administrative Code of Georgia. Above mentioned problem is typical for the countries of civil law, while in judge-made law, the situation is quite different: if even both parties (or at least one of them) are legal entities of private law, contact settled between them let's say, about provision of administrative servicing, is acknowledged as administrative agreement. In Georgian law, such contract is considered as a civil agreement, because civil and common laws have different objectives of regulation.

Administrative agreement is an interesting and contradictory institute of Law, caused by controversial provisions of the General Administrative Code of Georgia.

In Georgian law the term "Administrative Agreement" had been applied even before the passing of General Administrative Code, e.g. in the Law of Georgia "On the Privatization of Public Property" of 1997 ("bargain on privatization").

author). Until 24th of June of 2005 above mentioned Code defined administrative agreement as administrative bargain by which the lawmaker underlined civil feature of such agreement with relevant consequences.

Current General Administrative Code of Georgia defines, that: "administrative relations can be established, changed or terminated by means of administrative agreement. Administrative agency, which has right to regulate administrative relations with the help of enacting of administrative act, can do it by entering into administrative agreement". We think that entering into administrative agreement is typical example of law-applying administrative activity upon which the agreement becomes a legal source for parties of contract, but has specific features:

- Unlike individual administrative act it expresses the will of not just one but both parties of agreement.

Article 2, p."z" of the General Administrative Code of Georgia defines administrative agreement as: "Administrative agreement is a civil agreement with natural or legal entity or another administrative agency, concluded in order to carry out its public power". It's distinctly clear, that one and the same agreement cannot be both civil and administrative at the same time! This is a serious fault in legislation and we'll try to analyze the juridical nature of administrative agreement, settled during the process of performing public management.

How can we distinguish civil and administrative

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agreements? Following factors are crucial: identity and interests of the parties of agreement, types of rules which govern contractual relations and objectives of agreement.

Case 1: agreement is concluded between public agency and **legal entity of private law** (like business entities, trade-Unions, NGOs and so on);

- The parties of such agreement are public agency and legal entity of private law, e.g. political party or business company;
- Execution of such agreement is carried out with the norms of civil law, though the rules of entering into such agreement is regulated by means of administrative norms in the frame of public activity of state body;
- Objectives of agreement are;
- For the public agency – it is execution of public objectives (public objectives);
- For the business company or political party – it is execution of the objectives of their charters (private objectives);
- two kinds of interests are reflected in the agreement :
- public interests – in case of public agency;
- private interests – in case of business company or political party.

Case 2: agreement is concluded between public agency and natural person of private law, e.g. with the sole proprietor. In this case:

- a) The parties of such agreement are public agency and natural person of private law;
 - b) according to the article 651 of GAC of Georgia execution of such agreement is carried out according to the norms of civil law;
 - c) Objectives of agreement are;
- For the public agency – it is the execution of public objectives (public objectives);
 - For the sole proprietor – it is the execution of profitable business objectives (private objectives);
 - two kinds of interests are reflected in the agreement:
 - public interests – in case of public agency;
 - private interests – in case of sole proprietor.

Case 3: agreement is concluded between security police as public agency and natural person on guarding his (her) flat.

- The parties of the agreement are security police as public agency and natural person as citizen;

- Although security policy carries out service activity in accordance with administrative norms adopted by the Ministry of Home Affairs, upon the article 651 of GAC such type of agreement is executed by means of civil legal norms;

- Objectives of agreement are:

For the public agency – it is the protection of private property, reflected in the public objectives of security policy, and it deals with public authority of police (public objectives);

For the citizen – there are only personal and private objectives (private objectives);

- two kinds of interests are reflected in the agreement:
- public interests – in case of security police because it deals with authority of police as one of the most important public institutions;
- private interests – in case of a citizen who wants to be secured.

Case 4: employment agreement is concluded between the Ministry of Home Affairs as public agency and natural person. In this case:

- The parties of such agreement are public agency and natural person of private law;
- In order to define which rules govern an execution of this agreement we must determine whether it is employment agreement between Ministry and natural person administrative or civil contract. As we mentioned above, article 65 of GAC of Georgia permits an appearance of administrative relations by means of conclusion of administrative agreement. The rules employment of officers for the system of the Ministry of Home Affairs is regulated by the Law “On the Public Service” and the law “On Police” of Georgia. Because of this, we can clearly assert, that employment agreement between the Ministry and a citizen is a type of administrative, but not civil agreement, because it is governed by means of administrative norms and the candidate has clear public objectives;

- Objectives of agreement are:

- For the Ministry – public objectives through entering into employment contract which bears public character;
- For the candidate – these are public interests of a private person concerning with public servicing;
- We meet public interests from both sides of agreement.

Case 5: contract is concluded between the Ministry of Defense as public agency and serviceman on the military servicing abroad.

- Both parties of agreement are subjects of public law;

- Contract, settled between them is governed by administrative legal norms;
- Objectives from both sides bear public character;
- Both parties have public interests;

Case 6: agreement is concluded between two bodies of local government (or self-government). In this case:

- Both parties of agreement are subjects of public law;
- Agreement, settled between them is governed by administrative legal norms;
- Objectives from both sides bear public character;
- Both parties have public interests;

Comments to Cases

• Administrative agencies of Georgia enter into legal relations with other public agencies more frequently than with the subjects of private law, because their activity bears public character. At the same time, administrative agreements between administrative agencies are concluded rarely because almost all issues between public agencies of administrative, financial or property types can be resolved by means of orders, plans and so on.

It is incomprehensible, why law-maker defines an agreement between two public (administrative) agencies or between public agency and natural person of public law (e.g. Serviceman), as civil agreement when such contract is governed with administrative legal rules, have public objectives, reflect public interests from both sides and is not going beyond the frame of administrative law. Maybe we should admit that in Georgia there are privileged and non-privileged branches of Law?

• It is quite different when public agency enters into agreement with natural or legal person (entity) of private law.

According to the article 651 of GAC of Georgia in civil legal relations administrative agency acts as the subject of private law that is an agreeable idea. Any agreement, where one party is subject of private law while another side is public agency or sometimes legal entity of private law, acting on the name of state, the distinguishing factor is existence of the subject of private law as of party of agreement. Because of this, any contractual dispute between parties has to be heard by civil court. In this situation public agency goes beyond the frames of administrative law and enters into fields of civil law. It was a matter of decision by a law-maker to recognize above mentioned legal relations as either civil or administrative one. Law-maker decided to recognize such relations as civil in order to provide legal equality of both parties. We get the following scheme:

Public agency>>>citizen, sole proprietor, business company= civil relation = civil agreement.

Conclusion

1. When public (administrative) agency enters into contract with another public agency or public officer – such agreement should be recognized as administrative agreement because it is completely submerged in the field of administrative law;

2. When public (administrative) agency enters into contract with the natural or legal person (entity) of private law relevant agreement changes the field of administrative law to the field of civil law and logically should be recognized as a civil agreement (contract);

3. In some specific juridical situation the agreements has to be recognized as of administrative type, even when a side of agreement is subject of private law (e.g. in case of employment contract between the Ministry of Home Affairs and a citizen who aims to join the police), because the distinguishing factor in this case is not an existence of the citizen, as subject of private law, but:

* administrative norms, which govern the employment agreement;

* public interests of candidate citizen, determined by his(her) will to be employed in law enforcement system;

* mere fact that in case of dispute between the parties of employment contract the case will be considered by administrative court.

Taking into account our conclusions, we are sure, that articles 2,65,651 of GAC

must be fixed that public(administrative) agency has right to conclude both administrative and civil agreements. So, we offer following versions of:

• article 2, p."z" :

“administrative agreement – agreement, concluded by administrative agency with another administrative agency or natural person of public and private law in order to carry out public power”

• **article 65 (“Right of an administrative agency to conclude administrative agreement”) “administrative relations may occur, change and terminate by means of setting administrative agreement. Public agency has right to govern administrative relation with the help of administrative agreement, if it has right to govern it by means of passing administrative act”;**

“ administrative agreement is administrative act concluded by administrative agency with other administrative agency, public official or natural person of private law”;

“ administrative agreement is governed by the norms of this Code and additional requirements concerning the contract, defined by the Civil Code of Georgia”

• article 65-

1. “ in private legal relations administrative agency acts as the subject of civil law”;

2. “ in order to carry out public power administrative agency can enter into civil agreements with natural and legal person (entity) of private law”

3. “ When administrative agency enters into contract with the subjects of private law the norms of civil law are applied”

While entering into administrative or civil agreements, administrative agency acts in the frame of granted authority and such agreements should not contradict law in force, the Constitution of Georgia and must not violate human rights and freedoms. Article 69 of GAC defines that administrative agreement has to be concluded in written form, but administrative practice knows not only so called “express contract” previously agreed between parties, but “implied-in-fact contract” as well, e.g. Silent agreement between owner of the car and check-up point.

And finally, article 70. P.1 of GAC indicates that administrative agreement can be recognized as void according to the norms of Civil Code of Georgia. It is correct, when administrative agency concludes an agreement with the subject of private law, but it is not correct in case of administrative agreement, especially, when GAC contains articles 59 and 60 that regulate procedures of recognition of administrative agreement as void or invalid. Moreover p.2 of the article 70 somehow resolves this issue by stating, that administrative agreement should be announced void if the normative act on the ground of which the agreement was enacted had also been recognized as void.

References

General Administrative Code of Georgia. 1998. (Changes of June 24, 2003)