Zuzana Adameová

Public law agreements between private subjects in the Czech Republic and Slovakia

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Zuzana Adameová
Department of Administrative Law
Palacky University in Olomouc

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Introduction

Public Law Agreements are an unusual and modern form of activity in public administration. They do not belong to recently introduced legal instruments neither in the Czech Republic nor Slovakia. Public law agreements, in which one or all parties are not vested with a public authority, represent a tool that involves entities of administration in the procedure of achieving its goals. Furthermore, public law agreements are believed to increase efficiency and speed of administrative activities.

The aim of this paper is to draw attention to one particular type of public law agreements, public law agreements between private subjects and related issues[1]. Despite of their long existence, the interpretation of the relevant legislation in the Czech Administrative Procedure Code[2] and lack of practice of this administrative tool in general does not leave administrative legal theory and practice quite without question marks. Unlike in the Czech Republic Slovakia does not have any general legislation on public law agreements. Scarcity of special laws enabling public law contracts between private subjects does not provide much experience either.

Firstly, the paper deals with the definition of public law agreements between private subjects in legal theory, their position in classification of public law contracts. Before the paper further examines what the subject of the contract between private subjects governed by public law is, attention is paid to brief introduction of legislation in both countries. Although in both countries theory recognizes public law agreements between subjects as a mean of transfer of individual public rights and duties or agreement of

[1] Terms "administrative agreements", or "contracts governed by the public law" are used. This linguistic issue is addressed below.

[2] Act no. 500/2004 Coll., the Administrative Procedure Code, as amended.

the parties on the manner of exercising their rights or duties, the commonly accepted general idea of non-transferability of public rights and duties appears to establish significant obstacles to their practical use. Finally paper addresses the ongoing puzzled discussion on the role of Section 162 of the Czech Administrative Procedure Code. In other words the unanswered question is whether conclusion of the public law agreement requires an explicit statutory authorization in special laws.

According to legal theory a public law contract is a bilateral or a multilateral legal act that constitutes, modifies or annuls a legal relationship in the sphere of public law[3]. In the beginning it should be noted that opinions on the name for this administrative tool are not unified. Although these agreements are referred to as public law agreements or contracts in the Czech Republic, the attribute "public" is construed either *sensu stricto*, i.e. corresponds to the objective scope of the Administrative Procedure Code, or *sensu lata*[4]. In Slovakia under the term public law contracts (agreements) literature includes agreements governed by the public law other than administrative or beyond the administrative law and reserves the term "administrative agreements" for those that are governed by norms of administrative law only[5].

Legal theory and legislature are not unified on the issue of using terms "contract" or "agreement" for this administrative tool. In the Czech Republic legislature decided for the term "contract", and it also prevails in literature. In Slovakia they are mostly referred to as administrative *agreements*.

In the past, however, the term "administrative agreements" was preferred over the term *contracts*. The argument for the term "agreements" is that parties' autonomy is particularly weakened here. Parties of an administrative agreement do not have the same freedom and autonomy regarding its contents as parties of the private law contract. Requirement of legality that brings such limits is one of the key features of public law agreements.

Author decided to refer to them as "public law" since nowadays we are witnessing that new legal fields are being separated from the original branches of legal system, for instance environmental law has been recognized as a separate from the corpus of administrative law, and this particular legal area seems to offer a lot of options for contractual approaches to public administration. As far the linguistic issue is concerned, author does not insist exclusively on either of them. After all, either we use "contract" or "agreement", the material concept and legal construction should prevail

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[3] V. Sládeček, *Obecné správní právo*, 2009, p. 163.

[4] J. Vedral, *Správní řád: komentář*, 2006, p. 908.

[5] M. Vrabko, *Verejnoprávne dohody – formy èinnosti orgánov verejnej správy s právotvornými úèinkami*, "Právny obzor" 2001, no. 84, pp. 134–143. See also R. Jakab, *Verejnoprávne zmluvy*, "Justièná revue" 2005, no. 57, pp. 1368–1380.

[6] J. Hoetzel, *Československé správní právo. Èást všeobecná*, 1937, p. 277.

and distinguish them from other forms of administrative activities. Where article refers to a particular legal provision, an identical language will be used.

Historical development of public law agreements in the Czech legal system has roots in the history of Austria-Hungary. It took decades before public law agreements became supported by the legal theory. One of the strongest opponents was Otto Mayer and his main argument against public law agreements was that private and public legal institutes should not be joined.

Hoetzel has recognized public law agreements as one form of administrative acts. He distinguished public law agreements between the state and a citizen, agreements between public law subjects and public law agreements between private subjects[6]. Staša divides public law contracts into public law contracts *sensu stricto*, i.e. contracts in which at least one party is a public authority and *sensu lata*, i.e. contracts concluded by parties that neither is a public authority. Vedral emphasizes importance of the public law contract's content. It is the decisive factor in the process of determining a public or private nature of the agreement[7]. Polčák adds another classification of public law agreements according to their nature. He distinguishes normative and individual public law contracts[8]. Vrabko submits a hybrid character of public law agreements, while they are regulated by norms of administrative law, and they constitute, amend or terminate rights or duties in the public sphere, but their very basis is contractual and thus of a private law nature[9]. Public law agreement is deemed an alternative to administrative acts issued by an administrative body, when it is required by law and such law does not stipulate otherwise[10].

Public law agreement between parties is an administrative tool that enables parties that are not a public authority but natural or legal person of private law to make an agreement on the transfer or manner of execution of their rights or duties unless this is excluded by the nature of the manner or if a special law provides otherwise.

At the beginning we shall discuss the issue of public rights and duties and idea of their transferability while the general idea is that public rights and duties are non-transferable. Already Hoetzel admitted that their transfer is possible if, at least indirectly, laws stipulate so. The Czech Administrative Procedure Code allows transfer of right and duties or any agreement on their execution as long as such agreement does not contravene the law and public interest.

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[7] J. Vedral, op. cit., p. 909.

[8] R. Polčák, *Normativita veřejnoprávních smluv*, "Veřejná správa" 2003, no. 14.

[9] M. Vrabko, op. cit., pp. 134–143.

[10] J. Slováček, L. Jemelka, *Veřejnoprávní smlouvy*, "Právní rozhledy" 2007, no. 15, pp. 394–402.

Public right and duties *ad rem* are generally transferred together with the transfer of the object to which they relate. Agreements on public rights and duties related to a specific object with simultaneous transfer of the object alone, require examination from case to case in order to evaluate whether it would not contravene the law or public interests. Transfers of public rights and duties *in personam* on the other hand may be well used in the area of limited natural resources for instance. Public right constituted by a decision may not be fully exercised by its bearer thus the person might be allowed to enable others use of it, as long as criteria set by law are met.

Although public law agreements are not new in Czech legal order, it was only in 2006 when new Administrative Procedure Code came into effect and brought the general and complex regulation of public law contract. On the other hand, in Slovakia such regulation has not been passed yet. That is the main difference between the two legislations. Before the "new" Administrative Procedure Code was passed, conclusion of a public law agreement required that a special law stipulated so *ad hoc*[11]. And furthermore, for such contracts there were no general provisions regarding contract modification, avoidance or termination, review of legality etc.

Act no. 500/2004 Coll., the Administrative Procedure Code, as amended, has been the first act to provide a coherent regulation of public law contracts in the Czech Republic. Although the provisions on public law contracts are of substantive nature, their inclusion in Administrative Procedure Code appears the most appropriate. First reason is that the Czech administrative law has no general substantive code or set of laws. Secondly, provisions governing public law contracts are closely connected with the provisions governing administrative procedure[12].

Part Five of the Administrative Procedure Code, governing public law contracts, contains provisions on all types of contracts governed by public law. It classifies, however not expressly, public law contracts into co-ordinate and subordinate contracts and so called public law contracts of the third type, named contracts between the parties. Administrative Procedure Act requires all given types of contracts to comply with legislation and public interest. A coordinate contract is concluded between administrative bodies of equal or almost equal rank, while a subordinate contract is made by parties who stand in the position of a subordinate and a superior. It should also be noted that besides chapter five, provisions of part one and part two apply subsidiarily to the matter, in particular those regarding basic principles of activities of administrative bodies[13].

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[11] J. Staša [in:] D. Hendrych et al., *Správní právo*, 2009, p. 159.
[12] J. Vedral, op. cit., p. 159.
[13] Section 170 of the Administrative Procedure Code.

In overall the Administrative Procedure Code is inspired and based on the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz*). Public law contracts are governed by ss. 54–62 VwVfG. Unlike in the Czech Republic, German administrative law considers contracts of the third type to be co-ordinate contracts, and thus recognizes only two types of contracts under public law.

Section 162 of the Administrative Procedure Code states that: "Those who would be participants under s. 27(1) whose proceedings are in progress under Part Two and those who are participants in such proceedings may enter into a public contract relating to the transfer or manner of execution of their rights or duties unless this is excluded by the nature of the matter or if a special law provides otherwise. Entering into such contract shall be subjected to the consent of the administrative body; the body shall consider the public contract and its content in order to establish whether or not it complies with legislation and the public interest".

Sections 163 *et seq* regulate the procedure of contract conclusion and formal requirements. Administrative Procedure Code requires that public law contract is concluded in a written form. Despite constantly increasing influence of technology on various spheres of law, including public administration, it is questionable whether parties can or cannot contract electronically. Vedral[14] and Kolman[15] conclude that public law agreements currently cannot be concluded via electronic means of communication. We should agree with such interpretation since Section 170 Administrative Procedure Code excludes application of the Civil Code provisions that recognize electronic documents as equal with signed documents on a paper carrier provided that their content is recorded for the future use and their author could be identified with certainty, i.e. that, in order to be recognized as made in written form, signed with an electronic signature[16]. Perhaps for the purpose of public law agreements between parties Administrative Procedure Act could allow application of Civil Code provisions on validity of legal acts including the written form. Also it depends on the development of electronic communication and the use of electronic signature that is at least at the time being rather complicated and costly than effective. On the other hand, in Slovakia, where such general legislation has not been passed and provisions of the civil law apply subsidiarily, public law agreements may be concluded electronically.

Administrative Procedure Code stipulates that public law agreement shall be considered according to its content rather than its name. If any particular public law agreement evades law, like in the situation when such

[14] J. Vedral, op. cit., p. 930.

[15] P. Kolman, *Vybrané aspekty veřejnoprávních smluv*, "Právní rádce" 2011, no. 19, pp. 21–26.

[16] J. Švestka, J. Spáčil, M. Škárová, M. Hulmák et al., *Občanský zákoník. Komentář*, 2009, p. 372.

contract cannot be made, it shall be cancelled as concluded unlawfully. A significant feature of public law agreements is their constitutive nature. According to Section 159 they constitute modify or terminate rights and duties in the sphere of public law.

Public law contracts according to the Czech Administrative Procedure shall not be contrary to the public interest. Neither Czech nor Slovak law contains definition of a public interest. Last requirement of the Section 162 is the condition that conclusion of the contract shall not be excluded by any special law or by the nature of matter.

In Slovakia, on the other hand, in Administrative Procedure Code there is lack of general regulation of all types of public law agreements and the situation is the same as it had been in the Czech Republic before 2006. Only law stipulates whether public law contract may be concluded. Contract conclusion, formal requirements, modifications, enforcement of obligations arising out of contracts, etc., that are not regulated by particular public law acts need to be found elsewhere. Unless that act stipulates otherwise, provisions of civil law shall apply. Special law may of course expressly refer to civil code or other acts of civil law.

As had already been outlined in the introduction, the role of the Section 162 of Czech Administrative Procedure Code in my opinion has not been definitely resolved in the legal theory yet. Two possible interpretations exist so far. First, conclusion of a public law agreement between private parties is conditioned by a special statutory authorization contained in a special law in addition to the Section 162 of the Administrative Procedure Code. Secondly, the Section 162 of Czech Administrative Procedure Code alone contains general statutory authorization that requires only the approval of the administrative body and compliance with law while further authorization is not required.

Author submits there is a particular uncertainty about its interpretation even though prevailing number of administrative theorists support the first way of interpretation.

Explanatory note to the Administrative Procedure Code does not contain a definite answer to this issue. It expressly insists on requirement by a special law in the case of subordinate contracts but as far as the contracts of the third type are concerned it repeats draft provisions, i.e. exclusion by the nature of matter or if special law provides otherwise. Fore mostly, in both countries we lack valuable practical experience that we could support such interpretation with. Secondly, even commentaries on Administrative Procedure Code primarily focus on the first two types (under the common Czech terminology) of public law agreements, so does the literature.

Vedral submits that even though Section 162 expressly does not condition contract conclusion by the express statutory authorization, in fact this

condition must be met, in particular with regard to rights and duties arising out of administrative decision[17]. According to Staša the authorization contained in Section 162 is probably general. Further he asks question whether this provision is a breakthrough and whether it establishes the competence of the administrative body to give consent with the public law agreement and finally concludes, although not definitely, that a special law is required. Aguments for both ways of interpretation are outlined below.

First, the wording of Section 162 does not explicitly stipulate that special authorization is required. On the other hand, public contracts whose subject-matter is the execution of the state administration may be entered into by subjects such as state, public corporations or other persons vested with powers in public administration, only if a special law provides so[18]. Moreover, subordinate contracts between an administrative body and a person who would otherwise be a participant in the proceedings may only be entered into if a special law provides so as well[19]. Was it the clear intention of the legislator to request a special statutory authorization for two types of the public law contracts and none for the last one in the general regulation contained in the Administrative Procedure Code?

Vedral argues that especially when the public rights and duties resulting from administrative decisions are concerned, the statutory authorization is required. Material legal effect of a decision disables disposal of rights and duties thereby established[20]. If a statute is required to overcome the legal effect of a decision, why could not it be the general law represented by the Section 162 of the Administrative Procedure Code?

As a sufficient means of control to undesired transfers and agreements execution on public rights and public duties the Administrative Procedure Code requires consent of administrative body. Such authority further examines whether content of the contract complies with legislation and the public interest. The main argument of supporters of the first interpretation is that even if a special law would not be necessary to allow transfer of the public rights and duties, Section 162 requires consent of an authority. While administrative bodies may only take a measure or issue a decision, administrative body would need a legal basis for consent issuance, i.e. a special law. The questions would thus be whether we may consider Section 162 be a special authorization for administrative bodies to give consent with a contract. Some say that conclusion of the agreement is not excluded without existence of a special law, but lack of competence would require a special law anyway. On the other hand, opponents argue that the competence would be

[17] J. Vedral, op. cit., p. 924.
[18] Section 160 § 5 of the Administrative Procedure Code.
[19] Section 161 § 1 of the Administrative Procedure Code.
[20] J. Vedral, op. cit., p. 924.

given to those authorities that are competent to issue a decision to both subject to a contract if administrative proceeding was to be held or authorities within whose material competence given contract falls. General rules to territorial competence may apply to determine which body shall give or not to give the consent. Technically speaking the transfer of a public right from one subject to another provided that a consent is given is exactly the same as cancellation of a right by one decision and creation of the right for another person.

In Slovakia where general legislation does not exist and thus discussion on existence of general statutory authorization lacks any ground, legal theory explains that a law must explicitly stipulate when administrative agreement can be concluded[21] and substantiate it by Article 2 of the Slovak Constitution[22]. In case when Slovak parliament decides to pass a general regulation on administrative agreements, the Czech experience may serve as a good example.

Both countries are by the nature of their legal systems very close to Germany. Even though the German Administrative Procedure Code served as a model for the Czech legislator, the inspiration has not been examined thoroughly. German administrative theorists require a statutory authorization by special laws for public law contracts between private subjects. The Czech legislator decided to follow a slightly amended path and introduced the wording of Section 162 without proper explanation or reference to experience of other legal systems with similar approach. As a result the Czech Republic lacks practice in this area and there is no case-law. There are a few special laws that enable parties to conclude an agreement under Section 162. Unfortunately, in general the potential of this particular contractual approach in public law sphere has been left unused.

Streszczenie

Umowy publicznoprawne pomiędzy prywatnymi podmiotami w Czechach i na Słowacji

Słowa kluczowe: prawo administracyjne, umowy, podmioty prywatne.

Celem tego artykułu jest zwrócenie uwagi na jeden konkretny rodzaj umów prawa publicznego – umowy prawa publicznego między podmiotami prywatnymi i zagadnienia pokrewne. Pomimo ich długiego istnienia, wykład-

[21] M. Vrabko, op. cit., pp. 134–143.

[22] Article 2 § 2 of the Act no. 460/1992 Coll., *Constitution of the Slovak Republic*, as amended, stipulates that state bodies may act solely on the basis of the Constitution, within its scope and their actions shall be governed by procedures laid down by a law.

nia odpowiednich przepisów w czeskim kodeksie postępowania administracyjnego rodzi wiele wątpliwości. Widoczny jest też brak praktyki w stosowaniu tego narzędzia. Inaczej niż w Czechach na Słowacji nie ma żadnych ogólnych przepisów dotyczących umów prawa publicznego. Nieliczne ustawy szczególne umożliwiające zawieranie umów publicznoprawnych przez podmioty prywatne skutkują brakiem wystarczającego doświadczenia.