

CURRENT GUIDELINES IN THE FIELD OF ADMINISTRATIVE CONTRACTS

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Abstract:

In recent years, especially in Europe, it has been noted the tendency of uniformity and common conceptualization of the rules referring to the birth, amendment, execution or termination of contracts, ultimately leading to the emergence of new branches of Community law, contract law.

This study examines whether these European concerns have implications in relation to administrative contracts, if we can talk about a European administrative contracts law or if the experts' concerns have focused only on the field of civil contracts. Our conclusion is that we can talk at this point of similar rules in the European administrative contracts field, and in Romania as in the European Union, public procurement contracts especially have been a constant concern of the legislature in recent years.

Key words: administrative contracts, codification of contract law, European contract law, new guidelines

JEL Classification: K12, K39

INTRODUCTION

Twist on contracts in general, at European level, has started from the discovery of a number of three parameters (Patulea, Stancu, 2008) considered essential, which led to the current developments in this area:

- socio-economic development of society and its legal framework;
- globalization, internationalization of legal relations obligation;
- structural change of the regulatory framework of contractual legal relations obligation.

Among many initiatives in this field I will remember some more significant, since the work of European Contract Law Commission, chaired by Professor Ole Lando, amid the necessity of a Community draft convention on the law applicable to contractual and non-contractual obligations. The project was discussed at the International Conference on Copenhagen 1974. More recently there have been noted the contributions of Giuseppe Gandolfi, who proposed that in the coding approach of contracts to start from the Italian Civil Code (Gandolfi, 1992), the “Common Core of European Private Law” project, initiated by Mauro Bussani and Ugo Mattei and the group study which aimed to trace the outline on which to engage European wide debates regarding the opportunity of a European Civil Code (Bussani, Mattei, 2007).

Certainly, the actions at Community level to harmonize national systems have been made cautious, by means of directives, inspired by a sense of current market dynamism (Patulea, Stancu, 2008), focusing primarily on areas such as consumers protection, competition, electronic commerce, vicious products. It was adopted a number of seven directives on consumer protection matters incidental contractual technique, between 1985-1999 and a total of 5 general directives on contract law harmonization. It has been noted and a blur of effects of the Directive in relation to Regulation, starting most likely from the need of following the principle of legal certainty, the directive approaching the regulation through the degree of detail and specificity. The involvement of European institutions in the codification of contract law has culminated with the adoption by the European Parliament of the resolution on 3 September 2008 on the common reference for European contract law (published in Romanian in *Official Journal of the European Union* on <http://eur-lex.europa.eu> dated 4/12/2009), in which it is suggested that if the future shape of the frame of reference is that of an optional instrument, this should be limited to those areas where the Community legislature has been active and likely to be active in the near future, or are closely related to contract law and any optional instrument should have the basic common framework. It is

The problem of interest here is to determine whether these European concerns have implications in relation to administrative contracts, if we can talk about an *administratively European contract law* or experts' concerns have focused only on the sphere of civil contracts.

Many of the current trends in European contract field are currently only theoretical; however, in this matter, although law specialists are not necessarily advocate for a *common European body of administrative contracts* - so difficult in many ways - we can speak of common rules and similar principles. One of the main problems of harmonization, as well as in private law of contracts, is finding a bridge between the two great systems of law, the Roman-Germanic and the *common law* system. I consider that it is possible a concerted action by European institutions in order to standardize administrative and contract law and I motivate this by the fact that matters is the area per excellence of the action of community legislation on public procurement, where the adopted directives led to the harmonization of the national law of EU Member States.

The procedure for awarding public procurement contract in Romania has been a constant concern of the legislature in recent years, based on the need for clear procedures in spending public money and reaching at an effective and transparent competition between economical operators in order to achieve a more efficient administration of public property assets. One key element in the EU integration process, with impact on all other areas of interest for the communitarian acquit for "Internal Market", was the development of a system of efficient and credible public procurement. The previously system, established by GEO no. 60/2001, had serious deficiencies, observed over time, both in terms of effective deployment of procedure and in terms of efficient appeal of documents disposed during this proceeding.

In order to improve the legislative framework of public procurement, the Romanian government issued Emergency Ordinance no. 34/2006, concerning the award of public procurement, of public works concession contracts and services concession contracts. Through this legislative act the dispositions of Directive no. 18/2004/CE and Directive no. 89/665/EEC (in terms

of procurement in the "classic" sector) and the dispositions of Directive no. 17/2004/CE and Directive no. 92/13/EEC (relating to "utility" business acquisitions) are being transposed into the national legislation.

In the Romanian Government meeting of 7 March 2009 major changes to rules on public procurement were adopted by emergency ordinance, undertaken by the government program at the end of 2008 (published in Romanian Official Journal no. 156/12.03.2009). The adoption of the Ordinance has not been without criticism, focusing in particular that the project of the normative act has not been subdued to the procedure of information and public debate.

Only three months after the coming into application of the Government Emergency Ordinance no. 19/2009, a number of discrepancies between some provisions of this emergency decree with Directive 2007/66/EC of the European Parliament and the law Council of 11 December 2007 have been noted. This was likely to give rise to infringement proceedings by Romania of the Community law, according to art. 226 European Community Treaty, and to generate further financial adjustments to contracts financed from the Community funds. Under these circumstances, a new legislative amendment was required, as the Government Emergency Ordinance no. 72/2009.

The need of amending the public procurement legal framework has thus resulted from the adoption, at the Community level, of *Directive no. 2007/66/EC of the European Parliament and the Council of 11 December 2007 of amending Directives No. 89/665/EEC and no. 92/13/EEC regarding the improvement of the effectiveness of review procedures concerning the award of public contracts*, but also the assuming, by Romania, of the action plan developed from the issues raised by the European Commission in the evaluation of the Lisbon Strategy implementation at the EU Member States level and the euro area, published on January 28, 2009.

Sure, especially after 2006, with substantial changes to national legal framework of public procurement, and field experts have tried to find solutions through relevant research, to the problems arisen in practice, in conjunction with the competence of the public procurement contract, procedures award, conclusion, execution or annulment of these types of contracts, solutions that had to be similar with the European ones.

Corroborating the provisions of GEO no. with the Law 34/2006 554/2004, in finding that procurement contracts, it applies legal regime of administrative law, both in terms of the contract award and to conclude on issues, performance, annulations or its appealing in court.

Doctrine, the opinion that we concur (Albu, 2007), assimilates the legal regime of administrative law established by Law 554/2004 and administrative proceedings held by public authorities and makes award contracts concerning the management and use of state's private domain and of administrative-territorial units.

We can therefore say that this type of contract, by reference to the administrative contract, represents the specific difference while the administrative contract is the proximate type. In this context, the public procurement contract, in the no 34/2006 GEO sense as it was originally drafted had a double law subordination having to comply with both the legal regime established by the law of administrative court and the legal regime established by public procurement legislation (Niculeasa, 2007). With the substantial change of Ordinance by GEO19/2009 and GEO No. 72/2009, the procurement contract would apply its own legal proceedings, other than the administrative litigation law, procedure whose rules are detailed specified by new articles of the Ordinance concerning procurements. Applying the legal regime of administrative law in public procurements almost in all European states, leads to the conclusion that it's possible to have a European administrative contracts law based on similar legislations.

A European contract law in this matter, I think it should also lead to rethinking of traditional applicable principles, not by denying the existing classical principles, but by *adapting* and *adopting* new principles, determined by socio-economic changes in the contemporary world. In addition to classical principles, arising from the creative process of law achieved by the European Court of Justice, which, starting from *Algera Decision* and so far, has developed a rich jurisprudence in the middle of which are found: the principle of *proportionality*, the principle of *government by law*, *legal certainty*, *protection of legitimate claims*, *non-discrimination*, *right to a hearing in the*

decision-making of administrative procedures, equal conditions of access to administrative courts, non-contractual responsibility of government, etc., new principles have emerged, at least at the level of theorization of law. In the *Case of Algera*, July 12, 1957, the European Court of Justice ruled that "no provision in the constituent treaties do not prevent litigation, will have to consider legislation, doctrine and jurisprudence of the States in the dispute" (Kakouris, 1994).

It was rightly held that the European Court of Justice may generate general principles to govern a European administrative law (Alexandru, coordinator, 2007). The above statement is based on possible actions to be taken to form the European law of contract, actions in two ways: first, the scholarly way, that of doctrine of works produced in the international conferences of experts, and secondly, the way of European institutional mechanisms, achieved by harmonizing the legal rules using unification laws through regulations and directives (Stancu, 2008).

Insisting on the first way, there have been identified in recent doctrine (Stancu, 2009,) three principles that complement the legal framework of contracts and can print a new vision including in administrative contracts, especially those in public procurement. These principles are: the principle of *consistency* (his involves reducing the contradictory terms by the judge through a coherent interpretation that actually translates a first subtle common will), the principle of sustainability (which is regarded as the economic imperative - emphasis on the contract, considered as an asset to be maintained in a sustainable and efficient economic environment, and as a moral imperative - contract quality requirement is a contractual relationship founded on mutual trust of moral contractual action today) and the principle of rebalancing the economy contract (this principle is based on the factors leading to "upset" the economy contract and requires that a contract must be executed under its economy, interpreting the concept of "economy" coming back to the judge who will decide whether the parties must return to the negotiation table or it is required the annulment of the contract).

Partly, they are grafted on the general principles contained in the Romanian public procurement legislation, implemented by European directives: *non-discrimination, equal treatment, mutual recognition, transparency, proportionality, efficiency of use of public funds, accountability* (registered in art. 2) - listed only in O.U.G. no. 34/2006 as amended and explained in art. 13 of O.U.G. no. 54/2006 (transparency - providing all interested parties the information on the procedure for awarding the concession; *equal treatment* – applying, in a non-discriminatory manner, by public authority, the criteria for awarding the concession contract; *proportionality* - requires that any measures established by public authority must be necessary and appropriate to the nature of the contract, *non-discrimination* - application by the public authority of the same rules, regardless of the nationality of the participants in the procedure for awarding the concession contract, with the conditions laid down in agreements and conventions to which Romania is party; *open competition* - ensuring the conditions by public authority that any participant from the awarding process has the right to become operator under the law, of the conventions and international agreements to which Romania is a party).

Reflecting the new guidelines to the field of contracts, we find it also in the Romanian legislation - the Civil Code published, but inapplicable - stating specifically on two principles that have previously found the consecration law, but have not been enacted yet unequivocally : *freedom of contract* (article 1169: "The parties are free to conclude any contracts and determine their contents, to the extent required by law, public order and morals"; article 1183. par. 1: "The parties have free initiation, conduct and breaking of negotiations and they cannot be held responsible for their failure" and *good faith* (article 14: "Natural and legal persons involved in civil legal relations must exercise their rights and perform its obligations in good faith in accordance with public order and morals. Good faith is presumed until proven otherwise"; art. 1170: "The parties must act in good faith both in the negotiation and conclusion of the contract and throughout its execution. They can not eliminate or limit this obligation"; article 1183. par. 3: "The party initiating, continuing or breaking negotiations, contrary to good faith, is liable for the damage caused to the other party. To establish this damage it will be taken into account the expenses incurred in the negotiations, the waiver by either party to the other bids and any similar circumstance").

CONCLUSIONS

All these factors, which should add explicit provisions concerning liability and its kinds, require the conclusion that the administrative contract law is far from being homogenized and the burden of codification returning first of all to the doctrine, which should inspire future legislature to adopt a code of administrative procedure in line with national realities but also with the changes of contemporary European law.

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