The legal nature of the public administrator's management contract in Romania. Aspects of comparative law

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Abstract

Public administrator is a new function, which was introduced into the Romanian legislation by the Law no. 286/2006 amending and supplementing Law no. 215/2001; the management contract, under which public administrators carry out their responsibilities, is not defined either by legislation or by doctrine, because there are various opinions in the specialty literature ranging from its qualification as a labour contract to the civil nature of this legal relationship. In this article, we try to provide a basis for the administrative contract view about the management contract concluded between a public administrator and the public executive authority within an administrative territorial unit.

Keywords: *public administrator, management contract, public authority, administrative territorial unit, appointment criteria and procedures.*

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1. Brief history regarding the appearance of the city manager

This function, relatively new to our public system, has deep roots in other law systems, being a function characteristic of the Anglo Saxon right system.

The concept of "city manager" has appeared in history about 100 years ago and it is a concept implemented for the first time by the US, then also taken over by Western Europe. A city Manager is responsible for controlling the operations of the municipality and for implementing the measures adopted by the local council. He acts like an *executive chief officer* of a corporation that provides professional management services. The most important functions and responsibilities of a city manager include: daily supervision of the city Council departments and their leaders, preparation of annual budget projects, provision of relevant advice on various matters of interest to the council, meeting with citizens or organized groups of citizens to better understand the issues that concern them, ensurance of a leasing that encourages higher performance of municipal workers/officials and ensurance of a normal and efficient development of the activities carried out by the

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municipality on the basis of a thorough understanding of the way in which they are carried out. The first city manager[3] designated was in Stautonton, Virginia (USA), in 1908, this institution functioning till today, which proves its undeniable success. Moreover, as a result of the increasing use of the city Manager institution, organizations such as the International Organization for City/County Management, abbreviated OIMOJ or the English ICMA (http://icma.org), are carrying out with the help of the local Government System Initiative, division of the ILOJ, a database, which provides information from the experience of exercising this function in other countries, to serve as a guide to local governance in the countries of Central and Eastern Europe. One of the main objectives of this initiative is to improve the capacity and professionalism of local government by exchanging information and experience, as well as by coordinating reform activities. The dissemination of this function from the American and Anglo-Saxon system to the continental law systems was natural, so that good practices spread naturally to these continental systems as well. The example of France is probative in this case. Thus "the head of cabinet of the mayors of the big cities becomes the real manager of these institutions and not the official elected. This is a new phenomenon in France, something similar to the U.S. city Manager"[4].

The introduction of the institution of the public administrator was an element of the administrative reform. It is difficult to universalize a definition of administrative reform. However, there is consensus among academics as to the objective, which is the improvement of public administration, by attracting the problems of the system to the center of attention. The primary focus is to improve current public services with efficient, effective and responsible action[5]. At the level of governance of public policies, the paradigm has also evolved to the extent that it is not possible to continue focusing only on administrative processes or intra-organizational management, which were, for a long period of time, the central concerns of bureaucratic administration and the new public management, respectively. Today the focus is different and broader, where the central importance lies in the needs of clients/citizens/users, in which emphasis is placed not only on the governance of interorganizational and intersectoral relationships, but also on the effectiveness of public service delivery systems[6]. However, the public manager should play an essential role in improving public services.

[3] https://conceptul-de-city-manager-119059/, consulted on 1.05.2022.

[4] P. Allum, *State and society in western Europe*, Great Britain: Polity Press, 1995, p. 463.

[5] Sandra Patrícia Marques Pereira, Pedro Miguel Alves Ribeiro Correia, *Post-new public management movements: the new public service*, Lex Humana, vol. 12, no. 1, 2020, p. 70.

[6] Pedro Miguel Alves Ribeiro Correia, Ireneu De Oliveira Mendes, João Abreu De Faria Bilhimp, *Collaboration networks as a factor of innovation in the implementation of public policies. A theoretical framework based on the new public governance*, Lex Humana, vol. 11, no. 2, 2019, p. 144, 145.

2. The appearance of the public administrator function in Romania. Opinions on this public function

This function was introduced by the Law no. 286/2006 amending and supplementing the Law no. 215/2001.

Some authors consider this position as "exogenous to Romanian realities and, from some points of view, unconstitutional, meaning reflected in other studies".[7] In the conception of other authors "the function of public administrator was introduced into the Romanian legislation as a wish to professionalize the decisional act at the local, county level or of the inter-Community development associations".[8]

Another opinion, is that the public administrator represents "an innovation brought to the occasion of the changes introduced by the Law no. 286/2006 to the local public Administration Law, inspired by the model existing in the Anglo Saxon system, known as city Manager".[9]

Other authors consider that this function appeared as a result of a partnership between the central structure upon the reform of the public administration, aiming at "professionalizing the administration, by improving and streamlining the system of providing public services to citizens, attracting some professionals/specialists, who should have knowledge of a technical, scientific, administrative nature, with managerial skills and abilities, representing an alternative to this".[10]

In a conciliatory opinion, this new function "has settled itself in the realities in Romania, in some places with efficiency, and we appreciate that we can only contribute to reject or deny what cannot be removed, it is preferable to accept the existence of a legal and institutional reality and to try to counter the improvement of its regime".[11]

The whole Chapter VIII of the former local public administration Law no 215/2001 (now Chapter II. Part III of the Administrative Code) consecrates the legal regime for this function.

Apparently convincing, these regulations refer to the legal nature of the nomination of the public administrator and to the management contract nature. What this declaration does not imply is easier to answer than what this function implies!

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[7] D. Ciochina (Bakirci), *The public administrator, an anti-Constitutional and artificial juridical building*, Journal of Public Law no. 3/2006, p. 57-64.

[8] M. C. Apostolache, *The Law no. 215/2001 of the local public administration*, the second revised edition, *completed and added*, Ed. University, Bucharest, 2017, p. 433.

[9] Dana Apostol Tofan, *Administrative Law*, vol. 1, ed. a 4-a, Ed. C.H. Beck, Bucharest, 2018, p. 379.

[10] O. Puie, *The public administrator and the management contract of the public administrator, in the context of the Administrative Code adopted by OEG No. 2019*, Journal of Public Law No. 2-2020, p. 111.

[11] Verginia Vedinas, *The annotated administrative Code*. News. Comparative examination. Explanatory notes. Third edition reviewed and added, Publishing House Legal Universe, Bucharest, 2021, p. 267 and later.

By carrying out this mention, let's see first what does not imply the creation of the position of a public administrator?

It doesn't imply:

- a report of the constitutional law - characteristic of the elected dignitaries, of the type of mayor, county council president, etc., who carry out their activity on the basis of a mandate to represent them, between the legal person governed by public law [u.a..] and the election for that position;
- an employment report - between the employer of the public administrator [mayor, president of the county council] and the public administrator[12];
- an administrative document - between the head of the concerned institution/public authority and the public administrator, the latter not having the status of a public official, and his nomination is not an administrative act of authority, on the condition of taking the oath.

What does this function imply in terms of the legal report?

- the existence of a management contract can lead us to: classify the contract as possible, **civil, economic or administrative**.

In a **civil** agreement, we have the following opinion: "as a legal nature we consider that we are dealing with a **civil contract**, **a public service contract**, which has the following characteristics:

- it is a named contract, covered by special provisions, such as Government Decision no.527/2009;
- it is a bilateral contract, with the institution or public authority as its parties, under whose authority the de-concentrated public service and the person who will be the coordinator or deputy director of the public service function;
- in summary, the interdependence of the rights and obligations of the parties to the management contract is obvious;
- commutatively, the rights and obligations of the parties are known when the management contract is concluded;
- for consideration (public administrator - filling in ns.), the coordinator or deputy director shall be remunerated in accordance with the legal provisions laid down for the budgetary institutions;
- it is a contract with successive execution, the coordinator or deputy will act on the basis of the objectives and performance indicators, which are covered by the annex to the management contract.[13]"

Trying to follow the line of the *wide law* regulations invoked in this opinion, we find H.G. nr. 527/2009 which regulated the management insurance of the de-concentrated public services of the ministries and other central public administration bodies in u.a.t.

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[12] Dan Top, „*The legal nature of the management contract with the principal authorizing officer under the authority, coordination or under whose authority the de-concentrated public service operates*", Romanian Labor Law Magazine, no. 5/2009, pp. 43-50.

[13] Opinion advanced by the unknown author on http://consultjuridic.blogspot.ro/2014/04/contractul-de-management.html.

But this normative act cannot be applied to the public officials of the u.a.t, as this post is related to an administrative - territorial unit, as there are no subordinate relationships between them and the Government that would allow the Government to regulate the activity of an u.a.t, and on the other hand the normative act itself, it has no legal basis anymore because the O.G. nr. 37/2009, based on which the above-mentioned resolution was adopted, was rejected by the Romanian Parliament!

Interesting to note is the fact that this function was created "at the level of municipalities and towns" and "at the level of counties"[14]. In this context, the public administrator is not, in our opinion, part of the specialized structure of the local/county council because they are only local/county public authorities, and the public administrator is the owner of the Internet, as a legal person governed by the public law, as well as the secretary of the u.a.t. We consider a split of the former Article 77 of the Law no. 215/2001 in the sense of not including the public administrator, in addition to the other functions listed by the law, in the concept of "city hall" as the organizational structure at local level. In another acceptance, "civilized" origin, more precisely what is related to **commercial law** is that given by Article 1 of the Law no. 66/1993, the law of the management contract stipulating the following: „The management contract is the agreement whereby a legal person performing an economic activity, as owner, entrusts a manager, the organization, the leadership and the management of his business, on the basis of some objectives quantifiable performance criteria, in return for a payment."

Even after a summary analysis of this definition, it is clear that this interpretation cannot be given to the management contract of the public administrator, because the "employer", meaning a part of the contract, is a legal person carrying out economic activity, as owner, that u.a.t [being a legal person governed by public law] is not, and the object of the contract cannot be the organization, leadership and management of its activity!

Is the management contract an **administrative contract**? Let's review some features of the administrative contract:

- the parts of the contract - a part is mandatory an authority of the public administration;
- the object- the satisfaction of a public interest;
- the legal inequality of the parts - as a part is mandatory a public authority, as a priority is the public interest to the detriment of the private interest, as the freedom of the authority is limited by law, we are therefore in the situation of the management contract.

In order for an instrument to be considered an administrative contract, a number of **conditions** must be accomplished:

„- to have a will agreement between an authority of the public administration and a private;

[14] Articles 112 si 113 of Law no. 215/2001.

- the willing agreement must aim to create legal obligations for the provision of services in exchange of a remuneration;
- the performance is the consequence of the operation of a public service;
- the parts, by an express clause, by the form of the contract, by the way of collaboration or by any manifestation of will, agree to be subject for the public law;
- the inequality of the parts in the contract;
- the extensive interpretation of the contract in favor of the administration, since the individual is obliged to sacrifice his own interests, in order to achieve the public interest of the administration, but subject to the right for compensation;
- the right for the administrative authority to take enforcement measures unilaterally, because it retains, together with its status as a contractual part, the status of a state authority, of public power, so it is no longer necessary to look for legal action to obtain the execution or the end of the contract;
- applying the theory of improbation that the private person appears as a collaborator of the public administration, who, in turn must support the private person[15]."

3. The legal nature of the public administrator's management contract

Continuing the analysis of this opinion, let us see the **legal regime applicable to the administrative contracts:**

- It is considered that to those contracts we apply both administrative and civil law rules.
- Regarding the **rules of the administrative law**, which constitutes the administrative legal regime applicable to such contracts, we retain the following conditions:

1. the written form which such contracts must take;
2. contracts are concluded intuitu personae, which means that such contracts may not be passed on to other persons unless the law permits;
3. the competence to settle disputes between contracting parts lies with ordinary courts, but more and more authors, including us, argue that such disputes should be settled by administrative courts,

The civil law rules applicable to the management contract are those mentioned by the civil concept, as shown above.

In defining the administrative contracts [16], the possibility is that: "special laws may provide for other categories of administrative contracts subject to the jurisdiction of administrative courts". In this context we consider the Law no. 215/2001 [even if it was an organic law], as a special law in the acceptance of the

[15] Ivan Vasile Ivanoff, *Public procurement,* Ed. Valahia University Press, Targoviste, 2011, p. 11.
[16] Article 2(1)(c) of Law No 554/2004.

law of administrative contencious, because this legal basis is the only one that governs, as much as possible, the legal physiomy of the public administrator.

The management contract concluded by the public administrator has been qualified as "an administrative contract, and the provisions of the Article 543 C. administrative provisions apply of a general nature to the matter of the management contract concluded with the public administrator, regarding the specific requirements to be fulfilled by the management contract concluded with the public administrator".[17]

The same legal qualification is given to this contract by other authors, except that "the object of the contract is to provide a public service".[18] As for the taking up of this function, an interesting opinion was stated in the doctrine, namely: "the public administrator should be familiar with the problems of the public management, and therefore we appreciate that it should be recruited among the civil officials with the status of public manager".[19]

In our opinion, there is a special legal Regulation imposed by law, just as in the field of cultural institutions a special law on the cultural management contract is functioning which regulates in detail all aspects related to this field[20]. As a parenthesis on this point, we mention the lack of qualification of the legal nature of the cultural management contract, which is very important in determining the parts, the duration and the object of the contract, without defining which kind of contract belongs!

As additional arguments in favor of the legal nature of the management contract of the public administrator, as belonging to the category of administrative contracts, we bring the following:

- setting up the post of public administrator is exclusively the will of the local deliberative authority [local/county council];
- the legality of setting up such a post is supported exclusively by the Law no. 215/2001;
- the appointment, dismissal from office shall be made by the mayor/president of the county council
- the election and the dismissal shall be made by the mayor/president of the county council;
- the specific criteria, procedures and tasks shall be determined by the deliberative public authority [local/county council].

All these aspects are related to the will and competence of some public authorities and are based on authoritative administrative acts.

The management contract comes only after these mandatory, **imperative** administrative procedures, have been carried out, and the **rule** that supports the

[17] O. Puie, *op. cit.*, p. 130.
[18] Al. Ticlea, *Discussions regarding the position of public administration,* from *the perspective of the Administrative Code,* Law Journal no. 10/2019, p. 18.
[19] See C. S. Sararu, *Administrative Law, Fundamental issues of the public law*, Ed. C.H. Beck, Bucharest, 2016, p. 714.
[20] Emergency Ordinance of the Government (OUG) no. 189/2008.

existence of this contract is **allowed** and allows the public authority, if it wishes, to delegate the performance of some coordinating tasks of the specialized structure or of the public services of local/county interest.

The same permissive rule is met if the mayor/president of the county council delegate to the public administrator, under the law, the status of main authorizing officer.

We notice from this last wording of the law, on the one hand, the consensual nature of some regulations, but also the overlap between these consensual regulations, beyond the will of the parts, or it is precisely this expression that is actually the definition of the administrative contract (consensual clauses and regulatory clauses).

Starting from the establishment of the legal nature of the management contract of the public administrator we can make some assessments on its status and its relation with the public authorities. I have seen that the main element of the appearance of this office, as in the case of any public service, represents the general interest.

If the general interest of u.a.t. calls for the appearance of this office, then it is born, and consequently, if the public interest requires it, this function disappears.

If in the case of the birth of this function, we have seen clear administrative procedures involving both the deliberative and the executive authorities, in the case of the end of this contract the law does not lay down any procedure.

In this case, we consider the symmetry argument of the legal acts, *mutuus consesus mutuus disensus*, that is to say a simultaneous and convergent involvement of public authorities in such a situation is necessary. The issue is the importance of the management contract and its clauses in dialog with the administrative acts!

If at the time of the contract conclusion the rule is clear, it is the administrative act which creates the basis for the existence of the function and sets the rule of the game, if the management contract is ended before the deadline agreed between the parts by an administrative act, what would be the legal solution? In fact, in this case the force of the contract must be examined in relation to the force of the administrative act. In order to be more concrete, what happens if a decision of the local/county council is taken out of the organization chart the position of public administrator before the deadline set in the management contract? Is that possible? What would be the legal consequences?

If we accept the legal nature of the management contract as an administrative contract, then the administrative act which is the basis of the contract and which sets out the specific criteria, procedure and tasks, then the idea of the management contract disappearing could be accepted, that is to say the post should disappear from the establishment plan.

In this context, the management contract would have no reason to exist any more.

If we make an analysis in the light of the will agreement that is the basis of any contract, then it can be noticed that the parts/or a part to the management

contract do not wish/do not wish to end the contract before the deadline. What would be the legal solution? In our opinion, we must permanently go back to the principles level and by this point make any legal analysis. The principle that supports the existence of this function and the exercise of it is only the general interest. If the general interest requires a certain conduct, then the public administration, which serves this general interest, must act accordingly. In other words, in case of exception such a situation can happen and it would be legal only if the general interest calls for such a scenario, any other legal trick would be arbitrary and censored as such by the court of contencious, the only one that could rule in such a situation. This type of reasoning starts from the status of this function and the special position the legislator has given to it.

As mentioned above, the public administrator is of the territorial administrative unit serving, in fact, two public authorities, even if the management contract is concluded only between two parts (mayor/president of county council and public administrator). At the level of u.a.t. there are also the local/county council as deliberative authorities that support, by their acts, the basis of the contract and set the rule of the game. Therefore, starting from this, the attitude of the public administrator must be the concordance of this reality. Apart from public functions and authorities, it is the general interest that gives substance to the existence of this public function, as it expresses the will of the citizens in whose service the public authorities function and act.

4. Conclusions

In the light of what it is expressed in this analysis of the legal nature of the management contract of the public administrator, we can conclude that it meets all the features of an administrative contract based on an administrative act of authority, adopted or issued by a public authority.

But the law ferenda must be drawn up by a normative subsidiary act of the organic norms, which supports the existence of this public function that clearly defines its legal nature, as well as all characteristics before, concurrently and after the conclusion and performance of the management contract, which supports the functioning of this public function, which is relatively new, introduced into the system of public functions in Romania.

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