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PROCEDURE OF MAKING ADMINISTRATIVE AGREEMENTS BY LOCAL SELF-GOVERNMENT BODIES

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SUMMARY

The article deals with the stages of making administrative agreement by local self-government bodies. The author proposes to divide the procedure of making administrative agreement into general and special one. General procedure establishes the following stages: 1) organizational stage; 2) making an offer on administrative agreement; 3) consideration of the offer and adjustment of terms of the agreement; 4) making administrative agreement. In turn, special procedure includes the following stages: 1) competition announcement. 2) submission of applications for participation in competition; 3) competition; 4) making an agreement.

Key words: administrative agreement, stages, local self-government bodies, essential conditions of the agreement.

АНОТАЦІЯ

У статті розглянуто стадії укладення адміністративного договору органами місцевого самоврядування. Запропоновано поділити процедуру укладення адміністративного договору на загальну та спеціальну. У загальній процедурі укладення адміністративних договорів виділено такі стадії: 1) організаційну стадію; 2) висловлення пропозиції на укладення адміністративного договору; 3) розгляд пропозиції та узгодження умов договору; 4) укладення адміністративного договору. У свою чергу спеціальна процедура укладення адміністративного договору передбачає такі стадії: 1) оголошення про проведення конкурсу; 2) подачу заявок на участь у конкурсі; 3) проведення конкурсу; 4) укладення договору.

Ключові слова: адміністративний договір, стадії, органи місцевого самоврядування, істотні умови договору.

Issue. Administrative agreement is an important tool in the activities of local self-government bodies. It shall be made in accordance with the special procedure provided by law, as it will decrease an opportunity of its challenging. Such category as “a contract” (agreement) is researched thoroughly in theory and practice of civil law. The Civil Code of Ukraine [1] establishes general requirements to the procedure of making, terminating contracts (agreements), their form, reasons for their nullity. Administrative legislation does not cover these issues. That is why it causes many problems in practice.

Analysis of recent research and publications. Such scholars as V. Averianov, K. Afanasiev, Zh. Zavalna, R. Kuidida, R. Melnyk and others researched the issue of administrative agreement. But the scholars did not draw enough attention to the stages of making an administrative agreement. That is why it is the **purpose** of this paper.

Main body. The private law knows the principle of freedom of the contract which is provided by p. 1 of art. 1 of the Civil Code of Ukraine [1]. It means that the parties can decide what contract to make and whether there is a need in it. But this principle is not inherent to administrative law that follows from the Constitution of Ukraine. Part 2 of art. 19 of it says that local self-government bodies shall be obliged to act only on the grounds, within the powers, and in the way determined by the Constitution and the laws of Ukraine [2]. In this regard, we can conclude that the right of the local self-government body to make an agreement shall be enshrined in law. If the legislation does not provide it, then the agreement will be void because it will not comply with the Constitution of Ukraine, which is the law of the highest priority.

But it does not mean that administrative agreements cannot be regulated by civil law. As German scholars mention “Unlike administrative acts which legality or nullity is established primarily by law, that caused adoption of a relevant administrative act, validity of an administrative agreement is established by

the Civil Code unless these issues are covered by the special law” [3, p. 321]. In other words, provisions of civil law are applied until they comply with regulations, which stipulate a special procedure of making administrative agreements.

Part 1 of art. 1 of the Civil Code of Ukraine fixes the principle of legal equality, free expression of the will, property autonomy of the parties to the contract. These provisions reach public authorities, local self-government bodies, public authorities of the Autonomous Republic of Crimea and other bodies in accordance with p. 2 of art. 4 of the Civil Code of Ukraine [1]. As the public authorities and local self-government bodies are vested with the power of Ukrainian people, state and territorial community under art. 5 of the Constitution of Ukraine [2], we can conclude that relations between local self-government bodies and private persons (individuals and legal entities), which do not contradict the principle of equality of the parties, can be covered by the Civil Code of Ukraine.

Supporting scholars’ approach that administrative subjects and individuals (legal entities) are technically equal in administrative agreement, we agree that the Civil Code of Ukraine can be applied to all types of administrative agreements.

But this statement shall be enshrined in the future Administrative Procedural Code of Ukraine [4], which draft, by the way, does not contain any provisions on administrative agreement. It is essential to mention in this bill, that the Civil Code of Ukraine is applied to make, amend and terminate administrative agreement unless otherwise is provided by law. It is also important to stipulate in the draft law, that instead of the administrative act, public authority is entitled to make an administrative agreement with the person. In such a way, it will provide parties to administrative relations, particularly individuals, with more freedom. If administrative act is a unilateral act of the will, which mostly imposes obligations on the individual, administrative agreement is some compromise between the local self-government body and individual which imposes rights

and obligations on both parties. Sometimes instead of passing a burden act it is better to make an administrative agreement and provide the person with some free choice.

The absence of the Administrative Procedural Code of Ukraine, which establishes general requirements to the acts of public administration necessitates to search for conditions of making administrative agreements in other legal acts. According to the Law of Ukraine "On Local Self-Governance in Ukraine" local self-government bodies are authorized to make administrative agreements in the following spheres: division of local budget funds, provision of legal aid, education, construction, housing services and utilities, household services, transportation, finances, social and cultural development, planning [5].

At the same time procedure of making these agreements is regulated by various legal acts. We think, that procedure of making administrative agreements can be divided into general and special one. General procedure covers mainly agreements, made between local self-government bodies related to fulfillment of common tasks or between local state administration and local self-government body related to delegation of powers. In other words, it is all about coordination agreements, when the parties are not subordinated and have an equal legal status. But according to art. 18 of the draft law of Ukraine "On the Procedure of Delegating Powers of Executive Bodies and Local Self-Government Bodies" [6] the Verkhovna Rada of Ukraine (Ukrainian Parliament) makes a decision in the form of the law to delegate powers of executive bodies to local self-government bodies or territorial communities. We assume that it is senseless because the procedure of adopting the law is long. At first the draft law is considered in the committees of the Verkhovna Rada of Ukraine and then it should pass several readings in the parliament before adoption. In such a way the need to delegate powers and its immediate delegation will be separated in time and a fast resolution of situation will be impossible. In our opinion, administrative agreement will be more effective here. It should be noted that general procedure of making administrative agreement is not regulated in legislation. That is why we refer to scientific approaches in this sphere.

According to S. Borodovskyi general procedure of making administrative agreements consists of the following stages: 1) organizational one, where the parties of the future agreement are defined, draft agreements are developed, negotiation rules are established; 2) the stage of coordinated approvals, where legal capacity of the parties, the right of the party to the subject of the agreement, opportunity to perform works or providing services are checked; 3) the stage of making an agreement where the will of the parties acquires a necessary form and the agreement is registered in accordance with the procedure provided for certain types of contracts [7, p. 60]. The lack of this approach is that the author did not take into account such an important issue as making an offer to make an agreement by one of the parties. The offer shall contain such essential elements as subject, purpose, duration of the agreement and terms of its performance. Only after doing this the parties adjust the terms of the agreement and develop its provisions.

V. Yusupov notes that to make an administrative agreement the following stages shall be completed: 1) study of the administrative situation by each party to the agreement; 2) choice and analysis of the relevant legal norms; 3) previous adjustment of the content and terms of the agreement; 4) signing of the agreement by the parties [8, p. 75]. We think that choice and analysis of the relevant legal norms are included to all stages of the procedure of making administrative agreements. We cannot accept

the name of the fourth stage. It is better to name it the stage of making an agreement when the signing of the agreement will be just one of the important phases.

In this regard, we propose the following stages of making an administrative agreement:

1) organizational stage, when the situation is studied, necessity to make an agreement and parties are determined;

2) making an offer on administrative agreement. We agree with K. Afanasiev that an offer shall be always in writing. It shall cover all essential conditions, provided by law for these types of agreements. It shall refer to certain subject (subjects) of administrative law and express an intent to establish administrative agreement-based obligations [9, p. 135]. In other words, an offer to make an agreement is a draft of it;

3) consideration of the offer and adjustment of terms of the agreement. On this stage, the party which gets an offer decides on usefulness of its acceptance; negotiates with another party on the essential conditions of the agreement. At this point the agreement is modified and amended; legal capacity of the parties to the agreement is established; consent from the third parties to make an agreement is accepted, if their rights and interests can be affected, and other necessary measures are taken;

4) making administrative agreement. On this stage the parties agree on the essential conditions of the agreement, sign and register it if necessary.

We think that general procedure of making administrative agreement shall be provided by the Administrative Procedural Code [4], which will regulate the actions of the parties. These stages are inherent to all administrative agreement but legislation can establish additional requirements to each of these stages.

Unlike general procedure, special procedure of making administrative agreements is regulated by various legal acts such as the Law of Ukraine "On Public-Private Partnership" [10], the order of the Ministry of Justice of Ukraine dated 15.06.2012 № 891/5 "On Approving the Procedure and Criteria of Involving Legal Entities of Private Law by Local Self-Government Bodies to Provision of Free Primary Legal Aid" [11], regulation of the Cabinet of Ministers of Ukraine dated 03.12.2008 № 1081 "On Approving the Procedure for Competition in Transportation of Passengers at the Bus Route of General Usage" [12] and others. Analysis of these and other acts allow to separate the following stages of making an administrative agreement:

1. Competition announcement. On this stage all the competition documents are prepared. Place, time, procedure, organizers (competition committee), list of documents to apply for the competition are established. After determining the basic conditions, competition announcement is prepared. It shall be published in local printed media and on the official website of the local self-government bodies. Legal acts stipulate various time limits within which the competition announcement shall be published. For example, the Procedure for Competition in Transportation of Passengers at the Bus Route of General Usage [12] establishes 30 days. At the same time the Law of Ukraine "On Concessions" provides 60 days [13]. In such a way all the interested persons can get acquainted with the competition terms, determine their potential possibility to participate in it and prepare all the necessary documents.

2. Submission of applications for participation in competition. An application and all other documents, established by the competition committee, can be submitted directly to the relevant local self-government bodies or mailed to the competition organizer in accordance with the procedure and within terms provided by the competition announcement. The name

and location of the organizer and participant, name of the project (program) shall be mentioned on the envelope. Regulations stipulate all the necessary documents, which shall be enclosed to the application. Their amount depend on the competition object.

3. Competition. Competition is one of the most important stages because at this point the winner, who will be the party to administrative agreement with local self-government body, is determined. In this regard, competition shall be conducted in accordance with certain principles. Nowadays they are enshrined in the order of the Ministry of Justice of Ukraine dated 15.06.2012 № 891/5 “On Approving the Procedure and Criteria of Involving Legal Entities of Private Law by Local Self-Government Bodies to Provision of Free Primary Legal Aid” [11]. But, in our opinion, they shall cover other competitions, which are organized and conducted by local self-government bodies. These principles include the following: transparency (it means that all interested persons shall have an access to information on the competition, its location and time), equality of competition participants (all persons who meet the competition requirements, can participate in the competition and the local self-government body cannot prevent them from it); fair competition (all the entrepreneurs, who participate in the competition, shall act in accordance with rules, trade and other customs provided for business activity) [14]; efficiency (local self-government body shall choose among all the proposal the one, which meets its needs in the best way, and has the best quality-price ratio); impartial evaluation of competition proposals (local self-government body shall have equal attitude to all participants of the competition and choose the one who meets the requirements in the best way); prevention of conflict of interest and corruption risks (local self-government body shall comply with anti-corruption legislation and prevent corruption offences of competition participants). Upon the competition results, the competition committee decides on the winner and informs him/her about it within terms established by legislation.

4. Making an agreement. Local self-government body makes an administrative agreement with the competition winner. Agreement is considered to be made when the parties agree on the essential conditions and sign the agreement. Legislation can provide essential conditions of the agreement which mean its subject, terms, that are considered essential by law or are necessary for agreements of this type, and other conditions which shall be agreed by the parties upon the request of one party [15]. If the parties do not take them into account, it can cause invalidity or non-signing of the agreement.

Thus, we can draw a conclusion that special procedure of making administrative agreement is more complex but all these stages are necessary to achieve the result which will comply with the public interest.

In spite of the fact that Ukrainian legislation does not cover this issue, administrative agreements shall be made in writing. This shall be enshrined in the future Administrative Procedural Code of Ukraine. The precondition for it is that administrative agreement shall meet public interest and it refers to many persons. That is why it shall be thoroughly described and provided to the community if necessary. In our opinion, all the administrative agreements which are made by local self-government bodies, shall be published on their official websites. On the one hand, it will enhance public trust to the local self-government bodies, on the other hand, it will increase public control over their activities.

It is necessary to focus on the issues when administrative agreement enters into the force. According to the general rule

it becomes effective after being signed. As the agreement is a tool of consensus, the parties can independently determine the time and terms of its entry into the force. At the same time legislation can stipulate some additional requirements. The Law of Ukraine “On Concessions” provides that if the object of concession belongs to community property, then the authorized body shall register such an agreement with the executive body of the relevant council and inform the State Property Fund of Ukraine that such concession agreement was made [13]. In such a way this agreement will become effective after being registered.

If administrative agreement can affect the rights of the third persons, it will become effective in the event of acceptance of a written consent from them to an agreement. If administrative agreement is made instead of the administrative act, which is considered to be passed after obtaining a permission, consent or coordinating with the other body, it will become effective when the other authority participates in these activities in accordance with the established procedure.

Administrative agreement will be effective until it expires; all the terms of the agreement are performed; or the parties terminate it, and for other reasons which local self-government bodies and its counterparts may establish.

The content of administrative agreement can be changed or amended in accordance with the procedure provided by civil legislation but taking into account peculiarities of administrative agreement. Local self-government body can terminate the agreement, change or amend it to prevent or eliminate harsh consequences which can infringe public interests. At the same time local self-government body shall provide reasoning in its decision and compensate material damage which was caused by it to the party.

It is necessary to pay attention to invalidity of an administrative agreement. Such situation arises, if invalidity is followed from the relevant application of the Civil Code of Ukraine. It mainly refers to the person’s incompliance with such requirements as contradiction of the transaction the interests of state and society, including moral principles; expression of the will of the party to a transaction which corresponds to his/her inner volition; focus on realistic occurrence of legal consequences stipulated by the transaction. A transaction shall be invalid if its invalidity is established by the law (void transaction). In this case, invalidation of the transaction by the court shall not be required (art. 203, 215 of the Civil Code of Ukraine) [1].

As administrative agreement-based relation are covered not only by civil law but also by administrative law it is essential to determine which provisions of this branch of law affect its invalidity. Both administrative act and administrative agreement aim at regulation of relations in the sphere of public law. In this regard, rules of invalidity of administrative acts can apply to administrative agreements. In other words, administrative agreement will be invalid if administrative act of the same content were invalid.

Administrative agreement will be also invalid if local self-government body promises to make an inadmissible action. For example, local self-government body promises to conduct one more competition and make an agreement on transportation of passengers with the entrepreneur without taking into account the other agreement which was made by it last week with another entrepreneur.

Conclusions. Thus, according to the mentioned above we draw a conclusion that legislation does not cover the procedure of making administrative agreements. At the same time civil law can cover this issue, if it complies with the nature

of administrative relations. This shall be provided by the future Administrative Procedural Code of Ukraine. Procedure of making administrative agreement can be divided into general and special one. General procedure establishes the following stages: 1) organizational stage; 2) making an offer on administrative agreement; 3) consideration of the offer and adjustment of terms of the agreement; 4) making administrative agreement. In turn, special procedure includes the following stages: 1) competition announcement. 2) submission of applications for participation in competition; 3) competition; 4) making an agreement.

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