Studia Iuridica 103
ISSN 0137-4346; e-ISSN 2544-3135

https://doi.org/10.31338/2544-3135.si.2024-103.7

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ADMINISTRATIVE AGREEMENT (OUTLINE OF THE ISSUE IN THE POLISH LEGAL SYSTEM)

Abstract

There is no general regulation in the Polish legal system that would specify the rules for executing administrative contracts. What is more, a number of legal acts offer solutions that do not fit the formula of 'traditional' forms of contracts under administrative law and civil law. When it comes to activities that require cooperation of a public administration body with entities outside the administration, the above-mentioned forms of action are often referred to as administrative agreements. Therefore, this study attempts to determine the basic properties of an administrative agreement, with a particular emphasis on the juxtaposition of its features with its civil law counterpart.

KEYWORDS

administrative agreement, administrative authority, civil law

SŁOWA KLUCZOWE

umowa administracyjna, organ administracji publicznej, prawo cywilne

I. INTRODUCTION

The aim of this study is a critical analysis of the features of administrative agreement that are presented in the Polish literature. The Polish legal scholars and commentators have published an array of studies, also including monographs[1] that address the subject matter of administrative agreement.[2] Moreover, this question has been discussed multiple times when presenting legal forms of operation of administration[3] and when commenting on a project that was ultimately not implemented and that was intended, inter alia, to outline general rules of the Polish variant of the administrative agreement.[4] At that point, we need to note that almost all authors specify their own catalogue of features of an administrative agreement.

It needs to be emphasized in this context that numerous publications feature discussions on foreign solutions (e.g. German,[5] French[6] or Italian[7]). However, the administrative agreement is often subject of a separate and general regulation in other countries. Given that as well as the objective differences between individual legal systems, the discussion in this study will be limited to Polish determinants of the administrative agreement.

The aim of this study is also to prepare proposals of a definition of the administrative agreement. The pretext for this initiative came in the words of Bieś-Srokosz who says that:

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[1] See, e.g. Ziemowit Cieślik, *Umowa administracyjna w państwie prawa* (Kantor Wydawniczy Zakamycze 2004).

[2] See, e.g. Andrzej Panasiuk, 'Umowa publicznoprawna (próba definicji)' [2008] 2 Państwo i Prawo 18, 18ff; Lucyna Staniszewska, 'Zagadnienia konstrukcyjne umów publicznoprawnych' [2019] 3(27) Studia Prawa Publicznego 139, 139ff.

[3] See, e.g. Jerzy Starościak, *Prawne formy działania administracji* (Wydawnictwo Prawnicze 1957) 250-272; Eugeniusz Ochendowski, *Prawo administracyjne. Część ogólna* (Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora" w Toruniu 1998) 186.

[4] See, e.g. Agnieszka Krawczyk, 'Umowa administracyjna w kodeksie postępowania administracyjnego (propozycja regulacji)' [2015] 2 *Państwo i Prawo* 100, 100ff; Dariusz Ryszard Kijowski, 'Umowa administracyjna w części ogólnej polskiego prawa administracyjnego' in Jan Boć and Andrzej Chajbowicz (eds), *Nowe problemy badawcze w teorii prawa administracyjnego* (Kolonia Limited 2009) 283-292.

[5] See, e.g. Marcin Miemiec, 'Umowa administracyjna według prawa niemieckiego' in Jerzy Korczak and Jan Szreniawski (eds), *Cywilizacja administracji publicznej: księga jubileuszowa z okazji 80-lecia urodzin prof. nadzw. UWr dra hab. Jana Jeżewskiego* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego 2018) 311-324.

[6] See, e.g. Michał Kania, *Umowa o partnerstwie publiczno-prywatnym. Studium administracyjno-prawne* (Oficyna Wydawnicza Wacław Walasek 2013) 127-136.

[7] See, e.g. Marek Szewczyk, 'Umowa ekspropriacyjna' in Marek Szewczyk and Maciej Kruś and Zbigniew Leoński, *Prawo zagospodarowania przestrzeni* (Wolters Kluwer Polska 2022) <https://sip.lex.pl/#/monograph/369519344/8?tocHit=1> accessed 2 May 2023.

> [u]nfortunately, an agreement under civil law is often mistaken for an administrative agreement, which de facto does not have a legal definition or a definition developed by the scholarly circles. Naturally, there have been numerous attempts to define it, though without the desired effect of its further acceptance.[8]

Given the limitation of the volume of the text and the research purpose, this study adopts the following initial assumptions. First of all, the administrative agreement is a legal form of activity of administration,[9] and to be more precise, a legal act of administrative authorities.[10] Secondly, the administrative contract is a non-authority imposing form of activity of public entities.[11] Thirdly, it is assumed that the administrative agreement is not simply an agreement under civil law executed by public administration authorities.[12] Therefore, it seems necessary to refer the features of the administrative contract to the foundation of contracts under civil law, that is the principle of freedom of contract.[13]

Some other information must be added to the above. There is no general regulation in the Polish legal system that would set rules for executing administrative agreements.[14] Nevertheless, legal scholars and commentators assume that selected contracts executed by public authorities should be indeed treated as administrative agreements.[15]

The lack of administrative regulation indicated above means that the features of the administrative agreement will be outlined in this study on the basis of three sources. In the first instance, the achievements of legal scholars and commenta-

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[8] Paulina Bieś-Srokosz, 'Kierunek działań prawodawczych ustawodawcy w stosowaniu prywatnej i hybrydowej formy działania w administracji publicznej' [2018] 2(244) Zeszyty Naukowe KUL 65, 70.

[9] See Krystian Ziemski, *Indywidualny akt administracyjny jako forma prawna działania administracji publicznej* (Wydawnictwo Naukowe UAM 2005) 138ff.

[10] The point is that it is undertaken directly for the purpose of producing a legal effect… ibid, 143.

[11] Bartłomiej Jaworski, 'Niewładcze formy działania administracji – potrzeba redefinicji?' [2018] XVI/1 (2) Opolskie Studia Administracyjno-Prawne 133, 134ff.

[12] See Paweł Sancewicz, 'Umowa jako prawna forma działania administracji publicznej w polskiej i niemieckiej doktrynie prawa publicznego' [2019] 1 (25) Studia Prawa Publicznego 55, 57-63.

[13] See Piotr Machnikowski, *Swoboda umów według art. 353[1] KC. Konstrukcja prawna* (C.H. Beck 2005).

[14] Sławomir Pawłowski, 'Umowa publicznoprawna – niewykorzystana szansa' [2021] 35/117 Acta Iuridica Resoviensia 320.

[15] What is meant here is the so-called expropriation agreement and social contact. See respectively, Sławomir Pawłowski, 'Pojęcie, przedmiot i charakter prawny umowy wywłaszczeniowej (ekspropriacyjnej)' [2018] 4(244) Zeszyty Naukowe KUL 2018 155, 155ff; Alina Miruć, 'O roli i specyfice umów w działaniach administracji pomocy społecznej' Jerzy Korczak and Jan Szreniawski (eds), *Cywilizacja administracji publicznej: księga jubileuszowa z okazji 80-lecia urodzin prof. nadzw. UWr dra hab. Jana Jeżewskiego* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego 2018) 325-338.

tors on this form of activity of public administration will be presented. Secondly, the previously mentioned reference to the civil law regulation concerning freedom of contract will be referred to. Thirdly, the discussion will be complemented by individual solutions relating to regulations concerning contracts recognized in the literature as examples of administrative agreements. To be more precise, what we mean here is the so-called expropriation agreement[16] and the so-called social contract.[17] It is highlighted at the same time that a detailed discussion of both these contracts and an analysis of foreign models of administrative agreements go beyond the framework of this study.[18]

II. LEGAL BASIS FOR EXECUTING AN ADMINISTRATIVE AGREEMENT

Most studies emphasize that the execution of an administrative agreement hinges on the existence of an appropriate legal basis.[19] It is, undeniably, the appropriate approach. As is rightly noted in the literature, 'the specific characteristics of actions taken by administration require each time a legal basis to execute a given action. This principle is expressed in the Constitution, which provides that

[16] See Sławomir Pawłowski, 'Pojęcie, przedmiot i charakter prawny umowy wywłaszczeniowej (ekspropriacyjnej)' [2018] 4(244) Zeszyty Naukowe KUL 2018 155, 155ff.

[17] See Iwona Sierpowska, *Pomoc społeczna jako administracja świadcząca. Studium administracyjnoprawne* (Wolters Kluwer Polska 2012) <https://sip.lex.pl/#/monograph/369255273/166010> accessed 2 May 2023.

[18] It needs to be pointed out that apart from the expropriation agreement and the social contract referred to above, legal writings also identify other examples of presence of administrative agreements in the Polish legal system. For example, we must note a subsidy agreement in the light of Polish and foreign regulations and an agreement on the execution of an individual programme of overcoming homelessness. See respectively, Anna Ostrowska, 'Koncepcja umowy administracyjnej na przykładzie umowy o dotację w świetle polskich i zagranicznych regulacji' [2018] 6/3 *Prawo Budżetowe Państwa i Samorządu* 9, 9ff. Dominika Cendrowicz, 'Koncepcja umowy administracyjnej na przykładzie umowy w sprawie realizacji indywidualnego programu wychodzenia z bezdomności' in Maciej Kruś and Lucyna Staniszewska and Marek Szewczyk (eds), *Kierunki rozwoju jurysdykcji administracyjnej* (Wolters Kluwer Polska 2022).

[19] Piotr Szreniawski, *Administracyjnoprawne zagadnienia przeciwdziałania nikotynizmowi* (Wydawnictwo piotrszreniawski 2005) 69. Starościak's position needs to be noted in this context, according to whom the administrative agreement does not usually feature: 'as a fully independent form, but as a form bound by an administrative act. This is the case when admissibility to execute an agreement depends on the existence of an administrative act, whose provisions the agreement develops or where there is an obligation to have the agreement confirmed or registered by another public authority'. Quotation from: Jerzy Starościak, *Prawo Administracyjne* (Państwowe Wydawnictwo Naukowe 1969) 251.

all government and administrative authorities act under the law'.[20] In this context, however, it must be raised that the sole fact of binding authorities with law does not provide a basis to differentiate the administrative agreement from other forms of activity of public administration.[21]

Taking the above into consideration, it is also worth emphasizing that the execution of an agreement under civil law[22] by a public entity should also be based on the provisions of the law.[23] Therefore, the principle of the freedom of contract does not apply in the sense that the assessment of the correctness of a public authority becoming a party to a private law relationship does not come down to verifying whether establishing a given legal relationship has not been in violation of the law. It is thus necessary to verify whether there is a legal basis that justifies the conclusion of a given contract by a public entity.

It must also be noted that binding the authority that enters into a civil law agreement by law also matters for the counterparty from outside public administration. The issue lies in the fact that if a public entity does not have a legal basis while entering into a private law agreement the legal effect of such a contract may be undermined. It is worth pointing out in this context that the presented relation

[20] Joanna Lemańska, 'Umowa administracyjna a umowa cywilnoprawna' in Iwona Niżnik-Dobosz and others (eds), *Instytucje współczesnego prawa administracyjnego: księga jubileuszowa profesora zw. dra hab. Józefa Filipka* (Wydawnictwo Uniwersytetu Jagiellońskiego 2011) 421.

[21] What is meant here is that due to Article 7 of the basic law, de facto any activity of an authority must be based on provisions of the law. See Jan Olszanowski, 'Treść zasady' in Grzegorz Łaszczyca and Andrzej Matan and Wojciech Piątek and Jan Tarno (eds), *System Prawa Administracyjnego Procesowego. Vol. II. Część 2. Zasady ogólne postępowania administracyjnego* (Wydawnictwo Uniwersytetu Jagiellońskiego 2018) <https://sip.lex.pl/#/monograph/369442027/387170> accessed 2 May 2023.

[22] 'Agreements under civil law in administration will include, inter alia, agreements in cases of public contracts, public-private partnership agreements, agreements for the provision of health care services, or agreements executed on the basis of provisions on financing science or provisions of the law on higher education'. Quotation from: Anna Fermus-Bobowiec, 'Wybrane zagadnienia dotyczące wykorzystania umowy cywilnoprawnej jako instrumentu działania administracji' [2018] 4(244) Zeszyty Naukowe KUL 125, 126. It must be noted on the side that the issue of the use of agreements under civil law was examined even in the period of the Polish People's Republic. See Zbigniew Kmieciak, 'Umowa cywilnoprawna i porozumienie administracyjne jako formy działania organów administracji w sferze zarządzania gospodarką państwową' [1987] 3 Ruch Prawniczy, Ekonomiczny i Socjologiczny 159, 159ff.

[23] Kijowski points in this context to the diversity of positions presented by legal scholars and commentators: 'On the one hand, it was being proven that the possibilities of the use of civil-law forms of operation of administration are very broad, agreements must be executed on the basis of task-based norms (...). On the other hand, the need of existence of a detailed legal basis to execute each agreement was being proven'. Quotation from: Dariusz Ryszard Kijowski, *Czy cywilnoprawne formy działania administracji cywilizują jej podejście do spraw obywateli?* in Jerzy Korczak and Jan Szreniawski (eds), *Cywilizacja administracji publicznej: księga jubileuszowa z okazji 80-lecia urodzin prof. nadzw. UWr dra hab. Jana Jeżewskiego* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego 2018) 195.

between the meaning of the legal basis for authorities' entering into agreements under civil law is analogous to a situation where public entities enter into administrative contracts.

III. THE SUBJECT OF AN ADMINISTRATIVE AGREEMENT

The special objects of the administrative agreement are the second feature most frequently mentioned when discussing it. The literature points out that the purpose of the execution of such a contract is either to satisfy society's needs[24] (also public needs)[25] or to implement public tasks.[26] There is also talk about the fact that 'an agreement executed by an administrative authority is related to the implementation of its planned obligations'.[27] Analysing these views, it needs to be noticed that despite the different specification of objectives of an administrative agreement, each of the positions presented has a visible reference to the essence of the operation of public sector entities. Thus, it means proceedings that are intended to satisfy public needs in the sphere in which the legislator outlines the scope of operation of a specific public entity. However, it needs to be noted that these assumptions that refer to the objects of an administrative agreement may in certain cases be realized also by the public authority entering into a relationship under civil law. The private-public partnership[28] may serve as an example here. Its objective may be to realise a specific public task.[29] Bearing this in mind, Lemańska's position needs to be rejected. She claims that 'in the case of administrative agreements, the objects of the contract are usually so strongly related to admi-

[24] Paulina Bieś-Srokosz, 'Kierunek działań prawodawczych ustawodawcy w stosowaniu prywatnej i hybrydowej formy działania w administracji publicznej' [2018] 4(244) Zeszyty Naukowe KUL 65, 71.

[25] Lucyna Staniszewska, 'Zagadnienia konstrukcyjne umów publicznoprawnych' [2019] 3(27) Studia Prawa Publicznego 139, 149.

[26] Andrzej Panasiuk, 'Umowa publicznoprawna (próba definicji)' [2008] 2 Państwo i Prawo 18, 27.

[27] Jerzy Starościak, *Prawne formy działania administracji* (Wydawnictwo Prawnicze 1957) 270.

[28] 'The literature predominantly presents a belief that the legislator rightly held that a private-public partnership agreement has a civil law nature, which in practice has undoubtedly helped avoid possible different opinions on the legal nature of these agreements' - quotation from: Katarzyna Płonka-Bielenin, 'Kwalifikacja prawna umowy o partnerstwie publiczno-prywatnym' in Marek Mączyński and Mirosław Stec (eds), *Działalność gospodarcza jednostek samorządu terytorialnego* (Wolters Kluwer Polska 2016) <https://sip.lex.pl/#/monograph/369394630/311760> accessed 2 May 2023.

[29] Katarzyna Płonka-Bielenin, 'Realizacja zadań publicznych w formie partnerstwa publiczno-prywatnego' in Bogdan Dolnicki (ed), *Sposoby realizacji zadań publicznych* (Wolters Kluwer Polska 2017) <https://sip.lex.pl/#/monograph/369405745/332801> accessed 2 May 2023.

nistration that they could not function outside of it'.[30] On the other hand, it needs to be said that naturally there will be administrative agreements whose objects will be impossible to recreate in relationships under civil law. Nevertheless, such cases must not be treated as a rule, or more strictly speaking, such an assumption cannot be made before the legislator creates general rules on executing administrative agreements.

IV. ADMINISTRATIVE AGREEMENT AND ADMINISTRATIVE RELATIONSHIP

Issuing an administrative decision, and thus taking this particular legal act by a public entity, results in the emergence of an administrative relationship. Thus it becomes necessary in this place to emphasize the fact that so far no consensus has been made as to how to understand the administrative agreement itself.[31] This absence of a joint position of legal scholars and commentators is all the more troublesome as it concerns one of the key institutions of administrative law. However, we may notice that it is assumed as a rule that the essence of a relationship under administrative law is the fact that its participants are not equal.[32] At the same time, the dominant role is attributed to the public side of administrative relations because it is this party that has 'the right to rule on and decide in a binding manner about the situation of the other party to this relationship'.[33]

Given the above, it is worth quoting Ochendowski, according to whom 'an administrative agreement may cause the establishment, change or cancellation of administrative relations'.[34] Unfortunately, he fails to develop his view. At the

[30] Joanna Lemańska, 'Umowa administracyjna a umowa cywilnoprawna' in Iwona Niżnik-Dobosz and others (eds), *Instytucje współczesnego prawa administracyjnego: księga jubileuszowa profesora zw. dra hab. Józefa Filipka* (Wydawnictwo Uniwersytetu Jagiellońskiego 2011) 424.

[31] See Roman Hauser, 'Stosunek administracyjnoprawny' in Roman Hauser and Zygmunt Niewiadomski and Andrzej Wróbel (eds), *Instytucje prawa administracyjnego. System Prawa Administracyjnego* (C.H. Beck 2015) <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zoge4tkmbwgq3dambogqxde#id=mjxw62zoge4tkmbwgq3dambogq> accessed 2 May 2023).

[32] See Jan Zimmermann, *Aksjomaty prawa administracyjnego* (Wolters Kluwer Polska 2013) 131.

[33] Roman Hauser, 'Stosunek administracyjnoprawny' in Roman Hauser and Zygmunt Niewiadomski and Andrzej Wróbel (eds), *Instytucje prawa administracyjnego. System Prawa Administracyjnego* (C.H. Beck 2015) <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zoge4tkmbwgq3dambogqxde#id=mjxw62zoge4tkmbwgq3dambogq> accessed 2 May 2023). The Author refers to Jerzy Starościak, 'Stosunek administracyjnoprawny' in Teresa Rabska and Janusz Łętowski (eds) *System Prawa Administracyjnego* (Ossolineum 1978) 21.

[34] Eugeniusz Ochendowski, *Prawo administracyjne. Część ogólna* (Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora" w Toruniu 1998) 186. Also, the concepts that

same time, we cannot rely on this statement only. Thus, given the non-authority imposing nature of an administrative agreement, we need to hold that a relationship modelled on the basis of the execution of a contract does not correspond to the 'classic' administrative relationship. An obvious question appears here about how to qualify this relation. Undeniably, execution of an administrative agreement results in the emergence of a legal relationship between its parties. Besides, we may say with certainty that it is not a relationship under civil law as it effects in the execution of a private law agreement. Given this, it is worth remembering other features, apart from the above-mentioned inequalities of parties that legal scholars attribute to the administrative relationship. It is assumed in the literature that the emergence of the analysed relation means that a public authority must be one of the parties to it[35] (personal feature), and its objects remain related to the implementation of the responsibilities of this entity[36] (material feature). It may easily be noticed that both these attributes are also characteristic of relations that emerge as a result of the execution of an administrative agreement. Therefore, it is proposed that the understanding of an administrative agreement be modified in such a way that its formula includes both, relations that emerge as a result of issuing an administrative decision and those that will be constituted after the execution of an administrative agreement. Therefore, it seems that such a general administrative relationship should have the features mentioned above (that is, personal and material). Naturally, such an approach may be undermined by a belief that individual civil law relations may also fit within such a framework. The previously-mentioned public-private partnership agreement may serve as an example here. However, it is worth noting that even a simultaneous occurrence in a civil-law relationship of both of the said features of an administrative law relationship does not constitute a private law relationship. This is because a relationship under civil law has other features.[37] Therefore, it must be said that a given relation may be of a private law character despite having features of an administrative relationship (that is personal and material). Moreover, the said modelling of a specific relationship under civil law is only one of the variants of a private law relationship. On the other hand, rela-

assume the creation of regulations of an administrative agreement emphasize that such contracts should result in the creation of an administrative-private relationship – Piotr Ruczkowski, 'O potrzebie wprowadzenia procesowej i materialnoprawnej umowy publicznej (administracyjnej) do systemu prawnych form działania administracji' in Emil Kruk and Grzegorz Lubeńczuk and Marian Zdyb (eds), *Dysfunkcje publicznego prawa gospodarczego* (C.H. Beck 2018) 84.

[35] Jan Zimmermann, *Alfabet prawa administracyjnego* (Wolters Kluwer Polska 2022) 239.

[36] Jerzy Starościak, *Prawo Administracyjne* (Państwowe Wydawnictwo Naukowe 1969) 15.

[37] What is meant here is that we can talk about a civil law relationship only in the case of a financial and non-financial relationship of two equal and at the same time any given entities that have rights and obligations towards each other. The basis of their emergence lies in civil law regulations. Thus, it is not that one of those entities must be a public administration authority and that the relationship of the participants of the relationship must refer to administrative law. See Agnieszka Kawałko, Hanna Witczak, *Prawo cywilne część ogólna* (C.H. Beck 2020) 35-36.

tions that emerge as a result of issuing an administrative decision or the execution of an administrative agreement cannot be devoid of any of the features mentioned, that is a public entity must be one of the parties and the objects of the contract must be related to the execution of tasks of the administering entity.

Referring to the quoted view by Ochendowski, one could also come to the conclusion that the execution of an administrative contract may impact another legal relationship, that is the relation that emerged under a given agreement. In this context, it needs to be noted that the execution of a social contract has the same effects.[38] In turn, the signing of the so-called expropriation agreement allows 'avoidance' of an administrative relationship *sensu stricto* that would have to emerge as a result of issuing a decision that takes away ownership of given real estate.[39] It also needs to be emphasized that the given examples of consequences of the execution of administrative agreements cannot be seen as representative of the entire legal system. This conclusion is founded on the fact that the relations of these agreements with administrative relationships result from the specific characteristics of both contracts, not from any general assumptions.[40] Therefore, it needs to be assumed that the possible impact on 'external' administrative relations towards a specific administrative agreement is not a feature that would distinguish this type of contract.

V. FREEDOM OF CHOICE OF THE FORM OF AN ADMINISTRATIVE AGREEMENT

The foundations of private law relations include the option to add instruments that serve the implementation of a given goal. For example, transfer of ownership may well proceed under the contract of sale and a donation agreement. Therefore, it is worth looking at this issue from the perspective of contracts under admi-

[38] 'For example - the aim of the contract may envisage its implementation in the form of a decision of a social assistance authority on granting an earmarked benefit'. Wojciech Maciejko, Monika Lew, 'Jurysdykcyjna rola kontraktu socjalnego' [2014] 73 Casus 8, 9.

[39] See Marek Szewczyk, 'Umowa ekspropriacyjna' in Marek Szewczyk and Maciej Kruś and Zbigniew Leoński, Prawo zagospodarowania przestrzeni (Wolters Kluwer Polska 2019) <https://sip.lex.pl/#/monograph/369451743/476?keyword=marek%20szewczyk&tocHit=1&cm=SREST> accessed 2 May 2023. What is meant here is Case SK 39/15, 12 December 2017 Polish Constitutional Tribunal (Trybunał Konstytucyjny) OTK-A 2017. See Sławomir Pawłowski, 'Glosa (aprobująca) do wyroku Trybunału Konstytucyjnego z dnia 12 grudnia 2017 r., sygn. SK 39/15' [2018] 21 Studia Prawa Publicznego 2018, 175, 175ff.

[40] When it comes to the social contract, the 'additional' administrative relations are to become a platform for providing social assistance. On the other hand, when it comes to the expropriation agreement, its execution allows one to avoid a situation where taking away real estate would proceed on terms imposed by a public authority.

nistrative law. One may first look at the scope of discretion of the operation of entities from outside public administration. If specific proceedings may be closed only by the conclusion of an administrative agreement, then entering into this agreement by an entity from outside administration becomes obligatory in the sense that a certain issue may not be handled otherwise. For example, as a rule,[41] granting 24-hour temporary shelter to homeless persons depends on their execution of an administrative agreement,[42] which means a social contract.[43]

It also seems that a similar outlook may be taken on all those cases where the conclusion of an administrative agreement was to be an alternative to issuing an administrative act. It means that if wishing to handle a certain administrative matter, its participant must become a party to this contract 'under the pain' of becoming an addressee of the alternative form of activity of administration (e.g. administrative decision). The said regulations on the expropriation agreement are an example of such a state of affairs. Indeed, if the competent body or disposer of the real estate does not execute the said contract, then expropriation proceeds through issuing an administrative decision.

Given the above, however, the described structure of 'compulsory' execution of an administrative agreement does not apply to the obligations *sensu stricto*. It means that one could talk about an absolute obligation to enter into an administrative agreement only for proceedings initiated *ex officio*, which could close only by the conclusion of an administrative contract and the relevant authority would not be allowed e.g. to discontinue the proceedings if the administered body was not willing to enter into the agreement. Naturally, we cannot rule out that the legislator may adopt such a solution. It needs to be noted though that the competent authority would be then, and in any other case, obliged to close the case it is examining. This fact would not change due to 'unwillingness' of the administered entity. Therefore, it is easy to identify a threat where the essence of operation of

[41] It needs to be emphasized that it is a rule we are talking about here. On the other hand, the content of provisions Act of 12 March 2004: The Social Assistance (Ustawa z dnia 12 marca 2004 r. o pomocy społecznej; consolidated text [2021] JoL 2268 as amended; hereinafter: SAA) accommodates exceptions from this rule.

[42] The rule quoted in the text results from Article 48a(2) SAA.

[43] As Iwona Sierpowska explains: 'A social contract demonstrates features of an administrative agreement, rare in Polish law. First of all, this contract is wholly regulated by provisions of administrative law, including its definition; they do not even stipulate supplementary application of the Civil Code. Secondly, despite the lack of full freedom and equality of parties, the activity discussed is bilateral and is executed by way of negotiation. Even though the entity that represents administration has a stronger position, it may not impose the obligation to conclude the agreement or establish its content unilaterally; these features clearly distinguish the social contract from an administrative decision. Thirdly, conclusion of a contract models the administrative law relationship and the related conflicts are not subject to examination by a common court of law'. Quotation from*:* I. Sierpowska, 'Commentary art. 108' in Iwona Sierpowska, *Pomoc społeczna. Komentarz*, (Wolters Kluwer Polska 2021) <https://sip.lex.pl/#/commentary/587230021/660204/sierpowska-iwona-pomoc-spoleczna-komentarz-wyd-vi?cm=URELATIONS> accessed 2 May 2023.

a public entity in the described case would be to impose provisions of the administrative agreement and the very 'expression of consent' for its conclusion. As a consequence, entering into such a *de facto* obligatory contract would not differ *sensu stricto* much from having to abide by an administrative decision.

It needs to be highlighted that the question of freedom of administrative contract looks considerably different in the case of public administration, which is a result of a mechanism that *de facto* refers to each form of activity of public administration. Thus, public entities undertaking individual activities is a consequence of such an obligation inscribed in the provisions of the law. There are two scenarios here. We must first describe those cases where the legislator directly orders that a certain action be performed. For example, this will apply where the entity entitled will request permission for construction. In this case, the legislator obliges the relevant authority to respond in a particular way, that is issue an administrative decision.[44] An analogous example may be found in regulations concerning administrative agreements. Legal scholars and commentators point out that 'in the case of a homeless person who requests admission to a homeless shelter, the social worker does not have the right to refuse the signing of this contract'.[45] In other words, the competent public entity is obliged to perform a particular action (that is to conclude an administrative agreement).

Cases where the legislator does not order directly that a certain action be taken need to be mentioned. On the other hand, such a necessity is associated with the realization of a specific task that rests on a given public entity. It needs to be emphasized at that point that it is about actions that may not necessarily be attributed to a specific obligation of a public administration entity, thus they may have a 'universal' character. To illustrate such a situation, Article 7(2) of the Act of 8 August 1990 of Commune Self-Government Law may be invoked,[46] pursuant to which meeting collective needs of the community falls under the commune's own tasks. These tasks include, for example, matters of communal roads, streets, bridges, squares, and traffic organization. Given this, a commune is obliged to 'construct such facilities and the accompanying infrastructure and to maintain them in a condition adequate to the satisfaction of the community's transport needs'.[47] Implementation of this task may require the introduction of division of

[44] See Justyna Goździewicz-Biechońska, *Wadliwość decyzji administracyjnych w procesie inwestycyjno-budowlanym* (Wolters Kluwer Polska 2011) <https://sip.lex.pl/#/monograph/369233535/162248> accessed 2 May 2023.

[45] Magdalena Małecka-Łyszczek, Radosław Mędrzycki, 'Kontrakt socjalny' in Magdalena Małecka-Łyszczek and Radosław Mędrzycki, *Osoby ubogie, niepełnosprawne i bezdomne w systemie pomocy społecznej* (Wolters Kluwer Polska 2021) <https://sip.lex.pl/#/monograph/369490747/424938> accessed 2 May 2023.

[46] (Ustawa z dnia 08 marca 1990 r. o samorządzie gminnym) consolidated text [2023] JoL 40 as amended (PL).

[47] Marta Romańska, 'Obowiązki gminy dotyczące dróg' in Katarzyna Małysa-Sulińska and Mirosław Stec (eds), *Prawo do dobrego samorządu w kontekście realizacji zadań publicznych*

real estate or even taking ownership of it. Therefore, it needs to be pointed out that the relevant authority does not have discretion under civil law in how these actions are performed and it is obliged to take such actions that are stipulated in the law. It needs to be assumed that the legislator too points to the administrative agreement (e.g. as is the case of expropriation) as a form of handling a particular matter related to the authority's obligations and this public entity has no other choice but to take action to execute a specific contract.[48]

VI. THE CONTENT OF AN ADMINISTRATIVE AGREEMENT

Freedom in composing the content of agreements is undoubtedly one of the pillars of the freedom of contract.[49] It needs to be emphasized that what is obvious in this case cannot be said about absolute freedom. The fundamental relevant provision here (that is Article 353^1 of the Civil Code[50]) provides that parties executing a contract may arrange their legal relationship at their discretion as long as the content or purpose of the contract is not contrary to (the nature of) the relationship, the law or the principles of community life. In addition, it needs to be pointed out that we may talk about the correct execution of individual categories of the so-called nominate contracts only when their parties bind themselves with an agreement that includes provisions specified by law.[51]

Given the above, it may be concluded that administrative agreements are similar to the said nominate contracts in a certain scope. The essence of it lies in the fact that the correctness of entering into an administrative law relationship is assessed from the perspective of whether the basis for creating it (such as e.g. administrative agreement) is not only contrary to the provisions of the law (that is like a 'regular' agreement under civil law), but, moreover, whether its content corresponds to individual requirements that are stipulated for a given form of operation (like in the case of a nominate contract).

(Wolters Kluwer Polska 2021) <https://sip.lex.pl/#/monograph/369494572/425550> accessed 2 May 2023.

[48] See Sławomir Pawłowski, 'Pojęcie, przedmiot i charakter prawny umowy wywłaszczeniowej (ekspropriacyjnej)' [2018] 4(244) Zeszyty Naukowe KUL 2018 155, 155ff.

[49] Piotr Nazaruk, 'Com. art. 353^1' in Jerzy Ciszewski, *Kodeks cywilny. Komentarz* (LEX/el. 2023) <https://sip.lex.pl/#/commentary/587858110/714351/ciszewski-jerzy-red-nazaruk-piotr-red-kodeks-cywilny-komentarz-aktualizowany?cm=URELATIONS> accessed 2 May 2023.

[50] It is naturally Act of 23 April 1964 Civil Code (Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny) consolidated text [2023] JoL 1610 as amended (PL).

[51] See Michał Niedośpiał, *Pojęcie umowy nazwanej, mieszanej i nienazwanej oraz systematyka i związek umów: Słowa Boga* (ERIDA 2014) 75ff.

When comparing nominate contracts with administrative contracts, one needs to mention an essential difference between them. As a matter of fact, violation of principles of executing a specific type of a nominate contract does not mean that there will be no relation under civil law established between the parties. Such a legal relationship may arise as long as the clauses of a given contract are not contrary to Article 353^1 CC referred to above. Undoubtedly, it needs to be reserved that in such a case we are no longer talking about a nominate contract. On the other hand, if the parties to a specific relation do not meet the requirements specified by provisions of administrative law, in the best case we will be able to say that an erroneous relationship under public law has been established.

Given the above, it needs to be noticed that an administrative agreement may be differentiated from a civil law agreement in the context of freedom of modelling their content from two perspectives. We must first say that the total of clauses of a contract under administrative law should correspond only to the goal behind legal provisions that provide a basis for executing it. As results from the principle of legalism,[52] a public authority that enters into an administrative agreement may only act on the basis and within the limits of the law, that is a regulation that specifies conditions for concluding a particular contract. As a result, a public entity may not arbitrarily 'enrich' the content of a specific contract with clauses not stipulated in the law, even if they believed it would 'pay off' from the perspective of the public interest. In comparison, parties to individual civil law contracts may freely decide about the scope and purpose of their agreements and, for example, create hybrid contracts that include clauses that regulate different legal events (e.g. sale and lease) at the same time. It needs to be added here that how the content of a given administrative agreement is modelled may also largely depend on its parties. Such an option, still depends on a specific decision of the legislator, not a general rule, as is the case of relations under civil law.

The above also entails the fact that in the case of the conclusion of administrative contracts, one must talk not so much about establishing their content by their parties but about their acceptance of the legislator's assumptions. The activity of the party to an administrative agreement *de facto* comes down to two new questions. The first one refers to expressing consent for being bound by an administrative contract. The second one regards establishing data that may be defined more as technical rather than *sensu stricto* legal. What we mean here is, for example, specifying identification of data of a party to an agreement and identifying information specific to a particular type of administrative agreement. For example, in the case of an expropriation agreement, it will be about the price of the real estate being taken over, and in the case of a social contract – the fact

[52] See Bartosz Rakoczy, 'Commentary art. 7' in 'Komentarz do Konstytucji Rzeczypospolitej Polskiej' in *Prawo ochrony środowiska. Komentarz* (LexisNexis 2013) <https://sip.lex.pl/#/commentary/587387560/185000/rakoczy-bartosz-komentarz-do-konstytucji-rzeczypospolitej-polskiej-w-prawo-ochrony-srodowiska...?cm=URELATIONS> accessed 2 May 2023.

of giving homeless persons a place in a shelter. In other words, it would have to be concluded that the achievement of a specific effect in administrative law is not possible in any other way but by adhering to a model specified by the legislator. In comparison, creating a relationship under civil law requires not so much pursuing a path outlined by the legislator, but moving within the boundaries delineated by the lawmaker. The same approach then must be taken when it comes to freedom in shaping the content of an administrative agreement (that is proceeding pursuant to the legislator's order) and an agreement under civil law (that is acting within the boundaries set out by law).

VII. THE PARTIES OF AN ADMINISTRATIVE AGREEMENT

Legal scholars and commentators assume that the execution of an administrative agreement requires cooperation of at least two entities, where at least one of them must be a representative of a public entity and the second one should come from external administration.[53] It would seem then that this rule makes a breakthrough in one of the pillars of the principle of freedom of contract, that is freedom to choose one's counterparty.[54] Therefore, it needs to be remembered that under civil law we cannot say that it is absolute freedom either. The fact is that the very possibility of entering into a civil law contract depends, for example, on having the capacity to perform legal acts.[55] Therefore, rules that restrict the freedom of choosing the counterparty are considered general. Moreover, certain relationships under civil law may be made between parties that meet certain special requirements laid down by the law. In this case, the life annuity agreement is an example where only a natural person may become one of the parties (the so-called annuitant) to this agreement.[56] Thus, we may say that under private law, freedom in the choice of the counterparty must be understood as freedom in choosing the party to the agreement among entities that meet requirements for any given contract and at the same time requirements set for the specific contract the parties wish to execute. It needs to be concluded that this rule may be freely applied to

[53] See Kacper Rożek, *Umowa o partnerstwie publiczno-prywatnym a umowa administracyjna* (Wyższa Szkoła Humanitas 2018) 40ff.

[54] Agnieszka Goliszewicz, *Treść i charakter prawny umowy deweloperskiej* (Wolters Kluwer Polska 2013) <https://sip.lex.pl/#/monograph/369270865/187616> accessed 20 March 2023.

[55] Marek Watrakiewicz, 'Wiek a zdolność do czynności prawnych' [2003] 3 Kwartalnik Prawa Publicznego 497, 497 ff.

[56] Adam Bieranowski, 'Commentary art. 908' in Jerzy Ciszewski and Piotr Nazaruk (eds), *Kodeks cywilny. Komentarz aktualizowany*, (LEX/el. 2023) <https://sip.lex.pl/#/commentary/587858803/715043/ciszewski-jerzy-red-nazaruk-piotr-red-kodeks-cywilny-komentarz-aktualizowany?cm=URELATIONS> accessed 20 March 2023.

agreements under administrative law. Thus, the general rule would be that, as mentioned earlier, at least one of the parties of the contract must be a competent authority, and only entities that do not belong to public administration may act as the other party. On the other hand, detailed rules should result from solutions that refer to a specific kind of administrative agreement.

The above means that agreements under civil law and administrative agreements are subject to the same analogical rules that apply to restrictions in choosing counterparties. Now, departing from these rules will not automatically mean that one cannot establish a relationship under civil law. This results from the fact that if a given relationship is not contrary to the aforementioned Article 353^1 CC, we can talk about a correct execution of the so-called innominate contract. Therefore, the situation here is the same as in the case of effects (discussed before) of departing in private law contracts from statutory assumptions on the content of a specific nominate contract. On the other hand, when it comes to contracts under administrative law, it may be assumed that like in the case of other legal forms of operation of administration, violations of law in the area of selection of counterparties will result in a given contract being defective. A situation where a given contract is not concluded by a public authority is an exception to this principle. It may be assumed that such a situation will be the case of a non-act.[57] However, it is only the sphere of administrative law that is concerned here. Such defective contracts may have effects in case of civil law too. For example, the said expropriation agreement may simply be recognized as a contract of sale.

VIII. CONCLUSIONS

Based on this discussion, the following definition of the concept of an administrative agreement may be proposed. The essence here lies in a legal administrative act that does not carry authority, which may be performed only by entities listed in the act, where one of them must be a public entity and the content and objective of such a contract relate to the obligations of its administrative side and depend on the legislator's decision. At the same time, the mandatory content of a contract may be specified by listing directly the required clauses (e.g. as in the case of the social contract) or by specifying the objects of the contract (e.g. as in the case of the expropriation agreement). What is essential here though is the fact that irrespective of the adopted model of specifying the content of an administrative agreement, its parties are deprived of the possibility to cross beyond the subject matter outlined by the law.

[57] See Laura Münkler, *Der Nichtakt. Eine dogmatische Rekonstruktion* (Duncker & Humblot 2015).

When looking at the institution of an administrative agreement from the perspective of its civil law counterpart, two obvious differences come to the fore. They are the place of regulation and the extent of freedom of counterparties' conduct. The second aspect naturally means that the parties to a relationship under civil law act more within the boundaries of law, while participants of an administrative law relationship may only take such actions that the legislator allows them to perform (that is operate more on the basis of the law). The juxtaposition of effects of violations of methods of modelling both kinds of contracts seems especially interesting. What is meant here is, naturally, a comparison of the so-called nominate contracts with administrative agreements. And what follows, modelling a civil law relationship that is contrary to detailed rules does not entail its defectiveness as is the case of the relationship under administrative law. The core of the case is that a contract executed contrary to provisions on a specific nominate contract 'transforms' into the so-called innominate contract, whose possible defectiveness is evaluated from the perspective of Article 353[1] CC. Naturally, in the case of administrative contracts such a 'two-stage' evaluation of correctness of their execution is not possible.

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