

ADMINISTRATIVE CONTRACT IN ADMINISTRATIVE MATTERS: SLOVENIAN LAW IN COMPARATIVE PERSPECTIVE / Katja Štemberger Brizani

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Abstract: *Administrative contracts are also known in Slovenian law, where they are mainly used as an instrument to regulate in more detail the (previously issued) administrative act, and generally cannot replace the issuance of an administrative act. Namely, the General Administrative Procedure Act only provides for settlement between parties with opposing (private law) interests. However, the elements of administrative contracts as an ADR mechanism can be found in other (sectoral) legislation, but are often very deficiently regulated, leading to the application of private law rules that govern contractual relations and which are not adapted to administrative law relations. Given all the advantages of alternative dispute resolution and shortcomings of the current legal framework, Slovenian law should also – while respecting all the specific features of administrative decision-making and following the example of selected comparative-law regimes – systematically regulate subordinate administrative contracts (replacing administrative acts), at least for some administrative matters. They should be limited only to those areas of administrative functioning where the administration has a certain margin of discretion in determining the content of the decision on the administrative matter. This means, on the other hand, that the possibility of a subordinate administrative contract should normally be excluded in the case of legally binding decision-making since the content of such a decision is predetermined and the administrative authority is bound by it (principle of legality). However, the administrative authority must have a specific power to conclude such a contract in a (sectoral) law – a general power to conclude subordinate administrative contracts is not sufficient due to the risk of infringing the principle of equality and legality.*

Key words: *ADR; Administrative Law; Administrative Contracts; Slovenian Law; Principle of Legality; Public Interest*

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1. INTRODUCTION

Traditionally, administrative relations have been governed by (unilateral) acts of administrative authorities in which the individual, as the addressee of such an act, has had no opportunity to participate. However, with the (still ongoing) process of

modernisation of the public administration, the focus of its functioning is increasingly shifting towards the consensual regulation of administrative law (Kovač, 2017, pp. 80–81), the so-called alternative administrative dispute resolution (ADS) in administrative matters, also through mechanisms (more) typical for the civil (especially commercial) law sphere – by contract. In the second half of the twentieth century, a special type of contract, the so-called public law contract, developed in comparative law regimes, particularly in German law,¹ by which an administrative authority may establish, modify, or terminate a legal relationship in the field of administrative law, and which may even replace the issuance of an administrative act (§ 54 of the VwVfG). This type of contract was later adopted by many other comparative law systems, following the example of German law (Athanasiadou, 2017, pp. 7–10). In Slovenian law, on the other hand, there are (still) many reservations about the introduction of this form of ADS in administrative matters, even though the administrative contract is theoretically already a (widely) accepted institution,² but it is not (generally) used as a substitute for authority regulation of administrative-law relations. These reservations are related to the specific characteristics of the administrative decision-making process, in which the administrative authority decides on the rights, obligations, or legal interests of the parties by the applicable rules while ensuring that the interests of the parties are not contrary to the public interest, all of which reduces the possibility of (free) negotiation (Kovač, 2016, p. 80). Other restrictions on the consensual resolution of administrative matters include the obligation of the administrative authority to establish the true facts of the matter, and the duty of equal treatment of the parties to the administrative procedure (Jerovšek, 2000, p. 172), which could be infringed if the administrative authority and the parties were free to settle the administrative matter by contract. It is therefore limited by constitutional and statutory principles, in particular by the principle of separation of powers (Article 3(2) of the Constitution of the Republic of Slovenia (“RS”), *Ustava Republike Slovenije*, hereinafter: **Constitution**³), the principle of legality (Article 120(2) of the Constitution and Article 6 of the General Administrative Procedure Act, *Zakon o splošnem upravnem postopku*, hereinafter: **GAPA**⁴), the principle of equality (Article 14(2) of the Constitution), the principle of substantive truth (Article 8 of the GAPA) and the principle of free assessment of evidence (Article 10 of the GAPA). Therefore, contractual regulation of administrative relations cannot be left (entirely) to the discretion of the administrative authority but must be defined and limited by law (Balthasar, 2018, p. 14).

The paper will present the possibilities of contractual regulation of administrative matters in Slovenian law, together with the deficiencies of the legal framework, and will also make some *de lege ferenda* proposals, supported by selected comparative law solutions. It aims to confirm or disprove the following hypothesis: The ADS of administrative matters in the form of an administrative contract should be limited to those areas of administrative functioning where the administrative authority has a certain margin of discretion.

To achieve this aim, established legal science methods were used, in particular dogmatic, comparative, axiological, and sociological methods. Dogmatic and axiological

¹ Public-law contracts were introduced into German legal system in 1976 when the General Administrative Procedure Act (Verwaltungsverfahrensgesetz, hereinafter: **VwVfG**) of 25 May 1978, in the version published on 23 January 2003 (BGBl. I, p. 102), as amended, was accepted. See also Hüther, Blänsdorf and Lepej (2022a, p. 304).

² See, for example, judgements of the Supreme Court of the RS, No. III Ips 37/2020-3 of 19 January 2021 and No. III Ips 80/2018 of 12 February 2019.

³ Official Gazette of the RS, No. 33/91-I as amended.

⁴ Official Gazette of the RS, No. 24/06 as amended.

methods were used to explore and identify the legal problems of the current legal framework and to formulate possible solutions, also using the comparative law method, both in terms of theoretical and legal framework. The paper examines foreign legal orders where the administrative contract as a mechanism for resolving administrative matters is already (widely) established (German, Czech, and Estonian law), but also French law, which is the basis for the theoretical construct of administrative contracts in Slovenian law. The research is closely linked to the question of the effectiveness of the current legal framework, and therefore the sociological method was also used, as it is the basis for distinguishing between norms and their implementation in (judicial) practice. The synthesis of the arguments allowed us to formulate the conclusions, confirm, or disprove the hypothesis, and possibly offer improvements for *de lege ferenda* regulation.

The paper uses the single term "administrative contract" for contracts (of a public law nature), replacing administrative acts irrespective of their designation in comparative law (where they may also be referred to as "public law contract", "contract under public law", or "public contract").

2. COMPARATIVE-LAW REVIEW

2.1 German Law

Administrative contracts (under the term "public law contracts") are governed by the VwVfG and supplemented by its other provisions (on administrative acts), sectoral laws, and provisions of the Civil Code. The latter provisions apply only if they are compatible with the public law nature of the administrative contract (Athanasiadou, 2017, p. 75). German law divides administrative contracts into subordinate and coordinate contracts. The former usually replace the issuance of an administrative act, while the latter are concluded in the relationship between the entities with equal position, in cases where the law does not provide for the issuance of an administrative act (e.g., between several administrative authorities) (Spannowsky, 1994, p. 203; Gurliit, 2000, p. 30). In the absence of any contrary legal provision, the administrative authority decides whether to resolve the administrative matter by an administrative act or by concluding a contract. Subordinate administrative contracts are usually concluded in the field of construction and environmental law (e.g., expropriation contract, urban planning contract) (Schulze-Fielitz, 2012) and in the field of public funding (Unger, 2016). Subordinate administrative contracts are further subdivided into settlement contracts (§ 55 of the VwVfG) and exchange contracts (§ 56 of the VwVfG). A settlement contract is concluded to eliminate factual and/or legal uncertainties in an administrative matter by mutual yielding (compromise) of the contracting parties, if the administrative authority, within the scope of the discretion conferred, decides that the conclusion of such a settlement is an appropriate way of eliminating the existing uncertainties (Faber, 1989, pp. 271–272). In an exchange contract, the administrative authority and the party agree on the performance of the agreed mutual obligation (Pudelka, 2017, p. 214).

Therefore, the administrative authority has a general power under the VwVfG to conclude a subordinate administrative contract insofar as no prohibition on the conclusion of such contracts is expressly or impliedly provided for in other legal provisions (Pudelka, 2017, p. 213). Such prohibitions are particularly common in tax and social law (Macedo Weiß, 1999, pp. 116–120). On the other hand, in certain administrative fields, the administrative authority must always act by a contract and, therefore, has no discretion in choosing between an administrative act or a contract, for example, when public services are provided by a private operator or when regulating relations between

several administrative authorities. The scope of use of an administrative contract is therefore broader than that of an administrative act. Within these limits, the administrative authority has the discretion to decide which form of administrative action is more in the public interest in a particular case (administrative act or administrative contract). However, such a decision is not legally unbound since the administrative authority must comply with the formal and substantive rules laid down by the VwVfG and derived from the Civil code (Macedo Weiß, 1999, pp. 112 et seq).

If the legal requirements have not been complied with when concluding a subordinate administrative contract, such a contract is usually null and void, while an administrative act may be illegal (and still valid) or null and void. However, if the violation of the law does not fall under any of the cases referred to in § 59 VwVfG, the administrative contract is still illegal, but nevertheless valid, and cannot be challenged before a court. In other words, the contract is still binding and must be complied with (*pacta sunt servanda*) (Hüther, Blänsdorf and Lepej, 2022b, p. 553).

2.2 Czech Law

Code of Administrative Procedure (hereinafter: **CAP**⁵) defines administrative contracts ("public contracts") similarly to VwVfG. It is a bilateral or multilateral act that establishes, alters, or cancels rights and obligations in the sphere of public law and shall always be assessed according to its content (§ 159(1,4) of the CAP). Czech law distinguishes between three types of administrative contracts: coordinate contracts (§ 160 of the CAP), subordinate contracts (§ 161 of the CAP), and contracts between participants (§ 162 of the CAP). Coordinate contracts are concluded between several public law entities to perform their (public) tasks, while subordinate contracts have the same function as in German law: they replace an administrative act (Ondruš, 2005, p. 459 et seq). However, they can be concluded only between an administrative authority and a party to the administrative procedure, if a special act provides so (§ 161(1) of the CAP). This distinguishes Czech law from German law, where the status of the contracting parties is not relevant, and the administrative authority has a general power to conclude a subordinate contract. Subordinate administrative contracts can also be concluded after the administrative procedure has already been initiated – in such a case, the administrative authority, by a procedural decision, shall stay the administrative procedure (§ 161(2) of the CAP). Typical examples of such contracts are planning contracts (Hegenbart, Sakař et al, 2008, p. 189), and contracts replacing the building permit (§ 116 of the Building Act⁶). Contracts between participants are concluded between parties to an administrative procedure (or those who would be parties of such a procedure if it was held) concerning the transfer or the manner of exercise of their rights or obligations, meaning that it is an administrative contract in the broad sense (Hendrych et al, 2009, p. 253) since it does not concern the regulation of relations between an administrative authority and a private-law entity. However, it must be approved by the administrative authority that decides on an administrative matter. The CPA states that an administrative contract must not be contrary to legal regulations, must not bypass legal regulations, and must be consistent with the public interest (§ 159(2) of the CAP). If an administrative contract is contrary to legal regulations, it shall be revoked by the competent administrative authority (i.e., the administrative authority superior to the administrative authority that is a party to the administrative contract), either *ex officio* or on motion of a

⁵ Act No. 500/2004 Coll. Act of 24 June 2004, Code of Administrative Procedure as amended (*Zákon správní řád*).

⁶ Building Act No. 183/2006 Coll with further amendments (*Stavební zákon*).

party to the administrative contract, other than the administrative authority (§ 165(2) and § 167 of the CAP). For matters not regulated by the CPA and by sectoral laws, the rules of the law of obligations shall apply in so far as the nature and purpose of public-law contracts do not preclude it, apart from those provisions which are specifically excluded in the § 170 of the CPA.

2.3 Estonian Law

An administrative contract ("contract under public law") is an agreement that regulates administrative law relationships, whereby at least one of the parties to the contract must be a public law entity (§ 95 and § 96(1) of the Administrative Procedure Act, hereinafter: **APA**⁷). Administrative contracts can be divided into coordinate administrative contracts, concluded between public administrative bodies in a horizontal legal relationship, and subordinate administrative contracts, concluded between a representative of a public authority and a natural or private legal person (Aedmaa et al, 2004, pp. 434–436). The APA further distinguishes between administrative contracts governing an individual case (§ 98 of the APA) and administrative contracts for an unlimited number of cases (§ 97 of the APA). Only the former can replace the issuance of an administrative act unless a law or other regulation requires only the issue of an administrative act (Aedmaa et al, 2004, pp. 436–437). To administrative contracts that may replace the issuance of an administrative act, the provisions of the APA on administrative acts apply, insofar as this does not conflict with the legal nature of the administrative contract (§ 99(1) of the APA).

The procedure to conclude an administrative contract is an administrative procedure (§ 2(1) of the APA). It starts with the submission of a proposal for the conclusion of a contract (§ 35(3) of the APA), and ends with the conclusion of the contract, the agreement or decision of one of the parties not to conclude the contract, or the death or dissolution of a party to the administrative contract (§ 43(3) of the APA). The APA distinguishes between null and void and unlawful administrative contracts. However, an unlawful contract is still valid and shall be performed (as in German law) except in the cases provided for by law (§ 103 and § 104 of the APA). For matters not covered by the APA, the civil law rules contract conclusion shall apply, taking into account the specifications established by the APA (§ 105 of the APA).

2.4 French Law

In France, the scope of administrative acts and administrative contracts is more strictly limited, as they are not interchangeable forms of administrative functioning, but an administrative contract usually complements a previously issued administrative act, i.e., the administrative act selecting the future contractual partner. Furthermore, in the field of regulatory administration, a public entity may not use an administrative contract unless expressly provided for by law (Richer, 2012). The traditional field of use of the administrative contract is public procurement and concessions, as well as cooperation with other administrative authorities (contract, concluded between several public law entities), while in granting subsidies or social assistance, both forms, i.e. the administrative act and the administrative contract, are used. However, the public entity does not normally have discretion in choosing the form of action, but it is predetermined by law (Noguellou and Stelkens, 2010, pp. 675–676).

⁷ Riigi Teataja, RT I 2001, 58, 354 of 6 June 2001 as amended (*Haldusmenetluse seadus*).

An administrative contract is classified according to two criteria: formal and substantive, which must be cumulative. The first relates to the subject of the legal relationship, i.e., the contracting parties (the "parties' criterion"), and the second relates to the object (the "object criterion") and/or the content (the "excessive clauses criterion") of the legal relationship. In addition, the legislator has expressly regulated the legal nature of certain contracts. French law therefore distinguishes between administrative contracts under the law itself (*les contrats administratifs par détermination de la loi*) and administrative contracts under the case law (*les critères jurisprudentiels*) of the Council of State (*Conseil d'État*). In some cases, these two categories also overlap (Waline, 2016, pp. 478–479).

3. ADMINISTRATIVE CONTRACTS IN SLOVENIAN LAW

3.1 Theoretical Framework

Slovenian law does not regulate administrative contracts as special nominative contracts, but they are accepted in theory and case law (Štemberger, 2021, p. 249).⁸ These are contracts where at least one of the contracting parties is (as a rule) a public law body ("the parties' criterion") and are concluded in the public interest which prevails over other contractual interests ("the aim criterion"), or (alternatively) contain provisions that constitute supremacy of the public law person, and which would not normally be accepted by the other contracting party in a private law contract ("the content or special provisions criterion") (Pirnat, 2000, p. 151).⁹ Slovenian law has followed French law (Štemberger, 2021, p. 249) in relation to the criteria for identifying administrative contracts. An administrative contract is defined both by the parties to the contract (formal criterion) and by the subject matter of the contract (material criterion), whereas in German law the status of the contracting parties is not relevant for the identification of a contract as an administrative contract (Maurer, 2011). The most typical administrative contracts are concession contracts (Štemberger, 2023b, p. 242),¹⁰ public financing contracts¹¹ and public authority delegation contracts (cf. Kovač, 2016, p. 83). They are normally concluded after the administrative (tendering) procedure has been completed and the administrative act selecting the future co-contractor has been issued. Therefore, they are based on a previously issued administrative act and cannot be classified as ADS mechanisms in administrative matters in the strict sense (Kovač, 2016, p. 87). However, using the established criteria for identifying administrative contracts, it is possible to find (in sectoral laws) also (administrative) contracts that replace authority (administrative) acts, although they are not defined as such in the legislation. This means that Slovenian law contains features of both French and German law.

Because administrative contracts are not specially regulated in the Slovenian legal system (apart in certain sectoral laws which apply as *lex specialis*), they are subject to the general rules of the law of obligations "insofar as its public law elements do not exclude it", meaning that these rules apply *mutatis mutandis*.¹² In other words, the rules of the law of obligations apply only to the extent that they do not conflict with the specific nature of the (particular) administrative contract (it is an *in concreto* assessment),

⁸ Decision of the Higher Court in Ljubljana, No. I Cpg 51/2018 of 17 May 2018.

⁹ See also, the following judgements of the Supreme Court of the RS: No. III Ips 31/2012 of 15 October 2013; No. III Ips 80/2018 of 12 February 2019, and No. II Ips 21/2018 of 14 February 2019.

¹⁰ Judgement of the Supreme Court of the RS, No. III Ips 64/2014 of 28. October 2015.

¹¹ For example, judgement of the Higher Court in Ljubljana, No. II Cp 1731/2020 of 25 February 2021.

¹² Judgement of the Supreme Court of the RS, No. III Ips 37/2020-3 of 19 January 2021.

whereas, in the case of private law contracts (of administration), they apply by analogy ("in full"), i.e. in the form laid down by law (without any adjustments), and subsidiarily (to the extent not otherwise regulated by specific laws, e.g. public procurement rules). The legal nature of the contract concluded by the administration (administrative contract or private law contract) therefore determines how the rules of the law of obligations shall apply.

This also means that disputes relating to the performance of such contracts are usually decided by courts of general jurisdiction, rather than administrative courts (as is typical in comparative law) (Pirnat, 2000).¹³

3.2 Administrative Contract as an Alternative to an Administrative Act – Legislative Overview

Replacing administrative acts with a contract is generally not permissible in the Slovenian administrative procedure. Namely, the GAPA only provides for settlement between parties with opposing interests, i.e., where several parties are involved in the procedure (Art. 137(1) of the GAPA), but not between the administrative authority that decides on an administrative matter and a party to the administrative procedure. Although a settlement between parties with opposing interests replaces (in whole or in part) an administrative act that would otherwise have been issued by an administrative authority on the parties' claims, it is accepted in theory that such a settlement is normally of a private-law nature (i.e. a private law contract) and consequently cannot be equated with a concrete administrative act (Kerševan and Androjna, 2017, p. 241). However, according to the position taken in this article, such a settlement can also have a public law nature, typical for an administrative contract, if one of the parties (with opposing interests) is a public-law entity representing the public interest. For example, according to the Spatial Management Act (*Zakon o urejanju prostora*, hereinafter: **SMA**¹⁴) the expropriating beneficiary (the state or municipality) and the expropriated person (the owner of the property subject to expropriation) may agree on damages or other compensation for the expropriated property after the expropriation decision has become final (Art. 217(1) of the SMA). The agreement shall be made on the record before the administrative authority in charge of the expropriation (the administrative unit according to the location of the property) and shall be included in the decision, which may be challenged on the grounds on which a settlement under the GAPA may be challenged (Art. 217(4) of the SMA), meaning that it is a special form of settlement between parties with opposing interests. However, in concluding this agreement, the expropriating beneficiary is not acting as a representative of a private interest, but as a representative of the public interest, since expropriation is permissible only if it is in the public interest (Art. 202(2) of the SMA). It is therefore an administrative contract, as it meets the parties' criterion and the aim criterion.

An expropriation contract also corresponds to an administrative contract in terms of its characteristics (Pirnat, 2000, pp. 152–153).¹⁵ It may be concluded instead of an expropriation, i.e., instead of an expropriation decision, which is an administrative act. The SMA provides that the submission of an offer to purchase the property is a procedural prerequisite for the initiation of an expropriation procedure (Art. 207 of the

¹³ For judicial protection in relation to concession contracts, see Štemberger (2023a, pp. 347–350).

¹⁴ Official Gazette of the RS, No. 199/21 as amended.

¹⁵ According to case law, it is a contract of a "compulsory" nature. See judgement of the Higher Court of Ljubljana, No. I Cp 1609/2018 of 30 January 2019.

SMA). The expropriation procedure may be initiated only if an expropriation contract has not been concluded within 30 days after the expropriation offer has been served (Art. 209(1) of the SMA). Since such a contract is always concluded by a public law entity as a contracting party (in Slovenian law, only the State or a municipality can be an expropriation beneficiary, Art. 205(1) of the SMA) and is concluded in the public interest, it meets the defining criteria of an administrative contract. In addition, the contractual freedom of the property owner is *de facto* limited, as the "threat of expropriation" lingers over it. However, this contract differs from a typical subordinate administrative contract replacing an administrative act in that it is not concluded with the administrative authority that decides on the expropriation, but with the expropriation beneficiary, i.e., an entity that would have the position of a party with an opposing interest in the administrative (expropriation) procedure.

Moreover, the same Act regulates an urban planning contract (Art. 167 of the SMA), whereby the investor and the municipality agree that the investor will build (at his own expense) part, or all the communal facilities for the land on which it intends to build, and in return will not have to pay (part of) the communal contribution. Construction of communal facilities, which are normally provided by the municipality, is a financial cost that is partly passed on to investors through the payment of a communal contribution based on the valuation decision (Art. 166 of the SMA). However, if the investor builds the communal facilities instead of the municipality, it is considered to have paid (part of) the communal contribution in nature. Therefore, the construction of municipal facilities based on an urban planning contract constitutes a (legal) alternative to the monetary fulfilment of (part of) the public law levy, i.e., the municipal contribution, which is otherwise levied by the municipality by a decision. Due to the presence of many public law elements in the contractual relationship (Art. 167(6) of the SMA), an urban planning contract can be classified as an administrative contract.¹⁶ Furthermore, it has similar features to an exchange contract, which is a type of subordinate administrative contract in German law.

On the other hand, decisions by the Competition Protection Agency accepting an undertaking's commitments in a restrictive practices' procedure (Art. 63(3) of the Prevention of Restriction of Competition Act, *Zakon o preprečevanju omejevanja konkurence*, hereinafter: **PRCA**¹⁷), or its corrective measures in a merger procedure (Art. 75(1) of the PRCA), are similar in substance to a settlement contract (as a subordinate administrative contract). With commitments, the undertaking in a restrictive practice's procedure commits to remedy the situation that gives rise to the likelihood of a breach of the prohibition of restrictive practices, while with the corrective measures the notifying party agrees to remove serious doubts about the compliance of the merger with the competition rules. If the Competition Protection Agency accepts these measures (proposed by the undertaking or the notifying party subject to the procedure), it decides (by administrative decision) that there are no longer grounds to continue the procedure (on the grounds of restrictive practices) or not to oppose the concentration and declaring that it is compatible with the competition rules */.../*. It therefore replaces the issuance of a (unilateral) decision by which the Competition Protection Agency (as a holder of public authority) otherwise finds an infringement, orders appropriate measures, and imposes an administrative sanction (under the conditions laid down by law). As such a decision is *de facto* based on an agreement between the Competition Protection Agency and the

¹⁶ Judgement of the Supreme Court of the RS, No. X Ips 283/2009 of 3 March 2011, and judgement of the Administrative Court of the RS, No. U 2282/2008 of 14 May 2009.

¹⁷ Official Gazette of the RS, No. 130/22.

undertaking to remedy (potential) infringements by way of mutual indulgence, it shall be – notwithstanding its designation as a "decision" – considered as a settlement contract (as a type of subordinate administrative contract) (Lovšin, 2023).

A settlement between an administrative authority and a person who was a party or an accessory participant in the procedure for issuing an administrative act is admissible in an administrative dispute. According to the Art. 57 of the Administrative Dispute Act (*Zakon o upravnem sporu*, hereinafter: **ADA**¹⁸), such a settlement may be achieved at any time until the administrative court's decision is issued, and it replaces (in part or in full) the contested administrative act. The possibility of replacing an administrative act with a judicial settlement (as opposed to a settlement between the administrative authority deciding on an administrative case and a party to the administrative procedure) is justified by the fact that the administrative authority and the party to the administrative dispute are acting as procedurally equal parties and that a neutral third party (the judge) is involved in the procedure for concluding the settlement (Kerševan and Androjna, 2017). However, according to the view taken in this article, the position of the administrative authority when concluding a court settlement is not *de facto* substantially different from unilateral decision-making in administrative procedure (cf. Đerđa and Wegner, 2020, p. 56), as the administrative authority, when concluding a court settlement, is still acting as a holder of public authority as it must ensure that the settlement is in accordance with the public interest. In addition, it must also consider the costs and duration of the procedure if no settlement is achieved (Art. 57(3) of the ADA). Therefore, it can negotiate only within the limits of the law, meaning that it cannot reach a settlement with content that could not have been determined in the operative part of a lawful administrative act. Protection of the public interest is therefore still the responsibility of the administrative authority, not the courts (principle of separation of powers) (Kerševan and Androjna, 2017, p. 585). This means, on the other hand, that the administrative court does not have the power to assess whether a proposed settlement is in accordance with the public interest, but only whether it is in accordance with the law (Art. 57(2) of the ADA). Furthermore, the court settlement replaces (in part or in full) the contested administrative act (Art. 57(3) of the ADA) and not the judgment of the administrative court, since the court generally does not have the power to decide on the administrative matter itself, but to annul the unlawful decision of the administrative authority and refer it back to it for (re)decision. It is therefore an alternative to the administrative authority's decision-making in the administrative procedure, although it is (in terms of its procedural effects) equivalent to a judgment by which a court modifies an administrative act, i.e., it has the effect of an enforceable court decision (Smrekar, 2019, p. 326). It can be concluded that a court settlement in an administrative dispute corresponds to the characteristics of a subordinate administrative contract, since the administrative authority is still acting as a public authority when achieving it (despite the contractual form). It is therefore substantially similar to a settlement reached in an administrative procedure between the administrative authority deciding on an administrative matter and a party to the administrative procedure, although it is formally concluded before a judge.

3.3 Shortcomings of the Current Legal Framework

Slovenian law does not regulate administrative contracts systematically, but they are scattered in a number of (sectoral) laws, which often devote a single article to the

¹⁸ Official Gazette of the RS, No. 105/06 as amended.

contract while leaving the essential issues unaddressed. For matters not covered by these laws, the general rules on contracts in the law of obligations apply, but they are not adapted to the specific nature of administrative contracts, as they regulate relations between equal subjects, whereas in administrative contracts the position of the public law entity is superior. In addition, private law is based on contractual autonomy and the dispositive nature of legal norms, while public law provisions are mandatory, and administrative authorities are bound by the principle of legality in their functioning, meaning that they need legal power to act ("reservation of the law") and that they must act within the framework of the law ("primacy of the law").¹⁹

Such an inadequate legal framework opens the door to the application of contractual provisions which are the result of the agreement of the contracting parties or their intention at the time of the conclusion of the contract and the power of the individual contracting party. This can lead to unequal treatment of parties in the same position and thus to a breach of the principle of equality before the law. Hence, even insufficient regulation can lead to a violation of the fundamental principles of administrative functioning, indicating that the possibility of (systemically) introducing subordinate administrative contracts into Slovenian legal order should be reconsidered in the future. This is also supported by the comparative law study, as administrative contracts are regulated separately and differently from private law contracts in all analysed foreign legal orders.

3.4 Other Reasons for Introducing Subordinate Administrative Contracts at the General Level

Subordinate administrative contracts have proven to be an effective way of regulating administrative law relations in comparative law (Hüther, Blänsdorf and Lepej, 2022a, p. 304) and their introduction into national legal systems is also encouraged by Recommendation Rec(2001)9 on Alternatives to Litigation between Administrative Authorities and Private Parties of 5 September 2001 of Council of Europe.²⁰

Among the reasons in favour of the introduction of contractual regulation of administrative-law relations are, in particular, the more flexible alignment of the public interest with the interests of the party, which can lead to a more substantively correct and better accepted solution to a specific administrative matter, since the party has had the opportunity to participate in its formulation; an increase in the predictability of administrative action and thus in legal certainty (Kerševan, 2004); an increase in the efficiency of decision-making in the public administration and the administrative judiciary (more cases decided in less time, and consequently lower costs), greater satisfaction of the parties and, above all, a change in the perception of the nature of dispute resolution in administrative relations from a strictly formalistic to a more consensual procedure (Žuber and Marflak Trontelj, 2020), with a consequent development of the creative role of the administration (Kovač, 2016).

¹⁹ For more on the principle of legality, see the decision of the Constitutional Court of the RS, No. U-I-79/20 of 13 May 2021.

²⁰ See also the CEPEJ Guidelines on better application of the Recommendations on alternatives to judicial settlement of disputes between administrative authorities and individuals (CEPEJ (2007) 15, of 7 December 2007).

4. POSSIBILITIES FOR INTRODUCING A SUBORDINATE ADMINISTRATIVE CONTRACT IN SLOVENIAN LAW

Contractual regulation of administrative law relations cannot fully replace the possibility of unilateral and authoritative functioning by the administrative authority. Some administrative areas do not allow for mutual negotiation of the content of rights and obligations (e.g., setting tax rates; cf. Kovač, 2016, p. 83). However, it can be an important complement to this form of administrative functioning. In any case, the administrative authority must be legally authorised to conclude the subordinate contract (principle of legality). Comparatively, there is a distinction between a general power, which is given to the administrative authority for an indefinite number of cases (for example, in a general legal act, such as the general administrative procedure act,²¹ a characteristic of German and Estonian law), and a specific (special) legal power, which is given for each individual case (in sectoral laws, a characteristic of Czech law). Given the diversity of administrative matters, the administrative authority should have a specific power to conclude an administrative contract in those areas where (in the opinion of the legislator) contractual regulation of the relationship proves to be appropriate. The conclusion of an administrative contract cannot, therefore, be left to the discretion of the administrative authority (as to whether the specificities of a particular administrative area do (not) allow for contractual regulation), but must be a possibility provided for by law, and its implementation will depend on the circumstances of the individual case (and the consent of the co-contractor). A different regime could lead to a nonuniform application of the administrative contract in practice in factually and legally similar cases, especially due to the lack of a proactive administrative culture in Slovenia.²² However, the fundamental characteristics of subordinate administrative contracts must also be regulated at a systemic level (in general law), following the models of German, Czech, and Estonian law, ensuring more legal transparency and, consequently, legal certainty. This can be achieved by extending the provisions on administrative settlement in the GAPA to the relationship between the administrative authority and the party to the administrative procedure, with the possibility of adopting additional specific or more detailed provisions in sectoral legislation. The GAPA would therefore (*mutatis mutandis*) apply to all those contracts concluded between an authority and a party instead of an administrative act, unless otherwise provided for in specific rules.

Such a settlement should be initiated by the party or the authority, and in some cases, an initiative for an amicable settlement of an administrative law relationship should also be a procedural prerequisite for the initiation of administrative procedure (e.g., in spatial planning matters). The settlement should be complete (and it would *de facto* replace the adoption of an administrative act) or partial (only on a specific disputed issue, while the administrative procedure would continue with respect of the issues not settled in the settlement).

However, contractual resolution of administrative matters should be limited only to those areas of administrative functioning where the administration has a certain margin of discretion in determining the content of the decision on the administrative matter.²³ This means, on the other hand, that the possibility of a subordinate administrative contract should (as a rule) be excluded in the case of legally binding

²¹ Cf. § 54 of the VwVfG.

²² For more details on the lack of a proactive administrative culture in Slovenia, see Kovač (2016).

²³ Cf. Kerševan and Androjna (2017, p. 585) and decision of the Higher Court of Ljubljana I Cpg 51/2018 of 17 May 2018.

decision making since the content of such a decision is predetermined and the administrative authority is bound by it (principle of legality). In these cases, the administrative authority should therefore be obliged to issue an administrative (authoritative) act conferring a public right or imposing a prescribed obligation on a party. However, if the administrative authority is given the power by law to determine certain modalities of the decision [e.g., the extent to which a particular obligation is imposed (cf. Kerševan, 2004, p. 190), the duration of the right, the time limit for the fulfilment of the obligation (cf. Kovač, 2016, p. 83) or the enforcement method, if not prescribed (cf. Đerđa and Wegner, 2020, p. 56), a contract could be concluded regarding these aspects.

In view of the above, the contractual resolution of administrative matters (between the administrative authority deciding on the matter and the party) is possible (in particular) in the areas where cooperation is to the benefit of both, such as concessions, spatial planning, taxation (Rusch, 2014, p. 191; cf. Rogjić Lugarić and Čičin-Šain, 2014), inspection matters,²⁴ obtaining public funds. In cases where the public and private interests are equally strong, there is no need to issue an administrative act (cf. Jerovšek, 2000, p. 171). Therefore, the initial hypothesis must be confirmed.

In addition, certain protective mechanisms must also be established to prevent abuse of the contractual form of functioning by the administration. In particular, the duty of the administrative authority to protect both the public and the private interest, regardless of the form of the administrative functioning, and to refuse to enter a contract (by issuing a decision refusing to conclude the contract) if it involves a disposition outside the law, should be maintained and explicitly stated by law. If a contract is nevertheless concluded, the effects of such a contract (unlawfulness, nullity, or other form of invalidity) must be determined. Namely, in the absence of specific substantive rules, the rules of civil law apply to administrative contracts, but they do not adequately (and fully) address all the substantive aspects of these contracts. Moreover, other (substantive) aspects of the administrative settlement, such as the conditions for its modification (e.g., due to changed circumstances, public interest) and termination, should also be specifically regulated in GAPA. The same approach has been adopted in German, Estonian, and Czech law.

It is also necessary to establish control over (the conclusion of) the administrative contract, for example by a hierarchically higher administrative authority (as in Czech law), or by an administrative court (as in German and Estonian law) - in the latter case, the provisions of the Administrative Disputes Act will also have to be adapted accordingly, as the Act does not currently provide for judicial protection against contracts, but only against unlawful administrative acts. This supervisory body should be empowered to interfere with the validity of such a contract, at the request of the parties (or of a third party affected by the contract), or *ex officio* (if the administrative, rather than the judicial, authority would be responsible for supervision).

In addition to the administrative settlement (as a form of subordinate administrative contract), Slovenian law should also regulate basic features of administrative contracts, supplementing an administrative act, following the French model. However, they should not be regulated in GAPA, but rather in a specific law. Namely, these contracts are concluded after the administrative act has been issued and the administrative procedure has been completed, and thus the GAPA is not the appropriate act to regulate this matter.

²⁴ Javna uprava 2020: Strategija razvoja javne uprave 2015–2020. Ljubljana: Ministrstvo za javno upravo, 2015, p. 123. Available at: <https://www.gov.si/assets/ministrstva/MJU/Kakovost-in-inovativnost-v-javni-upravi/Strategija/Strategija-razvoja-javne-uprave-2015-2020.pdf> (accessed on 18.08.2023).

5. CONCLUSION

With the modernisation of public administration, the functioning of administration is increasingly shifting towards the consensual regulation of administrative matters, which were traditionally regulated by authoritative acts. One of the mechanisms of the ADR is the administrative contract, which can be concluded from a comparative law perspective as an alternative to an administrative act and is an effective way of resolving administrative matters. In Slovenian law, however, administrative matters are typically resolved by administrative acts, since a settlement can generally only be achieved between parties with opposing interests. However, a number of other (sectoral) laws regulate contracts that correspond (in their substance) to the characteristics of subordinate administrative contracts but are (due to their non-comprehensive (sectoral) regulation) generally subject to the rules of (private) contract law. Given all the advantages of alternative dispute resolution and shortcomings of the current legal framework, Slovenian law should also – while respecting all the specific features of administrative decision-making – systematically regulate subordinate administrative contracts (replacing administrative acts), following the German, Czech and Estonian models, at least for some administrative matters.

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