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# ANALYTICAL REPORT
concerning
THE NEED TO IMPLEMENT
ARBITRATION IN ADMINISTRATIVE JURISDICTION

1. The considerable changes, introduced in administrative jurisdiction in the last years, updated it in compliance with the European requirements for a good administration. The Administrative Procedure Code /APC/, becoming effective in July 2006, is a modern law, which incorporates the procedures for the issuance, challenging and fulfillment of administrative acts, and makes provisions for the establishment of regional administrative courts.

Besides the familiar institutes, APC stipulated for the first time the possibility of **negotiating agreement with the administration** in all phases until the issuance or the challenging of the administrative acts. The agreement in the administrative procedure is a novelty in the Bulgarian legal system and, besides being a possibility for the direct inclusion of the natural persons in the state administration, it is also one of the tools for out-of-court settlement of disputes. Pursuant to art.20, par. 8 of APC, the agreement shall replace the administrative act and resolve administrative issues with the participation of the administration and all parties concerned. The agreement in administrative proceedings is expected to bring higher efficiency in the executive activity, to reduce the workload in the courts and to contribute for minimizing the court disputes.

According to statistical data, about 2400 administrative cases are initiated on the average per month in Bulgaria and their number is steadily increasing. Currently, the administrative cases are tried by the administrative divisions of the district courts as the first instance, while the Supreme Administrative Court /SAC/ acts as the cassation instance. Statistics point again that 14279 actions were initiated in the first half of 2006, which accounts for 17 % of the total number of initiated legal actions1. The lawsuits in SAC have also increased, where in 2005 each judge resolved an average of 200 cases2.

Besides courts, administrative jurisdictions also administrate law. These jurisdictions belong to the structure of the executive authority and act in accordance with the judicature principles. Administrative jurisdictions are the Commission for the Protection of Competition /CPC/, under the Law on the Protection of Competition, the Public Procurement Act and the Concessions Act, the Central Commission at the Ministry of Defense and the Bulgarian Army, the Disputes Department a the Patent Office, under the Patents Act.

Legal theory holds the view that the administrative jurisdictions do not have constitutional grounds for their existence. The main argument in favor of this view is Constitutional Court Decision No. 22, case No. 18/1998, according to which

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[1] For more detailed information, cf. the reports published on the site of the Supreme Judicial Council (www.justice.government.bg.)

[2] According to the report published on the site of SAC (www.sac.government.bg), 16 410 cases were initiated in 2005 before SAC and 12 493 cases were resolved.

“extrajudicial and administrative bodies in particular may not administrate justice because the Constitution precludes their existence”.

The advocates of the idea for the need of the special administrative jurisdictions claim that they will facilitate greatly the courts of justice by undertaking a share of the administrative disputes. Some special jurisdictions were found by the Constitution of 1991, but with the legislative reform and the adoption of the European Law, new ones were introduced. Regardless of the disputes in the doctrine, the administrative jurisdictions are expanding their field of application. Typical example is the new procedure for public procurement and concessions related disputes before CPC.

2. The arbitration procedure for extrajudicial settlement of disputes has a number of advantages compared to the special jurisdictions.

The legal system of Bulgaria is well familiar with and has traditions in arbitration. Its application is basic in the private law, particularly in the area of commercial legal disputes. Bulgaria has established 10 arbitrations, the more eminent among which are: Arbitration Court at the Bulgarian Chamber of Commerce and Industry /BCCI/, Arbitration Court at the Bulgarian Industrial Association /BIA/, Center for Mediation at the Bulgarian Union of Jurists, Arbitration Court at the National Association "Legal Initiative for Local Government ", Arbitration Court at the Association of Commercial Banks, Arbitration Court at the Bulgarian Stock Exchange – Sofia AD, Arbitration Court at the National Association “Business and Law”, Arbitration Court at the Industrial Association – Plovdiv, etc. The Arbitration Court at BCCI is a body with widely recognized authority with a history of over fifty years, while the Arbitration Court at BIA has been working for 7 years.

From the historical legal aspect, arbitrations in our country had been set up also on the strength of a special law. The Public Procurement Act, for instance, which was adopted in 2004, provided a possibility to settle public procurement related disputes before a specially constituted Arbitration Court at the Public Procurement Agency /PPA/. Such a body corresponded to the development tendencies in the European and in the International Law and Practices, and was a requisite both for optimizing the administration in the sector of the national economy and for creating reciprocal structures of the European bodies with regard to the specialized funds. The Arbitration Court at PPA was unable to unfold fully the prospects of its constitution, because its activity was terminated in April 2006, following the adoption of the Act on the Amendment and Supplement to the Public Procurement Act. The argument underlying this legislative change was “the incompatibility with the administrative procedure for appellation of public procurement orders”3.

Arbitration in the administrative jurisdiction is the more efficient way to relieve the judicial system, because arbitration is one-instance procedure and because its awards are

[3] 3a For the short time of its duration, the Arbitration court at PPA examined and finalized 5 cases.

not appealed before the court. There is only extra-instance, extraordinary control on arbitration awards, which is limited to the validity of the arbitration agreement and the adherence to the arbitration procedure, without its regularity in essence4.

In this sense, the arbitration procedure dealing with disputes in the sphere of administrative jurisdiction could be the viable alternative for the overburdened administrative courts, because it is capable of efficiently reducing the administrative lawsuits.

The arguments against admitting arbitration in administrative jurisdiction concern the peculiarities of the administrative challenge. It is acknowledged that the ex-officio principle implemented by the court and the right of the court to replace the administrative organ in its competence to produce (or amend) an administrative act in the settlement of the dispute upon its merits is essentially an obstacle to allow arbitration. In so far as the arbitration is a voluntary, non-governmental body, it cannot exercise state supreme powers and undertake the liability of the state for damages caused by administrative activity. Therefore, the arbitration court cannot replace the administrative body and respectively the court of justice in its explicit competence to operate in substance and produce an administrative act.

The current administrative jurisdiction tendencies, the broader participation of natural persons in administration, the undertaking of state functions by citizens organizations, the opportunities of electronic administration and public-private partnership – all these provide ground for reflection.

The possibility for the non-governmental bodies and citizens organizations to exercise state functions was familiar to the effective Bulgarian law even before the adoption of APC. This possibility was further developed and expanded by APC and by a number of special laws. Pursuant to art. 21, in connection with §.1, p. 1 and p. 2 pf APC, administrative acts may be produced not only by administrative bodies, but also by a number of private legal subjects, empowered to exercise administrative authority by virtue of a law. Some examples of this aspect are art. 7, p. 6 of the Public Procurement Act, § 1, p. 11 of the Concessions Act, art. 148 of the Road Transport Act, etc. Administrative acts are not only the declarations of the state administration organs, but also certain acts, actions and inactions of other subjects, which are not essentially authoritative and which are not targeted to the direct functioning of the state mechanism. The concept 'administrative act' covers also the administrative services, provided both by administrative organs and private legal subjects on the strength of administrative contracts.

The arbitration juridical authority proceeds from the volition of the disputing parties and in this meaning, the trust in arbitration exceeds the trust in the mandatory special jurisdiction. Arbitration has juridical authority only provided that all parties, concerned

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[4] Practice in civil jurisdiction shows only an insignificant percentage of repealed arbitration awards on this ground.

with the issued administrative act, have expressed their will to give it the authority to settle the dispute, while the juridical authority is mandatory for the special jurisdiction and proceeds by virtue of the law.

The main issue of accepting arbitration in administrative jurisdiction is which administrative disputes are subject to treatment by arbitration and what authorities would the arbitration have, if the administrative act is found to be irregular?

Naturally, not all administrative disputes should be subject to arbitration hearing. With the issuance of acts, the administration resolves daily most diverse tasks within the public governance. The issuance of administrative acts is an expression of the state supreme power of administrative bodies. The scope of the state regulatory impact is extremely broad – from national security, public order, healthcare, education or fiscal issues up to a number of economic (economic and commercial) issues.

However, a large number of the administrative acts go beyond the scope of the direct state administration and reflect in the area of economic activity. Such are the cases of issuing permits for a particular business activity, issuing licenses, providing administrative services, etc. The administrative acts often give indirectly rise to civil legal consequences as an element of complex factual composition of negotiating contracts, such as public procurement contracts, concession contracts, public services contracts, etc.

The rules of APC include in the scope of administrative jurisdiction also disputes, which were examined so far under the general claim proceedings. Such are the claims for damages caused by irregular acts and actions of the administration under the State and Local Government Liability Act for Damages /SLGLAD/ and unlawful actions in the enforcement of administrative acts. The declaratory actions, stipulated in the Code, establishing the existence of an administrative relationship (art. 128, par. 2) and the reduction improbation (art. 128, par. 1 p. 8) now fall within the cognizance of the administrative court, while they were examined in the past under the general civil procedure (art. 97 and art. 109 of CPC). Such disputes and other similar disputes should be subject to arbitration procedures because they are civil in essence.

The juridical competence of the arbitration should cover also the disputes, which go beyond the scope of the essential tasks of the administration and which give rise to direct or indirect civil legal consequences. Such are the administrative acts, which reflect on the economic activity. The businesses are well familiar with arbitration and are directly concerned with its implementation. The slow administrative jurisdiction is directly frustrating for the business because economically it is futile to achieve even a fair result, when such result is postponed for an indefinite time.

The practice of some European states and a number of normative acts of the Council of Europe contain arguments for the admissibility of arbitration in the administrative jurisdiction. Back in 1981, the Council of Europe adopted Recommendation No. R (81)7 on the measures facilitating access to justice, and in 1986 – Recommendation No. (86)12, concerning measures to prevent and reduce the excessive workload in the courts. These

recommendations established that conciliation, arbitration and mediation are tools, which, if used widely, could reduce the excessive workload in the courts of the European states. Treating especially administrative disputes, in 2001, the Committee of Ministers adopted Recommendation No. R(2001)9 on the alternatives to litigation between administrative authorities and private parties. The quoted European acts establish that the excessive load of the courts derogates the right to hearing the case in reasonable time, stipulated in art. 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The alternative out-of-court mechanisms are simpler, more flexible and offer faster and cheaper resolution of disputes. The recommendations emphasize that the wide implementation of alternative mechanisms for settling disputes may bring the administration closer to the public and avoid the antagonism between the litigating parties. The out-of-court methods encourage participation of citizens in the activity of the administration and provide the public with better information about it. In this way, the administration will become more available to the citizens and at the same time – better informed on the public opinion.

According to p. 63 and p. 64 of Recommendation No. R(2001)9, arbitration has no place in disputes proceeding from acts, which settle the essential tasks of the administration. It cam be applied only for challenging acts, which have as effect negotiation of a contract with private persons. In the meaning of the Recommendation, arbitration may exercise indirect control on the legality of the produced administrative act, triggering rights (in personam) for the private persons. If the civil consequences of the produced administrative act are disputed, the arbitration may also rule on the legality of the administrative act. This will include also administrative acts, which are part of a complex factual composition of negotiating a contract between the administration and private persons. The examples listed in the Recommendation are the public procurement contracts, public service contracts, provision of supplies and generally, the contracts without direct relevance to the essential tasks of the administration.

Examples of admissible arbitration in the disputes between the administration and private parties can be found also in some national European legislative systems.

Italy, for instance, has established an operating arbitration board for the public construction sector, which is a judicial body, replacing the courts without jurisdiction in this domain.

In Portugal, the state and other public legal companies may negotiate arbitration agreements, if this is stipulated in a special law. APC stipulates the inclusion of an arbitration clause in the administrative contracts and determines several categories of administrative disputes, such as the public construction contracts, which are subject to arbitration. The Portugese draft laws on administrative disputes accept arbitration as a tool for settlement of disputes related to administrative contracts, liability of public authorities and some issues with respect to the state service.

Arbitration in Greece is a legal method to resolve litigations on administrative issues, provided this is regulated with a law, or if the contract has an arbitration clause, which is

lawful. The arbitration court rules on factual and legal issues, and has authority to give orders to an administrative body for the payment of compensation, but has no authority to cancel or change the content of administrative acts.

The arbitration procedure in Switzerland is possible in certain strictly determined cases like the compulsory purchase.

In Belgium, article 1676-2 of the Civil Cod allows the recourse to arbitration for public legal companies in the cases, where this has been regulated by an international treaty or a special law.

In conclusion, in the context of the quoted recommendations and by the experience of the several European member-states, which were mentioned, we can draw the conclusion, when determining the scope of arbitration, that it can be applied the following cases in administrative jurisdiction:

- administrative disputes, which are civil in essence, but by virtue of APC are referred to the administrative jurisdiction. Such are the disputes concerning compensations for damages caused by unlawful actions and inactions of the administration, by execution of administrative acts issued by organs and organizations with administrative authorities and those administrative acts, which are issued by administrative organs, but which have direct or indirect civil consequences and which concern the business sector.

- disputes generated by administrative acts, issued by private legal subjects (organizations) with administrative authority in the meaning of §1, p.1 of the AP Code. Most of them have direct civil legal consequences in the economic sector, or represent in essence the provision of public or administrative services.

Arbitration is inadmissible in the direct challenging of acts, which ensure the functioning of the state and which exercise direct supreme powers. Such are the acts in the areas of state security, public order, public healthcare, conducting elections, fiscal issues, etc.

Regarding the arbitration competence to deal with an administrative dispute, in consideration of the practices in the European member-states and in the meaning of the quoted Recommendation of the Council of Europe, we should conclude that arbitration judicial competence should be reduced only to establishing (finding) an irregularity of the administrative act, but not to substituting the power of the administrative body to issue a new administrative act compliant with the law. In the meaning of the CE Recommendations, arbitration should not have such sovereign competence, leaving this possibility to the administrative organ, which should receive back the file with prescription regarding the application of the law.

3. By implementing arbitration in administrative jurisdiction, the legal system of Bulgaria will meet largely the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The adoption of

arbitration will have a positive impact on the court system, because arbitration is the tangible opportunity to reduce its excessive workload. This will limit the tendency for the ever increasing administrative cases as result of the larger subject of administrative jurisdiction.

All actors in the process will benefit from adopting arbitration in administrative jurisdiction. The parties are definitely interested in the prompt resolution of administrative disputes, within one or two months, which on the background of 2 to 3 years court proceedings is a great advantage. The arbitration procedure is also cheaper because it involves smaller expenses. The arbitration fee is paid as a lump sum because the dispute is examined by one instance only. By allowing arbitration in administrative jurisdiction, the businesses will be able to enjoy the advantages of the arbitration procedure, such as promptness, efficiency, transparency and confidentiality. The procedure before the arbitration court is transparent, because each litigant party chooses its own arbitrator, who is part of the decision-making tribunal. To put it figuratively, each disputing party has its own representative in the decision-making tribunal. This reduces to a minimum the possibility of illegal impact on the tribunal settling the dispute. Quite often, the parties to a business dispute need confidentiality, which is difficult to achieve in a state court of justice, where the principle of publicity operates.

Arbitration will reflect also on the efficient work of the administration. There have been many unfair parties, profiting from the lengthy procedure of the court litigation with the single aim to suspend the execution of the administrative act. By rule, challenging has a suspension effect. Allowing immediate execution is an exception and it is not recommendable for a wider implementation due to the risk of subsequent repeal of an executed act, which will create greater problems and generate new claims for compensation of the affected parties. In this meaning, the prompt resolution of the dispute and the issuance of a sound administrative act is a good option for the administration to deal efficiently with executive issues.

The practical implementation of the need to introduce arbitration in the administrative jurisdiction has to go through a concept development of the legal regulation for the arbitration and proposal of model versions for legislative amendments in the current legislation. In this way, from the practical aspect, the idea of regulating the arbitration procedure for challenging administrative acts will be put on the agenda of the lawgiver and to the attention of all interested parties. Such initiative will reflect the requirements of the Community Law and will rank the Bulgarian legal system among the progressive judiciary models.