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# ADMINISTRATIVE AGREEMENT AS A FORM OF IMPLEMENTATION OF THE DISPOSITIVE METHOD OF ADMINISTRATIVE LAW

**Summary.** In the article, the author carried out the description of the administrative agreement. In particular, in the author's opinion, with the dynamic development of the institution of administrative agreement as a source of administrative law and form of public administration, the participation of individuals in the administration of a significant number of legal relationships will subsequently grow and change, and then the gradual expansion of boundaries of the influence of the dispositive method of administrative law on the social relations that shape its subject. In this context, it is proposed at the legislative level, in particular, in a separate special law, to consolidate the institution of the administrative agreement with its legal definition, principles of implementing its norms and conditions, procedures for its conclusion, change, and cancellation, and the like.

**Key words:** administrative law, administrative agreement, administrative law method, discretion, dispositive method, imperative method.

In modern conditions of the development of domestic law, dispositiveness (from the Late Latin *dispositivus* – the one who manages, from the Latin *dispono* – arrange, organize) received general legal significance. It finds expression both in substantive law and procedural law, at the level of empowering rules of private and public law, ensuring their mutual integration with the help of means of the dispositive method of legal regulation. At the beginning of the XX century, scientists emphasized the special significance of dispositivity for the legal regulation, its versatility, and the uniqueness of its legal influence [1]. Moreover, the main issues about the essence, legal nature, and significance of dispositiveness were comprehended by the legal doctrine of the pre-revolutionary period [2]. Already in the first scholarly works devoted to the study of dispositivity, there was a tendency to distinguish between two types of dispositiveness: substantive and formal. At the same time, the content of the concept of substantive dispositivity was not limited to branches of substantive law, but its understanding extended to the field of procedural law [3, p. 18].

In the domestic legislation, the legal definition of dispositiveness is absent and there is no generally accepted interpretation in the legal doctrine. Such a situation can be explained by the fact that dispositivity is a multifaceted phenomenon, which permeates many branches and institutions of private and, strangely enough, public law. That is why, representatives of branch legal sciences, based on the specifics of the legal sphere, which they are investigating, determine both the concept of dispositiveness and forms of its manifestation somewhat diversified from each other. In legal literature, dispositivity is understood both as a characteristic feature, or rather, a kind of method of legal regulation, and as an institution of law, and as a principle of law.

As a problem of scientific knowledge, dispositiveness was originally developed in writings of representatives of the criminal and civil process, but it is the general theory of law, including using scientific achievements of "domain experts", laid the foundation for a modern understanding of the dispositive method of legal regulation. In the theory of law, the category of dispositivity is considered as a "special model for constructing a legal matter". So, S.S. Aleksieiev believes that it is one of such models (permissive or dispositive construction of the legal material, which is implemented in the scheme: subjective right + legal guarantees), which is based on private law. Its meaning – to provide the person with the opportunity to determine his own behaviour by himself, which opens the space for acts of a person in his vision, on his own accord, and in his own interests [4, p. 589]. According to S.S. Aleksieiev, the essence of dispositive regulation is expressed in the fact that "the lawful actions of participants in social relations themselves are relatively independent, individual, "autonomous" source of "legal energy" [5, p. 295].

O.Yu. Hlukhova in general formulated the conclusion that the scholars and lawyers laid the foundations for the emergence of the concept of the institution of dispositivity, based on the connection of the private law nature of dispositivity with the public sphere of its expression [2].

In turn, M.I. Koziubra believes that the specified method of law involves organizing the behaviour of subjects of legal relations by establishing three types of legal rules: a) rules that establish limits of permissible behaviour of subjects; b) subsidiary rules, that is, those which apply only if subjects themselves have not established other rules (failed, unwanted or forgotten to establish them) to arrange relations between themselves; c) rules that embody principles of legal regulation of a certain sphere of social relations.

The dispositive method, according to the scholar, involves free self-regulation by subjects of their behaviour on the basis of the principles of law, establishes only the limits and procedures of such self-regulation. It is peculiar primarily for the private law since it involves the independence of subjects in choosing their version of behaviour. In this case, the right respects the autonomy of subjects, proceeding from the fact that they are better known for the specifics of relevant relations, recognizes the possibility of decentralized coordination legal regulation (in particular, due to the conclusion of transactions) [6, p. 100].

According to P.V. Khriapinskyi, who explores the potential of encouraging rules of criminal law, dispositiveness can be

regarded as a general legal, universal method of legal regulation, expressed in the normatively foreseeable possibility of choosing one or another variant of behaviour by a person by own will at own discretion [7, p. 150].

A.R. Valiieva, who studies the double legal nature and patterns of interaction between the private law and public law principles of dispositiveness in the judicial jurisdictional process, notes that dispositiveness in substantive law and procedural law has a single legal nature. Dispositiveness has its legal framework, which are the rules of law, which establish the freedom of subjects of law to dispose, at their own discretion, their substantive and procedural rights at the level of both private and public law. Unlike the norms of law, which establish the imperative rights of private and public actors, as emphasizes A.R. Valiieva, their implementation is limited to self-regulation. The legal nature of procedural dispositivity is characterized by inter-branch connections with dispositivity in substantive law. Procedural dispositivity is related to the substantive dispositivity in relation to which it performs a security function determined by violations of substantive law. According to A.R. Valiieva, the difference between manifestations of substantive and procedural dispositivity consists in the nature and content of transactions addressed to the subjects of law. However, their essence is unique – freedom of the will of recipients of the authorized rules of law in lawful, at own discretion, disposal of substantive and procedural rights belonging to them. As the scholar emphasizes, the unity of the legal nature of substantive and procedural dispositivity can serve as the basis for a broad understanding of dispositivity as a legal principle of law [3, p. 35–36].

In the Glossary of Terms of Administrative Law with reference to works of S.H. Stetsenko, the dispositive method is identified with civil legal and is disclosed as a method characterized by the fact that the object of management has the freedom to choose behaviour in a particular situation [8, p. 119]. It seems that such a variant of interpretation of dispositive method is somewhat controversial since instead of first priority emphasis on the equality of subject of administrative law, which is achieved with the help of dispositive principles, the authors emphasize on subordination, which is only limited (not prohibited) by a certain freedom of behaviour. In other words, the use of category "object of management" in the context of the dispositive method of administrative law, in our belief, brings to nought the right understanding of its essence and reflects a dogmatic view of the role of administrative law and regulatory influence of its rules.

The most meaningful view of the essence and role of dispositive method of administrative law was given by V.B. Averianov, who not only recognized the possibility of applying dispositive principles in the administrative law (which is repeatedly emphasized in this research) but also focused attention on the necessity of using the full potential of its elements. In particular, V.B. Averianov in his numerous works often drew special attention to the modern transformation of the method of administrative law. The scholar in the field of administrative law stressed that the imperative method of regulation, which is traditional for administrative law, is substantially complemented by elements of the dispositive method. In particular, the use of general permits acquires more and more significance that can be rated as a key direction of the transformation of the method of this branch of law, which is taking place in modern conditions of its development and reformation. On the quite right opinion of the scholar, a spectacular example of the use of general permits in administrative legal regulation is the citizens' provision of a great massif of rights that follow from constitutional rights of citizens [9, p. 78]. Revealing profound significance of the issue of rethinking of the method of administrative law and its transformation for a new doctrine of administrative law, the outstanding scholar emphasized that this rethinking is probably the most complex task because here the positions of the Soviet scientific school are firmly held and the estimation of the method of administrative law is considered as unambiguously imperative. The appropriateness of using at least certain elements of another main – dispositive – method of legal regulation, as V.B. Averianov stresses, is said, so to speak, "shyly-modestly", as if praying for such courage. But is it really impossible in administrative law to combine features of the two methods mentioned [10, p. 61]?

As perspective in the context of administrative legal regulation that combines both imperative and dispositive elements of legal influence, V.B. Averianov considered further development of the institution of administrative agreement [9, p. 77]. Completely agreeing with the scholar and his abovementioned thoughts, we think we need to put into words our own view of the understanding of administrative agreement and prospects of its definitive introduction in the system of forms of administrative legal influence. Along with that, it should be mentioned that the author's view of this problematics is based on the theoretical foundation developed by representatives of the science of administrative law thus it is worth starting its consideration from the analysis of corresponding doctrinal sources.

Administrative agreement as a subject of scientific research predictably attracts the attention of legal scholars who justly note that at the level of substantive administrative legislation, this institution remains unregulated. According to R.O. Kuibida and V.I. Shyshkin, features of administrative agreement may include the following: administrative legal personality of subject of authoritative powers when concluding administrative agreement, legal inequality of parties which is expressed in exclusive authority of "managed" party of agreement; public legal nature of contractual obligations; mandatorily determined terms of agreement by means of designing; the purpose of agreement – to meet public interests [11, p. 398]. According to V.B. Averianov, the administrative agreement should be considered as an agreement concluded by subjects of administrative law on grounds of administrative legal rules in national and other public interests, which legal regime is determined by the content of authoritative powers, which carrier is obligatory one of the parties [9, p. 280]. Given the specified definition, features of an administrative agreement, in V.B. Averianov's opinion, are the following:

1) the emergence of a public authority in connection with the implementation of its authoritative powers by the executive body or local government;

2) the cause of the occurrence is the law enforcement act adopted by the said authorities;

3) organizing character;

4) the purpose is to meet public interests, achieve public good, that is, the domination of social goals [9, p. 279].

In general, I.P. Holosnichenko, M.F. Stakhurskyi, and N.I. Zolotarova demonstrate a similar understanding of this institute of administrative law [12, p. 16]. At the same time, scholars emphasize that contractual forms should be actively used in relations between state executive authorities and local authorities, for example, when transferring object management from the local government to the city district administration [12, p. 17].

V.K. Kolpakov believes that the administrative agreement is an agreement of parties, defined by acts of administrative law, one

of which parties is the bearer of state authoritative powers in relation to others [13, p. 220]. Approximately the same understanding of the essence of the administrative contract is proposed by Yu.P. Bytiak and O.V. Konstantyi, who argue that an administrative agreement is a legal act of management, which is concluded on the basis of legal rules by two (or more) subjects of administrative law, one of which is necessarily an executive body, may contain mandatory rules of conduct (regulatory character) or establish (change, terminate) specific legal relations between its parties (individual character) [14, p. 106].

In turn, K.K. Afanasiev considers an administrative agreement as a voluntary agreement between two or more subjects of administrative law, one of which is endowed with its own or delegated authority in the field of public administration over the solution of executive and regulatory issues, which is concluded in the form of a legal act that establishes (terminates, changes) their mutual rights, duties, and responsibilities [15, p. 51]. Among the main signs of the administrative agreement, K.K. Afanasiev considers the following:

1) participation of the executive body or local self-government body as a mandatory party;

2) practical implementation by these authorities of powers granted to them for the implementation of state-management activities;

3) implementation of this activity in the field of public administration;

4) legal regulation and protection of relations established by the agreement should be carried out according to the rules of various branches of law but based on the rules of administrative law as it is these rules will be of binding character for contractual parties [16, p. 107–108].

In turn, V.M. Bevzenko and R.S. Melnyk consider that it is necessary to speak about an administrative agreement in such cases as: it is directed to realize rules of administrative law and, accordingly, establish (change, terminate) administrative legal relations; obligations imposed by it or orders realized within its limits are administrative-legal. In the view of scholars, it gives grounds to state that agreement is considered administrative if it is directed to the realization of administrative rule; which contains an obligation to issue an administrative act or to perform another administrative action; which is based on obligations or rights of a private person enshrined by rules of administrative law [17, p. 293].

In addition to these theses, the scholars express their opinion about views of the essence and signs of administrative agreement that exist in the national science. In particular, according to right opinion of V.M. Bevzenko and R.S. Melnyk, "parties of contractual relations are not that sign which allows <…> unambiguously defining the legal nature of agreement. <…> Such sign as "the presence of relations of power and subordination between contractual parties" also cannot be used as a criterion of delimitation of said agreements because a large number of administrative legal relations are not authoritative by nature and thus administrative agreement does not necessarily have to be characterized by authoritative features" [17, p. 292–293]. However, the scholars in the field of administrative law consider therewith the fact that the agreement fulfils a public task (meets public interest) is also not decisive for the establishment of the legal nature. In this context, V.M. Bevzenko and R.S. Melnyk emphasize that subject of public administration can achieve public goals also by the way of concluding private law agreement [17, p. 293]. We do not share the latter thesis of reputable scholars because we believe that the essence of administrative agreement is properly its orientation to the exercise of powers of public administration in a special form, which is noted by these scholars indicating that "administrative agreement is a tool of activity of public administration, and the introduction of administrative-contractual form of activity of public administration became a consequence of changing the format of relations between public authority and private persons" [17, p. 289]. From this follows that even if one assumes that private law agreement also can be an indirect form (or separate stage) of achievement of public interest (which in some cases of law enforcement practice is quite likely, in particular, acquisition of certain property that will be further used for the purpose of exercise of concrete powers of a state agency etc.), then definitely administrative agreement is exclusively oriented to meeting public interest, and the realization of private interest with its help can be carried out only by means of a formula: public interest is equal to the set of private interests.

Moreover, private law agreement cannot be considered a classical form of activities of public administration as directly at the expense of precisely this agreement (economic or civil), a concrete power of subject in relation to the administration of one or another legal relation is not exercised. As it is already indicated above, we believe that private law agreement can be used by public administration authority only for ensuring the exercise of powers of such a subject; in other words, such an agreement serves as a certain stage that precedes the direct execution of the specified set of powers.

Problematics of the administrative agreement are extremely meaningfully disclosed on the pages of the textbook "General Administrative Law" under the general editorship of I.S. Hrytsenko. In particular, the corresponding chapter of the textbook meaningfully investigates some aspects of administrative agreement in the theory and practice of foreign countries, its concept, features, and importance, court practice's view of this issue, legal prerequisites for the conclusion of an administrative agreement, grounds for the execution of an administrative agreement, legal consequences of its illegality, etc. [18]. For instance, the authors of this textbook note that experience of some European countries confirms that there is no unified understanding of administrative agreement in Europe. In some countries, agreements with the participation of administrative authorities are recognized as a sphere of private law (Lithuania), in others – their scope is very limited (Latvia), somewhat wider (Estonia, Germany) or very wide (France). The issue of administrative agreements is usually regulated by administrative procedure codes, special laws regarding some types of agreements, and in the absence of regulation, provisions of the civil law of contracts are applied. Certain types of agreements can be directly determined by law as administrative, in other cases, their nature is determined by the court [18, p. 277].

What about court practice and even the supreme body – the Supreme Court of Ukraine, interpretation of the concept of administrative agreement, the authors of the textbook quite rightly point out its ambiguity. According to the scholars in the field of administrative law, the greatest problem is the requirements for agreements regarding the disposal of state or communal property, in particular land, by state or local governments. In truth, one can note the orientation of the Supreme Court of Ukraine to the viewpoint that these agreements are not administrative because, with their help, state and local authorities exercise not power administrative functions but solely ownership powers [18, p. 285].

In the opinion of I.S. Hrytsenko, R.S. Melnyk, A.A. Pukhtetska, and others, features of the administrative agreement are necessary (those determined by CALP of Ukraine) and additional (those relating to all or a part of the administrative agreements). To the necessary features scholars include: 1) the obligatory party in it is power entities (the other party or other parties may be both the subjects of authoritative powers and other participants of legal relations); 2) its content (the subject matter) are the rights and obligations of the parties associated with the exercise of at least one of the power administrative functions of the power entity. In turn, the following are outlined among the additional ones:

– the power entity, concluding the relevant agreement, acts to meet not personal needs as a natural or legal person, but public interests (needs);

– the power entity, as a rule, when entering into such an agreement, is bound by requirements (procedures, restrictions, etc.), determined by the legislation both as regards the choice of the counterparty, so in terms of establishing the essential terms of the agreement;

– the power entity concludes an agreement on the realization of its administrative legal personality, but not civil one (for administrative legal personality, the status of natural or legal person makes no difference for the power entity);

– the power entity usually concludes agreement upon a decision made for the exercise of authoritative administrative power;

– the agreement can set up terms that are not typical for civil agreements and oriented to the optimal provision of public interest [18, p. 285–286].

Generally sharing the same vision of permanent features of an administrative agreement, we consider it necessary to clarify that such an agreement is not always concluded solely between subjects of public administration or with obligatory participation of at least one of them. We should note in this context that above there is an example how agreement-based regulation of delegation of authorities to the private person in relation to the administration of "parking" fee is taking place. Herewith one should emphasize that today the current legislation of Ukraine does not stipulate for any condition at which such a private person could not conclude a similar agreement with another private person on the delegation of a part of authorities to this person, for the fulfilment of an administrative agreement with the subject of public administration. In relation to this, we consider appropriate to emphasize that, as it is already mentioned in this research with a reference to works of V.M. Bevzenko and R.S. Melnyk, subjective sign cannot be determinant in the context of establishment of the legal nature of administrative agreement, even though it should necessarily be taken into account during the analysis of corresponding agreements with a view to their belonging to administrative ones.

Thus, we can state with assurance that along with the dynamic development of the institution of administrative agreement as a source of administrative law and a form of public administration, the participation of private persons in the administration of a large number of legal relationships will further considerably increase and change, and then a gradual expansion of influence of dispositive method of administrative law on social relations, which form its subject-matter, will take place. In this context, it is worthwhile to propose at the legislative level, in particular, in a separate special law, to enshrine the institution of an administrative agreement with its legal definition, principles of realization of its rules and conditions, procedures of its conclusion, change, and termination, etc. Moreover, in our view, the harmonization of legislation with provisions of p. 2 art. 19 of the Constitution of Ukraine in relation to the fact that state and local authorities, its officials are required to act on the basis of, within the limits of authority, and in the manner provided by the Constitution and laws of Ukraine, is extremely important in the aspect of prospects of further introduction of this institution in the practice of public administration [19]. There is a belief that the absence of legislatively determined procedure for concluding such an agreement gives grounds for ambiguous interpretation of the essence of this institution, generates uncertainty of court practice on this issue, and places in question separate cases of conclusion of administrative agreements by subjects of public administration from the viewpoint of their compliance with provisions of art. 19 of the Fundamental Law of Ukraine.

The abovementioned thoughts about the essence and role of administrative agreement highlight its special nature and confirm its ability to effectively regulate administrative legal relations also by means of dispositive norms, allowing its parties to determine independently means and forms of enforcement of their rights and responsibilities (powers). It is beyond argument that further transformation of the method of administrative law, which is being actively discussed on the pages of administrative-legal literature, will be carried out so to speak with the obligatory study of the regulatory capacity of the administrative agreement, which potential mainly depends on the level of its legal certainty. We believe, it is an agreement-based form of exercise of certain powers of public administration that is, say the least, an innovative step, and legal equality of parties as a requirement of such agreements will ensure and optimize attraction of private persons to the participation in the management of separate government and municipal processes.

Concluding, we should emphasize that dispositive method of administrative law is that guideline for further reformation processes in the field of public administration that has sufficient resource for essential modernization of public-private sphere. Certainly, the way of gradual expansion of the use of dispositive norms in administrative law is quite difficult, burdened not only with timeframe but also the mental perception of public administration as a regulatory machine, and provisions of administrative law as imperative regulators. However, rapid development of separate institutions of civil society, gradual transformation of national administrative legislation substantiate the trend to liberalization of legal regulation of administrative legal relations, development of contractual bases in the sphere of administrative law and consequent achievement of balanced use (simultaneous, mixed, etc.) of both imperative and dispositive fundamentals in administrative legal regulation, which, in its turn, is a clear example of continuous process of not only reinterpretation of the role and purpose of administrative law but also evidence of the fact that national administrative law science develops in the spirit of advanced modern European studies while not losing its nationality and independence.

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**Юровська В. В. Адміністративний договір як форма реалізації диспозитивного методу адміністративного права**

**Анотація.** У статті автором здійснено характеристику адміністративного договору. Зокрема, з динамічним розвитком інституту адміністративного договору як джерела адміністративного права та форми публічного адміністрування в подальшому суттєво буде зростати й видозмінюватись участь приватних осіб в адмініструванні значної кількості правовідносин, а отже, відбуватиметься також поступове розширення меж впливу диспозитивного методу адміністративного права на суспільні відносини, що формують його предмет. У цьому контексті запропоновано на законодавчому рівні (зокрема, в окремому спеціальному законі) закріпити інститут адміністративного договору з його легальною дефініцією, принципами реалізації норм та умов, процедурами укладення, зміни й розірвання тощо.

**Ключові слова:** адміністративне право, адміністративний договір, метод адміністративного права, диспозитивність, диспозитивний метод, імперативний метод.

**Юровская В. В. Административный договор как форма реализации диспозитивного метода административного права**

**Аннотация.** В статье автором осуществлена характеристика административного договора. В частности, с динамичным развитием института административного договора как источника административного права и формы публичного администрирования в дальнейшем существенно будет расти и видоизменяться участие частных лиц в администрировании значительного количества правоотношений, а следовательно, будет происходить также постепенное расширение границ влияния диспозитивного метода административного права на общественные отношения, формирующие его предмет. В этом контексте предложено на законодательном уровне (в частности, в отдельном специальном законе) закрепить институт административного договора с его легальной дефиницией, принципами реализации норм и условий, процедурами заключения, изменения и расторжения и тому подобное.

**Ключевые слова:** административное право, административный договор, метод административного права, диспозитивность, диспозитивный метод, императивный метод.