ACTS OF ADMINISTRATIVE ASSURANCE: NATURE AND EFFECTS

Mladen Mladenov[*]

Abstract

This article considers a particular type of measures taken by public authorities; that can be called "Acts of Administrative Assurance". In its essence, this type of measures is characterized by the following elements: i) a public authority, ii) adopts an act with the goal of providing for its future conduct, iii) concerning procedures affecting the same type of substantive interests protected by the law. The Principle of Protection of Legitimate Expectations as a base of such legal concept is examined accordingly. The next step is to distinguish 'typical' and 'atypical' Acts of Administrative Assurance, on the basis of a quick comparative analysis of both the legislations of some European countries and their judicial practice. *De lege ferenda* proposals are grounded in three possible methods of approaches – EU legislation, national general administrative procedural legislation and national sector-specific legislation. Conclusions about legal nature, legal origin, legal ground, legal significance, legal idea and legal effect of the Act of Administrative Assurance are also drawn in the end of the article.

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[*] Lecturer in Legal Studies, New Bulgarian University

1. Introduction

This paper has a modest task to describe in a general context the idea, nature, existence and effects of the legal institution of Acts of Administrative Assurance (AAA). The text is structured into six parts. The present first is the introductory one – with a broad view on the assurance as an institutional social phenomenon. The second one leans on the Principle of Legitimate Expectation as a basic principle for the entire European legal area. The third one examines the extant examples of typical Act of Administrative Assurance in the national legislations within Europe, respectively – the fourth one considers atypical forms of AAA. Both typical and atypical existence of AAA are analyzed in their legislative aspects; nevertheless judicial practice and legal doctrine are also used in the argumentation. The fifth part of this work is based on *de lege ferenda* issues – proposals for future legislative approaches. And the last sixth part locks the expose with the logical conclusions in consequences of the developed thesis.

The entire history of human civilization is based on relations between the individuals and the society, and very correctly Barry points out, 'people come to realize that social arrangements are not a natural phenomenon but a human creation'[1]. The human community bases itself on the organizational values, purposes and achievements in both public and private sector. The latter is self-organized (in a certain extend) and the relationships into it are endless as quantity, but also as diversity. And *vice versa* – the public sector subsists by the goods, realized by private sector. In free democratic states with rule of law and open economics, based on competiveness, the public sector *inter alia* regulates the private one with common legal rules. As Hart observes, 'even in a complex large society, like that in a modern state, they are occasions when an official, face to face with an individual, orders him to do something'[2].

The actors both in public and private sector need foresight as a broad vision for the future. In some cases they need even more – assurance in concrete dimension, plan or process.

[1] B. Barry, *Theories of Justice. A Treatise on Social Justice* (1989).
[2] H.L.A. Hart, *The Concept of Law* (1994).

When the politicians during the pre-election campaign promise to the potential voters this is a preliminary *political assurance* in a future policy, a declared line, which pretend to be supported in the course of elections. Commonly such an assurance is uncertain in its beginning, because the promised (during the pre-election competition) ideas for future realization are so many and inconsistent, that they are simply impossible in their combination. It is worthy to note here the thesis of Navarro and Rodriguez that, 'by reference to the ideal worlds there is no chance to represent obligations that stem from the failure to comply with other obligations'[3].

In case of strategic political acts of the government (in broad meaning) as declaration of the executive or/and legislative power, there is a *political assurance with a quasi-normative element (legislative)*. Although in a different context, Cooper punctually alludes to, 'convergence between the legal and political approaches'[4]. Usually such strategies in the modern times are based on idea of equity, transformed to promise for governmental care and its 'understandable" duty; and as Dworkin mentions "we believe our government … does have this duty'[5]. Martinot states that "it signifies a political transformation of legality (due process) into impunity (withholding of basic rights), which occurs as a rejection of accountability"[6]. Namely, the lack of accountability in the political process leads to impunity in any case, including in situations, when the political assurance is not kept. There are not directly expressed opinion by the politicians that their political statements are partially binding for their authors.

However, the rational mind knows that a level of changeability of the final towards expected result always exists to any promise, even for political statements. In such a direction Schedler draws attention to the fact that "We face natural, transcendental, technological, and systemic uncertainties…We and others may always act differently than we are supposed to"[7]. Hence, the own nature of the human life and society presumes

[3] P.E. Navarro & J.L. Rodriguez, *Deontic Logic and Legal System* (2014).
[4] P.J. Cooper, *Public Law and Public Administration* (2000).
[5] R. Dworkin, *Law's Empire* (2002).
[6] S. Martinot, *Due Process and the Reconstruction of Democracy*, 43 Soc. J. 2 (2016).
[7] A. Schedler, *The Politics of Uncertainty. Sustaining and Subverting Electoral Authoritarianism* (2013).

that even the promises are given conscientiously, the various factors beyond the promising person are able to change the promised and expected result.

While the enacted law with the act of its promulgation is a pure *legislative assurance* that the legal relations in the scope of this law will be treated in the course of it. But, as Craig marks, 'there is no sound foundation for the belief that issues of normative choice that do not entail balancing are less problematic than those that do'[8]. In this way, there is no guarantee here, in general, too.

Quite different is the *judicial assurance* with the interpretative decisions of the supreme courts (mostly in the legal systems of Civil Law) and precedents (in the legal systems in Common Law) – shown the line of subsequent judicial acts in similar cases. There is *condition sine qua non* here – the facts must be similar and the law should be the same, for following this line of jurisdiction. But, having in mind the very exact sentence of Posner that, 'the political and personal factors create *preconceptions*, often unconscious, that a judge brings to a case[9]'. Thereby, the facts and legal provisions must be considered in such a way, that the judicial decision to be turned aside of the judicial assurance. For that reason, it is very insecure in its nature.

But the essential difference here from the all assurances above is this one, which is *administrative assurance.* Firstly, it is neither political, nor legislative or judicial assurance, but derives from the executive. Secondly, it exists only in already developing administrative proceedings. And the finally, it is assurance to the concrete legal subjects (citizens and legal entities) and doesn't have legal effects to the third private legal subjects.

Exactly from these reasons this kind of assurance is always administrative act with and individual characteristics. It must have a legal base, i.e. – to be provided in the legislation (normally – in the administrative procedural legal norm from the general legislation, but also in the special legislation with the administrative rules).

Therefore the very plain title of this legal institution should be *Act of Administrative Assurance (AAA)*, because it is a legal act,

[8] P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (2015).
[9] R.A. Posner, *How Judges Think* (2010).

emitted by the organ from the executive power (or another public body with such a competence, or, 'hybrid public/private institutions or even fully private institutions[10]'), with the purpose of assurance in future act by this organ during the coming proceedings based on the same material legal interests.

2. Principle of Legitimate Expectations

Act of Administrative Assurance draws its legal ground in one of the most popular general principle of Law – the Principle of Legitimate Expectations[11]. Into the European legal area there is a plethora of judicial practice on it. Starting with the well-known, 'those who are subject to it are entitled to consider themselves to have suffered damage to their legitimate expectations or to their rights and to ask for reparation of the damage which has thus been done to them'[12], though, 'the concept of force majeure adopted by the agricultural regulations takes into account the particular nature of the relationships in public law between traders and the national administration'[13], across, 'does not… constitute an infringement of the principle of protection of legitimate expectation of the individual'[14].

It must be clarified right here, that the Principle of Legitimate Expectation is a basic principle for the entire European legal area. It might be founded in *one or many* legal acts – laws, administrative acts, contracts and agreements, etc. Thereby frequently there are series of acts or measures in being. They reach the same effect, but on the base of different approaches. Similarly, their authors might be different legal subjects – the legislator, the government, the municipality, the independent administrative body, the professional association, the certified organization, the private contractor and so on. Naturally, a single and unitary Act of Assurance can achieve the same result. The weight of this depends

[10] L Murphy, *What Makes Law. An Introduction to the Philosophy of Law* (2015).
[11] Also known as Principle of Protection of Legitimate Expectations.
[12] Judgment of the ECJ, 14 July 1961, in Joined Cases 9/60 and 12/60, Société Commerciale Antoine Vloeberghs.
[13] Judgment of the ECJ, 17 December 1970, in Case 11/70, Internationale Handelsgesellschaft.
[14] Judgment of the ECJ, 27 May 1975, in Case 2/75, Einfuhr- und Vorratsstelle für Getreide und Futtermitte.

from the legitimacy of the author of the act and from the trust of the recipient of this statement.

European Court of Justice (ECJ) counts 'the principle of the protection of the legitimate expectation of the parties'[15], towards the fundamental doctrine that 'the principle of respect for legitimate expectations prohibits those institutions from amending those rules without laying down transitional measures unless the adoption of such a measure is contrary to an overriding public interest'[16].

As is very clearly written, 'Although in general the principle of legal certainty precludes a […] measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected'[17], this principle is aimed to the future legal effects.

As the judicial practice says the scope of this principle is not general (hence – must be only individual one): "in such a context, the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules"[18].

Ought to highlight that unwritten (in the legislation) *proviso* for the application of the Principle of Legitimate Expectation is the following of the general Principle of Prudence: "the Court has consistently held that any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectations. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a […] measure likely to affect his interests, he cannot plead that principle if the measure is adopted"[19].

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[15] Judgment of the ECJ, 8 June 1977, in Case 97/76, Merkur Außenhandel GmbH & Co.KG.

[16] Judgment of the ECJ, 16 May 1979, in Case 84/78, Angelo Tomadini S.n.c. with Unione Industriale Pastai Italiani.

[17] Judgment of the ECJ, 25 January 1979, in Case 99/78, Weingut Gustav Decker KG.

[18] Judgment of the ECJ, 13 July 1995, in Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93, O'Dwyer and Others v Council.

[19] Judgment of the ECJ, 15 April 1997, in Case C-22/94, Irish Farmers Association and Others.

3. Typical Act of Administrative Assurance

As a base of this exposition, the contemporary Albanian legislation is considered as a simple example for the argumentation of the thesis, and the legislations of other European countries confirm in definitive scope the significance of the AAA and the similar legislative approaches to its typical form, and also in the next part of the text – the atypical states of this legal institution too.

Nowadays one among the very newest legislation in Europe gives a very precise definition: an 'act of assurance' is an individual administrative act, through which the public organ, if provided by a special law, may, preliminary assure that it will issue or refrain from issuing a certain administrative act at a later date[20].

In such a way, the Code of Administrative Procedure (CAP) in Albania[21] defines this specific legal institution – act of assurance, to be settled by a special legislation.

This legal provision from Albanian legislation will be one simple example on the ground of the thesis in this article. It may be expected - that into the broad European legal area (when the convergent evolutionary legislator creates laws) - the other counties will amend one day their legislations in the same direction.

There are two conflicting values at stake: the inequality with monopoly position (because the administrative organ is the only one in possession of administrative competence and in a such role it is dominant over the legal subject) and lack of transparency (but with legal certainty) from one side; and equal treatment with open possibilities to anyone and transparency (but with insecurity of endless changes of the legal conditions).

The elements of the Act of Assurance (AA) in the definitions above are:

First, beyond doubt this is an individual administrative act. In most legal systems in the world, the Administrative Law has close understanding about this main administrative institution. If we use the Albanian definition in Ibid, Article 3, paragraph1, letter

[20] Article 3, paragraph 1, letter c) from Law No. 44/2015, Code of Administrative Procedures of the Republic of Albania, adopted in 30.4.2015, into force from 1.5.2016.

[21] An official candidate for accession to the European Union since June 2014.

a) of CAP: an 'individual administrative act' is every expression of will by a public organ, in the exercise of its public function, towards one or more individually determined subjects of law, which establishes, modifies or terminates a specific legal relationship.

With deep respect to ReNEUAL Model Rules on EU Administrative Procedure[22] in its classification of non-legislative acts, adopted by EU institutions the AAA are not visible among private regulatory acts, interinstitutional acts, non-legislative acts of general application present specific problems, plans, and guidelines. Hence, this famous book of procedural rules "is opened" for future categories of non-legislative acts, why not for Act of Administrative Assurance.

Second, it is issued by the public organ. The Albanian CAP (Article 3, paragraph 6) is very precise and might be use even in global aspect with such a definition:

A 'public organ' is any organ of central power, performing administrative functions, any organ of public entities, to the extent they performs administrative functions; any organ of the local government, performing administrative functions; any organ of the Armed Forces, to the extend they perform administrative functions, as well as any natural person or legal entity, which, by virtue of a law, bylaw, or any other form, is conferred the right to exercise public functions.

Third, AAA is provided by a general procedural law. Therefore, it might be applicable by all public sector's institutions and organizations. On principle (but not always), the organic and procedural laws are general, but substantive (material) are special.

Fourth, it has got a preliminary significance related to the regular administrative procedure and its final aim – ordinary administrative act. The preliminary significance affects the present legal motivation of the legal subject, notwithstanding the endmost goal is the final (regular) administrative act.

Fifth, the main idea is assuring in issuing or refraining from issuing a certain administrative act. Sixth and final, the legal effect

[22] H.C.H. Hofmann, J.P. Schneider, J. Ziller, J.B. Auby, P. Craig, D. Curtin, G. della Cananea, D.U. Galetta, J. Mendes, O. Mir, U. Stelkens & M. Wierzbowski (eds.), *ReNEUAL Model Rules on EU Administrative Procedure. Administrative Rulemaking* (2014).

of AA is directed for assurance now, but for real issuing the certain act in the future. Here the assurance is only a bureaucratic promise from issuing or refraining from issuing a certain administrative act. This is very complicate active-passive and positive-negative legal picture in the time to come. In all possible four combination, depends of existence or not of the AA and in the same time – of the legal interests of the legal subject, the assurance now can be verify in the future only.

The combinations are: active-positive (issued act, satisfying the legal subject), active-negative (issued act, satisfying the legal subject), passive-positive (lack of issued act, satisfying the legal subject) and passive-negative (lack of issued act, satisfying the legal subject). Maybe to wit the legal doctrine as the current exposition is able to give assistance to both administrative and judicial practice and also to the next scientific works in connection with the correct understanding and implementation of the Act of Administrative Assurance, rendering on account the values of the going legal order and legal interests of the state, society and individual legal subjects.

This systematical order and doctrinal decomposition on elements, based on one legal definition in national legislation might be used generally for AAA's in global aspect, because of clear normative definition into Albanian CAP, which allows to disclose all important manifestation of this legal institution.

Article 103 arranges definitely the legal institution Act of assurance in Albanian CAP. By virtue of paragraph1, the AA is issued by the competent public organ only upon request of the parties and has at any case a written form. This means that the *ex officio* issuing of such type of AA is impossible. Normally, the public organ is concerned with apparent legal interest of the legal subjects, but not with their legal expectations. That's why the request here is needed. On the other hand, id the public organ is so worried *ex officio*, this abnormal administrative behavior is indicator for partiality, conflict of interest or corruption (or all of them in a pile). The form of prove is written form here – first, for the confidence of the legal subject, second – for the base of future investigation against the public body (for instance – in case of corruption). The second paragraph of Art.103 accepts that if prior to the issuing of the act of assurance, the competent public body considers that there must be a hearing with the person or persons,

or under the law the participation of another public organ is required, the act of assurance shall be issued after the hearing of the person or persons or the participation of the public organ.

The hearing here is the emanation of the Principle Duty to Hear the Addressee of a Decision, but with additional legal ground – in case of participation of another public organ. Brown and Bell accentuate on this "adequate opportunity of presenting views", which is nothing, but "necessity to hear both sides" *(audi alteram partem)*[23]. Harlow and Rawlings[24] point at the statements of Craig that "all legal systems have to determine the content of the right to be heard"[25]. All of these reputable scholars stress on the importance of right of the subject to be heard and for the corresponding duty of the administrative organ to hear this subject. Except for civil rights of the private persons, this procedural duty ensure the informed administrative decision-making process, as well. Thereby, the administrative organ reduce the risk of mistake to one acceptable level.

This is something as Insurance of Assurance, i.e. the public body insures itself against the future administrative or audit pretentions and litigations with one open and transparent procedure for future decision about issuing or not of AAA. The last third paragraph says that if after the issuance of the act of assurance, the facts or legal basis of the case change in such an extent that if the organ would have been aware of this change, it would not have issued the act of assurance, the latter shall no longer be mandatory for the public organ body. The third paragraph from Article 103 of Albanian CAP is very important normative ground for deep understanding of the real nature and legal effect of AAA.

It must be stressed that in both cases – when the facts or legal basis of the case are changed (but after the issuing of AAA), the same hasn't already binding effect for the public organ. The facts might be new or/and unknown, the legal basis might be new or/and modified national, but also International (or European) legislation.

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[23] L. Neville-Brown & J.S. Bell, *French Administrative Law* (2003).

[24] C. Harlow & R. Rawlings, *National Administrative Procedures in a European Perspective: Pathways to a Slow Convergence*, 2 Italian Journal of Public Law (2010).

[25] P. Craig, *EU Administrative Law* (2006).

There is a *proviso* here – if the public organ would have been aware in this changes (factual or legal) on the spot of issuing of AAA, it would not have issued this AAA. The "awareness" here has only intellectual (rational, cognitive) meaning, and excludes the emotional (irrational, spiritual) feelings of the public officials (in public body and its administration). The proviso in its fully conditional sense must be proved factually (with new legal facts or/and new legislation) in each case, when the public body wants to step back from the AAA and its legal effect.

The opposite is breach of the Principle of Legal Certainty and shows an arbitrary approach without legal grounds. The intricacy here is that the proviso (a negative one in its nature) must be applied *ex tunc* (since then; in the past) with the present-day knowledge. This abstraction is *legal fiction* in its pure manifestation. The only one lawful and correct way to apply this *fiction-proviso* is to replace the past factual or/and legal picture by the present one/ones. In such cases the conclusion must be that the AAA has no binding effect, because would not have be issued by public organ.

However, in some cases the Act of Administrative Assurance shall continue its binding effect, because nevertheless new factual or/and legal changes, the final factual and legal picture leads to the same legal conclusions (to issue AAA in the same content to the same legal subject).

Another interesting manifestation of similar necessities can be found in the legislation of another European country; that is, Serbia's Law on General Administrative Proceeding[26] (LGAP)[27]. One clear definition is given in Article 18, paragraph 1:

Guarantee Act is a written act with which the public authority binds itself, at the relevant request of the party, to adopt administrative act of specific content.

Paragraph 2 provides that Guarantee Act shall be adopted when stipulated by specific law.

From analytical point of view here there are two main differences from Albanian legal framework: first, the act is not

[26] Law on General Administrative Proceeding, promulgated State Gazette No. 18/2016, into force from on the eighth day following its publishing in the "Official Gazette of the Republic of Serbia" and shall be applied from 1.6.2017.

[27] An official candidate for accession to the European Union since February 2012.

assurance, but guarantee one; second, the public authority not simply preliminary assures, but binds itself for adopting administrative act of specific content. Anyway, the idea is the

The Failure to Adopt Administrative Act in Accordance with the Guarantee Act is in Article 19. The first paragraph is in sense that public authority shall adopt administrative act in accordance with guarantee act only upon party's request. This is a genuine appearance of the leading principle in the Administrative Law and Administrative Process – Principle of Legitimate Expectations (as considered above).

The second paragraph of Article 19 of Serbian LGAP declares that a party may lodge an appeal against administrative act when administrative act has not been adopted in accordance with guarantee act. Because of that, the provision of Article, paragraph 4 enacts that a party has the right to lodge an appeal in other cases stipulated by law (here is stipulated in general administrative procedural legislation, but there is no legal impediment the same to be pointed out in the special legislation).

What is more, paragraph 6 of the same article explains that an appeal against first instance decision may be lodged by any person whose rights, obligations or legal interests may be influenced by the outcome of administrative proceeding, within the same time limit as the party in administrative proceeding. As a legal consequence, based on Article 158, paragraph1, point 8, decision may be annulled due to the fact that administrative act has not been adopted in accordance with guarantee act.

Further, the third paragraph is very important (because of four specific exceptions) and enacts that the public authority shall not be obliged to adopt administrative act in accordance with guarantee act: when request for adopting administrative act is not submitted within a year from the day of issuing guarantee act or within other time limit stipulated by specific law (the specific time limit, when findings of fact, which are basis of request for adopting administrative act, are significantly different from what has been described in the request for adopting guarantee act (the disparate factual context summons different legal provision to be applied); when legal basis has been amended based on which guarantee act has been adopted in such manner that new regulation prescribes avoidance or setting aside of, or amendments to, administrative acts adopted on the basis of

previous regulations (in principle, the legislations operates *ex nunc*, and when the public authority is functioning now, it applies the legislation in force, not the previous legislation); when there are other reasons stipulated by specific law (exceptions into the legislation).

Article 20 provides that the Guarantee Act cannot be against the public interest, nor yet against the interests of third persons. In searching of meaning of public interest[28] it must be emphasized that this idea has various interpretations in different legal systems. Also, the third persons must be understood as any legal persons, which might be influenced by the Guarantee Act. The legal interpretation here must be in narrow scope – without public authorities, first – because *requirement of the protection of public interest gives safeguard* in such a case; second – because the public authorities have no interests, but *competence and subject-matter* of it. That is why Article 33, paragraph1 specified that subject-matter jurisdiction of the authority shall be determined by regulations which cover certain administrative area or jurisdiction of individual public authorities.

The Article 21 explains that provisions of this law on administrative act are accordingly applied to guarantee act. That is why Article 16 is applicable here. Paragraph 1 contains the following meaning: 'Administrative act', in the sense of this law, is a single legal act by which public authority, directly applying regulations of relevant administrative area, shall decide on rights, obligations or legal interests of the party, or procedure issues. The second paragraph states, administrative acts are decisions and conclusions. And the last third paragraph allows that decisions and conclusions may also be titled otherwise if so envisaged under a special piece of legislation.

There is still another interesting example that is worth considering, that of Bulgaria. In Bulgarian Law on Concessions[29], Article 40, paragraph1 provides that within 7 days from the accepting of the *decision for launching* a concession procedure, the body as per Article 19 paragraphs 1-4 shall approve by a decision

[28] According to Bryan A. Garner, Editor in Chief, *Black's Law Dictionary*, second Pocket Edition (2001), public interest means: 1. The general welfare of the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.

[29] Promulgated SG No. 36/2.05.2006, into force from 1.7.2006.

the announcement of the procedure, the documentation for participation into the procedure and a draft concession agreement. The second paragraph enacts that by virtue of issuing the decission, the body shall be bound by the decision for the launching of a concession procedure.

The decision for launching a concession procedure is premise for the decision the announcement of the procedure. The 7-days time limit is only period for technical (bureaucratic) preparation of the decision the announcement of the procedure, the documentation for participation into the procedure and a draft concession agreement, and nothing more. If the decision for launching a concession procedure exists, the decision the announcement of the procedure must be realized. The first decision plays role of AAA for the latter one. The last decision only guarantees for the legal subjects that they can participate in the next phases of the concession procedure, but not that they will be chosen for the winner in this competition process as a concessionaire. There is no assurance that the decision for selection of a concessionaire shall indicate concrete legal subject, or the concession agreement conclude with him.

The assurance effect here will be only procedural one – if the legal subject follows strictly decision, the announcement of the procedure, the documentation for participation into the procedure and a draft concession agreement, he is still into concession procedure and might hope to win this competitive procedure as well.

Here the assurance effect does not exist for the substantive dimension of a certain administrative act – first, because there is no substantive aspect of that, and seconds – because the final legal act here is not administrative act, but an agreement. Only as a supplement – here the complex factual composition is existing – administrative acts and following agreement. In other words – this form of AAA secures the procedure, as a series of activities of interested parties – the private person and the public body. The assurance of the private person is in the preliminary approved by the organ conditions. If everything from procedural point of view is followed properly, the very final act will be bases on the documentation and the project of the concession agreement, known *in advance*.

With concluding of the concession agreement, the complex factual and legal composition will be done fully. On that account, here is a mere phenomenon of convergence between legal branches[30] - both from public and private law.

The origins of this procedural legislation is caused by many factors, but two of them are obviously important. Firstly, anyone legal subject is confused by perpetual amendments in Bulgarian legislation. For example, only the Law on Concessions, cited above is changed from 2006 until now 28 times[31]. Secondly, the foreign investors are not very confident of bureaucratic, which frequently changes the requirements in different administrative procedures. This causes the necessity into the Law on Concessions to be "nailed" the rule that the procedure itself, the documentation for participation and a draft concession agreement to be preliminary adopted from all sides in the concession procedure.

The Bulgarian legal regime that we have just examined has some analogies and differences with that which exists in Hungary. Consider Hungary's Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (GRAPS)[32], Section 38/C, paragraph 1, that a certification body so authorized by way of the means specified in an act or government decree may participate in the process of ascertaining the relevant facts of the case. The authority must accept the certificate issued by the certification body in ascertaining the relevant facts of the case, and shall conduct *no further procedural steps in respect of the facts certified*.

The second paragraph in the same section of GRAPS accepts that where an act or government decree so provides, rights based on facts endorsed by a certificate issued by a duly authorized certification body may be exercised directly. The relevant act or government decree shall define the rules pertaining to the liability of the certification body as regards the facts endorsed on the basis of the certificate.

Consecutively pursued pats of legal assurance is settled in Section 85, paragraph 1: 'Official Certificates', where is written that the authority shall issue an official certificate in cases specified in the relevant legislation - containing the information

[30] M. Mladenov, *Convergence between Commercial and Public Law*, 4 Prob. Comm. Law (2015).
[31] Towards 18 July 2017.
[32] Into force since 1.11.2005.

prescribed therein - for the permanent verification of the data or rights of the client.

This is the administrative assurance in factual or legal dimension. The key word is permanent, which is a guarantee for the party in the administrative proceeding. Further away, the next paragraphs accept that the official certificate shall be accepted by all for verification of the data and rights entered, and the client may not be compelled to supply additional evidence for such data and rights (which defines more accurately, that such a certificate is valid not only for the same proceeding, but for any proceedings before the any authority).

These provisions shall apply to the procedure for providing proof to the contrary. There is a legal safeguard here - if an authority or official person duly authorized to check the official certificate determines that the official certificate or the data it contains is false or untrue, the official certificates shall be confiscated for further procedures against a receipt issued.

Additionally, the Section 172, letter a) recites that or the purposes of this Act: 'Electronic certificate' shall mean an electronic document verifying the existence of facts, status, entitlement or other data, or verifying the particulars or rights of clients, made out by the authority or another organization for use by the client or the authority in proceedings governed by this Act.

Here is the broadest concept of certificate and the paradox is that the electronic form is better explained in the law, than the "common one". The simple explanation can be find in electronic data bases and registers, where facts, status, entitlement, other data, particulars or rights exist and it is very easy to be found, estimated and reproduced (in electronic document with significance of administrative certificate). In such a way, this certificate is an administrative act itself, from the kind of declarative administrative acts. By this means, even though in electronic form, the certificate is not only a contemporary modality, by which an act is 'communicated' to affected parties.

In analyzing of the legal provisions of Hungarian GRAPS there must be underline that maybe this is the most detailed and clear general procedural administrative legislation, arranged quasi - Act of Administrative Assurance, because the last element is not settled – the promise, that the final act will be issued. Anyway, with such a certificate, even if it not sure that the act will be

enacted, the firm believe is that if it will be, the same will be based only on the facts, status, entitlement, other data, particulars or rights, already pointed out into the certificate.

Maybe one among many typical AAA's is defined in German Administrative Procedure Act (APA)[33], Section 38 'Assurance', paragraph 1, which enacts that the agreement by a competent authority to issue a certain administrative act at a later date or not to do so (assurance) must be in writing in order to be valid. If, before the administrative act in respect of which such assurance was given, participants have to be heard or the participation of another authority or of a committee is required by law, the assurance may only be given after the participants have been heard or after participation of such authority or committee. It rouses interest the expression 'the agreement by a competent authority'.

This agreement is not a contract between the authority and the party, but *an expression of full conviction* of the authority in its later activity (to issue or not final act). For this reason, the Act of Administrative Assurance can be in positive (to issue) or negative (not to issue) meaning. It is purposed only at the future (at a later date). The form for legal validity here is needed – a written one.

The third paragraph of Section 38 of German APA explains that after an assurance has been given the basic facts or legal situation of the case change to such an extent that, had the authority known of the subsequent change, it would not have given the assurance or could not have done so for legal reasons, the authority is no longer bound by its assurance. The alteration of both basic facts and legal situation of the case in the moment after issuing Act of Administrative Assurance, the same is not binding one for the authority. There is one legal condition here, which must be interpreted in different ways – the changes must be serious (in such an extent) and so would hold back the authority of issuing of AAA.

It is disputable in each separate case which change is in such an extent, that the given assurance in not already under obligation of its author. Anyway, this legal provision in German legislation is very stable established one, so its influence is for sure

[33] Of May 25th 1976, In the wording last promulgated on January 23rd 2003, Federal Law Gazette I p. 102 [Verwaltungsverfahrensgesetz (VwVfG).

in the fundament of the cited above very new legislations in different legal systems across the Europe.

Following the classification of Schröder, according to the subject-matter this AAA in German legislation is a structuring administrative act, because establishes, changes or removes a concrete legal relationship; according to the consequences it is a beneficial one – because of confirming legal advantage; according to legal limits on the Administrator – it is free act, because it is not bound by any statutory provisions[34].

4. Atypical Act of Administrative Assurance

Atypical (quasi) Act of Administrative Assurance must be this one, which is not explicitly defined in the legislation, but exists in the legal provisions and covers one or more elements (but not all and singular) of a typical AAA.

The legal provision of Article17, paragraph3 of Tax-Insurance Procedure Code (TIPC) in Bulgaria declares: when a liable person acts according to the written instructions of the Minister of Finance, a body of receivables or a public executor, which subsequently appears illegal, the charged interests as consequence of the actions according to the given instructions, shall not be owed, and the sanction determined by the law shall not be imposed[35].

The legal effect is only in restraint from disadvantageous consequences, there is no positive legal result here. In analyzing of this legal norm, it must be found that nowhere here is assurance that the final act will be based on these written instructions, but following them there is no legal threat of administrative sanctions. Uncovering the last element of AAA – assurance of issuing the final act, this kind of written instruction as a legal institution is Untypical Act of Administrative Assurance.

Sensu stricto, "written instructions" must be understood only in the parallel with Article 7, paragraph 3 of Law on Normative Acts (LNA), which specifies: Directives shall be issued

[34] M. Schröder, *Administrative Law in Germany*, in R. Seerden & F. Stroink (eds.) *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis* (2002).

[35] Tax-Insurance Procedure Code, Prom. SG. 105/29 December 2005, in force from 01.01.2006.

by a superior body to a subordinate body, providing instructions on the implementation of a normative act which was issued by the former or the implementation of which must be ensured by it[36].

In juxtaposition, the "written instructions" in TIPC are preliminary interpretation of the law, whereas the same in LNA is instruction on the implementation. The first one is an explanation, the second one is a direction. They are at least to dimensions of this instructions (regulations in their nature), which are guidelines in their substantive character – limitative and explanatory ones. In other words "it should be noted that regulation is often thought of as an activity that restricts behavior and prevents the occurrence of certain undesirable activities (a "red light" concept) […] may also be enabling or facilitative ("green light")" [37].

In searching of judicial practice there is an interesting interpretation what can be understood under "written instruction". The judicial composition decides that it may be also any sort of act (unfortunately, without such an expression). Albeit, it was implicitly noted down in the following two sentences: 'In the present case is applicable the legal provision of Article17, paragraph 3 of TIPC […] The liable person had acted according Protocol for deduction and refund of excise No. 11/16/24.2.2011. It had submitted a demand for refund of excise according tax legislation'[38].

With close manner of interpretation the judicial practice states that: 'The sum […] was admitted as liable to a refund with an act of Customs authorities, by reason of what the complainant had been scrupulous (about the Law) at the moment of receiving of it. The last follows from the explicit provision of Article 17, paragraph 3 of TIPC'[39].

The most interesting judicial interpretation is in the following judgment: 'The Court finds admissible the appeal of the Instructions as intra-departmental act with obligatory nature to subordinate of the organ which issued it, in connection with

[36] Promulgated State Gazette No. 27/03.04.1973, amended SG No. 65/1995.

[37] R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation. Theory, Strategy, and Practice* (2012).

[38] Judgment No. 10062/4.07.2013 of Supreme Administrative Court in Administrative case n. 12328/2012, Chamber VIII.

[39] Judgment No. 4520/2.08.2012 of Administrative Court – Sofia in Administrative case n. 867/2012.

taxation […] the administrative act loses its purely interpretive and internal nature and shows effect "outside" towards third persons, to whom the interpreted legal provisions are applicable and to whom the interpretation is directed. The statement into the Instructions does not be exhausted with the application of the valid legal norm, but in interpreting it, obliges application in the indicated way, i.e. – acquires the normative nature[40]'.

In another Bulgarian legal act - Civil Servants Act (CSA), Article 24, paragraph 3, declares: "each civil servant may request a written confirmation of the official act, should the verbal order given thereto contain a breach of law manifest to the said servant"[41].

This written confirmation is a statement that underwrites the irrevocable and unchangeable belief of the manager in lawfulness of the given order. In other words, in the future moment the manager should stand on the same position to this case and to all identical cases, i.e. – should order exactly the same. Similarly, if the prepared by the civil servant administrative act or performed administrative action might be projected in the field of influence of the manager himself, the final result should be the same. The confirmation here plays a role of Act of Assurance that the preparatory and technical work of the civil servant will be base of the future administrative act/action of the public authority.

More or less, some kind of certificates can be correlated to Act of Administrative Assurance. As an illustration, in Bulgarian Law on Encouragement of Investments[42] Article 15, paragraph 1 proclaims:

The investments, received certificate as class A or class B are encouraged to fulfillment of the investment project with shortened time limits for administrative servicing, individual administrative servicing, and so forth.

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[40] Judgment from 20.7.2007 of Administrative Court – Sofia on Administrative case № 1805/2007, First Chamber.

[41] Promulgated, State Gazette No. 67/27.07.1999, in force since 28.8.1999.

[42] Promulgated, State Gazette, No. 97/24.10.1997, title changed State Gazette No.37/94, in force since 6.8.2004. The more detailed study here is N. Natov, *Foreign Investment in Bulgaria*, Springer (2000). See also K.W. Glaister & H. Atanasova, *Foreign direct investment in Bulgaria: patterns and prospects*, 98 European Business Review (1998).

The certificate in this provision is untypical AAA, which promised certain administrative behavior from the authorities to the investor. This behavior is a privileged one, compared to the other investors, as well to the other legal subjects. The certificate is a particular administrative act, directed to stimulation of a special (for the authorities) legal subject. It gives high level of assurance for special positive treatment. The only one distinction with the typical AAA is that the element of assuring in issuing or refraining from issuing a certain administrative act is not in being here. The special treatment is in the area of pure procedural legal dimension, but the issuing or refraining from issuing a administrative act has both material and procedural dimensions. That is why the certificate cannot "promise" an administrative act, if the material legal conditions (rights of the party) are not in hand. Anyway, in some cases the certificate can assure that the act will be issued *quickly and with high quality.* This is the case, when the document declares or ascertain already existing rights, or a will for issuing or not of a document in connection with rights. That very hypothesis is clearly portrayed in Article 21, paragraphs 1 and 2 in Bulgarian Administrative Procedure Code[43] (APC):

The individual administrative act shall be also and the act of volition, by which are declared or asserted already arisen rights and obligations, as well as an individual administrative act shall be also and the act of volition for issuing of a document, significant for recognition, exercising or redemption of rights or obligations, as well as the refusal to be issued such document.

Hence, the certificate assures that if there are all factual and legal conditions for the issuing of a document (which is recognized in the two provisions above as an individual administrative act), it will be issued to the investor in due privilege administrative servicing.

Looking at it in that light, the Section 151 "Issuance of a document" of Czech Code of Administrative Procedure (CAP)[44] provides in its four paragraphs that where an administrative body fully satisfies an application for the creation of a right the existence of which is certified by a document stipulated by statute it shall be permissible to issue that document only instead of

[43] Prom. State Gazette No. 30/11.4.2006, in force since 12.7.2006.
[44] Promulgated State Gazette, Act of of 24th June 2004, No. 500/2004.

issuing a written decision. A list of documentary materials for the decision shall be entered in the file instead of its express reasoning. The day of the receipt of a document by a participant shall be the day when the decision becomes legally effective and has other legal effects. Should the decision be abolished after it becomes legally effective, the document issued thereby shall cease to be valid.

Namely the phrase "instead of issuing a written decision" can be interpreted, that if the party wants, the written decision should be issued (eve the document already is issued). In a different word, the document assures that the administrative act is issued in another form – as a document itself, instead as a decision (which is the basic form).

5. *De Lege Ferenda*

The Act of Administrative Assurance is a specific administrative instrument. First of all, it is impossible to be issued *ex officio*, but only at the request of the interested party. Even with very good intentions (such as encouraging investments), it is not possible also to be issued by no matter who administrative body, but only by substantially competent one. Issuing by incompetent administrative organ leads to nothingness of this AAA. Second of all, it is not self-under-stood part of the administrative proceedings in its essence, so that is why it should be created by legislation as a legal procedural option for the administrative body.

Ergo, there must be taken legislative steps for the broader recognition of this specific legal institution in the branch of Administrative Law and Administrative process. The methods of approach here may be the following ones:

First, it is possible to use the very sophisticated approach of Model rules, possible adoption as an EU Regulation, as the famous ReNEUAL Model Rules utilizes. In such a way, among other legal values, principles, norms, procedures and institutions, the AAA shall be uniform for the whole EU legal area (including the Member states legal systems). The advantage here is namely in the uniform approach. The predictability and intelligibility of the public authorities in Europe will be visible in using of this option in each separate case. Eventually, the impediments here could be

the confrontation of some legal systems (and their legal authorities) to any promise of the public bodies to private persons (which is the very nature of AAA).

Second, the general procedural administrative codes in the each different legal system to adopt the AAA as a legal possibility in each administrative proceeding. This approach is facilitated by national legal tradition or spacious comparative analyses (as Dragos and Neamtu lately edited, but for another legal institution - ADR[45]) and the advantage here is to use existing legislation as a fundament, with installing the AAA as a legal institution into the relevant part of set of legal norms. Moreover, the national legal language can be used freely here. The shortcomings here could be found in absence of administrative procedure codifications in some countries, and in this respect the AAA should wait the future legislation as a whole – to be part of it.

Third, the AAA to be fixed in more and more administrative material legislation in specific areas. The advantage is in real necessity of such a legal institute in some legal spheres, the disadvantage – in fragmental and (in some cases) chaotic legal approach, with use of heterogeneous legal techniques and terminology, which is the base of future legal hindrances in interpretation and implementation of legislation.

Usually, the practitioners (sometimes – the legislator too) cannot imagine exactly where the Act of Administrative Assurance can be executed. By reason of that, examples ate needed here, even the legal fields of application of AAA are various. Some of the possible stages of applications are:

In the field of Public Procurements it will be good legislative approach, if it is explicitly written in the law, that the public bodies, which administrate the public procurements, issued to the companies (involving in the process) a certificate. The last one must be temporary (one year validity is a judicious approach), with possibility of renewal. This certificate will verify that the owner of it conforms to all legal requirements for admissibility in the process of procurement with public resources. Thus the certificate plays a role of Administrative Act of Assurance – in the phase of submission of the documents (including the certificate

[45] D.C. Dragos, B. Neamtu (eds.), *Alternative Dispute Resolution in European Administrative Law* (2014).

itself) the subsequent act of admission in the competition is securing, because the administration is bound with its own certificate. Hence, the certificate as an AAA simultaneously is a guarantee for the company (in its participation in a future phase of the process) and stumbling-block for the administration for arbitrary estimation for admissibility (and this is a barrier against corruption too). Thereby, many participants shall compete - if they have valid certificates (without check-up), and if they have not too (but with serious *ad hoc* check-up for admissibility). Anyway, the chance for one and only admitted candidate in the procedure, which will be the winner in the final phase (because of lack of another) is restrain with legislative instrument.

The same approach is applicable in the legal areas of Investments and Concessions, in addition to the already functioning legal regimes, considered above.

In the area of urbanization the legal subjects may need the assurance that if in the future moment they start to build on some plot, the permission will be done, if they cover all legal requirements. This kind AAA assures only the legal status of the plot and do not bind the administration, if the legal subject is careless in other legal conditions, needed in the administrative proceeding.

Close to this is the planning and construction area, when and administrative permission for the building is needed. This permit is a document, having all characteristics of AAA. The same assures, that during the validity of it, all needed documents in the building process, will be granted, if the legal requirements are covered. Even the requirements are covered, but out of validity of the permit, the new one is needed, for the lawful end of the building from administrative point of view.

As for administrative servicing, the best example here is – any sort of proceeding, which requires the document from another public body. Instead of waiting, both the legal subject and the administration can proceed to the next phases of the process (except to the final one). This is possible on the base of AAA from the other administration, which certifies that the legal subject is scrupulous about legal requirements and wait for administrative act (i.e. – the act is admissible, even it is not sure to be positive or not for the applicant). Thus, the Act of Administrative Assurance

is "half-in-half", because assures in admissibility, not in lawfulness of the pretention.

The wise legislator nowadays must weigh up the balance between legitimate expectations of single legal subjects and legal certainty for the common interest of the Society and the State. One of possible approach into the administrative proceedings is the existence of well described into the legislation legal institution of Act of Administrative Assurance.

6. Conclusions

For generalization and concentration of the exposition above, some conclusions must be found.

In the beginning, in its legal nature the Act of Administrative Assurance is an individual administrative act, because concerns one or more legal subjects, but individualized one/ones. In such a way it is not collective administrative act, or sub-normative administrative law (sub-legal act, by-law).

Of its legal origin, the AAA is issued by the public organ, but also by any natural person or legal entity with competence of exercising public functions. They must have a substantive competence for this issuing by law.

Then, as a legal ground the AAA is provided by a special law, as a rule. Anyway, the general law can stipulate its existing as a legal institution in the main, without explanation of legal areas of application. In some cases, even the general procedural law may indicate the possibility of issuing of AAA, though.

Afterwards, the legal significance of the AAA is a preliminary one - affecting the present legal motivation of the legal subject, aimed to the final administrative act in the proceedings. Because of confirming legal advantage this administrative act is a beneficial one.

In its legal idea the AAA is assuring in issuing or refraining from issuing a certain administrative act, i.e. – administrative promise to reach or not the final administrative act. Therefore, it is a structuring administrative act, because establishes, changes or removes a concrete legal relationship.

Finally, the legal effect of AAA is assurance now for the future situation in the concrete administrative proceeding. Thus the Principle of Legal Expectation is covered in considerable

manner. Suffice it to remember the worldly axiom that for each person its own attitude of confidence in administrative body is stronger than the abstract trust in the public authorities in general. On that account, the Act of Administrative Assurance is one perfect legal instrument for increasing of the faith in both the Modern and Democratic State and in the Rule of Law.