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Summary
The purpose of this work is to carry out a study on Public Consortia. This institute, of great importance for Administrative Law, aims to achieve objectives of common interests among federated entities, promoting the associated management of public services. The focus of this article is on an analysis of the peculiarities of consortia, their characteristics, their legal regimes, ways of acting, the objectives that the Public Administration pursues when establishing them, as well as the limits of their participation, implementation and practice. Furthermore, this article will seek to reflect on certain controversial topics on the subject.

Key words: Consortium. Legal regime. Associated Management.

Abstract
The purpose of this work is to conduct a study on public consortia. This institute, of great importance for administrative law, aims to achieve objectives of common interests among federal entities, promoting the associated management of public services. The focus of this article focuses on an analysis of the peculiarities of consortia, their characteristics, their legacies regimes, ways of acting, the objectives that the Public Administration pursues when instituted them, as well as the limits of their participation, implementation, and practice . In addition, this article will seek to reflect on certain controversial topics on the subject.
Keywords: Consortium. Legal Regime. Associated Management.

1. Introduction

Public consortia are constitutionally provided for in art. 241 of CF/88. This constitutional mandate was regulated by law 11,107/2005, which is, as a rule, a national law, published by the Union in its exclusive jurisdiction.

Public consortia aim to achieve objectives of common interest among the consortium entities, promoting the associated management of public services.

To better understand the topic, it is necessary to relate the institute to the concepts of cooperative federalism and Consensual Public Administration. The first relationship consists of

a federation that has its entities endowed with their own autonomy, but that must dialogue with each other so that the provision of administrative activities and public services is more efficient. The connection with the second concept occurs as the idea of consensus has been gaining strength within Public Administration in recent years, promoting both public partnerships, such as consortiums and agreements, and public-private partnerships, in a broad sense. sensu (administrative contracts, public service concessions, PPPs, third sector, etc.).

Furthermore, public consortia have the legal nature of plurilateral business. Pursuant to art. 1 of Law 11,107/2005, it is observed that the wishes of the parties are focused on purposes of common interests of all consortium members. Therefore, it can be said that they are on the same side of the legal relationship. There are no opposing objectives, as in private law contracts.

2 Peculiarities of the public consortium

2.1 Personification/personalization

Federated entities, when joining together in a public consortium, are obliged by law (art. 1, §1 of Law 11,107/2005) to create a new legal entity, which may be under public law or private law.

When it is a legal entity governed by public law, it will constitute a public association, and will integrate the Indirect Public Administration of all entities of the federation that are consortium members, according to the provisions of art. 6th, §1st of the Law. The public association is, in fact, a special authority and has the legal nature of a multi-federative authority, as it integrates more than one Indirect Administration.

When it is a legal entity governed by private law, the consortium must observe public rules such as bidding, accountability, public tender, etc. Furthermore, its legal regime, in the case of personnel admission, will be governed by the CLT.

Still regarding the personnel regime, Law 13,822/2019 amended art. 6th, §2º of the Law of Consortiums, now providing that the public association is also governed by the regime celetist legal.

Given this, the formalization of consortia must meet some requirements: Firstly, according to art. 3 of Law 11,107/05, the protocol of intentions must be carried out, this being the content of the adjustment made by the federated entities.

Once the protocol is signed, it must be ratified through legislative authorization from each participating entity, in accordance with art. 5th of the Law. It is worth highlighting that such ratification can be waived, if any entity has already enacted the law of its participation in the consortium, under the terms of §4 of art. 5th.

2.2 Apportionment contract

Provided for in art. 8th of the Consortia Law, provides that consortium entities only will deliver resources to the public consortium through the apportionment contract.

It will be formalized in each financial year and its validity period will not exceed to the appropriations that support it, that is, as a rule, it will last for 1 year. §1 of art. 8th brings the exception is contracts that have as their object exclusively programs and actions that are included in a multi-annual plan and the associated management of public services funded for tariffs.

Furthermore, the application of resources delivered through an apportionment contract to cover generic expenses, including transfers or credit operations, is prohibited, in accordance with the provisions of article 8, § 2 of the Law.

Finally, the consortium entity that does not allocate sufficient appropriations in its budget law to support the expenses incurred through the apportionment contract may be excluded from the public consortium, after prior suspension.

2.3 Program contract

Provided for in art. 13 of Law 11,107/2005, the program contract would be a condition of validity of the constitution and regulation of obligations that consortium entities may assume towards other consortium entities or towards the consortium itself.

Its objective is the associated management in which there is the provision of public services or the total or partial transfer of charges, services, personnel or goods necessary for the

continuity of transferred services. It is worth mentioning that the program contract will continue in force even if the public consortium is extinguished.

2.4 Control by the Court of Auditors

According to art. 9th, sole paragraph of the Law, the public consortium will be subject to accounting, operational and patrimonial supervision by the Court of Auditors competent to evaluate the accounts of the Head of the Executive Branch, legal representative of the consortium.

The article must be interpreted in the sense that the Court of Auditors of each consortium entity has the legitimacy to control the financial part corresponding to its consortium entity.

2.5 Controversies

2.5.1. Art. 1, §2 of Law 11,107/2005

The provision in question states that the Union will only be able to participate in consortia with Municipalities, if the State in which they are located also participates.

There is a discussion about the constitutionality of this device. In this sense, it is worth highlight the position of José dos Santos Carvalho Filho, who argues that it is unconstitutional, as it would violate Article 18 of CF/88, which deals with federative autonomy. This is because, somehow would mitigate the autonomy of the Union and Municipalities in the conclusion of their contracts.

2.5.2.Law 13,822/2019 which changed the legal regime of the public association to CLT member

There is great doctrinal criticism regarding the change in art. 6th, §2nd of Law 11,107/2005, as it changes the public association's personnel admission regime, which is now governed by the CLT.

According to doctrine, such a change violates art. 39 of CF/88 and the interpretation of the Federal Supreme Court on this article, since, within the scope of a legal entity of public law, the legal regime must be statutory.

2.5.3 Is Law 11,107/2005 a National or Federal Law?

Due to the literal nature of the law, it prevails that it is a national law, dictating general rules on the subject. However, there are controversies: Diogo De Figueiredo Moreira Neto maintained that the law would be federal, and therefore applied only to the Union. For the late author, the Union could not bring general rules of public consortium that bind the other federated entities, as in accordance with art. 241 of CF/88, each entity must regulate its own law. This understanding is based in the interpretation in accordance with the Constitution.

The majority doctrine states that it is a national law, since there is no unconstitutionality in classifying the consortium as a contract. Based on this idea, a systematic interpretation of articles 22, XXVII and 241, both of CF/88, is possible, stating that the Union can regulate general rules on the subject.

It is necessary to criticize the scenario where each entity disciplines its own law consortium, without there being a national law that would standardize the topic. In this sense, the institute of the public consortium would be unfeasible in practice, as there would be numerous laws dealing with the topic. In this way, normative conflicts would be caused, and this combined with the great political divergence between entities would make uniform regulation of the issue increasingly difficult.

Final considerations

Having completed the research, it is possible to conclude that different forms are available to the Public Administration for the effective provision of public services and administrative activities, with the public consortium being one of the most important.

As a result of an evolution from outdated Managerial Administration to Consensual Administration, which has efficiency as its main goal, public consortia emphasize an increasingly cooperative federation, always aiming for the common good in the public interest.

As discussed in this article, it is important that the thesis of Law 11,107/2005 as a National Law prevails, since in Brazil, whether due to its extension or not, there is a great political divergence, also due to the large number of political parties. It does not seem reasonable that the public interest is no longer pursued due to a political position that prevails in one State or some Municipalities and not in others. Therefore, the importance of

keep the theme uniform, since the interest of Public Administration must always be to seek to satisfy the common public good, regardless of political ideology.

References

CARVALHO FILHO, José dos Santos.**Administrative Law Manual.**31 ed. São Paulo: GEN, 2017.

OLIVEIRA, Rafael Carvalho Rezende.**Administrative Law Course.**6th ed., São Paulo: Method, 2018.

OLIVEIRA, Rafael Carvalho Rezende.**Administrative Organization.**6th ed., São Paulo: Method, 2018.

OLIVEIRA, Rafael Carvalho Rezende.**Law No. 11,107, of April 6, 2005.**Available at: http:// www.planalto.gov.br/ccivil_03/_Ato2004-2006/2005/Lei/L11107.htm. Accessed on: Aug 19. 2020.