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CAPITALIZATION ON THE PUBLIC PROPERTY OF THE STATE AND OF THE ADMINISTRATIVE-TERRITORIAL UNITS BY MEANS OF CONCESSION

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ABSTRACT

Traditional modality of using public property, the concession has played a significant role in the development of the modern state by capitalizing on those goods that by their legal nature have an inalienable character as well as by entrusting some works or public services to legal entities of private law which can execute them or make them more efficient.The economic development of the last decades of the states of the European Union, the acceleration of the commercial exchanges and the extension of the forms of circulation of the goods and services at community level have determined the reconsideration of the concession contract as a legal instrument for the capitalization of the public property goods, of the works and services that the state owns.The consolidation, at national level, of some legal norms meant to regulate concession and its forms was significantly influenced by the provisions of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. Thus, Law no. 100/2016 regarding the concession of works and services as well as the recent Government Emergency Ordinance no. 57/2019 on the Administrative Code implement the new European vision.

KEYWORDS:

Concession, public domain, contract, property, legislation

1. Regulation of the concession contract in the current legislation

The establishment by means of the constitutional norms of the inalienable character of the public property has led to the identification at the level of the fundamental law of those situations in which the public property can be capitalized upon, although it cannot be alienated. Thus, according to art.136 (4) of the *Romanian Constitution*, the administration, the concession, the public leasing and the free use represent the legal modalities by which public property can be capitalized upon, in accordance with the specific regulations (Jora, 2016). These legal procedures represent an indirect exercise of the public property right made available to the holders of this right (Săraru, 2016).

In a classic definition of the legal literature of the interwar period, the concession represents *"a form of exploitation of a public service, in which a*

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private individual, natural or legal person, takes upon himself the risks of the exploitation and of the management of the activity of the service, in exchange for the right to collect taxes for the provided services" (Negulescu, 1934).

At present, the regulation of the concession contract brings together, at national level, several normative acts based *on Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors*.

For the transposition into national law of the aforementioned normative acts, the adaptation of the Romanian legislation was relatively quick, conditioned by the imposition of some terms of implementation of the European directives at national level. Following a succession of amendments and legislative repeals, the following regulations applicable in the field of concession contracts were crystallized: *Government Emergency Ordinance no. 57/2019 regarding the Administrative Code (which repealed Law no. 213/2018 on the right of public property, the Law no. 215/2001 of the local public administration and Government Emergency Ordinance no. 54/2006 on the status of property concession contracts) Law no. 100/2016 regarding the concession of works and services (which repealed Law 178/2010 on the public-private partnership) and, of course, Law no. 287 of July 17, 2009 on the Civil Code*.

Thus, in the most recent autochthonous regulation in this matter, *the Government Emergency Ordinance no. 57/2019 regarding the Administrative Code*, in art. 303, paragraph (2), it is stipulated that "*the contract for the concession of public property goods is that contract concluded in written form by which a public authority, called the grantor, transmits, for a fixed period, to a person, called a concessionaire, who acts at his risk and liability, the right and the obligation to exploit a public property good, in exchange for a royalty*".

2. The impact of European Directive 2014/23/EU on national regulations

The perspective offered by the EU institutions on the concession contract in the last decade shows a substantial change in the role accorded to this form of administrative contract. The concession is *"one of the most important forms of collaboration between public authorities and private economic concessionaires, as a contractual means of enhancing the public domain, of carrying out public works or providing the necessary public services in a civilized society"* (Ciobanu, 2015, p. 25), and the European directives, under the influence of economic factors, have recognized the indisputable value of this legal instrument.

Previously, the concession was a contract partially neglected by the norms of European law, because in the view of the older European directives on public procurement, those of 2004, the concession was not addressed separately in relation to public procurement, it was treated in a subsidiary manner in comparison with public procurement and did not benefit from its own regulation that would give it relevance in the case of public business contracts at European Union level (Dinu, 2016).

The identification of the legal uncertainties that could constitute barriers to the proper functioning of the internal market and to the free movement of goods and services has determined the adaptation of the Union legislation to the requirements of the European economy, because, as specified in the preamble to *Directive 2014/23/EU*, without an adequate regulatory framework to regulate the procedures of awarding of the contracts, *"economic concessionaires, in particular*

small and medium-sized enterprises, are being deprived of their rights within the internal market and miss out on important business opportunities, while public authorities may not find the best use of public money so that Union citizens benefit from quality services at best prices".

The adoption, for the first time, in the European law of a normative act dedicated exclusively to the regulation of concession and the introduction into its content of the obligation of its transposition into national law within 24 months from the date of entry into force of the directive in the European Union area showed the new approach of the European institutions regarding the concession contract. The legal effects generated by the norms of the directive regarding the risk of operating in the case of concession contracts, the regulation of the most advantageous offer criterion or the adaptation of the mixed concession contracts to the new economic requirements of the European Union market can also be considered novelty elements.

In the spirit of the European values promoted at all the levels of union construction, the principle of equal treatment, non-discrimination and transparency in the field of concession contracts becomes one of the pillars of the legal edifice, and in art. 3, paragraph (1) of *Directive 2014/23/EU* it is stated that *"contracting authorities and contracting entities shall treat economic concessionaires equally and without discrimination and shall act in a transparent and proportionate manner. The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic concessionaires or certain works, supplies or services"*.

3. Concession of public property goods

Derived from the general administration right of the public property, the concession of a public property good is made in compliance with the principles governing the exercise of the public property right: the priority of the public interest, the protection and the preservation of the goods belonging to the public domain, the transparency and the publicity in carrying out the specific procedures, as well as the efficient management of the capitalization on these goods, as it results from the provisions of art. 285 of the *Administrative Code*.

From the perspective of the civil law of concession, which also implies the relation with third parties with whom the concessionaire established legal relations of civil law, the right of concession over public property goods is considered in the specialized literature as *"a main, real right, inalienable, irreplaceable and indescribable, constituted against payment, based on the concession contract concluded between the administrative authority and a private individual with regard to a public property good as a way of exercising the right of public property"* (Mâţă, 2018, p. 120).

The administrative nature of the concession as a means of capitalizing on the public property and of the concession contract as a legal instrument to achieve this capitalization is indisputable. According to art. 303 of the *Administrative Code*, *"the contract for the concession of public property goods is that contract concluded in written form by means of which a public authority, called a grantor, transmits, for a fixed period of time, to a person, called a concessionaire, who acts on his risk and accountability, the right and the obligation to exploit a public property good, in exchange for a royalty"*.

These provisions are supported by the provisions of the *Civil Code*, art. 871 paragraph (1), which states that *"the concessionaire has the right and, at the same time, the obligation to exploit the good, in exchange for a royalty and for a fixed duration, in compliance with the conditions stipulated by law and the concession contract"*.

The goods that the law establishes or, which due to their nature may be subject to

exploitation for the purpose of collecting natural, civil or industrial benefits, may be subject to concession. In the case of public property assets of the administrative-territorial units, their concession can be made only on the basis of a deliberative act of the autonomous local administrative authorities, a decision of the local council or a decision of the county council (Catană, 2017).

As far as the duration of the concession is concerned, the *Administrative Code* does not bring any substantial changes to the regulations it repeals. Thus, according to art. 306, the contract of concession of public property goods is concluded for a period that cannot be more than 49 years, from the moment of the signing of the concession contract, in compliance with the Romanian legislation, even if the concessionaire has another nationality or citizenship.

A specific element of the concession contract is the royalty, the amount of money that the concessionaire pays for the exploitation of the public property good to the state or to the administrative-territorial units. The criteria used by the authorities of the central and local public administration in the procedures for establishing the method of calculating the royalty take into account the proportionality of the royalty in relation to the benefits obtained from the exploitation of the public good property, the market value of the concessioned good, and the adequacy of the royalty for the duration of the concession contract. The royalty resulting from concessions becomes income to the state budget or to the local budgets.

The concession procedure, carried out in order to award the concession contract, is stipulated in art. 310-324 of the *Administrative Code* and is based on the application of the rules specific to direct auction, except in the situations stipulated by the law by which the public property goods can be directly assigned, as is the case of the owners of the property right on the constructions built on public property lands, in compliance with the legal provisions.

The concession contract is an administrative contract, governed by a regime of public power, and interpreted according to different rules regarding civil law contacts with the application of interpreting principles, such as the principle of good faith, the principle of common intention of the parties, the principle of good administration and the principle of extensive interpretation of the administrative contract (Săraru, 2013). From the perspective of the features, this contract is synallagmatic, commutative, constituted against payment, with successive execution, solemn and *intuitu personae* (Apostol Tofan, 2015).

4. Concession of public works and services

A category distinct from that of the concession of public goods of the state and of the administrative-territorial units is represented by the concession of public works and services by the central and local public authorities, an area on which *Directive 2014/23/EU of the European Parliament and of the Council of February 26, 2014 on the award of concession contracts* has a considerable influence, by contributing to the harmonization of national practices and to the increase in the level of legal security in the administration and capitalization of the public property (Vedinaş, 2018).

The adaptation of the national legislation to the requirements imposed by the implementation of the aforementioned directive was materialized in *Law no. 100/2016 on concessions of works and services concessions*. According to this regulation, art. 5, paragraph (1), letter (g), a works concession contract represents a *"contract constituted against payment, assimilated according to the law of the administrative act, concluded in writing, by which one or more contracting entities entrusts the execution of works to one or more economic operators, in which the consideration for works is represented either exclusively by the right to exploit the*

result of the works that are the subject of the contract or by this right accompanied by a payment". Symmetrically, the service concession contract refers to the provision and management of services, other than the execution of works.

A peculiarity generated by *Directive 2014/23/EU* and transposed into *Law no. 100/2016* refers to the operating risk arising from the award of a concession of works or services and which, as stipulated in art. 6 paragraph (1), *"always implies the transfer to the concessionaire of a significant part of the operating risk of economic nature, in connection with the exploitation of works and/or services".* There appears an operating risk when it is caused by events that the grantor or the concessionaire could not control, when the risk involves exposure to the market fluctuations and when, after assumption, the concessionaire does not receive the guarantee that he will recover the costs involved entailed by the investment and the exploitation of the works and services. The aforementioned conditions must be fulfilled cumulatively, according to the law.

For the implementation of the contract of concessions of works and services concessions, *Law no. 100/2016* establishes as procedures for awarding the open tender and the competitive dialogue, with the possibility of using, as an exception, the negotiation without publishing a concession notice. The open tender procedure involves the submission of tenders by all the interested economic operators and, then, at a different stage or at the same time, negotiations to improve the bids that have been accepted and the evaluation of the bids that have been so selected based on the criteria offered by the law.

The competitive dialogue, the other possibility of awarding, considers the submission of the candidates' applications and their selection on the basis of the qualification and selection criteria, the conduct of the competitive dialogue, following which the selected candidates will have the possibility to submit the final offers and, in the end, the final tenders and their evaluation, in compliance with the award procedure stipulated by law.

5. Conclusions

In exercising the right of administration of the public property of the state and of the administrative-territorial units, the public administration authorities have the freedom to choose the best solutions both for the capitalization on the goods, as well as for the execution of the works or for the performance of the services. The fact that the holders of the public property rights have these options does not represent a restriction of their freedom or a limitation of the prerogatives of power, but it constitutes a compatibility of the administrative legal acts and of the administrative contracts of the legal status of public law in which the public authorities carry out their activity with the principle of inalienability of public property goods (Bălan, 2007).

Although the concession has always been a modality used to capitalize on the public goods of the modern state, the increasing complexity of the economic relations at the level of the European Union and at the level of the Member States has determined the revival of the concession contract and its adaptation to the new demands of the European markets as well as its reinvestment with new legal values and meanings.

In light of the new European directives, the consolidation of the national legislation offered a greater degree of adaptability to the legal instruments meant to capitalize on the public property, both at the state level and at the level of the territorial-administrative units. The implications of adopting *Directive 2014/23/EU* and the transposition of the procedures recommended by it in the activity of the national public administration authorities go beyond the scope of strict legal applicability and can constitute premises for more transparent, better integrated Union economic policies, closer to the citizens' interest.

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