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ARGUMENTS FOR AND AGAINST CONCESSION OF PRIVATE GOODS

T. PRESCURE[1] C.G. DINU[2]

Abstract: *Is the regulation of the concession of privately owned assets, along with the concession of public goods - that is currently the rule, at least in terms of existing regulation? Despite the fact that, after the entry into force of Emergency Ordinance 54/2006, the concession of private property ceased to represent a preference in the law-making process, the provisions of Law no. 50/1991 remained in force. As a result, doctrine and judicial practice have polarized, creating two diametrically opposed views. This analysis does not outline the purpose of alignment with one of the two interpretations. Therefore, without excluding any of the two variants, we are trying to bring pros and cons of land concessions in the private domain.*

Key words: *concession, private, public.*

1. Introduction

The distinction between the public domain and the private domain is indisputable, but the perpetuation of a permissive attitude of the administrative authorities regarding the exercise of the right of concession on goods from the private domain, and thus not only on public goods, gives rise to confusion, which can sometimes be interpreted as a lack of transparency in the Romanian administration.

Recognizing the impact of public goods on a public service or the impairment of public utility nuances the importance of the distinction between the public domain and the private domain (Apostol Tofan, D., 2017, p.90; Prescure, T., Matefi, R., 2012, p.13).

2. Juridical controversies regarding the concession of goods

2.1. National regulations

Considering the constant evolution of the Romanian legislation in this field, we consider that it is necessary to find a legal framework appropriate to the regulation of the concession of goods in the private domain and substitution of the concession institution with the lease. The doctrine also proposed the solution of the special regulation of the civil right of *superficie* as an institution applicable to the private

[1] *Transilvania* University of Braşov, titus.prescure@unitbv.ro
[2] *Transilvania* University of Braşov, catalina.matei@unitbv.ro

domain, as it observes the tendency of the legislator to keep the concession as an institution strictly applicable to the public domain (A.M.Apetrei, 2014). It is mentioned, however, that in order to give effect to the *superficie* right in the case of goods belonging to the private domain of the State or of the territorial administrative units, express regulation is required in this respect.

2.2. European Regulations

Indeed, even at European level, point 15 of the Preamble to Directive 23/2014/EC regulates the limits of the concession, namely that this legal institution should not consider the exploitation of certain "public domains or resources under public or private law , such as land or property owned by the State, particularly in the field of inland ports or airports ".

Thus, contracts of this kind by means of which the contracting authority or entity only establishes the general conditions for the use of those goods without purchasing specific works or services is classified *as a lease and not as a concession*.

3. Romanian legislation regarding the concession of goods. Public vs private domain. The concession of private goods according to Law no.50/1991

Regarding the applicable law, by Law no. 50/1991 on the execution of construction works, republished, with the subsequent modifications and completions, the land belonging to the private domain of the state or the territorial administrative units for the execution of constructions was regulated.

The methodological norms for the application of Law no. 50/1991 were elaborated much later, and they entered into force only in 2009, their content attracting attention by its inconsistency with the provisions of Law no. 50/1991. So, the methodological norms for the application of Law no. 50/1991 regarding the authorization of the execution of construction works were approved by Order no. 839 of 12 October 2009 and published in the Official Monitor of Romania no. 797 of November 23, 2009.

Thus, if art. 13 of the Law no. 50/1991, republished, as amended, regulates the concession of land in the private domain, respectively in the public domain, the methodological norms regulated by art. 61 do so only for the concession of land belonging to the public domain of the state or of the territorial administrative units. Moreover, paragraph (2) of the same article provides for an unfortunate combination of legal terms, namely *the concession of land in the public domain for private purposes*, with a view to building temporary constructions.

Therefore, instead of detailing the conditions under which the procedure for assigning the concession of goods in the private domain could be carried out in order to build, in accordance with the provisions of Law no. 50/1991, the rules are limited to reproducing art. 13 par. (2) of the Law no. 50/1991, which refers to the concession of land in the public domain.

These legislative loopholes run the risk of giving rise to tenders organized at the discretion of the local authorities, with no coherence of this procedure at national level.

A proof of this is the proposal of the Court of Accounts, subsequently observed by the Local Council of Cluj-Napoca, regarding the drafting of a regulation on the concession of public and private assets in Cluj-Napoca in 2018.

3.1. The dispositions of the Romanian Civil Code

With the entry into force of the 2009 Romanian Civil Code (Romanian Civil Code, as follows), on 1 October 2011, a large part of the provisions of Law no. 213/1998 regarding the public property assets were abrogated, the regulated institutions being taken over in the initial normative act mentioned.

Thus, the legal regime of public property, as well as derived rights, including the right to concession, are now surprisingly found in a different framework designed to regulate "patrimonial and non-monetary relations between individuals, as subjects of civil law ", according to art. 2 par. (1) Civil Code (Matei, C.G., 2012, p.134).

Law no. 213/1998, which represented the general framework in the field of public property, "transferred" part of its subject matter to a civil law - Civil Code, which was criticized in the relevant doctrine of administrative law (Ciobanu, A.S., 2012, p.332).

Thus, the definition of the public property right, its characters and its legal effects, as well as the relevant real rights or the legal limits of the public property right was left to the Civil Code.

It is noted that the provisions contained in the Civil Code regulating public property bring nothing new in the field and do not modify the legal regime of public property.

Moreover, the Civil Code does not regulate the right of concession of the goods in the private domain, which underlines the tendency of the legislator to grant the exclusive concession of goods in the public domain, by correlating the normative framework with the provisions of the Government Emergency Ordinance (EOG) no. 54/2006.

However, the Civil Code does not repeal the provisions of Law no. 50/1991, which regulates the construction on land in the private domain for construction, and no other legal provisions stipulating the possibility of concession of goods in the private domain, so that the two types of concession currently operate simultaneously. However, we consider that, at present, the concession of land in the private dwelling is an exception to the rule of exercising the right of concession on the goods in the public domain.

3.2. Exclusive legislation regarding concession of public goods

We underline that, with the entry into force of new legislation on acquisitions and concessions, in particular Law no. 100/2016, EOG 54/2006 was not repealed and the provisions of Law no. 50/1991 on the concession of goods from the public domain and private goods were not a matter of regulating the new legislative package, although this would have been a good opportunity to reform the legislation in the field.

According to art. 1 par. (2) from EOG no. 54/2006 regarding the regime of public property concession contracts, with the subsequent modifications and completions (EOG No. 54/2006, as follows), the concession contract for public property is "the contract concluded in written form which a public authority, called a concessionaire,

transmits, for a determined period, to a person called the concessionaire acting on its own risk and liability, the right and the obligation to operate a public property in return for a royalty ".

4. Public interest. Delimitation between private and public contracts.

The public interest criterion has fundamentally determined the substantive jurisdiction of the admissibility court in a concession contract governed by special law.

However, where the public interest is not involved in concluding a concession contract, the case law has stated that it has the legal nature of a private contract (the High Court of Cassation and Justice, Administrative and Fiscal Complaints Division, Decision no. 812 of 13 February 2009).

Also, although the administrative nature of the concession contract for private property is denied and the case law has remained constant in the sense that it has a civil nature (the High Court of Cassation and Justice, Civil Division II, Decision no. 1708 of March 27, 2012; the High Court of Cassation and Justice, Administrative and Tax Appeals Division, Decision no. 3681 of September 17, 2010; the High Court of Cassation and Justice, Administrative and Tax Appeals Division, Decision no. 812 of 13 February 2009), it has been held that the litigation is a matter for the administrative courts. Moreover, the legal doctrine has argued the ambiguity of the ownership of the private property concession contract, since "private law does not know the concession of goods as an onerous way of using them, but only the lease" (Prescure, T., 2004).

As a consequence, we consider that, as regards the concession of goods in the public domain, but especially those in the private domain - given the insufficiency of the current legal framework regulating the concession of private property - it is necessary to regulate some mechanisms of necessary control over the private activities in connection with the organization of the public service, as well as some levers corresponding to the fulfillment of the fundamental criterion of the realization of the public interest (Dinu, C.G., 2016, p.80).

Several normative acts provide for the concession of goods in the private domain of the state or of the territorial administrative units, but the only normative act governing the award procedure and the conditions under which their concession can take place is the Government Ordinance no. 21/2006 on the concession of historical monuments, as subsequently amended and supplemented. Article 2 paragraph 1 of the Government Ordinance no 21/2006 on the concession of historical monuments, as subsequently amended and supplemented provides for the concession of historical monuments from the public domain or the state private domain or territorial-administrative units.

5. Jurisprudential Aspects

5.1. Decision No. 1708 of March 27, 2012, rendered in appeal by the High Court of Cassation and Justice

The court of first instance states that the applicant based its action on the non-

observance by the contracting parties of the provisions of GEO no. 54/2004, but that the concession does not belong to the public domain but to the commune's private domain, so that the texts of the law the violation of which is invoked by the applicant are irrelevant to the settlement of the case.

As to the concession of public property, the legal basis allegedly infringing could not be accepted as a ground for annulment of the acts whose annulment is required in the present case. At the same time, there were no other grounds for illegality that would lead to the annulment of the acts whose annulment is required in the petition of the action. The concession contract concluded by the defendant company did not prove to be unlawful, so that the application for suspension of its execution was found to be unfounded.

By the decision, the court of appeal ruled on the administrative nature of the case, taking as its basis the grounds of the court's instigation, in application of the principle of availability. Having found the criticism of the material lack of jurisdiction of the civil court in dealing with the second criticism was obviously no longer considered because it questioned substantive issues that were exclusively at the discretion of the court in whose jurisdiction competence was established.

In fact, by the second complaint in the appeal and by the criticisms made in the appellant's appeal, the applicant proposes that a possible substitution of the grounds of the contested judgments would create a legislative framework extending the provisions of GEO no. 54/2006 specific concession contracts having as object the public land of the state and the concession contracts having as object private land owned by the state on the basis of the rules of systemic interpretation of the civil law.

Controlling the legality of a judgment is made from the perspective of the incidental law, in the form and content that the legislator gave it. The lack of legal regulations cannot be remedied by the court by changing some considerations, the way chosen by the appellant - the plaintiff being thus improper from this point of view and contrary to the limits that the fundamental law confers on the judiciary.

5.2. Decision No. 3681 of September 17, 2010, rendered in appeal by the High Court of Cassation and Justice (Litigation-administrative and fiscal section of the Court of Appeal, having as object the concluding of a concession contract)

The High Court of Cassation and Justice decided that, according to the provisions of art. 8 par. 2 and art. 2 par. 1 lit. c of Law no. 554/2004, the administrative litigation court is competent to settle only those disputes related to the administrative contracts, namely those contracts that have as object the capitalization of the public property or other categories of administrative contracts expressly regulated by special laws. Consequently, the application for concluding a concession contract on a private land property of the state or the territorial-administrative unit does not fall within the scope of art. 2 par. 1 lit. c) of Law no. 554/2004, the court being competent as a court of common law.

6. Conclusion

In view of the issues at hand, it is no longer justified to maintain the concession as a means of capitalizing on the private property of the State or of the Territorial Administrative Unit. In this respect, the most powerful legal argument consists in the provisions of art. 136 par. (4) of the Romanian Constitution, according to which the concession has public property as object.

Congruently, according to art. 866 of the Civil Code., concession is a real right corresponding to public property.

Considering the already existing legal framework, which allows the renting of private property, as well as the provisions of art. 1783 Civil Code, which regulates the maximum rental duration of 49 years, we consider that exercising a rental right would be the most appropriate way of substituting concession and capitalizing on this category of property.

Also, if it is desired to establish a real right on the land in the private domain of the state or of the administrative-territorial unit, closer to the specific of the private law would be the conclusion of the recognition of a *superficie* right. This involves the use of the land of the State or of the territorial administrative unit during the existence of the construction by the concessionaire in exchange for a price of use.

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