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ASPECTS OF THE EUROPEAN JURISPRUDENCE REGARDING THE LEGAL NATURE OF SOME LEGAL ACTS THAT HAVE AS THEIR OBJECT REAL RIGHTS OVER SOME IMMOVABLE PROPERTY

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Abstract: *In the context of the interest in the development of real estate projects on land privately owned by the state or territorial administrative units, I wanted to identify how to ensure an adequate protection of the developer's rights, namely what real rights can be established in their favor and which is their correct qualification. In this sense, a recent Decision of the CJEU drew my attention. Corroborated with other cases from the CJEU jurisprudence, but not only, I wanted to clarify the nature of the relations that arise between the owner and the developer, and, indirectly, the nature of the rights constituted in favor of the developers.*

Key words: *property, usufruct, concession.*

1. Introduction

The present study starts from a recent judgment of the Court of Justice of the European Union, in Case C 327/20 (Judgment of the Court of January 13, 2022, Skarb Państwa – Starosta Nyski, ECLI:EU:C:2022:23) which had as object a request for a preliminary decision based on Article 267 TFEU. This request was made by a Polish court in a dispute between Skarb Państwa – Starosta Nyski (State Treasury – Nysa District), on the one hand, and New Media Development & Hotel Services, on the other hand, in relation to the interest that must be applied for late payment of an annual royalty due to the former, as remuneration for the perpetual usufruct over land ceded to the latter.

The request for a preliminary decision sought the interpretation of Article 6 paragraph (3) letter (b) of Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in the case of commercial transactions (OJ 2000, L 200 , p. 35), respectively of article 2 point 1 and article 12 paragraph (4) of Directive 2011/7/EU of the European Parliament and of the Council of February 16, 2011 on combating late payments in commercial transactions, which repealed the previous

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directive. More precisely, among other things, the referring court wanted to know whether, in the opinion of the Court, the concept of assets, from art. 2 point 1 of the Directive, includes immovable assets or not, and whether or not the concept of providing assets includes the establishment of perpetual usufruct over an immovable property, or whether such an operation can be considered as a provision of services or not. In short, the referring court requests the clarification of these aspects, in order to be able to determine whether or not the operations in question are commercial transactions, respectively to determine the applicability of Directives in the case with which it was referred.

2. The Right of Usufruct Seen through the View of Directive 2011/7/EU and Polish National Law

2.1. Normative aspects

Directive 2000/35/EC, respectively Directive 2011/7/EU on combating late payments in commercial transactions (Directive 2011/7/EU of the European Parliament and of the Council of February 16, 2011 on combating late payments in commercial transactions, OJ L 48, 23.2.2011, p. 1–10) aim to create mechanisms by which those situations that can affect the liquidity of companies can be prevented or quickly remedied, as a result of late payment of delivered goods or rendered services.

It is well known that, in commercial transactions between economic operators or between economic operators and public authorities, many payments are made later than was established in the contract or stated in the general commercial conditions. Such delays complicate the financial situation of companies, but also their competitiveness and profitability.

The application of Directive 2011/7/UE should be limited to payments made as remuneration for commercial transactions.

Commercial transactions, according to the directive, are those transactions between businesses or between businesses and public authorities that lead to the provision of goods or the provision of services for a fee.

By “public authority” is meant any contracting authority, according to the definition set out in Article 2(1)(a) of Directive 2004/17, respectively "the state, territorial collectivities, public authorities, associations formed by one or more such collectivities or one or more such public authorities".

For the purposes of the Directive, an enterprise is any organisation, other than a public authority, which carries out an independent economic or professional activity, even if that activity is carried out by a single person.

In Poland, the Directive was transposed by the Law on combating excessive delays in commercial transactions, dated March 8, 2013. According to art. 4 point 1 of the law, a commercial transaction is a contract having as its object a supply of goods or a provision of services in exchange for remuneration, if the parties, referred to in Article 2, conclude this contract in the course of their activities.

According to Article 232 of the Civil Code of Poland, dated April 23, 1964, the version

applicable to the main dispute is: "Lands that constitute the property of the state and are located within the administrative limits of cities, state lands located outside these limits, but incorporated in the development plan of the territory of the city and intended for the achievement of its economic objectives and the lands that constitute the property of the territorial collectivities or their associations may be granted in perpetual usufruct to individuals and legal entities.

In the cases provided for by special provisions, the perpetual usufruct may also concern other lands of the state, territorial collectivities or their associations."

According to article 238 of this code, "the holder of the right of perpetual usufruct pays an annual rent throughout the existence of his right".

Finally, according to art. 71 of the Law on the Administration of Immovable Assets of August 21, 1997, the transfer of the perpetual usufruct over a piece of land is subject to a first rent and annual rents.

2.2. Jurisprudential aspects

In fact, a Polish company, New Media, acquired, under a contract concluded on May 15, 2014, the perpetual usufruct over a piece of land from the person to whom the State Treasury had originally ceded this usufruct. In accordance with Article 71 of the Law on the Administration of Immovable Assets, New Media, as a perpetual usufructuary, is required to pay an annual rent to the State Treasury.

Since it did not receive the amount of this rent when it was due, on March 31, 2018, the State Treasury notified the competent court with a request with the object of obliging New Media to pay the amount owed mainly of 3,365.55 Polish zlotys (PLN) (approximately 755 euros), to which the legal interest for late payments was added, in accordance with the provisions of the Law of March 8, 2013.

Through the ruling, the court obliged New Media to pay the principal amount owed, plus legal interest for the delay in making payments, calculated from April 1, 2018, based on the provisions of the Civil Code, and not the provisions of the Law of March 8, 2013. The Court assessed that the obligation to pay the annual rent does not result from a "commercial transaction", in the sense of this law, but has as its legal basis article 71 of the Law on the administration of real estate and article 238 of the Civil Code.

The State Treasury declared an appeal against this decision to the Opole Regional Court, the referring court. It challenged the rejection of its interest claim under the Act of 8 March 2013, arguing that the main dispute fell within the application of that Act. The perpetual usufruct, although it is established by the Law on the administration of immovable assets, would by law give rise to a contractual relationship between the State Treasury, owner of the immovable, and the usufructuary.

Analyzing the applicable normative framework and the factual situation, the Court declared that the notion of "commercial transaction", in the sense of article 2 point 1 of Directive 2011/7/EU of the European Parliament and of the Council of February 16, 2011 on combating the delay in making payments in commercial transactions, must be interpreted in the sense that it does not cover the collection by a public authority of a rent, due as remuneration for the perpetual usufruct over a land, from an enterprise to

which this public authority is a creditor.

What we are interested in, however, is the qualification of the operation of establishment of the usufruct, whether or not it can be included in commercial transactions.

The Court of Justice of the European Union, in case 7/68 of 1968, Commission of the European Communities v. Italy (Decision of the Court of 10 December 1968, Commission of the European Communities v Italian Republic. Case 7-68. ECLI identifier: ECLI:EU:C:1968:51), in the sense of art. 9 of the EEC Treaty, stated that "by goods […] must be understood products that can be valued in money and that are capable, as such to be the subject of commercial activities, transactions." Commodities include not only tangible but also intangible assets such as energy or rights.

Returning to the text of Directive 2011/7, we recall that commercial transactions are considered those transactions between businesses or between businesses and public authorities that lead to the supply of goods or the provision of services for a fee.

The Polish Civil Code does not define what the provision of services is, but, through art.750, it refers to the mandate contract, the rules of which apply to the provision of services, if there are no special regulations. However, the notion of "provision of services" can be defined through the lens of Polish jurisprudence as any paid activity other than production or trade. In this regard, we recall a decision of the Supreme Court of November 15, 2017, in case no. II CSK 122/17 (Gwiazda) which highlighted the fact that the provision of services involves the provision of non-monetary benefits for which a payment is due (price, remuneration, rent, fee). The notion of service should not be limited to a service contract in the traditional sense, such as a mandate contract or a contract for the production of work. Indeed, the jurisprudence of the Court of Justice extends this concept to a contract for the use of another person's property, thus including a contract of lease or transfer of the right of usufruct.

As regards the supply of goods, this includes the sale and other forms of disposing, for consideration, of goods, a concept that includes all assets with monetary value, including waste and energy (Decision of the Court of Appeal in Warsaw, Section 7- of Commercial, from January 3, 2020, VII AGa 358/19).

Similarly, the Szczecin Court of Appeal ruled in the Judgment of June 21, 2021 (case no. I AGa 20/21) that the notions of delivery of goods and provision of services, as well as the concept of commercial transactions referred to in art. 2(1) of the Late Payments Directive, should be understood broadly. An agreement under which the principal consideration is the supply of immovable property for temporary use against payment may constitute a supply of goods or a provision of services within the meaning of the above provisions. In the Polish legal system, this primarily means leases or the establishment of usufruct rights and other similar agreements that are not expressly classified in the Civil Code (Maćkowiak).

3. Considerations from the Perspective of Romanian Law

From the point of view of Romanian law, the legal qualification would be different. Since, in this case, it is a matter of land belonging to the Public Treasury (public

institution), it will have a separate legal regime, whether it is a public property or a private property.

It is well known that public property is inalienable. However, certain real rights can be established over these goods, for a better exploitation of them, namely the right of administration, the right of concession and the right of free use**.**

As for the goods located in the private domain of public law subjects, they are part of the civil circuit. According to article 553 paragraph (4) of the Civil Code: "The objects of private property, regardless of the owner, are and remain in the civil circuit, unless the law provides otherwise. They can be alienated, they can be subject to compulsory prosecution and they can be acquired by any means provided by law". The text of the law does not distinguish between the holders of the right to private property, which leads to the idea that the common law legal regime is also subject to the goods that form the private domain of the state or of a territorial administrative unit. Similarly, art. 355 Administrative Code, provides that: "Goods that are part of the private domain of the state or administrative-territorial units are in the civil circuit and are subject to the rules provided by Law no. 287/2009, republished, with subsequent amendments, if the law does not provide otherwise".

According to art. 362 of the Administrative Code, the assets privately owned by the state or administrative-territorial units can be administered, concessioned, given for free use or leased, the provisions regarding the administration, concession, rental and free use of goods belonging to the public domain of the state or of the administrative-territorial units applying accordingly.

The contract for the concession of public property goods, regulated by art. 303 adm.c. and the following, is that contract concluded in written form by which a public authority, called the grantor, transfers, for a determined period, to a person, called the concessionaire, who acts at his own risk and responsibility, the right and obligation to exploit a public property, in exchange for a royalty.

Therefore, according to Romanian law, in order to produce legal effects similar to the perpetual usufruct in the case submitted for analysis, the Public Treasury could, at most, establish and transmit contractually a right of concession over the land belonging to it, even in private ownership.

The concession contract is mainly an administrative contract, containing a regulatory part and a proper contractual part (Chelaru, 2019, p.120). According to art.324 C.adm., the regulatory part includes the clauses provided in the specifications, and the actual contractual part includes the clauses agreed by the contracting parties, in addition to those in the specifications, without contravening the objectives of the concession provided in the specifications.

In the doctrine, the opinion was also expressed that the concession contract would be "a civil or commercial contract, in relation to the nature of the activity or service (whether or not these are objective commercial acts) that are the object of the concession, as well as the quality of the concessionaires (traders or non-traders)" (Prescure, 2004). It would be a contract of adhesion, since "a good and essential part of its clauses cannot be negotiated" (the regulatory part).

The same author proposed replacing the name "administrative contract" with that of

"contract for the administration of public and private patrimony of the state and/or territorial administrative units", opining that such a name would be likely to highlight "the essentially contractual character of this type of legal acts, the fact that a party is always a legal person under public law, the goods/activities/services that are the material object of these contracts belong/are reserved (naturally or by law) to the state and its administrative-territorial units, the purpose for which it is concluded (from the point of view of the person under public law) is the promotion (administration) of certain goods/activities/services under the management of certain public authorities" (Prescure, 2004).

However, I share the opinion expressed and supported by the majority of authors in the field, according to which the concession contract is, as a rule, an administrative contract, with its particularities. In support of this opinion, I also bring the provisions of art. 2 paragraph 1 letter c) of Law no. 554/2004 on administrative litigation, which provides that an administrative act is "the unilateral act of an individual or normative character, issued by a public authority in order to execute or organize the execution of the law, creating, modifying or extinguishing legal relationships; are assimilated to administrative acts, for the purposes of this law, and the contracts concluded by public authorities whose object is:

- enhancing the value of public property;
- execution of works of public interest;
- providing public services;
- public procurement."

In the same sense, the ÎCCJ ruled: "The contract for the concession of the public property is an administrative contract, in the sense shown by art. 2 paragraph (1) letter c) of the Administrative Litigation Law, as it is a contract concluded by a public authority having as its object the enhancement of the value of a public property" (ÎCCJ, Commercial Section, decision no. 640/2010).

Regarding the concession of assets in the private ownership of the state and/or territorial administrative units, the High Court of Cassation and Justice decided that, in accordance with the provisions of art. 2 para. (1) lit. c), sentence II of the Administrative Litigation Law no. 554/2004, a concession contract will be assimilated to an administrative act and will be subject to a legal regime of administrative law, only to the extent that its object is exclusively aimed at enhancing the value of public property. Per a contrario, a concession contract whose object is to enhance the value of private property of the state or administrative-territorial units, will not be subject to the jurisdiction of the administrative litigation courts (Decision no. 6 of January 6, 2011, pronounced on appeal by the Administrative and Fiscal Litigation Section of the High Court of Cassation and Justice with the object of suspending the obligation to pay the royalty resulting from the concession contract) (ÎCCJ, Administrative and Fiscal Litigation Section, Decision no. 6/2011 of January 6, 2011, File no. 2439/54/2008).

The concession of goods in the private ownership of the state and/or territorial administrative units, as well as the giving in administration or the giving in free use give rise to specific real rights, respectively the right of concession, the right of administration and the real right of use (Chelaru, 2019, p. 146). These rights are, as a rule, the subject of

civil law relations. We do not exclude the possibility that, with regard to the right of concession, it will be the subject of a commercial relationship, to the extent that, once the Civil Code, which repealed the Commercial Code, comes into force, we can still talk about commercial law relationships.

4. Conclusions

In the context of the interest in the development of real estate projects on land privately owned by the state or territorial administrative units, I considered this analysis to be interesting. Moreover, real estate developers have certain reservations about carrying out such real estate development on land they do not own.

As it follows from Law no. 50/1991, the possession of a real right regarding the land surface on which the construction works are to be carried out is one of the essential conditions to be able to start the process of obtaining the building permit. The building permit can be obtained on the basis of a right of ownership, right of administration, right of concession, use, usufruct, superficies, servitude.

However, as we highlighted previously, the ways of exercising the right of private ownership of the state and territorial administrative units over land can be administration, concession, rental and use free of charge.

According to art. 13 paragraph (1) of Law no. 50/1991 regarding the authorization of the execution of construction works: "Lands belonging to the private domain of the state or administrative-territorial units, intended for construction, can be sold, concessioned or rented through a public auction, according to the law, under the conditions of compliance with the provisions of the urban planning and land development documentation, approved according to the law, in order for the owner to carry out the construction".

In order to ensure adequate protection of the rights of the developer, who wants to build on land that is privately owned by the state or a territorial administrative unit, we consider that concluding a concession contract is the right choice.

References

Chelaru, E. (2019). *Drept civil. Drepturile reale principale* [Civil law. The main real rights]. București: Ed.C.H.Beck.

Directiva 2000/35/CE a Parlamentului European și a Consiliului din 29 iunie 2000 privind combaterea întârzierii efectuării plăților în cazul tranzacțiilor comerciale. (*Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions).* (2000). OJ L 200. 8.8.2000. (p. 35–38) https://eur-lex.europa.eu/legal-content/RO/ALL/?uri=celex:32000L0035 .

Directiva 2011/7/UE a Parlamentului European și a Consiliului din 16 februarie 2011 privind combaterea întârzierii în efectuarea plăților în tranzacțiile comerciale. (*Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions).* (2011). OJ L 48. 23.2.2011 https://eur-lex.europa.eu/legal-

content/EN/TXT/?uri=CELEX%3A32011L0007&qid=1697479448498.

Gwiazda, N. (2022). *Cum se recuperează costurile reale de colectare a creanțelor suportate de la debitor? (Jak odzyskać od dłużnika faktycznie poniesione koszty windykacji? - How are the actual debt collection costs incurred from the debtor recovered?).* https://prawodlasamorzadu.pl/2022-10-07-jak-odzyskac-od-dluznika-faktycznie-poniesione-koszty-windykacji .

Hotărârea Curții din 13 ianuarie 2022, Skarb Państwa – Starosta Nyski. *Judgment of the Court of 13 January 2022, Skarb Państwa – Starosta Nyski).* (2022). ECLI:EU:C:2022:23. https://eur-lex.europa.eu/legal-content/ro/TXT/?uri=CELEX%3A32011L0007.

Hotărârea Curții din data de 10 decembrie 1968. Comisia Comunităților Europene împotriva Republicii Italiene. Cauza 7-68. (The Court's decision of December 10, 1968. Commission of the European Communities v Italian Republic. Case 7-68). (1968). ECLI:EU:C:1968:51. https://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX%3A61968CJ0007.

Hotărârea Curții de Apel din Varșovia, Secția a 7-a Comercială, din 3 ianuarie 2020. (*Decision of the Warsaw Court of Appeal, 7th Commercial Section, dated January 3, 2020).* (2020). VII AGa 358/19. https://www.saos.org.pl/judgments/425738.

ÎCCJ. Secția comercială. Decizia nr.640/2010. *Dreptul*. (7/2011). (High Court of Cassation and Justice. Commercial section. Decision no. 640/2010). *Law.* (7/2011). (239).

ÎCCJ. Secţia de contencios administrativ şi fiscal. *Decizia nr. 6/2011 din 6 ianuarie 2011. Dosar nr. 2439/54/2008. (High Court of Cassation and Justice.Administrative and fiscal litigation section. Decision no. 6/2011 of January 6, 2011. File no. 2439/54/2008).* (2011). https://legeaz.net/spete-contencios-inalta-curte-iccj-2011/decizia-6-2011.

Maćkowiak, K. (2023). What is a commercial transaction? *Scholary Journal, In principle.Legal studies and analyses.* https://codozasady.pl/en/p/what-is-a-commercial-transaction- .

Prescure, T. (2004). Despre regimul juridic al contractului de concesiune în dreptul românesc contemporan. *Revista „Curentul juridic" (About the legal regime of the concession contract in contemporary Romanian law. "Juridical Current" magazine).* (nr.12/2004).http://revcurentjur.ro/old/arhiva/attachments_200412/recjurid041_24F.pdf.