CONCESSION, A WAY OF MANAGING PUBLIC DOMAIN

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Abstract

The concession, viewed in terms of civil law rules, is a real right corresponding to public property, this legal qualification being conferred by the provisions of article 866 of the civil Code.

From the point of view of the administrative law, the concession is seen as a way to capitalize on the assets that make up public and private domain.

The object of this contract is represented by public or private properties belonging to public or private domain of the state or of administrative-territorial units, these properties following to be registered in the land book before concluding the concession contract of public properties, under the sanction of absolute nullity of the contract, according to the provisions of article 305, paragraph 2 and paragraph 3, of the administrative Code.

Three fundamental stages can be distinguished in the development of the concession procedure:

- the initial stage, of preparing the documentation necessary to start the tender procedure, characterized by the initiation of the concession proposal and the elaboration of the specifications that include the criteria for awarding the concession contract;

- the procedure for conducting the auction, in which the bids of natural or legal persons of private law are submitted and assessed, a stage completed by the statement of the winning bid;

- the stage of concluding the concession contract, the regulatory part containing the elements determined in the specifications.

Concession of services and works is defined as an agreement by which a public person entrusts the provision of a public service to a private company, which ensures the financing of works, their operation and which is remunerated from royalties collected from statutory undertakers.

Concession of mining activities it is a special form of concession, which consists in concluding an agreement called a license, this representing the legal deed by which concession of mining exploration / exploitation activities is granted.

The legal nature of concession of forest lands, the public property of the state is that of the species of the service concession contract.

Keywords: *public property, concession, administration, auction.*

1. Introduction

In the current socio-economic context, marked by a generalization of global trade operations and a marked interoperability of markets for goods, services and capital, the way of valuing goods belonging to public or private domain of public administration authorities, established by the Romanian Constitution, at a central or local level, has experienced, in the last 12 years, a real structural and conceptual revolution and, obviously, of a legal approach, worthy of an emerging society, such as the Romanian nation, in full process of modernization and adaptation to the traditions, the vision and the European normative rigors.

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Or, from this point of view, that of the administration of public or private property, state or local, the Romanian legislation has known a constant evolution and a remarkable improvement, thanks to the obligatory European norm, which stimulated the Romanian legislator to keep up with the European Union legislation.

Capitalization, in compliance with constitutional and infra-constitutional provisions, of the goods that are the object of public and private domain at a national, county and local level implies a wide range of legal ways of exercising the right of public property and of introducing in the civil circuit the goods that the object of this modality, without disregarding, of course, the principle of inalienability, imprescriptibility and immunity from seizure of public property goods, ruled by the provisions of article 136, paragraph 4, thesis I, of the Romanian Constitution, as well as by the provisions of article 861, paragraph 1, of the civil Code of 2009.

One of the main forms of valorisation of state public domain assets is, unequivocally, the legal institution of the concession.

2. Concession of public property

The concession of public property is a legal institution established by legal norms of constitutional value, being established by the provisions of article 136, paragraph 4, the second sentence, of the Romanian Constitution, according to which "*Under the conditions of the organic law, they can be given in administration to autonomous administrations or public institutions or they can be conceded or rented; they can also be given free of charge to public utility institutions.*"

The concession, viewed in terms of civil law rules, is a real right corresponding to public property, this legal qualification being conferred by the provisions of article 866 of the civil Code, according to which *"The real rights corresponding to public property are the right of administration, the right of concession and the right of free of charge use."*

From the point of view of the administrative law, the concession is seen as a way to capitalize on the assets that make up public and private domain, therefore as an effective and useful legal tool for introduction into the economic circuit, in strict compliance with legal rules in this case and of the clauses of the concession contract, of state assets and of territorial administrative units.

A prestigious author [1], by quoting the interwar doctrine, points out that, historically, concession is the traditional means of capitalizing on public property, which has played a special role in the creation and the development of the modern state and its organization, because natural resources have been capitalized, non-productive assets from public domain were used and, thus, the development of civilization was facilitated.

Viewed with a broader sense, concession is a form of management of public service, and, consequently, of general interest, to which the notion of public service is inextricably related.

As pertinently noted in the doctrine, the public interest designates the material and spiritual needs of citizens at a given time, stating that this phrase is a concept that depends on political goals, its meaning may change with the change of concepts in the event of an alternation of powers[2].

[1] Verginia Verdinas, Administrative Law, the 12th edition, Universul Juridic Publishing House, Bucharest, 2020, p. 532.

[2] Marta Claudia Cliza, Administrative Law, part I, ProUniversitaria Publishing House, Bucharest, 2017, p.11.

The logical consequence of the syllogism created is that the concession contract must always be concluded in the public interest. Only in this way can the principle of balance between the general interest and the desire of the individual to obtain benefits be applied.[3]

As stated in the doctrine [4], concession of assets can be defined as that contract by which a public authority allows a private natural or legal person to exercise possession and use, under the law and the concession contract, an asset belonging to the public domain of the state and of administrative territorial units.

A particularly structured definition of concession can be found in the provisions of paragraph 11 of the recitals of the Directive number 2014/23/UE of the European Parliament and of the Council of 26 February 2014 regarding the award of concession contracts[5], according to which *"Concessions are onerous contracts concluded in writing by the intermediary of which one or more contracting authorities or contracting entities entrust the performance of works or the provision and management of services to one or more economic operators. The object of such contracts is the purchase of works or services by the intermediary of a concession, the compensation of which consists in the right to operate works or services or in the right to operate and a payment. It is possible, but not mandatory, for such contracts to involve the transfer of ownership to contracting authorities or contracting entities, but contracting authorities or entities always obtain the benefits of the works or services in question."*

It is also noted in paragraph 68 of the preamble to the same directive that *"Concessions are usually complex, long-term agreements in which the statutory undertaker undertakes responsibilities and risks traditionally borne by contracting authorities and by contracting entities and which enter normally within their area of competence. For this reason, subject to compliance with this directive and the principles of transparency and equal treatment, contracting authorities and contracting entities should have considerable flexibility to define and organize the procedure for selecting the statutory undertaker..."*

Based on these doctrinal and normative considerations, we understand to define concession as representing the administrative onerous contract, bilateral or multilateral, essentially temporary and solemn, by which a public authority, called grantor, transmits, in *public power* and for a limited period, the attributes *ius utendi, ius fruendi, ius possidendi and ius abutendi*, but only from a material point of view, from the content of the property right on public or private domain assets of the state or of administrative-territorial units, as well as the correlative obligation to exploit these goods or by which the right and obligation to perform works or to provide and manage services is assigned to a natural or legal person, exclusively of private law, hereby referred to as a statutory undertaker, who acts on his / her risk and responsibility in the performance of the contract, in exchange for a royalties.

In terms of terminology, the regime of public power is the regime in which the general interest prevails, when it is in

[3] Dana Apostol Tofan, Le Parteneriat public-privé, Annals of the University, Series: Law, number II / 2005, p. 51.

[4] Gabriel Boroi, Carla Alexandra Anghelescu and Bogdan Nazat, a Civil law course, Main real rights, Hamangiu Publishing House, Bucharest, 2013, p. 58.

[5] Published in the Official Gazette of the European Union number L94/08.03.2014.

conflict with the particular interest, through the prerogatives granted by the Constitution and by the laws[6].

Therefore, concession, as a form of exercising the right of public property, implies the conclusion of a concession contract, but legal relations between the parties do not only belong to the field of civil law, but must also take into account the elements of public law, which are present within their framework.[7]

The characteristics of the concession contract are as follows:

- concession is an agreement assimilated to administrative acts, concluded by two or more parties, one of which, called the grantor, is represented by a public authority, and the other party / the other parties is / are represented by a natural or a private law person; therefore, concession cannot be concluded by two (or more) public administration authorities;[8]
- in the development of the concession contract, the achievement of public interest, national or local, is preemptive to the particular one, with the observance, within the limits of the law and of contractual clauses, of contractual balance between the grantor and the statutory undertaker; The administration of the public service by an individual must always be aimed at satisfying a public interest, even if that individual obviously seeks to obtain a personal profit. In other words, the achievement of desired gain must not contradict general interest and concession must not lead to the destruction of public wealth and national heritage;[9]
- it is concluded for a limited period of time, concession being an essentially temporary contract;
- the performance of the concession contract is carried out at the risk and the exclusive responsibility of the grantor;
- concession does not entail the alienation of the asset, the owner retaining the right to legally dispose of the asset, and the one who uses the public asset or who exploits the work or public service acquires the attributes of material provision, possession, use and usufruct;[10]
- the onerous nature, concession implying the pursuit by each party of obtaining a certain patrimonial advantage in exchange for the undertaken obligations;
- the grantor always reserves the right to repurchase concession, in certain circumstances, hence the redeemable nature, which is traditional for concession.

Romanian legislation knows a multitude of forms of concession, but three of them are distinguished by their importance: concession of public or private property of the state or of administrative-territorial authorities, concession of works and concession of services.

The distinction between them is not exactly an easy thing in the practical activity, and that is why, in specialized doctrine and in jurisprudence, the problem of determining

[6] Marta Claudia Cliza, *op. cit*., 2017, p. 11.
[7] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit.*, p. 58.
[8] Verginia Verdinas, *op.cit.*, p. 533.
[9] Antonie Iorgovan, Treaty of Administrative Law, vol. II, the 4th edition, All Beck Publishing House, Bucharest, 2005, p. 185.
[10] According to the provisions of article 872, paragraphs 1 and 2 of the civil Code, "(1) The statutory undertaker may perform any material or legal acts necessary to ensure the exploitation of the asset. However, under the sanction of absolute nullity, the statutory undertaker may not alienate or encumber the asset given in the concession or, as appropriate, the assets intended or resulting from the performance of the concession and which must, according to the law or articles of incorporation, be handed over to the grantor upon termination. 2. Fruits and, within the limits provided for by the law and in the instrument of incorporation, products of the conceded property shall be incumbent on the statutory undertaker.".

the modality and the criteria of differentiation between these forms of concession was raised, with concrete practical implications, in the sense of identifying incident legal norms in the concrete legal relation established between contracting parties.

In terms of the relationship between the public service concession contract and the public property concession contract, the Romanian interwar doctrine established a fundamental difference between the agreed concession on a property belonging to the private domain or the public domain, on the one hand, respectively the concession of a public service, which is "a special, particular legal operation".[11]

In this sense, we show the fact that, according to the provisions of article 304 of the administrative Code, which regulates the matter of mixed concession contracts, *"(1) The provisions of this section do not apply to works concession contracts and service concession contracts. (2) In the case of a public works contract or services, of a works concession contract or of a service concession contract for the performance of which it is necessary to exploit a public property, the right to exploit that property shall be transferred within the framework and according to the procedure applied for the award of the contract in question. (3) In the case provided for in paragraph (2), the contracting authority concludes a single works or service concession contract, as appropriate, in accordance with the law."*

This legal norm puts an end to a previous doctrinal dispute and establishes a logical and necessary solution in case of meeting in the content of the concession contract to be concluded between the grantor and the statutory undertaker of a combination of characteristics, of the concession of public property and the concession of works or services.

Thus, in this situation, of the event of incidental legal norms in this case, the legislator opted for the solution of applying the special incidental legal norms in the matter of the works concession or service concession contract, as appropriate, the entire legal operation being governed by the special and derogatory norm, meaning that a single works or service concession contract shall be concluded.

The legislator's solution is not only fair, but also natural, given that, in this circumstance, the exploitation of public property is only an inherent way of performing the works concession contract or the service concession contract, the features of these latest contracts being important in this context, which shall coordinate the whole legal operation carried out between the contracting parties.

Consequently, the concession of public property is distinct from the concession of public services, unless assets in question are used for the supply, provision or operation of services which are the subject of delegation of management or concession of public services, where concession of public services includes concession of public property.

However, the stated case is only an exception in appearance, since the public property is not conceded, it is not the object of the statutory undertaker's exploitation. Legal provisions refer to the administration or concession of the asset, the rights recognized in this respect can be exercised only according to the given destination, namely, for the purpose of supplying or providing the service. Thus, the statutory undertaker's right to public property is a real right of use, of an ancillary nature, and it is only a means regarding the performance of

[11] Constantin Rarincescu, Theory of public service, The Lithographed Courses Publishing House, Bucharest, 1941, p. 181.

the public service. We therefore deem that, in addition to a right of exploitation of public service, the statutory undertaker also has a right of use exclusively of the public domain asset, which thus becomes an intrinsic part of the object of the public service concession contract..[12]

Regarding the relationship between the public service concession contract and the public works concession contract, starting from the theory of the public service from the Romanian interwar period [13], it follows that the public service is the basis of both public service concession contracts and public works concession contracts, so that the independent existence of the latter has been disputed.[14]

It was argued that the organization of a public service often involves the need to carry out certain installations, certain works, which, precisely because they are affected in order to operate a public service, have the nature of public works. It turned out that the performance of a public work is possible only for the purpose of performing a public service.[15]

Thus, regarding the determination of the legal qualification of the contract to be concluded, that of a contract having as object the concession of works, respectively the concession of services, with all the legal consequences deriving from this qualification, regarding the rights and obligations of the contracting parties, the delimitation criterion between the two categories of contracts is that of the purpose and the activities carried out, respectively of the predominant nature of the services to be performed, according to the provisions of article 309, paragraph 4, of the administrative Code.

So, if the predominant are the right and the correlative obligation of the statutory undertaker to perform a public service, then the concession contract shall be a service one, and if the effect of performing a public work is preemptive as weight, the contract shall be qualified as a works concession.

In this regard, we note that the main object of the designed concession contract is that which determines the legal qualification and legal features of the convention, respectively if, in this case, we are dealing with a public service concession contract or a public works concession convention.

According to the provisions of article 329, paragraph 1, of the administrative Code, the person who deems that a contract has been qualified as a concession contract for public property by the non-compliance with the legislation regarding works concessions and service concessions may request the point of view of the National Agency for Public Procurement.

According to the provisions of article 303, paragraph 2, of the administrative Code [16], „The public property concession contract is that contract concluded in writing by which a public authority, called grantor, transfers, for a limited period, to a person, called statutory undertaker, who acts at his / her own risk and responsibility, the right and obligation to exploit a public property in exchange for a royalty."

Therefore, this type of concession contract has as its main object the transfer by the grantor of the right and obligation to exploit a public property and which does not involve the exploitation of the property

[12] Ogarca (Dinu) Catalina Georgeta, PhD thesis, https://drept.unibuc.ro/dyn_doc/oferta-educationala/scoala-doctorala/rezumat-teza/ogarca-catalina-georgeta-iul-2015-ro.pdf.

[13] Constantin Rarincescu, Administrative Law, Emil Stanescu Publishing House, Bucharest, 1926-1927, p. 135 and the following.

[14] Ogarca (Dinu) Catalina Georgeta, *op. cit.*

[15] Constantin Rarincescu, *op. cit.*, 1941, p. 183.

[16] Published in the Official Gazette of Romania, Part I, number 555 of 5 July 2019.

within the framework of a complex legal operation of performance of a service or of a public work.

Although the provisions of article 303, paragraph 1, of the administrative Code refers exclusively to public property [17], however, this legal norm is completed by the provisions of article 362, paragraph 3, of the administrative Code, according to which the provisions regarding the concession of assets belonging to public domain of the state or of administrative-territorial units apply accordingly in the case of private properties of these public authorities.[18]

In the case of this concession contract, according to the provisions of article 303 of the administrative Code, the capacity of grantor belongs to the state, represented by ministries or by other specialized bodies of the central public administration, the county, by the president of the county council, or the municipality, city or commune, by the mayor, while the capacity of statutory undertaker may be owned by any natural person or legal person of private law, regardless of its citizenship or nationality, provided that the provisions of article 871, paragraph 2, of the civil Code do not make any distinction in this respect.[19]

The object of this contract is represented by public or private properties belonging to public or private domain of the state or of administrative-territorial units, these properties following to be registered in the land book before concluding the concession contract of public properties, under the sanction of absolute nullity of the contract, according to the provisions of article 305, paragraph 2 and paragraph 3, of the administrative Code.

Sub-concession of public or private properties belonging to public or private domain of the state or of administrative-territorial units is prohibited by law, the sanction being the absolute virtual nullity of the sub-concession contract, but the grantor may also request the termination of the concession contract, with payment of a compensation which is the responsibility of the statutory undertaker, according to the provisions of article 327, paragraph 1, letter d), of the administrative Code.

From the perspective of the regulation of the administrative Code regarding the concession of public or private properties of the state and of administrative-territorial units, the idea follows that three fundamental stages can be distinguished in the development of the concession procedure:

- the initial stage, of preparing the documentation necessary to start the tender procedure, characterized by the initiation of the concession proposal and the elaboration of the specifications that include the criteria for awarding the concession contract;
- the procedure for conducting the auction, in which the bids of natural or legal persons of private law are submitted and assessed, a stage completed by the statement of the winning bid;
- the stage of concluding the concession contract, the regulatory part containing the elements determined in the specifications.

Thus, concession takes place at the initiative of the grantor or following a proposal adopted by him / her, coming from any concerned person, natural or legal.

On the basis on the opportunity study, the grantor draws up the specifications of the concession, which shall contain the minimum elements provided by the

[17] Al.-S. Ciobanu, Inalienability and imprescriptibility of public domain in Romanian law and in French law, Universul Juridic Publishing House, Bucharest, 2015, p. 359.

[18] Verginia Verdinas, *op.cit.*, p. 534.

[19] See Antonie Iorgovan, *op. cit.*, ed. III, p. 223 and the following.

provisions of article 310 of the administrative Code.

According to the provisions of article 312, paragraph 1, of the administrative Code, the general rule established by law for the award of the public property concession contract is that of the application of the public tender procedure.

The award documentation is drawn up by the grantor, after the drafting of the specifications and it is approved by him / her by an order, a ruling or a decision, as appropriate. The grantor has the obligation to specify in the award documentation any requirements, criteria, rules and other information necessary to provide the tenderer with complete, correct and explicit information on how to apply the award procedure.

The auction is initiated by the publication of a tender notice by the grantor in the Official Gazette of Romania, Part VI, in a daily national newspaper and in a local one, on its website or by other media or public channels of electronic communications.

The auction notice is sent for publication at least 20 calendar days before the deadline for the submission of tenders.

The interested party has the right to request and obtain the award documentation.

The auction procedure may be carried out only if at least two valid tenders have been submitted following the publication of the auction notice.

If at least two valid tenders have not been submitted following the publication of the auction notice, the grantor shall be obliged to cancel the procedure and to hold a new auction.

In the event of the organization of a new auction, the procedure shall be valid if at least one valid tender has been submitted.

According to the provisions of article 68, paragraph 1, letters a) and b), of the Law number 98/2016 on public procurement [20], the auction may be open or restricted, each with its own organization and conduct procedure.

The difference between the two forms of auction is that while in the open auction procedure any economic operator has the right to submit a tender following the publication of a contract notice, in the case of the restricted tender procedure any economic operator has the right to submit a request to participate following the publication of a contract notice, following that only candidates who meet the qualification and selection criteria set by the contracting authority have the right to submit a tender at a later stage.

According to the provisions of article 78, paragraph 1, of the Law number 98/2016, the restricted auction procedure is carried out in two mandatory stages: a) the stage of submitting applications for participation and selection of candidates, by applying the qualification and selection criteria, b) the stage of submitting bids by the candidates within the framework of the first stage and their assessment, by applying the award criteria and the assessment factors.

According to the provisions of article 312, paragraph 3, of the administrative Code, the award documentation is prepared by the grantor, after the drafting of the specifications, and it is approved by him / her by order, decision or, as appropriate, by a Government Decision or by the decision of the urban or local county council[21].

The auction is initiated by the publication of a tender notice by the grantor in the Official Gazette of Romania, Part VI, in a daily national newspaper and in a local one, on its website or by other public media or channels of electronic communications.

[20] Published in the Official Gazette of Romania, Part I, number 390 of 23 May 2016.
[21] Verginia Verdinaș, *op.cit.*, p. 535.

The auction notice shall be drawn up following the approval of the award documentation by the grantor and shall be sent for publication at least 20 calendar days before the deadline for the submission of tenders.

Any interested person has the right to request and obtain the award documentation from the grantor, within a maximum of 5 working days from its request.

The auction procedure may be carried out only if at least two valid tenders have been submitted following the publication of the auction notice.

If, following the publication of the auction notice, at least two valid tenders have not been submitted, the grantor is obliged to cancel the procedure and to organize a new tender, in compliance with the procedure provided by the provisions of article 314, paragraphs 1 – 13, of the administrative Code.

In the event of the organization of a new auction, the procedure shall be valid if at least one valid tender has been submitted.

By exception from the general rule of granting by public auction the contact for the concession of assets, the public or private property of the state or of administrative-territorial units, the provisions of article 315, paragraph 1, of the administrative Code regulates the procedure for direct award of the concession contract to national companies, national societies or to companies subordinated, under the authority or coordination of the state, counties, communes, cities or municipalities, which were established by reorganization of the autonomous companies and whose main object of activity is management, maintenance, repair and development of the respective assets, but only until the completion of their privatization.[22]

Therefore, in this special procedure and derogating from the rule of awarding the concession contract by public tender, the capacity of bidder and, at the end of the procedure, of statutory undertaker cannot be held by a natural or legal person of private law, but only by a legal entity of public law among those listed above, precisely this aspect being the basis for which the award of the concession contract is made by a simplified procedure and derogating from the general rules.

Practically, in this situation, assets that are the object of the public domain remain in the exploitation of some institutions of public law, practically, not existing the risk of a scattering or of an irrational management of these assets.

In the case of direct assignments, it is not necessary to draw up the opportunity study and the specifications are not drawn up.

The concession by direct award is approved by a decision of the Government, of local, county councils or of the General Council of the Municipality of Bucharest, as appropriate.

The procedure for submitting tenders is detailed by the provisions of article 316 of the administrative Code, which establishes that the tenderer has the obligation to prepare the tender in accordance with the provisions of the award documentation.

The grantor has the obligation to establish the winning bid on the basis of the award criteria specified in the award documentation, which are the following:

a) the highest level of royalty;

b) economic and financial capacity of bidders;

c) environment protection;

d) specific conditions imposed by the nature of the conceded asset.

[22] *Ibidem*.

The weight of each criterion is established in the award documentation and must be proportionate to its importance assessed from the point of view of ensuring a rational and economically efficient use / exploitation of the conceded asset.

The weight of each of the mentioned criteria is up to 40%, and their amount must not exceed 100%, and the grantor must take into account all the criteria set out in the award documentation.

The winning bid is the bid that meets the highest score following the application of the award criteria.

If there are equal scores between the first ranked bidders, their tie shall be made according to the score obtained for the award criterion which has the highest weight, and, in case of further tie, the tie shall be made according to the score obtained for the award criterion which has the highest weight after it.

In this regard, the Court of Justice of the European Union has held [23] the fact that *"whenever a Member State intends to entrust such an assessment task to judicial authorities, the national system established for that purpose must comply with all the requirements laid down in article 38, paragraph (9), of the Directive 2014/23 and so as the applicable procedure be compatible with the terms imposed by the procedure for awarding concession contracts. Otherwise, and in particular in the event that the judicial authority is not empowered to carry out a detailed assessment of the evidence required by the second subparagraph of article 38, paragraph (9), of the Directive 2014/23 or is not in a position to definitively take a position before the end of the award procedure, the right established in the first paragraph of this provision in favor of the economic operator would have been emptied of substance."*

The grantor concludes the public property concession contract with the bidder whose bid was established as being the winner.

The grantor sends for publication in the Official Gazette of Romania, Part VI, a notice for the award of the public property concession contract, within 20 calendar days from the completion of the procedure for awarding the public property concession contract provided for in this section.

The concession contract for public property is concluded in writing, under the sanction of nullity, according to the provisions of article 322, paragraph 1, of the administrative Code, which determines us to qualify this bilateral legal deed as representing an authentic contract, from the way of regulating this extrinsic condition resulting the fact that the written form represents an *ad validitatem* condition of this convention.[24]

The refusal of the successful bidder to conclude the contract for the concession of public property may entail the payment of damages.

Pursuant to the provisions of article 324 of the administrative Code, the public property concession contract must contain the regulatory part, which includes the clauses provided in the specifications and 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.

The term for which the concession contract is concluded is of maximum 49 years, starting from the date of its signing.[25]

The duration of the concession is established by the grantor on the basis of the opportunity study.

[23] Case C-472/19 Vert Marine SAS against the Prime Minister and the Minister for Economy and Finance.
[24] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit.*, p. 58.
[25] Verginia Verdinas, *op.cit.*, p. 536.

The concession contract for public property may be extended by agreement of the parties, concluded in writing, provided that the total duration does not exceed 49 years.

However, by special laws, concessions with a duration of more than 49 years can be established.

Pursuant to the public property concession contract, the statutory undertaker acquires the right to exploit, at his / her own risk and responsibility, the public property that are the object of the contract, according to the objectives established by the grantor.

The statutory undertaker has the right to use and collect fruits, respectively products of the assets that are the object of the concession, according to the nature of the asset and the purpose established by the parties by the public property concession contract.

According to the provisions of article 872, paragraph 1, of the civil Code, the statutory undertaker may perform any material or legal deeds necessary to ensure the exploitation of the property. However, under the sanction of absolute nullity, the statutory undertaker may not alienate or encumber the property given in concession or, as appropriate, the assets intended or resulting from the achievement of the concession and which must, according to law or articles of incorporation, be handed over to the grantor upon termination, for any reasons, of the concession.

Termination of the public property concession contract may take place in the following situations:

a) at the expiration of the term established in the public property concession contract, insofar as the parties do not agree, in writing, to extend it under the conditions provided by law;

b) in the case of the exploitation, under the conditions of the concession contract of public property, of consumable assets, a fact that determines, by their exhaustion, the impossibility to continue their exploitation before the expiration of the established duration of the contract;

c) by unilateral termination by the grantor, in case the national or local interest so requires, by the payment of a fair compensation for the assignee, if he / she has suffered damage caused by the untimely termination of the contractual relationship;[26]

d) in case of non-compliance with contractual obligations by the statutory undertaker, by termination by the grantor, by the payment of a compensation to the responsibility of the statutory undertaker, pursuant to the provisions of article 1549, paragraph 1, of the civil Code;

e) in case of non-compliance with contractual obligations by the grantor, by termination by the statutory undertaker;

f) upon the disappearance, due to a force majeure cause, of the conceded property or in case of objective impossibility of the statutory undertaker to exploit it, by renunciation, without the payment of a compensation.

3. Works concession and service concession

According to the provisions of article 5, paragraph 1, letter g), of the Law number 100/2016 regarding works concessions and service concessions [27], the works concession contract is that "*onerous contract, assimilated according to the law of the administrative deed, concluded in writing, by which one or more contracting entities entrust the performance of works to one or more economic operators, in which the*

[26] Emil Balan, Introduction to the study of dominance, All Beck Publishing House, Bucharest, 2004, p. 107.
[27] Published in the Official Gazette of Romania, Part I, number 392 of 23 May 2016.

consideration for works is represented either exclusively by the right to exploit the result of the works subject to the contract, or by this right accompanied by a payment;"

Also, the provisions of article 5, paragraph 1, letter h), of the Law number 100/2016 states that the service concession contract designates "*the onerous contract, assimilated according to the law of the administrative deed, concluded in writing, by which one or more contracting entities entrust the provision and management of services, other than the performance of works provided for in letter g), to one or more economic operators, in which the consideration for services is represented either exclusively by the right to operate services that are the object of the contract, or by this right accompanied by a payment."*

The late professor Antonie Iorgovan shows that, by the concession contract, one party, the assignor, transmits to another party, called statutory undertaker, for profitable administration, for a fixed period, in exchange for a royalty, an economic activity, a public service, a productive subunit or a state-owned land.[28]

In the doctrine, concession of services and works is defined as an agreement by which a public person entrusts the provision of a public service to a private company, which ensures the financing of works, their operation and which is remunerated from royalties collected from statutory undertakers.[29]

Another author defines concession of public service as an administrative act by which a public person, called grantor, entrusts to a private person, called statutory undertaker, the management of public service at his / her own risk, recognizing his / her right to collect the royalty from the service beneficiaries.[30]

The service concession contract is the contract that has the same characteristics as the public property concession contract, except that in return for the services provided, the contractor, as statutory undertaker, receives from the contracting authority, as grantor, the right to exploit services for a fixed period or this right accompanied by the payment of an amount of money.

Such a definition was offered even by the legislator by the provisions of article 3, letter h), of the Government Emergency Ordinance number 34/2006, this normative deed being abrogated by the Law number 98/2016.

We deem that, although, unfortunately, such a normative provision is not resumed by the Law number 100/2016 nor by the Government Decision number 867/2016 for the implementation of this normative deed, nevertheless the logical-legal justice of the considerations of the provisions of article 3, letter h), of the Government Emergency Ordinance number 34/2006 cannot be challenged at present, from the definition of the two forms of concession unequivocally resulting the fact that while in the case of the concession of real estate of the state or territorial administrative authorities the object of the contract is objectified in the exploitation of some real estate, in the case of concession works or services, the performance of the statutory undertaker aims at the performance of works or the provision and management of services.

Another important distinction is the one revealed by the provisions of article 3, letter h), of the Government Emergency Ordinance number 34/2006, respectively the fact that, in case of concession of works or services, the royalty has a specific and

[28] Antonie Iorgovan, *op.cit.*, p. 103.
[29] Georges Vedel, Pierre Delvolvé, Administrative Law, Presses Universitaires de France, 1982, p. 847.
[30] Gilles Lebreton, General Administrative Law, the 10th edition, Dalloz, 2019, p. 122.

derogatory nature, being established the principle of liberalism and economic opportunity in the performance of the latter contract, meaning that, in this case, the consideration for services or works it is an alternative, being represented either exclusively by the right to operate the services which are the object of the contract, or by this right accompanied by a payment.

Also, an important legal norm is represented by the former article 3, paragraph (1), of the Government Decision number 71/2007 on the Norms for the application of the Government Emergency Ordinance number 34/2006, which provided that the distinction between the concession contract and the public procurement contract is made according to the distribution of risks, respectively the contract by the intermediary of which the contractor, as statutory undertaker, receives the right to exploit services, thus taking over the largest part of risks related to their operation, is deemed to be a service concession contract, otherwise being considered a public service acquisition contract. To this respect, in determining the legal nature of the contract concluded by the respondents, the manner in which they participate in profit and loss established by the contracting parties plays an important role.

In practice, it was noted that, according to contractual clauses, the participation is 60% for the "shareholder" and 40% for the City Hall.

In relation to the above legal provisions and the considerations retained, the court noted the fact that, although the parties entitled their contract as being a joint venture contract, subject to the provisions regarding civil professionals of the civil Code, in reality it is a service concession contract, the contracting authority having the obligation to apply the provisions of the Government Emergency Ordinance number 34/2006 and the other normative deeds issued in its application.[31]

This practice is confirmed by paragraph number 18 of the recitals of the Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 regarding the award of concession contracts.

It is true that a certain conceptual reminiscence or a certain slippage of language can be identified in paragraph 11 of the recitals of the Directive 2014/23/CE, according to which the object of concession is *"the acquisition of works or services by the intermediary of a concession whose compensation consists in the right to operate works or services or in the right to operate and a payment"*.

However, any confusion between the service concession contract and the procurement contract, which could result from this consideration in the recitals of the said directive, is terminated by the mentions of paragraph 18, quoted above, but also from paragraphs numbers 19 and 20 of the same directive, from which it emerges a clear and obvious distinction of the European legislator regarding the two forms of contract.

In this regard, the Court of Justice of the European Union[32] noted that, within the framework of the concession contractual relations, the statutory undertaker is obliged to undertake the risk of exploitation while operating *under normal conditions*, the amortization of the investments he / she made or the costs he / she incurred with the exploitation of the work or service which is the object of the concession is not certain. The transfer of risk to the statutory undertaker does not have to be complete.

[31] The Court of Appeal of Targu Mures, The Decision number 99/R/2011 from the 27th of January 2011.

[32] See case C-274/09, Privater Rettungsdienst und Krankentransport Stadler against Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau.

However, the transferred risk part must involve a "*real exposure to market hazards"*, according to article 5.1, paragraph (2), of the Directive 2014/23/Ce, and be *significant*, according to the European case law.

Paragraph 29 of the quoted directive also states the fact that "*In the case of mixed contracts, applicable rules should be determined as to the main object of the contract, if the various parts constituting the contract cannot be separated objectively."*

A distinguished French author states that this public works concession contract is a contract whereby the co-contractor of the administration undertakes to carry out a public work in exchange for collecting royalties on the uses of the work which he / she is responsible for operating in return for his / her financial commitment.[33]

The legal regime of concession follows the general rules applicable to administrative contracts and the relations between the grantor and the statutory undertaker are established in a specification, knowing that, at the end of the contract, the works performed shall return free of charge to the patrimony of the awarding public body (assets to be returned to the issuer of concession at the end of the concession agreement). Public works concessions are most often combined with a public service concession, but not necessarily (the case of pipeline construction concessions, for example).

As it results from the express mention in the Law number 100/2006 regarding works concessions and service concessions, this law transposes the provisions of articles 3, 8, 11, 13-19, 22-26, 28, 31, 34-36, 38-40, 43, 44 and 54 of the Directive 2014/23/UE of the European Parliament and of the Council of the 26th of February 2014 regarding the award of concession contracts, [34], and partially the provisions of articles 1, 2, 4-7, 9, 10, 20, 21, 29, 30, 32, 33, 37, 41, 42 and 45 of the Directive 2014/23/UE of the European Parliament and of the Council.

To this regard, it is easy to conclude that the norms of the Law number 100/2006 must be construed in the light of the provisions of the Directive 2014/23/UE.

The Court of Justice of the European Union [35] ruled the fact that "*Public service concession contracts do not fall within the scope of the Council Directive 92/50/CEE from the 18th of June 1992 regarding the coordination of procedures for the award of public service contracts (JO L 209, p. 1, Special edition, 06/vol. 2, p. 50), applicable on the date of the facts in the main proceedings. Although such contracts are excluded from the scope of this directive, public authorities awarding them are obliged to comply with the fundamental rules of the EC Treaty, the principles of non-discrimination on grounds of nationality and equal treatment, and the obligation of transparency which arises from those (see, to that effect, Telaustria and Telefonadress decisions, previously quoted, points 60-62, and the Decision from , Coname, C-231/03, Rec., p. I-7287, points 16-19). Without necessarily implying an obligation to launch a call to tender, this obligation of transparency requires the awarding authority to guarantee, in favor of any potential statutory undertaker, a sufficient level of publicity to ensure a competitive environment in the field of public service concessions, as well as the control of the impartiality of award procedures (see, to that effect, the previously quoted decisions*

[33] Jacqueline Miorand Deveiller and Pierre Bourdon Florian Poelet, Administrative property law, Course, theme of reflection, commentaries on judgments Notes of synthesis, the 15th edition, LGDJ, Paris, 2017, f-197-198.

[34] Published in the Official Gazette of the European Union, series L, number 94 of 28 March 2014.

[35] Case C-324/07, Coditel Brabant SA against Commune d'Uccle, Bruxelles Region – Capital.

Telaustria and Telefonadress, point 62, as well as Coname, point 21).”

Also, according to the provisions of article 1, paragraph 1 and paragraph 5, of the methodological Norms for the application of the provisions regarding the award of works concession and service concession contracts from the Law number 100/2016 regarding works concessions and service concessions of 16.11.2016, in the process of achievement of works concessions and service concessions, hereinafter referred to as concession contracts, in any situation for which there is no express regulation, the principles provided for in article 2, paragraph (2), of the Law number 100/2016 on works concessions and service concessions, hereinafter referred to as Law, apply.

The contracting entity is responsible for the performance modality of works concessions or service concessions, in compliance with all applicable legal provisions.

To this regard, the European court[36] noted the fact that “*the principle of legal security, which has as a corollary that of the protection of legitimate expectations, requires in particular that the rules of law be clear and precise and that their effects be predictable, especially when they may have adverse consequences for natural persons and for enterprises (see, to that effect, the Decision from the 11th of June 2015, Berlington Hungary and others, C-98/14, EU:C:2015:386, point 77, as well as the quoted case-law).*

However, an economic operator cannot rely on the total absence of any legislative amendment, as it can only discuss how to implement such an amendment (see, to that effect, the decision from the 11th of June 2015, Berlington Hungary and Others, C-98/14, EU:C:2015:386, point 78, as well as the quoted case-law).

To that regard, it should be noted that the obligation to provide for a sufficiently long transitional period to allow economic operators to adapt or for a reasonable compensation scheme (see, to that effect, the decision from the 11th of June 2015, Berlington Hungary and others, C 98/14, EU:C:2015:386, point 85, as well as the quoted case-law) is incumbent on the national legislator.”

According to the provisions of article 6 of the Law number 100/2016, the award of a concession of works or services always implies the transfer to the statutory undertaker of a significant part of the operating risk of an economic nature, in connection with the operation of the respective works and / or services. A significant part of the operating risk is deemed to have been transferred when the estimated potential loss incurred by the statutory undertaker is not an insignificant one.

The award procedures provided by the Law number 100/2016 apply to works concessions or service concessions whose value, VAT excluded, is equal to or higher than the value threshold of 25.013.925 Ron, according to the provisions of article 11, paragraph 1, of this normative deed.

Contracts that have as an object both works concession and services concession are awarded in accordance with the provisions of the Law number 100/2016, for the type of concession that characterizes the main purpose of the contract.

In the case of mixed concessions that have as an object both social services or other specific services, provided for in the annex number 3 of the law, as well as other services, the main purpose of the contract is

[36] In the case C 322/16, Global Starnet Ltd against the Ministry of Economy and Finance, Amministrazione Autonoma Monopoli di Stato.

determined according to the highest of the estimated values of the respective services.

In the case of mixed contracts that have as an object both elements for which the provisions of the Law number 100/2016 apply, as well as other elements for which the provisions of other normative acts apply, and the different parts of the contract are objectively separable, the contracting authority / entity has the right to choose between awarding separate contracts to separate parties and awarding a single contract.

In the performance of concession contracts, economic operators are required to comply with the obligations applicable in the fields of environment, social and labor relations, established by the legislation adopted at the European Union level, by the national law, by collective agreements or by international treaties, conventions and agreements in these fields.

Any economic operator shall have the right to participate in the award procedure as a tenderer or a candidate, individually or jointly with other economic operators, including in temporary association forms set up for the purpose of participating in the award procedure, a proposed subcontractor or a supporting third party, according to the provisions of this law.

According to the provisions of article 50 of the Law number 100/2016, the contracting authority / entity awards the concession contract by one of the following award procedures, which constitutes the general rule:

a) open auction;

b) competitive dialogue.

As an exception, the contracting authority / entity may use negotiation without publication of a concession notice as the award procedure.

Open auction is initiated by sending for publication a concession notice, by which the contracting authority / entity requests economic operators to submit tenders.

The open auction procedure is usually carried out in a single stage.

The contracting authority / entity may also establish by the concession notice the award documentation so that the open auction procedure shall be carried out in two stages, as follows:

a) the first stage - submission of tenders prepared in accordance with the information and requirements provided for in the award documentation, accompanied by documents proving the fulfillment of the qualification and selection criteria established by the contracting authority / entity;

b) the second stage - negotiations in order to improve the admissible tenders and the evaluation of improved tenders, by applying the award criteria.

If it chooses to apply the open auction procedure with a negotiation stage, the contracting authority / entity shall establish by the award documentation the elements that may be the subject of the negotiation.

In the contents of the award documentation, the contracting authority / entity defines the object of the works concession or service concession by describing the needs of the contracting authority / entity and the characteristics required for the works or services to be conceded and establishes the award criteria and the distribution method of risks.

The Court of Justice of the European Union [37] established that *"To that regard, it is common ground that the transaction at issue in the present case constitutes a "public works concession" within the meaning of article 1, letter (d), of the*

[37] The case C 423/07, the European Commission against the Kingdom of Spain.

Directive 93/37. According to that provision, "public works concession" is a contract having the same characteristics as those of "public works contracts", with the exception of compensation for carried out works, which consists either exclusively in the right to operate the work or in this right and a payment.

According to article 3, paragraph (1), of the Directive 93/37, in case contracting authorities conclude a contract for the award of works, the rules on publicity laid down, inter alia, in article 11, paragraphs (3) and (6) thereof, are applicable to this contract where its value is equal to or exceeds 5 000 000 ECU."

Following the completion of the first stage, the contracting authority / entity simultaneously sends to all tenderers who have submitted admissible tenders an invitation to participate in the negotiation stage.

The contracting authority / entity negotiates during the negotiation stage with each tenderer who has submitted an admissible tender and has been invited, in order to improve their content.

Within the framework of the negotiation, the contracting authority / entity and the tenderers may discuss any aspects related to the concession, indicated in the award documentation, except for the object of concession, the award criteria and the minimum requirements, which cannot be changed during the negotiation.

The competitive dialogue procedure is initiated by sending for publication a concession notice, by which the contracting authority / entity requests economic operators to submit participation requests.

Within the framework of the competitive dialogue procedure, any economic operator has the right to submit a request to participate, following that only candidates who meet the qualification and selection criteria established by the contracting authority / entity by the concession notice to have the right to participate in the following stages.

The competitive dialogue procedure takes place in three stages, according to the provisions of article 57 of the Law number 100/2016:

a) the first stage - submission of applications for participation and selection of candidates, by applying qualification and selection criteria provided in the award documentation;

b) the second stage - the dialogue with selected candidates, in order to identify the solution / the solutions able to respond to the needs of the contracting authority / entity on the basis of which the final tenders shall be submitted;

c) the third stage - the submission of final tenders by the candidates remaining following the dialogue stage and their assessment, by applying the award criteria.

According to the provisions of article 77 and article 78, paragraph 1, of the methodological norms for the application of the provisions regarding the award of works concession and service concession contracts from the Law number 100/2016 on works concessions and service concessions from 16.11.2016, the tenderer prepares the tender according to the provisions of the award documentation and indicates in its content that information from the technical proposal and / or the financial proposal is confidential, classified or protected by an intellectual property right, on the basis of the applicable legislation. The risks of submitting the tender / request to participate, including force majeure or fortuitous event, are borne by the economic operator submitting the respective tender / request to participate. The tender is made up of a technical proposal and a financial proposal and is accompanied by qualification documents and / or documents proving the fulfillment of the qualification and selection

criteria. The tender is binding, in terms of content, for the entire period of validity established by the contracting entity and undertaken by the bidder.

Following the completion of the first stage, the contracting authority / entity simultaneously sends an invitation to all selected candidates to participate in the second stage. The contracting authority / entity has the obligation to send the invitation to participate accompanied by a copy of the award documentation, which shall also include a descriptive document. The contracting authority / entity has the obligation to invite in the second stage a number of candidates at least equal to the minimum number of candidates indicated in the concession notice.

According to the provisions of article 6 of the Law number 100/2016, the contracting authority / entity carries out the dialogue stage with each selected candidate separately, in order to identify and define the best means to meet its needs. Within the framework of the dialogue, the contracting authority / entity and the selected candidates may discuss all aspects related to concession, indicated in the award documentation, except for the object of concession, the award criteria and the minimum requirements, which cannot be changed throughout the dialogue.

Following the completion of the dialogue stage, the contracting authority / entity simultaneously sends to all remaining candidates in the competition an invitation to submit the final tenders, accompanied by the solution / solutions, following the completion of the dialogue stage.

Final tenders include all the elements requested and necessary to the contracting authority / entity for achieving the object of works concession or services concession and are elaborated on the basis of the solution or solutions presented and negotiated with the respective candidate during the dialogue stage.

The contracting authority / entity has the obligation to prepare the award documentation containing all the necessary information to provide tenderers / candidates with complete, correct and accurate information on the requirements of works concession or services concession, the object of the contract, the distribution of risks and the way of conducting the award procedure.

Technical and functional requirements are established by the award documentation and define the necessary characteristics of works / services that are the object of concession.

Qualification and selection criteria must be related and proportionate to the need to ensure the statutory undertaker's ability to perform the concession contract, taking into account the object of the works or services concession and the purpose of ensuring a real competition.

In the light of the provisions of article 86 of the law, concession contracts are awarded on the basis of the criterion of the most advantageous tender from an economic point of view, established on the basis of some objective criteria that guarantee the assessment of tenders in real competition conditions.

According to the provisions of article 88 of the law, the completion of the award procedure of the award contract can be performed in two ways:

a) signing the concession contract or

b) cancellation of the award procedure.

According to the provisions of article 16 of the law, the duration of concession contracts is limited, in order to avoid distortion of competition. The contracting authority / entity estimates the duration of concession on the basis of works or services requested. For works concessions or service concessions with an estimated duration of more than 5 years, the maximum duration of

concession may not exceed the reasonably estimated time necessary for the statutory undertaker to obtain a minimum income meant to recover costs of investments made, costs in connection with the operation of works or services, as well as a reasonable profit.

Therefore, the term of the concession contract is a determined or determinable one, which shall, however, be inserted in the content of the contract, in order to confer certainty and predictability to the rights and obligations of the parties.

Unlike the concession of public property, the provisions of article 94 of the Law number 100/2016 provide for the possibility of sub-concession in case of works and services concessions, with the mention that the contracting authority / entity has the obligation to request the tenderer to specify in the tender the part / parts of the contract to be subcontracted and identification data of the proposed subcontractors. Proposed subcontractors are bound by the same obligations in the field of environment, social and labor relations, as are the bidders.

Sub-concession does not diminish the statutory undertaker's liability as to how to fulfill the future concession contract.

Pursuant to the provisions of article 110 of the Law number 100/2016, the contracting authority / entity has the right to unilaterally terminate a concession contract, in its validity period, in one of the following situations:

a) the statutory undertaker is, at the moment of awarding the contract, in one of the situations provided for in articles 79-81, which would have determined his / her exclusion from the award procedure;

b) the contract should not have been awarded to the concerned statutory undertaker, in view of a serious breach of obligations resulting from the relevant European legislation and which was established by a decision of the Court of Justice of the European Union.

4. Concession of mining activities

It is a special form of concession, which consists in concluding an agreement called a license, this representing the legal deed by which concession of mining exploration / exploitation activities is granted, as provided by the provisions of article 3, point 17, of the mining Law number 85/2003.[38]

According to the provisions of article 1 of this normative deed, mineral resources located on the territory and in the basement of the country and of the continental plateau in the economic zone of Romania in the Black Sea, delimited according to the principles of international law and regulations of international conventions to which Romania is party, are the exclusive object of public property and belong to the Romanian state.

Concession represents only one of the ways of acquiring the right to use the lands necessary to carry out mining activities from the exploration / exploitation perimeter.

According to the provisions of article 13 of the same law, mineral resources are valued by mining activities that are conceded to Romanian or foreign legal entities or are given in administration to public institutions by the competent authority, according to the present law.

As resulting from the provisions of article 13 of the mining Law number 85/2003, we consider that the reference law referred to in the special legal norm can only be the Law number 100/2016, if the mining exploration / exploitation activities involve the performance of a work or a service, and,

[38] Published in the Official Gazette of Romania, number 197 of 27 March 2003.

otherwise, the closing rules of the concession contract shall be those established by the provisions of article 302 and the following of the administrative Code, these legal norms constituting the common law in the matter of concession.

According to the provisions of article 3, point 8, of the law, mining concession represents the legal operation by which the state, represented by the competent authority, as grantor, transmits for a fixed period to a person, as statutory undertaker, the right and obligation to perform, at risk and own expenses, mining activities having as object mineral resources that fall under the incidence of the present law, in exchange for a mining royalty for exploitation and of a tax on the activity of prospecting, exploration and exploitation of mineral resources.

This legal definition entitles us to conclude that this type of concession represents a special form of works concession, regulated by the Law number 100/2016, so that the special legal and derogatory norms of the Law number 85/2003 shall be completed with those of the Law number 100/2016, for all situations in which the special law does not contain express rules, including on the procedure for preparing, awarding and concluding the concession contact.

According to the provisions of article 24 of the Law number 83/2013, the holder of a license may transfer to another legal person the acquired rights and undertaken obligations only with the prior written approval of the competent authority. Any transfer made without written approval is void as of right. If the holder of the license changes his / her status by reorganization, sale or any other reason, the license, as negotiated, shall be granted by an addendum to the legal successors of the holder, on the basis of the contract between the parties or the court decision, presented to the competent authority.

To this regard, in practice [39] it was noted that *the plaintiff E. E. SRL, by judicial liquidator Individual Insolvency Cabinet I. E., held the concession license for exploitation number 3714/2002 from the perimeter Izvorul Paraul S., but, entering the insolvency procedure, it gave its consent for the transfer of this license to D. J. SRL. The defendant, the National Agency for Mineral Resources, issued the Order number 185/25.08.2004 approving the transfer of the acquired rights and of the undertaken obligations according to the concession license for exploitation number 3714/2002 from the perimeter Izvorul Paraul S. concluded by the National Agency for Mineral Resources and E. E. SRL to D. J. SRL. On the date of issuing this order, the competent authority verified the fulfillment of the conditions provided for by article 24 of the Law number 85/2003. In this case, the current holder of the license, the defendant D. J. SRL did not express its consent to transfer the license it holds on the basis of the Order number 185 from 25.08.2004 issued by the National Agency for Mineral Resources. Therefore, the court found that the refusal of the holder of this license is a well-founded one, so that one of the mandatory legal conditions for approving the transfer of a concession license for exploitation is not fulfilled."*

Mining concession or mining administration ceases:

a) by the expiration of the term for which it was granted;

b) by the waiver by the holder of the license;

c) by revoking the license / the permit by the competent authority;

[39] The Court of Appeal of Bucharest, The Administrative Court Division, the Decision number 100/F/2009 of 17 June 2009.

d) upon the request of the holder, in case of occurrence of events that constitute causes of force majeure and that determine the objective and final impossibility of fulfilling some obligations and / or of achievement of some rights of the holder, provided in the license and which are essential for carrying out the mining activity;

e) by exhausting exploitable reserves, only in the case of concession / contracting out of mining exploitation activities.

5. Concession of forest lands, the public property of the state

According to the provisions of article 5 of the Order number 367/2010 for approving the value of concession, the method of calculation and the method of payment of the royalty obtained from the concession of forest lands, which are the public property of the state, related to assets sold by the National Forests Authority - Romsilva, as well as the concession contract model, *the owner of an asset located on the forest land that is the public property of the state that he / she uses under the concession contract has the obligation to notify the grantor of the intention to alienate the asset, 30 days before the start of legal proceedings regarding the sale.*

The Court of Justice of the European Union [40] ruled that "*It should be added that royalties may relate to goods being valued within the meaning of that article 32, paragraph (1), letter (c), even if those royalties relate only in part to the goods in question (see, to that effect, the decision from the 9th of March 2017, GE Healthcare, C-173/15, EU:C:2017:195, point 53, and the operative part). However, as it results from article 32, paragraph (2), of the customs Code, the additions to the actual price to be paid or payable must be applied only on the basis of objective and quantifiable data.*

As to the questions of the referring national court concerning the interpretation of article 158, paragraph (3), of the Regulation number 2454/93, it must remembered that, under that provision, where royalties or license fees relate in part to imported goods and in part to other elements or components added to the goods after importation or to post-importation provisions or services, the corresponding breakdown is made only on the basis of objective and quantifiable data, according to the interpretative note referred to in annex 23, which relates to article 32, paragraph (2), of the customs Code."

The payment of the royalty is charged from the date on which the asset was purchased.

The area of the forest land that is the object of the concession contract is the area of the landscaping unit in which the objective is located, established according to the forest arrangement in force.[41]

The sale-purchase contract of assets, which is concluded by the National Forests Authority - Romsilva and the buyer, must include the following clauses:

a) the clause regarding the manner of recovering the due and unpaid royalty, including penalties for late payment thereof;

b) the clause by which the buyer is obliged to send to the central public authority responsible for forestry the full documentation, in order to conclude the concession contract for the land related to the sold asset, within 10 working days from the date of concluding the sale-purchase contract of the asset;

[40] The case C-76/19, Direktor na Teritorialna direktsiya Yugozapadna Agentsiya "Mitnitsi", against "Curtis Balkan" EOOD.

[41] VASS Lawyers, Concession of forest lands, the public property of the state, https://www.juridice.ro/106822/concesionarea-terenurilor-forestiere-proprietate-publica-a-statului.html.

c) the clause by which the sale-purchase contract is concluded under suspensive condition, the buyer having the obligation that, within 10 working days from the date of the sale-purchase contract of the asset, to send to the central public authority responsible for forestry the complete documentation, in order to conclude the concession contract for the land related to the sold asset, otherwise it shall cease as of right.

According to the provisions of article 9 of the order, concession contracts for the forest lands related to the assets sold by the National Forests Authority - Romsilva are concluded by the central public authority responsible for forestry, according to the model concession contract provided in addendum number 3, which is an integral part of this order.

6. Concession of forest lands, the public property of the state

According to the provisions of article 29, paragraph 1, of the Law on community services of public utilities number 51/2006[42], republished, delegated management is the mode of management in which deliberative authorities of administrative-territorial units or, as appropriate, inter-community development associations aiming at public utility services, in the name and on behalf of member administrative-territorial units, award to one or more operators all or only a part of their own competences and responsibilities regarding the delivery / provision of public utility services, on the basis of a contract, hereinafter referred to as management delegation contract. Delegated management of public utility services involves making available to operators public utility systems related to delegated services, as well as their right and obligation to administer and operate these systems.

Paragraph 8 of the same article states that the situation of the contract for the delegation of the management of public utility services, which may have the legal nature of:

a) the service concession contract;

b) the public acquisition service contract.

The legal nature of this type of concession contract is that of the species of the service concession contract, an assertion based on the fact that, according to the provisions of article 29, paragraph 9, of this normative deed, in the case of public utility services, the procedure for awarding management delegation contracts is established, as appropriate, on the basis of the provisions of the Law number 98/2016, the Law number 99/2016 and the Law number 100/2016.

Also, according to the provisions of paragraph 13 of article 29, in the case of public utility services provided for in article 1, paragraph (2), the procedure for awarding management delegation contracts shall be established, as appropriate, according to the provisions of the Law number 98/2016 on public procurement, the Law number 99/2016 on sectoral procurement and the Law number 100/2016 on works concessions and service concessions.

The subdelegation by the operator of the management of the service / one or more activities in the area of public utility service

[42] Published in the Official Gazette of Romania, Part I, number 254 of 21 March 2006, published pursuant to article III of the Government Emergency Ordinance number 13/2008 for the amendment and the completion of the Law of community services of public utilities number 51/2006 and of the Law on water supply and sewerage service number 241/2006, published in the Official Gazette of Romania, Part I, number 145 of 26 February 2008, approved, as amended and supplemented by the Law number 204/2012, published in the Official Gazette of Romania, Part I, number 791 of 26 November 2012.

is prohibited. Subcontracting of works or related services, necessary for the delivery / provision of the service / one or more activities in the area of delegated public utilities service, is performed only under the conditions provided by the legislation in the field of public procurement.

By this normative provision, the special law does nothing but give effect to the general rule on the concession of works or services, established by the provisions of article 94 of the Law number 100/2016.

Pursuant to the provisions of article 30, paragraph 1, of the Law number 51/2006, organization and development of procedures for awarding the management delegation contract for public utilities services provided for in article 1, paragraph (2), are made on the basis of an award documentation drafted by the delegator, as appropriate, according to the provisions of the Law number 98/2016, of the Law number 99/2016 and of the Law number 100/2016.

7. Land concession for constructions

According to the provisions of article 13 of the Law number 50/1991 regarding the authorization for the performance of construction works [43], lands belonging to the private domain of the state or of administrative-territorial units, intended for construction, can be sold, conceded or rented by public auction, according to the law, under the conditions of observing the provisions of urbanism and spatial planning documentations, approved by the law, in order to be achieved by the owner of the construction.

Lands belonging to the public domain of the state or of administrative-territorial units may be conceded only in order to achieve constructions or objectives of use and / or public interest, in compliance with urban planning documentations approved according to the law.

Concession is made on the basis of tenders submitted by applicants, in compliance with the legal provisions, aiming at the superior capitalization of the land potential.

This way of valuing lands for constructions represents a special form of concession of the assets which are the public or private property of the state and of administrative-territorial units, so that the normative dispositions derogating of the Law number 50/1991 are to be completed by the provisions of article 302 and the following of the administrative Code.

According to article 14 of the Law number 51/1991, free construction lands under the administration of local councils that are the object of requests for reconstitution of the property right of former owners brought forward within the term provided by the Law number 10/2001 regarding the legal regime of some buildings abusively taken over in the period between the 6th of March 1945 and the 22nd of December 1989, republished, as subsequently amended and supplemented, cannot be the object of concession.

Therefore, the general rule in the case of this concession is that of the award of the contract pursuant to the public auction procedure.

Lands intended for construction can be conceded without a public auction, on the basis of the provisions of article 15 of the Law number 50/1991, by the payment of the royalty fee established according to the law, or they may be put into use for a fixed period, as appropriate, in the following situations:

[43] Published in the Official Gazette of Romania, Part I, number 487 of 31 May 2004, offering texts a new numbering. The Law number 50/1991 was republished in the Official Gazette of Romania, Part I, number 3 of 13 January 1997.

a) for the achievement of objectives of public utility or charity, of a social, non-profit nature, other than those achieved by local authorities on their lands;

b) for the achievement of housing by the National Agency for Housing, according to the law;

c) for the achievement of housing for young people until the age of 35;

d) for the displacement of households affected by disasters, according to the law;

e) for the extension of constructions on adjacent lands, upon the request of the owner or by his / her consent;

f) for works of protection or enhancement of historical monuments defined according to the law, with the approval of the Ministry of Culture and Cults, on the basis of urban planning documentations approved according to the law.

On the basis on the minutes of adjudication of the auction or of the decision of the local council, respectively of the General Council of the municipality of Bucharest, the concession deed shall be concluded, which shall be registered by the statutory undertaker in the Land Registry records, within 10 days from the date of adjudication or the issuance of the decision.

Concession of lands intended for constructions is performed according to the provisions of the law, its duration being established by local councils, county councils, respectively by the General Council of the municipality of Bucharest, depending on the provisions of the urban planning documentations and the construction type.

Prior to concession, lands shall be registered in the land book.

8. Conclusions

As above mentioned, from the point of view of the administrative law, the concession is seen as a way to capitalize on the assets that make up public and private domain, therefore as an effective and useful legal tool for introduction into the economic circuit, in strict compliance with legal rules in this case and of the clauses of the concession contract, of state assets and of territorial administrative units.

However, it is obvious that, viewed with a broader sense, concession is a form of management of public service, and, consequently, of general interest, to which the notion of public service is inextricably related.

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