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The Principles underlying the Awarding of the Concession Contract for Public Property Assets

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Abstract: The paper addresses a current problem not only for legal research, but also for practitioners. Thus, we resume a subject on which other authors have analyzed, namely the concession contract, thus highlighting, based on the analysis and comparison, certain particularities of the principles that underlie the awarding of the concession contract of public property assets. The principles established in the Administrative Code, namely transparency, equal treatment, proportionality, non-discrimination, and free competition are intended to ensure objectivity and efficiency in this procedure.

Keywords: principle; transparency; proportionality; equality; non- discrimination; free competition

1. General Considerations

The constitutional basis of the concession is established by art. 136 para. (4) from the Constitution, and the special regulation is established by several normative acts: the Civil Code; Law no. 100/2016 regarding work concessions and service concessions[2]; the Administrative Code. References to the concession can also be found in other normative acts: Law no. 15/1990 regarding the reorganization of state economic units as autonomous kingdoms and commercial companies[3]; Law no. 50/1991 regarding the authorization of construction works, republished[4];

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[2] Official Monitor no. 392 of May 23, 2016, amended and completed.
[3] Official Monitor no. 98 of August 8, 1990, amended and completed.
[4] Official Monitor no. 933 of October 13, 2004, amended and completed.

Law no. 84/1992 regarding the regime of free areas[1]; Mining Law no. 85/2003[2] etc.

The analysis of the concession must regard two aspects: the first concerns the concession right as a real right established over public property; the second considers the concession as a way of using the public domain, through the concession contract (Negruț, 2020, p. 138). In this article, we will consider the second aspect, namely the property concession contract.

Assimilated to the administrative act, according to the provisions of art. 2 paragraph (1) letter c[1]) from the law of administrative contentious no. 554/2004, the concession contract of public property assets is defined in art. 303 paragraph (2) of the Administrative Code as "that *concluded contract in written form by which a public authority, named grantor, transmits, for an established period, to person, called concessionaire, who acts on its risk and liability, the right and the obligation to exploit a public property, in exchange of a royalties"*.

The concession contract it is an onerous title contract, the concession becoming in exchange of royalties. The concession contract will end ever into the written form, according to art. 322 paragraph (1) of Administrative Code, written form being required *ad validitatem* (Albu, 2008, p. 155).

The concession contract of public property assets ends according to the Romanian law, regardless of nationality or citizenship of the concessionaire, for an established duration, which will not can exceed 49 years, starting from the date of signing it. The concession contract of public property asset can be extended through the agreement of will of the parties, concluded into the written form, provided that the duration aggregate does not exceed 49 years, according to art. 306 paragraph (1) and (3) from the Administrative Code. As an exception to these provisions, special laws may establish concessions lasting more than 49 years[3].

[1] Official Monitor no. 182 of July 30, 1992, amended and completed.
[2] Official Monitor no. 197 of March 27, 2003.
[3]Art. 306 para. (4) Administrative Code.

2. The Principles underlying the Awarding of the Concession Contract for Public Property Assets

The principles underlying the awarding the concession contract are listed and defined by art. 311 of the Code administrative. The mentioned principles have in view ensuring objectivity into the procedure for awarding the concession contract private property assets.

The first of the principle is transparency, which represents "*making available all the interested of information regarding the application of procedures for awarding the concession contract"*. The transparency administration assume knowledge by people of acts and action authority and public institutions. The access to documents public authority "*seems to be a condition and a manifestation of administrative transparency"*, constituting, at the same time, a modality through which the citizens oversee the administrative actions, but it is equivalent, in the first line, with the "*right to know"* of citizens (Coudray, 2007, p. 519). In article 15 of the Treaty Union European is established that "*in the order to promote a good governance and insurance participation civil society, institutions, bodies, offices and Union Agency in compliance into the highest degree principle of transparency"*. In our country, art. 31 of the reviewed Constitution establishes the fundamental right of the person to have access to anyth information of public interest, which cannot be restricted. This right, established under the influence of the international legakl instruments (Muraru & Tănăsescu, 2002, p. 230) includes not only the right of the person to be informed about anything information of public interest, but also the obligation of public authority to inform citizens about the public affairs and issues of personal interest. On this line there are also provisions of Law no. 52/2003 regarding decisional transparency into the administration public[1]. This normative act has as aim "*bringing closer the civil society of the decisional activity of the public administration, establishing the concrete ways through which this is to be done*" (Apostol Tofan, 2003, pp. 23-31).

The principle of transparency is found also into the Law no. 100/2016 regarding works concession contracts and service concession contracts, along with the principles regarding non-discrimination, equal treatment, mutual recognition, proportionality, assumption of liability.

Also, the principle of transparency is provided in other articles of the Administrative Code, as a specific principle of public property law (art. 285), a

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specific principle applicable to public services (art. 580 par. (2), respectively as the basic principle on the execution of public functions (art. 580) (Cătană, 2022, p. 684).

Equal treatment is the principle that represents "*the application, in a non-discriminatory manner, by the public authority, of the criteria for awarding the concession contract"*. The principle of equal treatment is seen as an applicability of the principle of contractual liberty (Puie, 2014, p. 19). This principle is found also in the law of Public Acquisitions no. 98/2016[1], Law no. 99/2016 regarding sectoral public procurement[2], Law no. 100/2016 regarding works concession contracts and public service concession contracts[3] etc.

The source of regulating this article is art. 16 of the Constitution, which establishes the equality of rights, all citizens being equal into the face laws and of public authority, without privileges and without discriminations. Referring to these stipulations and considering the definition in the Administrative Code, we can say that the legislator wanted to ensure objectivity into the procedure for awarding the concession contract of assets of public property, without any discrimination, the awarding criteria being the same for all the participants in the auction.

The principle of proportionality, taken from the European legislation, supposes, according to the Administrative Code, as "*every measure established by the authority public must to be necessary and corresponding to the nature of the contract".* According to this principle, the means used by the authorities must to be proportional to their purpose (Manolache, 2006, p. 43). The proportionality is found into the close relation to the reasonable and, at the same time, may mean that it is illegal to apply the law only then when it appears an advantage, an unintentional one, omitted by the law (Apostol Tofan, 2006, p. 40). The proportionality is not appreciated according to the means of action and the pursued purpose (Apostol Tofan, 1999, p. 46). It is necessary the establishment of a balance ratio between situation, finality and decision (Guibal, 1978, p. 478).

The principle of proportionality is mentioned in art. 5 paragraph (3) of the Maastricht Treaty, however into the specialized literature it is highlighted that the origin of this principle is found in art. 40 (3) of the Treaty on establishing the

[1] Art. 2, paragraph (2) letter b), art. 49, art. 58, art. 85, art. 155, paragraph (6), art. 183, paragraph (2), art. 209, paragraph (1).
[2] Art. 2, paragraph (2), letter b), art. 71, art. 98, paragraph (3), art. 104, paragraph (4), art. 116, paragraph (3), art. 197, paragraph (2), art. 121, paragraph (1).
[3] Art. 2, paragraph (2), letter b), art. 3, art. 42, art. 60 paragraph (3).

European Economic Community, signed in Rome on March 25, 1957 (Jacobs, 1999, p. 23).

The principle of proportionality is provided also into the European Code of the good administrative conduct, which stipulates that in the "adoption of decisions, the civil servant will ensure that the measures are proportionate to the pursued purpose". Also, "the civil servant will avoid limiting the rights of citizens or imposing obligations, in case in which these limitation or tasks are not found in a reasonable report for the purpose of the intended action". At the moment of the decision, the official must follow the necessary the fair balance between the interest of the private individuals and the general public interest.

Proportionality it is a general principle applicable to the public administration (art. 9 of the Administrative Code), but it is found into the Administrative Code and into the regulation of royalty, in the meaning of its proportionality with the benefits obtained from the exploitation the asset by concessionaire (art. 307, paragraph (5) letter a), as well as a principle of administrative liability (art. 567, paragraph (2).

Another basic principle for awarding the concession contract of assets of public property is the principle of *non-discrimination, which* consists in "the *application by the authority public of the same rules, regardless of nationality to the participants in the procedure for awarding the concession contract, with respecting the conditions provided into the agreements and conventions to which Romania is part of"*. It is seen as the basic principle for awarding any type of administrative contract, by which it is ensured, as specified into the specialized literature, "the *possibility of a real competitor of any economic operator, regardless of nationality, to have the chance to become contractor"* (Puie, 2014, p. 15).

The obligation of discrimination is regulated by G.O. no. 137/2000 regarding prevention and sanctioning all forms of discrimination[1]. According to art. 2, paragraph (1) from G.O. no. 137/2000, "*discrimination is understood as any distinction, exclusion, restriction or preference, based on race, nationality, ethnicity, language, religion, category social, beliefs, sex, sexual orientation, age, disability, disease chronicle non-contagious, HIV infection, belonging to a disadvantaged category, as well as any other criterion that has as its purpose the restriction, removal recognition, use or exercise, in conditions of equality, of*

[1] Republished in Official Monitor, no. 166 of 03.07.2014.

human rights and freedoms, recognized by law, in the political, economic, social and cultural field or into the any other area of public life".

Free competition is the principle "*that has as main goal the insurance by the public authority of the conditions for any participant in the awarding procedure to have the right to become concessionaire under the law, conventions and international agreements to which Romania is a part of"*. In accordance with the provisions European Union law[1], art. 8 paragraph (1) of the Law on competition no. 21/1996 According to art. 102 (former article 82 TCE) of the Treaty on the Functioning of the European Union, "is incompatible with the internal market and prohibited, as it may affect trade: "there *are forbidden any actions or inaction of the authorities and institutions of central or local public administration or entities to which they delegate the attributions, which restrict, prevent or distorts competition, such as: a) limitation of commerce liberty or enterprises autonomy, exercised by respecting the legal regulations; b) establishing discriminatory conditions for enterprises' activity"*. The administrative code refers to the principle of competition in art. 309 paragraph (3), in the case of preparing the feasibility study in order to award the concession contract[2], in art. 321, paragraphs (1) and (2) to avoid unfair competition

[1] Art. 101 and 102 of the TFEU. According to art. 101 (ex- article 81 TCE) para. (1) of the Treaty on the Functioning of the European Union, "are incompatible with the intern market and prohibited any agreement between companies, any decision of business associations and any practice concerted that can affect commerce from Member States and which have as object or effect preventing, restricting or misrepresentation of competitor into the internal market and , in particular, those which:
(a) establish, directly or indirectly, purchase prices or for sale or anything other trading conditions;
(b) limits or controls production, marketing, technical development or investments;
(c) share markets or sources of supply;
(d) applies, in relation with commercial partners, unequal conditions to equivalent benefits, thus creating them a competitive disadvantage;
(e) conditions the conclusion of acceptance contracts by partners of some additional benefits which, by their nature or according to customs commercial, are not related to the object of these contracts".
According to art. 102 (former article 82 TEC) of the Treaty on the Functioning of the European Union "is incompatible with the internal and prohibited market, to the extent that it may affect the trade between Member States, the abusive use by one or more enterprises of a dominant position held in the internal market or in a significant part of it.
These abusive practices may consist in particular of:
(a) imposing, directly or indirectly, sales or purchase prices or other unfair trading conditions;
(b) limits production, marketing or technical development to the disadvantage of consumers;
(c) the application in relations with commercial partners of unequal conditions for equivalent services, thus creating a competitive disadvantage for them;
(d) conditioning the conclusion of contracts on the acceptance by the partners of additional services which, by their nature or in accordance with commercial usages, are not related to the subject of these contracts".

[2] According to art. 309 paragraph (3), "*Contracting the services provided for in paragraph (2) is achieved in compliance with the legislation on awarding public procurement contracts, as well as national and European legislation in the field of competition and state aid". By art. 309 para. (2) it is*

or the occurrence of a situation that would disadvantage competition, as well as in art. 593, para. (2) regarding the act of delegation for services of general economic interest, with reference to the compensation granted for providing the public service.

To the principles previously mentioned we will add, as mentioned into the doctrine (Vedinaș, 2018, p. 366), *the principle of administrative freedom of public authority* established into the Directive 2014/23/EU on awarding concession contracts[1]. According to art. 2 paragraph (1), of the Directive it "*recognizes the principle of administrative freedoms of a national, regional and local authority in compliance with the national law and the law of the Union. The respective authorities have the freedom to decide which better way to manage the execution of works or delivery of services, to ensure a high quality level of safety and accessibility, equal treatment and promotion of the universal access to public services and user* rights. The principle is seen as a dimension of the discretionary power of the public administration, to establish, within the limits of the law, the means and procedures in the field.

3. Conclusion

With the exception of the principle of free competition, we note that the mentioned principles are part of the category of general principles applicable to public administration, regulated by the Administrative Code in art. 6-13.

The highlighted principles have a double meaning. On the one hand, it concerns the rights of the concessionaires, and on the other hand, it is about the correlative obligations of the public authorities and institutions, holders of the concession right.

Therefore, public authorities and institutions, as grantors, have the obligation to respect the application of the principles analyzed in the procedure for awarding contracts for the concession of public property, being defining aspect for the rule of law.

established that "In cases where the public authority does not have the organizational and technical capacity to prepare the feasibility study provided for in art. 308 para. (4), it can call on the services of specialized consultants".

[1] We specify that Directive 2014/23/EU considers concession contracts for works and services.

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