Exercising the Right of Private Property of the State or of the Administrative-Territorial Units

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Abstract: The study aims at highlighting the important aspects of the exercise of the right of private property of the state or of the administrative-territorial units. In order to achieve the objectives of the paper, we performed an analysis of the specific legislation, of the specialized literature, and of the jurisprudence. According to the Administrative Code, the private domain of the state or of the administrative-territorial units is constituted by the goods that are not included in the public domain, the state or the administrative-territorial units have a right of private property. The legal regime of the goods that constitute the private domain of the state or of the administrative-territorial units is the one of common law, except for the cases when by law another legal regime is established. The exercise of the right of private property of the state or of the administrative-territorial units considers, on the one hand, the general administration of the goods of the private domain of the state and of the administrative-territorial units, and on the other hand, the ways of exercising the property right. private property of the state or administrative-territorial units, respectively the sale, administration, concession, free use or rental of private property of the commune, city or municipality, or county, as the case may be, under the law. After the analysis and empirical research, the paper summarizes the general conclusions regarding the exercise of the right of private property of the state or of the administrative-territorial units, as they are presented by the Administrative Code approved by the Emergency Ordinance no. 57/2019.

Keywords: the right to private property; state; administrative-territorial units; general administration; exercise ways

1. Introduction

The private domain of the state or of the administrative-territorial units is constituted by the goods that are not included in the public domain, the state or the administrative-territorial units having a right of private property[2].

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[2] Art. 354 of the Administrative Code.

According to art. 44 para. (2) of the Romanian Constitution, private property is guaranteed and protected equally by law, regardless of the owner, and according to art. 136 para. (5), private property is inviolable, under the conditions of organic law.

Private property is defined by the Civil Code, in art. 555 para. (1), as: "*the right of the holder to own, use and dispose of an asset exclusively, absolutely and perpetually, within the limits established by law*".

The legal regime of the goods that constitute the private domain of the state or of the administrative-territorial units is the one of common law, except for the cases when by law another legal regime is established. Thus, according to art. 355 of the Administrative Code, "*the goods that are part of the private domain of the state or of the administrative-territorial units are in the civil circuit and are subject to the rules provided by Law no. 287/2009, republished, with subsequent amendments, unless otherwise provided by law*". These goods may be alienated, may be subject to enforcement and may be acquired in any other way provided by law[1].

According to art. 553 para. (1) of the Civil Code, there are subject to private property all assets of private use or interest belonging to individuals, legal entities under private law or public law, including assets that make up the private domain of the state and administrative-territorial units.

The regime of goods belonging to the private domain of the state or of the administrative-territorial units is governed by norms belonging to the common law, but the current legislation expressly provides the possibility to be governed by norms derogating from the common law regime, which makes the difference between goods belonging the private domain of the state or of the administrative-territorial units and the goods that belong to individuals, natural and legal persons (Albu, 2008, p. 192).

[1] For example, art. 13 para. (1) of Law no. 50/1991 on authorizing the execution of construction works stipulates that "lands belonging to the private domain of the state or of the administrative-territorial units, intended for construction, may be sold, concessionaire or rented by public auction, according to the law, under the provisions of urban planning documents and of landscaping, approved according to the law, in order to achieve the construction by the owner".

2. Exercising the Right of Private Property of the State or of the Administrative-Territorial Units

The organization of the exercise of the private property right is carried out by the holders of the property right over the private domain goods, respectively the state, the county, the city and the commune through subjects of law that have competences in this respect (Bălan, 2007, p. 136).

In this sense, we have in mind the provisions of art. 15 letter d) of the Administrative Code, according to which the Government exercises the function of administration of state property, which ensures the administration of public and private property of the state. Also, the local councils have attributions regarding the administration of the public and private domain of the commune, city or municipality[1]. In carrying out this responsibility, the local councils decide on the sale, administration, concession, free use or rental of private property of the commune, city or municipality, as the case may be, in accordance with the law[2].

The county council has similar responsibilities, which, according to art. 173 para. (4) letter b) of the Administrative Code, decides the sale, administration, concession, rental or transfer for free use of private property of the county, as the case may be, in accordance with the law.

These subjects of law act, in the activity of general administration of the goods of the private domain, exclusively as public authorities, subjects invested with prerogatives of public law, with administrative competence (Bălan, 2007, p. 136).

In accordance with Art. 362 para. (1) of the Administrative Code, the goods privately owned by the state or by the administrative-territorial units may be given in *administration, concessioned or rented*. Also, the goods privately owned by the administrative-territorial units can be given for free use, for a limited time, as the case may be, to non-profit legal entities, which carry out charitable or public utility activity, or to public services[3].

The local councils and the county councils decide *the sale, the administration, the concession, the free use or the rent of the privately-owned goods* of the commune, city or municipality, or of the county, as the case may be, under the law, according

[1] Article 129 para. (2) letter c) of the Administrative Code.
[2] Article 129 para. (6) letter b) of the Administrative Code.
[3] Article 362 para. (2) of the Administrative Code.

to art. 129 para. (6) letter b) and art. 173 para. 4 letter (b) of the Administrative Code.

According to article 362 par. (3), the provisions of the Administrative Code regarding the administration, concession, rental and free use of the goods belonging to the public domain of the state or of the administrative-territorial units shall be applied accordingly. Therefore, the provisions of art. 298 of the Administrative Code regarding the prerogatives that the authorities mentioned in art. 287 regarding the administration of public property shall also apply in the case of the administration of private property. These prerogatives have in view the keeping of the cadaster and real estate advertising records, in accordance with the law, the establishment of the destination of the goods for administration as well as the monitoring of the situation of the goods given in administration. The right of administration over the private property of the state or of the administrative-territorial units is a real right with absolute feature, being opposable *erga omnes*. With respect to third parties, this right can be defended by common law means[1], respectively by the action in claim, the possessory action, etc.

The constitution of the right of use over the goods belonging to the private domain of the state or the administrative-territorial units is achieved through an administrative act issued in regime of public power by the competent authority. Free use will always be done for a limited time and free of charge (Albu, 2008, p. 203). The right of free use ceases at the expiration of the established duration or, as a sanction, when the transmitted good can no longer be used according to its destination established by the administrative act of free use.

Analyzing the current legislation, we can mention examples of special regulation of the right to use the lands that are part of the private domain of the state or of the administrative-territorial units. According to art. 15 of Law no. 50/1991, amended, the lands destined for construction can be concessioned without public auction, with the payment of the royalty fee established according to the law, or can be put into use for a limited period, in the following cases: for the achievement of public utility or charity objectives, social, non-profit, other than those carried out by local authorities on their land; for the construction of housing by the National Agency for Housing, according to the law; for the construction of housing for young people

[1] See CCR Decision no. 1/2014 on the objection of unconstitutionality of the Law on establishing measures for decentralization of powers exercised by some ministries and specialized bodies of the central public administration, as well as reform measures on public administration, published in the Official Monitor, Part I no. 123 din 19.02. 2014.

up to the age of 35; for the displacement of households affected by disasters; for the extension of the constructions on adjacent lands, at the request of the owner or with his consent; for works of protection or enhancement of historical monuments defined according to the law, with the approval of the Ministry of Culture and Cults, based on urban planning documents approved according to the law.

The concession represents a contractual way of "putting into value" the goods of the administrative field (public or private), at the disposal of the administrative-territorial units.

The quality of concessionaire will always have a subject of private law. Concessions on privately owned property are based on a concession contract, which is concluded between the grantor and the concessionaire.

The concessionaire's right has a temporary feature, being constituted for a determined period of time. This right may cease in the following situations: upon fulfillment of the term for which it was established; in case of force majeure or in case of accident; the unilateral denunciation by the grantor in case of the existence of a public interest that the concessioned good would serve.

The settlement of the possible litigations determined by the concession of the goods belonging to the private domain belongs to the common law courts, we consider new, given the provisions of art. 370 of the Administrative Code (Vedinaş, vol. II, 2018, p. 389). In this sense there are also the provisions of art. 20 of Law no. 50/1991 regarding the authorization of the execution of the construction works, which establish the competent court in case of solving the possible litigations determined by the concession of the private domain goods. Thus, against the auction, until the moment of adjudgement, it will be possible to make an appeal, by any interested person, to the court in whose territorial area the auction takes place, the appeal suspending the auction until its final settlement. In view of this, the literature has expressed the view that, if disputes concerning an administrative procedure have been brought by the legislator under the jurisdiction of the common law court, the same solution will consequently have to be adopted in the case of disputes relating to closure, execution and termination of the concession contract (of private property)[1].

[1] In Decision no. 6/2011, the High Court of Cassation and Justice established that "a concession contract whose object is the development of private property of the state or administrative-territorial units, will not be subject to the jurisdiction of administrative courts".

Therefore, in this case the provisions of art. 8, para. (2) of the Law on administrative litigation no. 554/2004, according to which the administrative contentious court is competent to solve disputes that arise in the phases preceding the conclusion of an administrative contract, as well as any disputes related to the conclusion of the administrative contract, including disputes having as object the annulment of an administrative contract.

The administrative code contains special regulations regarding the procedure of sale of goods from the private domain of the state or of the administrative-territorial units, in the sense that their sale is made by public auction, applying the conditions established in art. 334-346 regarding the rental of public property. Also, the principles for awarding the concession contract of public property goods provided in art. 311 of the Administrative Code, unless otherwise provided by law.[1]

The opportunity to sell the goods in the private domain of the state or of the administrative-territorial units is established by the authorities provided in art. 287, except for the cases provided by law. In the case of state-owned real estate, the sale by public auction is approved by Government decision, while the sale by public auction of real estate belonging to administrative-territorial units is approved by decision of the county council, the General Council of Bucharest, respectively of the local council of the commune, of the city or of the municipality, as the case may be[2].

In order to carry out the procedure of sale by public auction of the goods privately owned by the state or of the administrative-territorial units, a guarantee is established, established between 3 and 10% of the price of the sale contract, without VAT. The sale procedure is completed by handing over-receiving the good through the minutes within a maximum of 30 days from the date of collection of the price.

By exception from the rules on the procedure for the sale of private property established by art. 363 para. (1), in case of sale of a land in the private property of the state or of the administrative-territorial unit on which constructions are erected, their *bona fide* builders benefit from a preemption right when buying the land for to the constructions. For the purpose of exercising the right of pre-emption, the

[1] Article 363 para. (1) of Administrative Code. It is about the principles of transparency, equal treatment, proportionality, non-discrimination and free competition.
[2] Article 363 para. (2) - (4) of the Administrative Code.

owners of the constructions are notified within 15 days on the decision of the local or county council and can express their purchase option within 15 days from the receipt of the notification.

In this case, the sale price is established on the basis of an evaluation report, approved by the local or county council, as the case may be[1].

In accordance with art. 364 para. (3) of the Administrative Code, other exceptions to the public tender procedure may be established by special laws.

3. Conclusions

If in the case where the state-owned goods or administrative-territorial units apply exclusively to a regime of public law, in the sense that they are inalienable, imprescriptible and imperceptible, in the case of state-owned goods or administrative-territorial units the legal regime applicable is the one of common law, except for the cases when another legal regime is established by law. These goods may be alienated, may be subject to enforcement and may be acquired in any other way provided by law. The exercise of the right of private property of the state or of the administrative-territorial units considers, on the one hand, the general administration of the goods of the private domain of the state and of the administrative-territorial units, and on the other hand, the ways of exercising the property right of the private property of the state or administrative-territorial units, which consist in the sale, administration, concession, free use or rental of private property of the commune, city or municipality, or county, as appropriate, under the conditions established by law.

[1] The exception is provided by art. 364 para. (1) of the Administrative Code. According to the rule imposed by the Administrative Code in art. 363 para. (6), "*unless otherwise provided by law, the minimum selling price, approved by Government decision or by decision of the deliberative authorities at the level of local public administration, as the case may be, shall be the highest value of the price of market determined by appraisal report prepared by appraisers natural or legal persons, authorized, in accordance with the law, and selected by public auction, and the inventory value of the real estate*".

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