

LEGAL AND PRACTICAL ASPECTS CONCERNING THE OBJECT OF ADMINISTRATIVE CONTRACTS

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Abstract

In order to carry out its activity, the public administration authorities entrusts to a particular (natural or legal person) the exploitation of a public good, the execution of a public work or the performance of a public service by concluding some administrative contracts. These can be concession contracts, service contracts, public-private partnership contracts etc.

The conclusion of such contracts require the proper identification of the object of the contract, especially in the case of public service concession, which involves the use of some public property goods. It would seem that in such situation, it is necessary to conclude two concession contracts: a concession contract for the public property good, on the one hand, and for the public service, on the other hand. In practice, the contracts whose object is the provision of a public service, the concession of goods is done simultaneously with the concession of the public service and as its accessory. There is a concession of goods when the principal performance in the exploitation of a public or private property good of the status or administrative-territorial units.

The concession which has as object the execution of a public work is also a concession of a public service, through which, however, the concessionaire does not undertake only to make to function this service, but undertakes to build himself, at his expense, the work required for the functioning.

This paper aims to study the main rules on the correct identification of the object of administrative contracts, in order to streamline the goods, services or public works, streamlining in the general benefit of the society who use these goods, services or public works, and for the private benefit of the concessionaire, by obtaining revenues which would allow the payment of the royalty to the Concession Provider, as well as its own profits.

Key Words: *Administrative contracts / concession contracts / service contract / public works / public services / public property assets*

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Human needs are many and varied, being encouraged by the technical progress which has determine new needs for the population, “necessities that public power was tempted to satisfy from the reasons of general interest”.³⁵ The multitude of social needs can not be covered by the state; as more as, the problem of

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³⁵ A. Vasile, *Provision of public services through private agents*, All Beck Publisher, Bucharest, 2003, p. 3.

supplying of public services is put to us, taking into account the economic problems facing the country. In this case, the public administration apply to authorization of certain individuals in supplying of services of general or public interest.

In the Republic of Moldova there is an outsourcing tendency of public services, aiming the serving of citizens in good condition. This is achieved through the delegation of public service management, through concession contracts, through public-private partnership contracts etc. In this case, public authorities conclude administrative contracts (concession contracts, public-private partnership contracts, contracts of management delegation) necessary to achieve in continuity regime and regularity of public services.

Today the administrative practice from the countries with a tradition of applying of market economy demonstrates the existence of indisputable benefits in the achievement of general interest, obtained by the administration through concluding of some contracts under administrative law.³⁶

Although in the practice we assist to the use of administrative contract (contracts of management delegation, concession contracts, public-private partnership contracts), legal and doctrinal basis of the Republic of Moldova, it is insufficient, contradictory and confusing.

Our work aims to highlight issues related to the subject of administrative contracts, especially those of concession. A current problem for research based on practical work and literature of specialty.

In the doctrine there is no single point of view on the concept of the object of the contract. Making only the reference to such disputes, we remember the definition in the basis of which the object of the contract consists of the "prestation (action or inaction) to which the parties or one of them is bound by the contract; where the prestation relates to certain goods they also appear as objects (derivatives) of the contract".³⁷

In principle, the prestation to which parties are obliged to an administrative contract aims to achieve an activity of public interest, which may be: an enhancement of public property, the supplying/provision of a public service; achieving of public works.

After what criteria or rules we determine the object of the concession contract?

For example, in the Republic of Moldova were concessioned "*the assets of State Enterprise "Chisinau International Airport" and its related land for a period of up to 49 years*", as was stated in the mass-media. According to p. 1.1. of

³⁶ C. S. Săraru, *Administrative contracts*, C. H. Beck Publisher, Bucharest, 2009, p. 2.

³⁷ M. Mureșan, *The Object of the Contract*, in M. N. Costin, M. Mureșan, V. Ursu, *Civil Law Dictionary*, Scientific and encyclopedic Publisher, Bucharest, 1980, p. 349; cited by D. Chiriță, *Civil Law. Special Contracts*, Lumina Lex Publisher, Bucharest, 1997, p. 41.

Annex no. 1 to Government Decision no. 780 of October 04, 2013³⁸, „*The objects of the concession are the assets of State Enterprise "Chisinau International Airport" and their related land, except receivables and payables*”.

The concession contract of assets under the management of State Enterprise "Chisinau International Airport" and their related land no. 4/03, concluded on August 30, 2013, between the Public Property Agency from the Republic of Moldova and LLC "INVEST AVIA", reiterates in the art. 2, the same object mentioned above.

From all said, we deduce easily, the subject of this concession contract, and namely, the goods of State Enterprise "Chisinau International Airport" public property of the Republic of Moldova, related to the provision of public service of air transport.

The real object of this contract is, in fact, the air transport services, whereas the assets of the state enterprise, such as building of Airport, runways, adjacent lands and auxiliary constructions, are nothing than - goods related to this public service of national interest. Therefore, in our case, the object of the concession contract is the exclusive right to provide public service of air transport and, alternatively, the exclusive right to operate, maintain and manage the leased assets, as well as the investments on the rehabilitation of existing assets.

These errors and ambiguities in the formulation object of the concession produce contrary effects to the purpose and objectives enshrined in law or stipulated in the concluded contract. Moreover, the errors can be so serious as to lead to misappropriation of public property, to the provision of services or execution of poor quality works in the detriment of the consumers and the entire society³⁹.

A similar example, is the concession contract concluded between the territorial administrative unit of Balti municipality and LLC "Glorinal Inginerig". According to art. 2 of the concession contract.⁴⁰

„2.1. The object of the concession contract are the assets that belong to the public sphere (movable and immovable property, technological interconnected and planned for the activity development in the concession contract) and plots of land required for organization of water evacuation on the territory of the Balti municipality, which it is subject to reconstruction (modernization) from the account

³⁸ Decision of the Government no. 780 of 04.10.2013 on confirmation of the approval of the concession of assets of S.E. „International Airpot of Chisinau” and of the conditions of their concession / published in Official Monitor no. 221 of 07.10.2013.

³⁹ M. Orlov, L. Belecciu, *Theoretical and practical aspects on concession institution in the Republic of Moldova*, International Scientific Conference “HISTORY, CULTURE, CITIZENSHIP IN THE EUROPEAN UNION”, Pitesti, Romania, 2016. Online - site: www.iccu.upit.ro.

⁴⁰ <http://www.monitoruldebalti.md/document/?doc=3250>.

of funds of the Concessionaire and specified in the Annexes. 1 and no. 2 to this contract.

2.2. The Grantor guarantees that the object of the contract is transmitted to Concessionaire free of rights of third parties and other restrictions on the ownership right of the grantor on the mentioned object, except for goods transmitted in economic management M.E. „Apa-Canal-Balti”.

The object of public-private partnership in the context of this concession contract is the public service for wastewater collection and treatment in Balti municipality.”

We identify a similar object, and namely, public goods propriety related to the provision of public service of sewage and wastewater treatment are the subject of the concession contract. And only in the final part, in an uncertain mode, is stipulated as object of the contract - public services for evacuation and wastewater treatment in Balti municipality.

From the examples given above, we find that in the Republic of Moldova the concession institution is not sufficiently known and regulated; also there is a lack of knowledge in the field of public services, public property, etc. The public services are mentioned only in terms of goods, and not vice versa.

The distinction between concessions goods, services and public works shall be found in French doctrine, which is based on a rich jurisprudence in this field. Thus, the essential difference between public goods and services that can be concessioned is that, while in the case of property leased, the main obligation of the concessionaire consists of exploiting the property, to the concession of a public service the obligation of the concessionaire performs a double duty: On the one hand the concessionaire must comply with the fundamental principles of public service: the service must operate continuously, and delays or postponements are not permitted. On the other hand, being acknowledged by a private the activity does not remain something else than a public service and responsible collectivity can not give up its power to organize this service, even if the organization rules are stipulated in the contract⁴¹.

If the concession of a public service is just a way to manage a public service, the concession of a public work is “also a concession of a public service, through which, however, the concessionaire does not undertake the function of only to operate this service, but he undertakes the function to build himself, at his expense, the public works necessary for the operation of the public service. The service management, shall enable him in this case to support the investment and to amortize the expenses regard the works which, at the end of the concession will return in a free way to grantor. That is why the concession is granted for a longer

⁴¹ P. Georges, *Droit public*, 10 edition, 1996, Dalloz, Paris, p. 258-259; cited by I. Avram, *Concession contracts*, Bucharest, Rosetti Publisher, 2003, p. 78.

period of time. The railway network, the largest part of the tram network has been achieved in this way. Today the system is used for toll motorways and underground car parks.⁴²,

Thus, the object of concession contracts is the assurance of public services in order to meet social needs of the public interest, that government already no longer covers them.

Public service concession, as mentioned by J. Rivero,⁴³ is the way of management of a public service by which a public person, the grantor, entrusts by contract a private person, the concessionaire, with operation of a service, for a certain period of time, assuming tasks, through law or of payment for its services.

This process of concession presents advantages when it is necessary to create new public services that requires the construction of some expensive installations, so ending a contract with an individual or a private company that is committed to build everything is needed, for fees which he will collect from the beneficiaries. In this way the administration is not spending anything. At the end of the concession, after a certain time required for amortization of expenses, the installations come back, in a free way, to granting authority.⁴⁴

However, in the case of the concession of some public services, which involves the use of public assets, is held one auction or more? Accordingly, is required the completion of a single concession contract or two concession contracts: a concession contract for good public property and a contract for public service.

These questions appear increasingly in the basis of delegation of public service management of water supply and sewerage, fueled by the lack of legislative stipulations. Law on Public Water Supply and Sewerage no. 303 of December 13, 2013⁴⁵ requires the granting of the right/obligation to ensure/provide the public service of water supply and sewage in the result of a public tender. In this case, will be hold a tender for the award of public service, and other for goods of public property related to this service? Will be concluded two contracts: one for the public services of water supply and sewerage, and the other for goods related to the ensuring/providing of public service?

In practice, the concession of goods is done simultaneously with the concession of public service and as its accessory. Or, if the concession of goods is an accessory of service concession, the applicable rules regarding the effects of the contract will be those of the main contract. The specific effects of the concession contract of goods will only apply if the goods are affected by an

⁴² J. Rivero, *Droit administratif*. 9-ieme edition, Paris, Dalloz, 1980, p. 459-460.

⁴³ J. Rivero, *op. cit.*, p. 459.

⁴⁴ M. T. Oroveanu, *Concession of public service, in Studies of Romanian Law no. 2/1995*, p. 157.

⁴⁵ Law on public service off watter supply and sewage no. 303 of December 13, 2013/ published in Official Monitor of the Republic of Moldova no. 60-65 of September 14, 2014.

activity which is not a public service.⁴⁶

In this case we mention the delegation management contract of the public service of water supply and sewerage concluded on November 3, 2011, between the administrative-territorial unit Floresti and J.S.C. "Communal Services Floresti". According to art.2 the object of delegation management contract is – the exclusive right to supplying the service is the - the exclusive right to ensure/provide public services of water supply and sewerage in the area of jurisdiction of the delegated authority and the exclusive right to operate, maintain and manage the public systems of water supply and sewage necessary for public service.

Therefore, together with the right of ensuring/providing of the service, are transmitted and assets related to achieving of the service. And notwithstanding, according to art. 13 line (12) of Law no. 303 of December 13, 2013, the delegation management contract is awarded in a directly way without a public tender, to the companies with public major capital.

In order to avoid conflictual situations, concerning the legality of the concession of assets of the public field related to the public service of water supply and sewerage, we propose related law, amending of the law on concessions, by setting up an art.12¹:

“(1) In the case of a delegation management contract the public service of water supply and sewerage, the concession of the goods related to this service is performed in and in accordance to the procedure applicable for the award of that contract. In this case, the contracting authority concludes a single contract governed by Law no. 303 of December 13, 2013 on Public Water Supply and Sewerage.”

In conclusion, we mention that the regulations of the Law on Concessions no. 534 of 1995 reduce the object of the concession only to goods of the public field, even are remembered and public services/works. In order to remove these legislative loopholes, we propose the detailed regulation, on the basis of clear criteria of delimitation of the object of the concession: public goods, public services and public works.

The common feature of concession of goods, works or public services is the obligation of the concessionaire to exploit them or to achieve or perform in such conditions that lead to more efficient services or public works, streamlining in the general benefit of society using these services or public works and in the private use of the concessionaire, through the obtaining of revenue which will enable the payment of the fee by the grantor and its own profits.

⁴⁶ A. Sebeni, *The concept of the concession contract and its conclusion*, Bucharest, The journal Law no. 8/1999 , p. 15.

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