Public works concession.
Delimitation from other contracts

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Abstract

The concession of public services without the concession of the related public works was viewed as an exception. The public services contract was considered to rank first among the administrative contracts. The European Court of Justice ruled that establishing of the nature of a contract – whether it is a public works contract or a public contract of a different nature – is made by identifying the main purpose of the contract that determines the applicable directive, including situations where the contract has elements regarding the concession of public works as well as other types of public contracts. Also, the concept of concession used in relation to both concession and PPP was deemed in Romania as a source of confusion and ambiguity regarding the confidence of both the public and private partner within the context of project development.

Keywords*: public work, concession contract, public services, public contract.*

JEL Classification: K23

1. The concept of public work

1.a. Brief considerations

The concept of pubic work was first defined in French jurisprudence by the State Council and the Tribunal of Conflicts. More recently, in community law, Directive 93/37 of 14 June 1993 introduced a different concept applicable to public acquisition of works. Initially the concept of public work had been established on three traditional conditions: the real object of he works, its purpose of general utility and its completion for the benefit of a public person. The latter of these conditions being very rigid, jurisprudence considered that public works should not be necessarily limited to work conducted for a public person. Thus this condition acquired alternative status: in order for a work to be public it needs to be executed either for a public person, or, if it is executed for subjects of private law, this has to be within a mission of public service[3]. Introducing the possibility of subordinating public works to works executed for a private person has lead to a reconsideration of public service theory and to an extension of the concept of public work.

The lack of legal regulations in French legislation concerning the definition of „public work" or of the elements allowing identification of criteria has bee

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largely criticised in literature, as establishing such criteria was left to the discretion of the administrative judge and the Tribunal of conflicts[4]. In principle it was established that the main elements of public works are the public interest and the public service, else works pertaining solely to private law[5].

In Great Britain, according to article 1 par. (2) of Thesis II of Directive 89/106/EEC on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products[6], construction works relating to both buildings and public works are generically referred to as „works"[7].

1.b. Definition of the concept of public work

The concept of public work includes both the operation and its result. The expression „*travail public*" refers to activities of building, maintenance and management of a certain work. The result of the work (*ouvrage*) is considered to be the object of the public work and while having the same judicial status it *lato sensu* describes the concept of public work.

The distinction between the two concepts originates in French jurisprudence and was much later included into Romanian doctrine. Thus it was considered[8] that the public work has two meanings: *stricto sensu* public work that includes three elements: real estate activity (including real estate by destination); general utility purpose of the activity; execution of the work for a public person or a private person within a mission of public service[9].

Lato sensu, public works include, in addition to *stricto sensu* public works also the public „oeuvre" (*ouvrage*). The public work, understood as „oeuvre" satisfies the criteria only if it is executed by man and not a consequence of natural causes. Thus a not developed beach or plot of land is not a public work (*ouvrage public*), as are not air corridors. Skiing tracks, however, can be such public works, as they have real estate character, are of general interest and require development[10].

A comprehensive definition[11] establishes that public works are all the building, development, repair and maintenance works conducted on a piece of real estate considered to be either public domain or private property destined for public

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[4] Hervé Arbousset, *Droit administratif des bines,* Studyrama, Paris, 2007, p. 281

[5] Idem, p. 281

[6] Published in the Official Journal (OJ) of the European Communities (EC) L 40/12 of 11 February 1989

[7] According to article 3 paragraph 1 of Directive 89/106/EEC, the essential requirements applicable to works that can influence the technical characteristics of a product are stated by the objectives included in Annex 1. Thus according to the provisions of article 8 paragraph 1 of the same directive, the European technical agreement certifies the fulfilment of the utilization conditions provided for a product based on the fulfilment of the essential requirements for the works the product is to be deployed for. According to Annex 1, taking in to consideration normal maintenance of the works, the requirements for constructions need to be satisfied over an economically reasonable life cycle.

[8] Sorin David, *Contractul de concesiune*, "Dreptul" no. 9/1991, p. 41-42

[9] Hervé Arbousset, cited work, p. 281

[10] Idem, p. 293

[11] Roger Bonnard, *Précis de droit administratif*, 2nd edition, Paris, 1940, p. 606

service, or, eventually, an administrative property destined for an enterprise of public interest.

In European Law, the Directive of the EU Council no. 93/37/EEC of 14 June 1993concerning the coordination of procedures for the award of public works contracts[12] establishes that the concept of public work includes execution, or execution and design of works related to one of the Activities established in Annex II or of works defined at article 1 c) of the same directive[13] or the execution by any means of a work according to the specifications of the contracting authority.

In Spain, the *Law of Public Sector Contracts* (Ley de Contratos des Sector Público no. 30/2007)[14] establishes at article 6 par. (1) that public works are those works achieved or executed according to Annex I to the law by any means satisfying the requirements specified by the public sector contracting authority. The definition of the result of the work (*obra*) originates from the previously mentioned directive and means, according to the same article 1 par.(2) of the law, the result of a set of constructions or civil engineering works conceived such as satisfy, themselves, an economic or technical function with a real estate object.

In France the Code of Public Acquisitions (Code des marchés publiques – edition 2006)[15], by article 1 – III, indirectly defines the concept of public work, this representing the activity conducted in view of obtaining a work that corresponds to the interest party launching the call for bids.

From the presented definitions it follows that the concept of public work has the same, previously enumerated characteristics, specific to both the *stricto sensu* and *lato sensu* interpretation.

In Romania the definition of public work follows indirectly from the framework law governing the concession of public works, namely the *Government Emergency Ordinance no. 34/2006 concerning the award of public acquisition contracts, of public works and services concessions,* approved with modifications by Law no. 337/2006[16]. Thus the public works are enumerated in Annex 1 of the ordinance, in the absence of a definition of this concept.

2.a. Delimitation from other public works contracts

Initially in France the judicial basis of contracts concerning the occupancy of public domain was the Law of 17 June 1938, but also article L 84 of the Domain's Code (1790), as well as a number of relevant decisions of the State Council[17]. Some of the contracts concerning the occupancy of public domain are

[12] Directive no. 93/37/EEC was published in OJ 1993 L199, p.54 and was amended by the Directive of the EC no. 97/52/EC of 13 October 1997, published in OJ 1997 L 328, p. 1

[13] Article 1 c) of Directive 93/37/EEC establishes that a work means the result of construction or engineering works in view of satisfying an economic or technical function

[14] 30 octombrie 2007; for details see also Francisco José Villar Rojas, *La concesión administrativa de obra pública como nueva formula de gestión de servicios sanitarios*, The XIVth Extraordinary Congress „Derecho y Salud", Universidad de la Laguna, vol. 14, March 2006, p. 6-7

[15] Consolidated version of 01 June 01 iunie 2011

[16] Published in Monitorul Oficial no. 625 of 20 July 2006

[17] Antonie Iorgovan, *Tratat de drept administrativ*, C. H. Beck, Bucharest, vol. 2, p. 223

the funeral contracts and certain public works or railway concession contracts[18]. Other contracts are applicable to domain areas not affected by this type of occupancy, namely the public domain destined for public use, like concessions of public road services or of maritime fishing institutions. The distinction is significant, as in dedicated contracts, like the funeral concession[19], the occupant's utilization and disposition rights are considerably wider than in the case of contracts of general interest.

In the spirit of art. 1 of the Law of 17 June 1938 the contract of public domain occupancy has certain defining elements: the deed underlying private utilization is a contract, while acknowledgement of a contractual relationship is not determined by the existence of contract specifications[20]; the contract needs to be constitutive in relation to public domain utilization; occupancy has to concern public domain, the concessionaire being the person authorized to manage the public domain.

The state is further responsible for public domain exploitation by a number of means, from simple access to the public domain to granting private utilisation rights[21].

In Romanian legislation, it was the Law of administrative claims no. 554/2004[22] that defined for the first time the concept of administrative contracts[23] and regulated the applicable judicial regime[24]. Thus, according to article 2 par. 1 - c), second sentence of this law, the category of administrative deeds includes contracts closed by public authorities concerning exploitation of public goods by performance works and services of public interest, and by public acquisitions, respectively.

Consequently several categories of public work contracts can be identified: Public acquisition contracts (*marché de travaux publics*), public works concessions, public services concessions, contracts known as *les marchés d' entreprise de travaux publics*, and emphyteutic leases (*baux emphytéotiques*), the latter being initially established by the Law of 5 January 1988. The Law of 29 August 2002 establishes that local public institutions and local communities can accept emphyteusis to private and public persons for a period of 18 to 99 years, by

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[18] Jean-Marie Auby, Robert Ducos-Ader, *Droit administratif*, 4th edition, Dalloz, Paris, 1977, p. 356

[19] A concession contract of burial plots is considered a civil contract assigning utilization rights for a limited or unlimited period of time. For details see, Sorin David, cited work, p. 36-45

[20] Jean-Marie Auby, Robert Ducos-Ader, cited work, p. 356

[21] René Dussault, Louis Borgeat, *Traité de droit administratif*, vol. 2, Presses Université Laval, 2eme édition, 1986, p. 111

[22] Published in „Monitorul oficial al României", part I, no. 1154 of 7 December 2004

[23] Paul Negulescu, *Tratat de drept administrativ*, vol. I, Bucharest, 1934, ediţia a-IV-a, p.160, quoted by Cătălin Silviu Săraru, *Capacitatea autorităţilor sau instituţiilor publice de a încheia contracte administrative*, „Dreptul" no. 1/2010. The author asserts that the institution of the administrative contract „is an exogenous institution that cannot describe the essence of endogenous realities".

[24] Emanuel Albu, *Contracte administrative. Achiziţii publice şi contenciosul administrativ*, „Curierul Judiciar" no. 1/2007, p.66; for details see decision no. 973/2008, Înalta Curte de Casaţie şi Justiţie (I.C.C.J.), commercial court (s.com.), respectively dec. no. 2043/2010, I.C.C.J., administrative and fiscal court (s.cont.adm şi fiscal), www.scj.ro (the most recent acces in the 24th of September 2012)

which the beneficiary is granted a real property right over the land on that works are performed.

The emphyteutic lessee however cannot alienate the object of the emphyteusis. Administrative emphyteusis[25] is legally established in order for a public service, of operations of general interest to be carried out. This contractual form allows a private person to develop the state owned public domain, the emphyteutic lessee exercising true property right over the erected buildings, what is assimilated to a public-private partnerships[26].

Through a *public acquisitions contract* a public person charges a contractor – a private person – to carry out public works for the benefit of the public person for a price (*prix*) agreed in that contract[27]. The identification criteria of these contracts were established by jurisprudence, starting from three elements: one of the co-contractors needs to be a public person (an organic criterion defining the very administrative judicial nature of the contract)[28]; the object of the contract needs to concern an operation of public works; the contractor is remunerated in form of a price. It is this last element that differentiates the public works acquisition contract from the public works concession.

According to art. 3 -f) of Government Emergency Ordinance no, 34/2006, the public acquisitions contract is the deed closed in writing between one or more contracting authorities on one hand and one or more economic operators on the other, with the object of conducting works, supplying products or performing services[29].

The contracting authority has to choose whether to implement the project in the traditional system of public acquisitions or as a concession. The differences are outlined in the *Guide for the Implementation of Projects by Public Works Concessions in Romania*[30]: in the case of a concession, the exploitation right of the results of the conducted works is granted to the concessionaire, who at the same time *mandatorily assumes most of the risks* in connection with conducting and exploiting the works[31]. Thus the entity assigning the concession does not undertake

[25] Hervé Arbousset, *cited work*, p. 148-149

[26] Idem, p. 148. The law of the state of Québéc considers emphyteusis a dismembered form of property and is a long term land contract that allows the beneficiary to improve a property in exchange for the right to enjoy that property as an actual owner over the duration of the contract. This institution is utilized in the large projects of urban management.

[27] Ibidem, p. 323

[28] Idem, p. 323; René Chapus, *Droit Administratif Général,* vol. 2, 15th edition, Montchrestien Editeur, Paris, 2001, p. 358

[29] Emanuel Albu, *cited work*, p. 67

[30] The Guide for the Implementation of Projects by Public Works Concessions in Romania was approved by Order no.1517 of 27 May 2009 of the Ministry of Public Finances and no. 9574 of 16 July 2009 of the National Authority for Regulation and Monitoring of Public Acquisitions, published in „Monitorul oficial al României", part I, no. 512 of 27 July 2009, http://discutii.mfinante.ro/static/10/Mfp/PPP/GHID_CONCES_PUBLICE.pdf (the most recent acces on 24th of September 2012)

[31] Exploitation risks include: a*) the risk of availability* (non-achievement of performance and quality parameters of the building or the provided service, clearly determined and measurable over the

to pay any amount of money, if the contract establishes that the exploitation risks are entirely assumed by the concessionaire. If the exploitation risk is divided between the concession assigner and the concessionaire, the concession contract needs to explicitly stipulate the financial contribution of the concessionaire during the contract.

Should the requirements for project implementation in form of a concession (long term delegation of a public service to a private operator, service productivity, value of the investment, starting date of the works, existence of similar concession projects) not be satisfied, the contracting authority can choose a traditional scheme of public acquisitions instead of a concession[32].

The *public works contract* is defined as a contract the object of that is either the performing of one of the works related to the activities of Annex 1 of *Government Emergency Ordinance no.34/2006* or to the execution of a construction, or both design and execution of works related to the activities of Annex 1, or design and execution of a construction; or by achievement by any means of a construction that satisfies the necessity and the objectives of the contracting authority.

Les marchés d'entreprise de travaux publics are those contracts by that a public person assigns building and exploitation of a „public edifice" (*ouvrage public*) and public services in principle to the contractor, the latter being remunerated by the public person (and not by royalties as in the case of concession)[33]. Similarly to the concessionaire, the contractor too has the obligation of exploiting the result of the work[34].

The *Mixed economy company*, as opposed to concession, is not limited to exploiting and organizing a public service, but can expand to exploiting certain assets by associating private capital to an activity of the state or to public services in form of a joint stock company, governed on one hand by the principles and rules of commercial law, but that includes also state capital on the other[35]. This was a form of state-owned subsoil exploitation after the Constitution of 1923.

The *Publicly owned entreprise*[36] is a contractual form of performing public works by the administration itself. The Romanian doctrine[37] stipulated that in addition to concession and the mixed economy company public service organization also includes the publicly owned entreprise under its various forms.

The *Arrendamento (lease)* is a type of contract the object of which is the exploitation of agricultural land, either by public exploitation plans or by private initiative. The deed we refer to is the *Law of Agricultural Reform no. 45404/1964* of Brazil; article 9 of this act stipulates that the state can exploit directly or

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entire duration of the project); b) *Market risk* (Non-utilization by the end-users of the results of the completed works)

[32] Guide for the Implementation of Projects by Public Works Concessions in Romania

[33] Hervé Arbousset, cited work, p. 325

[34] For details see René Chapus, cited work, p. 364

[35] Constantin Rarincescu, *Teoria serviciului public*, Cursurilor litografiate, 1941, p. 198

[36] Roger Bonnard, cited work, p. 607

[37] Constantin Rarincescu, cited work, p. 179

indirectly any of the agricultural properties in its ownership. Exploitation is applied to „public lands". These are either property of the „Union" (the federal state, s.n. - C.M.) and made available by the state to services and works of any kind, or belong to the individual federal states or townships. *Arrendamento*, however, is significantly different from the concession of public works. Agricultural exploitation does not involve public works and, according to article 94 of the same act, cannot be exercised on the public domain to other purposes than research, experimenting, demonstration and promotion of agricultural development.

All enumerated categories of contracts, although different under certain aspects, sometimes rather difficult to identify, have as a common denominator the fact that they are administrative contracts of public management. The purpose of closing public management contracts pertains to the essence of administrative contracts, hence the mere closing of such a contract between a public and a private person does not suffice[38].

All these contracts include clauses exorbitant to common law. As an exception the contracts closed between industrial and commercial public services[39] and their users are always contracts of private law, regardless whether they include exorbitant clauses. Thus the object of the industrial and commercial public service contract is an activity comparable to that of a private company, namely the production of goods and services (for example railway transportation) and involves management comparable to the private sector (absence of a monopoly, the functioning of the public service in a competitive sector).

In Spain the public works concession contract is one of the three classic modalities of executing public works, next to execution of the works by the Administration and by outsourcing. The concession contract is regulated in articles 5.2.a, 7.2 and 220-226 of the *Law of Public Sector Contracts.*

Like any administrative contract[40], its regulation includes the standard structure characteristic to these public judicial deeds: devising of the preparatory documents (feasibility study – economic and financial feasibility study, project of the works and economic – financial plan, contract specifications including the administrative clauses and technical specifications, articles 227-233 of the law, article 232 excepted), the modality of assignment (competition-based, exceptionally negotiated, article 231.1), the rights and obligations of the concessionaire (art. 242 and 243), the privileges of the contracting authority (art. 249 and in addition, *ius variandi* art. 250, receivership – art 251, penalties – art. 252), reception of the works and causes for contract termination (art. 261-266).

[38] For details see René Chapus, cited work, p. 359
[39] For details see Nadine Poulet-Gibot Leclerc, *Droit administratif: sources, moyens, contrôles*, 3rd edition, Bréal Ed., 2007, p. 162
[40] F. J. V. Rojas, cited work, p. 5

2.b. The case *Auroux et al. versus Roanne Region*[41]

In relation to the preliminary appeal in the case *Auroux et al. vs. Roanne Region* by the Administrative Tribunal of Lyon, France, The EU Court of Justice was requested to rule on the judicial nature of a contract, namely whether it is a public works concession contract.

The object of the preliminary appeal was the interpretation of art.1 and art.6 of Directive 93/37/EEC[42] of 14 June 1993 concerning the coordination of procedures for the award of public works contracts. The public works concession contract is regarded as a variety of public development contracts (public-private partnerships). The latter represents the public interest contract closed between two contracting authorities in view of conducting a development procedure based on that the second contracting authority conducts works such as to satisfy the requirements of the former, where upon completion of the procedure the result of those works is acquired by the first contracting authority.

The concession contract of public works, according to art.1 d) of Directive 93/37/EEC, represents a contract concerning the works stipulated at a) (public works contracts, s.n.), except the fact that the relevance of the works to be executed consists either exclusively in the exploitation right of the construction, or in the exploitation right of the construction in exchange for a fee.

Public works are those established in Annex II of the directive. Those at a) are the construction and engineering works of Class 50 of the general industrial classification of economic activities in the European Economic Community. The construction of buildings is expressly included. According to art. 6 of the directive, this is applicable to: a) public works contracts he estimated value of that, including VAT is not less than the equivalent of 5 million Euros, b) the public works contracts referred to at art. 2 par. 1 the estimated value of that is not less than 5 million Euros.

Regarding the applicable national French legislation, art. L300-4 of the Code of Urbanism[43] stipulates that „the state, appointed local authorities or public institutions can award urbanism works and the implementation of the legally regulated development projects to any qualified public or private person". If a contract is closed by a public institution, a semi-public local company as defined by Law no. 83-597 of 7 July 1983 whose majority capital is held by state, regions, departments, townships or groups thereof, this contract can take the form of a public-private partnership. In this case the contracting partner has to be ensured, by acquisition and execution of any measure or operation concerning achievement of the project that is object of the partnership (*public development agreement*).

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[41] CJUE, Case C-220/05, *Auroux et al. vs. Roanne Region*, roling of 18 January 2007, ECR 2007, p. I-385, OJ C56 of 10 March 2007

[42] OJ 1993 L 199, p. 54; Directive 93/37/EEC was amended by Directive 97/52/CE of 13 October 1997, published in OJ 1997 L 328 p. 1

[43] The Code of urbanism was amended by Law no. 2000-1208 of 13 December 2000, published in JORF of 14 December 2000, p. 19777

The considered case concerns the development of a leisure centre in a sequence of phases. The first phase is the construction of a multiplex cinema, commercial spaces to be transferred, parching spaces, access to public streets and spaces. The second phase is the building of a hotel. The Court of Lyon enquired with the Court of Justice whether such a contract engaged for the general interest where upon completion of works the result is automatically transferred to the first contracting authority, qualifies as a public works contract according to art. 1 of Directive 93/37/EEC.

The Court of Justice ruled that a contract where a contracting authority awards works to a second contracting authority represents a public works contract, according to Directive 93/37/EEC, regardless whether it is anticipated that the first contracting authority is or will become owner of all or just one of the resulting segments of the work (in the sense of an *ouvrage*, s.n.).

Consequently, *establishing of the nature of a contract* – whether it is a public works contract or a public contract of a different nature – *is made by identifying the main purpose of the contract* that determines the applicable directive, including situations where the contract has elements regarding the concession of public works as well as other types of public contracts.

2.c. Concession of public works and the public-private partnership

The present trend of expansion of public services provided by private agents has been qualified as contemporary neo-liberalism[44].

In a modern perspective characterised by the tendency to exceed the classical rigid delimitation of public/private and stat/private, respectively, public services are no longer limited to the domain of the state, involving „an extension of the regulation area of collective functions"[45].

The legal framework for public-private partnerships was Government Ordinance (G.O.) no. 16/2002 concerning public-private contracts[46], approved with modifications and amendments by Law no. 470/2002[47] subsequently modified and amended by Government Emergency Ordinance (G.E.O.) no. 15/2003 approved by Law no. 293/2003[48]. Ordinance no. 16/2002 was completely abrogated by Government Emergency Ordinance no. 34/2006. Law no. 178/2010 concerning public-private partnership[49] (further on PPP) established a new legal framework

[44] Ana Vasile, *La prestation des service publics par des agents privés*, All Beck, Bucharest, 2003, p. 5 quoted by Dana Apostol Tofan, *Le parteneriat public privé*, "Analele Universităţii Bucureşti", no. II/2005, p. 50; Dana Apostol Tofan, *Tratat de drept administrativ*, vol. II, Bucharest, C. H. Beck, 2009, p. 177

[45] Ioan Alexandru, *Consideraţii teoretice privind parteneriatul public-privat*, Revista de Drept Public no. 1/2004, p. 29

[46] Published in Monitorul Oficial al României no. 94 of 2 February 2002

[47] Published in Monitorul Oficial al României no. 559 of 30 July 2002

[48] For a critical analysis of PPP legislation at the time see Dana Apostol Tofan, *cited work*, p. 51

[49] Published in Monitorul Oficial al României no. 676 of 5 October 2010

that has already suffered significant modifications by Government Emergency Ordinance (G.E.O.) no. 39/2011[50].

Further art. 36 par.7 a) of the Law of Local Public Administration no. 215/2001[51] includes provisions concerning the possibility of cooperation and association with Romanian and foreign legal entities in view of joint financing and achievement of actions, works, services and projects of local public interest.

The abrogation by Government Emergency Ordinance (G.E.O.) no. 34/2006 of the specific PPP legislation created a legislative vacuum, considering that the mentioned ordinance did not include any regulations concerning the concept of PPP. Thus the question was raised whether closing of PPP was still possible[52]. Subsequently this situation was invoked in the rationale of the PPP Law project[53], its initiators pointing out that PPP legislation and the concept of PPP had been abandoned, the latter being replaced by two other concepts, namely public works concession and services concession, underlying the devising of a single deed concerning public acquisitions and concession of works and services. The concept of concession used in relation to both concession and PPP was deemed as a source of confusion and ambiguity regarding the confidence of both the public and private partner within the context of project development. The same rationale further points out that any onerous contract closed in writing between a contracting body and an operator, as entailing execution of works, achievement of an *oeuvre* or provision of services is called „public market" of works or services. It was further pointed out[54] that the difficulty in distinguishing between PPP and public works concession was caused also by the fact that Government Decision no. 925/2006 stipulating the application norms of Government Emergency Ordinance (G.E.O.) no. 34/2006 includes details relating only to the public acquisitions contract, but not concerning public works or services concessions.

The concept of concession is defined as a contract of the same type as one with public market characteristics, *except that in exchange for the executed works or provided services only the exploitation right of that work or service is offered.*

PPP was defined as a concept expressing a modality of cooperation between a public administration authority and the private sector, non-governmental organisations, associations of businesspeople or companies with the purpose of achieving a project expected to produce positive effects on the labour market and in local development[55]. In the case of such concessions, upon completion of the contract the assets created within the project are transferred free of charge to the public authority[56]. Within the context of the abrogation of G.O. no. 16/2002 and of

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[50] Published in Monitorul Oficial al României no. 284 of 21 April 2011

[51] Republished in Monitorul Oficial al României no. 123 of 20 February 2007

[52] Rodica Narcisa Petrescu, *Impactul adoptării Ordonanţei de urgenţă a Guvernului no. 34/2006 asupra contractului de parteneriat public-privat*, "Revista de Drept Public" no. 1/2007, p. 98

[53] http://www.cdep.ro/proiecte/2010/200/90/9/em299.pdf

[54] Rodica Narcisa Petrescu, *cited work*, p. 103

[55] Dana Apostol Tofan, cited work, p. 52

[56] On the other hand, the public works concession contract is defined according to article 3 g) of G.E.O. no. 34/2006 as being the contract that has the same characteristics as the works contract,

G.E.O. no. 34/2006 coming into force, the PPP contract was considered *a variant of the concession contract* of the judicial nature of an administrative contract[57].

Considering the complexity of delimitation of the two types of contracts the devising of a single legal deed regulating the two concepts was proposed, exactly in order to avoid equivocal and parallel legislation with incoherent and flawed applicability[58]. In France, unlike Romania, Ordinance no. 554/2004 concerning private financing initiative[59] was not abrogated by connecting French to EU legislation[60], thus conserving the tradition of cooperation between public authorities and the private sector by concession of public assets, but mostly by the concession of public services[61].

The adopted solution is not quite free of criticism, as it stipulates a restricted applicability of PPP legislation. Thus, according to art. 10 of Law no. 178/2010 the Law does not concern contracts regulated by G.E.O. no. 34/2006[62]. Consequently any similarity or assimilation of the public works concession contract to PPP or vice-versa is excluded. The approach to the legal

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the only dofference being that in exchangefor the executed works the contractor, as concessionaire, receives from the contracting authority the right to exploit the result of the works for an undetermined period of time, or this right accompanied by the payment of a previously agreed amount of money.

[57] Rodica Narcisa Petrescu, cited work, p.103; the author points out the similarity of the judicial status applicable to the concession contract and the PPP contract existing also under the old law.

[58] Dana Apostol Tofan, *cited work*, p. 52; Dana Apostol Tofan, *Drept administrativ*, 2nd edition, vol. II, C. H. Beck, Bucharest, 2009, p. 178

[59] JO no. 141 of 19 June 2004

[60] The directives transposed by G.E.O. no. 34/2006 are: Directive 17/2004/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, Directive 18/2004/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Directive 89/665/EEC and Directive 92/13/EEC. Other relevant directives are: Directive 71/305/EEC concerning the co-ordination of procedures for the award of public works contracts (JO no. L185, 16.8.71, p. 5), Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (JO no. L395, 30.12.1989, p. 33), Directive 93/37/EEC of 9 August 1993, called „works directive", Directive 89/106/EEC on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (JO L40/12 of 11 February 1989)

[61] Idem, p. 51

[62] The Romanian Government published 17 envisaged PPP proposals, of which we enumerate: the Braşov-Borş motor way, constructionof the sencond nuclear facility, constructions of units III and IV of Cernavodă, a hydropower plant on the Danube for ensuring the necessary funds for the projects, construction of a ski resort in the Parâng mountains, the Ploieşti-Buzău-Focşani motor way, the Târgu-Mureş-Iaşi-Ungheni motor way, completion of the danube – Black sea channel, the „Ana Aslan" health centre of Bucharest, motor vehicle traffice bridge ove the Danube between Brăila and Tulcea, etc. At present the first PPP contract is closed with the Vinci-Aktor consortium for the Comarnic-Braşov motor way segment. Information provided by the media in relation to this partnership also include the concept of concession (?!). A second partnership is allegedly closed with low-cost air company Blue Air, via Blue Aero who in 2010 initiated modernisation works of the "George Enescu" International Airport of Bacău (construction of a new terminal, modernisation of the runway, taxiing ways, a hotel, etc).

framework relating to PPP was and remains an example of excessive formalism[63] that allows undue intervention of the administration in establishing the magnitude of the funds required for materialization of the private initiative of investing in resources, eventually affecting the protection of public interest.

The new legislative context is not free of „complications" caused by the very ambiguity of the PPP-concession relationship. Thus promulgation of Law no. 178/2010 was initially rejected by the President of Romania, as generating confusion between the object of this law and that of G.E.O. no. 34/2006, and because of the contradiction between this law and the Community provisions reflected in G.E.O. no. 34/2006[64].

In relation to the limitations of the object of Law no. 178/2010, this is applicable neither to concession contracts, nor to joint ventures, but to other types of contractual arrangements concerning public property[65]. But, according to art. 136 par. 4 of the Romanian Constitution, republished, public property can only be conceded, leased, given into administration or gratuitous use. Hence it is difficult to understand what the object of PPP actually is, and should this exist distinctively, whether the relevant legal provisions are constitutional.

Further, not lacking relevance is the possibility created by Law no. 178/2010, of eluding the procedures of public bidding procedures in the case of concessions, and their substitution by negotiation procedures. In this respect we mention that according to art. 10 of the British *Public Works Contracts Regulations of 1991* the negotiations procedure, although not regulated by law, has subsidiary character and can be used only under limited circumstances.

We appreciate the opportunity of devising a single legal deed concerning both concessions and public-private partnerships, in which respect the example of Spain is relevant, where the Law of Public Sector Contracts no. 30 of 30 October 2007 specifies even the definition of the public-private partnership (art. 11).

2.d. The Concession contract of public services and the public works contract

The public service is aimed at the regular and continuous satisfying of a general requirement[66], and is organized by the state and the local public administration authorities upon establishing the existence of general interest. Public service has two senses: an organic one that entails the existence of a form of

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[63] For details on the relationship of the regularity and formal correctness of administration decisions on one hand and its performances on the other, see Ioan Alexandru, *Consideraţii teoretice privind parteneriatul public-privat*, „Revista de Drept Public" no. 1/2004, p. 31-32

[64] A remaining desideratum is a regulation "in clear, flexible and intelligent terms, such as to avoid parallelisms with similar legislative provisions concerning local public administration and concessions", Dana Apostol Tofan, cited work, p. 56

[65] On the other hand PPP was identified as a *joint venture partnership*. For details see Jeffrey Delmon, *International Project Finance and Public Private Partnerships*, Kluwer Law International, 2010, p. 11

[66] Paul Negulescu, cited work, p. 113, quoted by Aladar Sebeni, *Noţiunea contractului de concesiune şi închierea acestuia,* „Dreptul" no.8/1999, p. 5

organization, of an administrative apparatus, and a material sense that refers to an activity aimed at satisfying a general interest. The latter is essential for the characterization of a public service[67], which is a widely analyzed concept. Identification criteria were determined already in the interwar period, one of the four essential elements rendering the performed service public being the general public interest to be satisfied[68].

In the interwar period it was argued, based on the theory of the public service, that this underlies also public works concession contracts, hence challenging the independent existence of the latter. The French doctrine defined the concession contract as having for its main objective the assignment of the public service to the concessionaire. The object of the contract, however, can be the performing of operations required for that service, these being considered public works, „as they are performed on *property meant to ensure the functioning of the public service*"[69]. The concession of public services without the concession of the related public works was viewed as an exception. The public services contract was considered to rank first among the administrative contracts[70]. The assimilation of public works to public services concession is also addressed in more recent literature[71], considering that the concession contract merges the category of public works with that of public services, as in practically every case the beneficiary of the concession of a public work also undertakes the management of the public service the public works are meant for, and vice-versa, the concession of a public service will conduct and exploit public works related to this service.

The *pre-eminence of the public services concession* over public works concession is conditioned by the main object of the concession contract that has to concern the execution of a public service and not exclusively the execution of public works. This principle is acknowledge to the present, and underlies the rationale of the Government Emergency Ordinance no. 34/2006 as subsequently modified and completed. Also article 12 of the *Law of Public Sector Contracts (Spain)* provides that should a contract include provision of services based on one or the other type of contract, including the specific elements of public services or public works concession, respectively, the contractual provisions to be considered, based on certain criteria, are those most important from the economic viewpoint. Public works concession contracts are not to be confused with and are regulated separately from those of public services[72].

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[67] Sorin David, *cited work*, p. 36

[68] Constantin Rarincescu, *Drept administrativ*, Universitatea din Bucureşti, 1926-1927, Emil Stancescu Publishing House, Bucharest, p. 143. The elements identified by the author as specific for the concept of public service are: an element of enterprise, continuity of the public service, dependency on and subordination to the public power, general and collective utility.

[69] Roger Bonnard, cited work, p. 725

[70] Iulian Avram, *Contractele de concesiune*, Rosetti, Bucharest, 2003, p. 19

[71] Sorin David, cited work, p. 41

[72] The service contract that includes the works contract is not be confused with the public works contract and the public services concession contract. Thus art.10 of the *Law of Public Sector Contracts (Spain),* defines the service contract as having the object of constant performance for the

Conclusion

The public works concession contract is a modality of efficient public management – a concrete example of ample implementation of the public power prerogatives.

The concept of public works concession contract has acquired unconditional existence, recognized in both national and European law. On our opinion, a comparative study is necessary, as this contract – starting from a common basis – has different characteristics in the various states applying it in relation to their national legislations. The aim of a comparative study is to reveal the conflicting aspects, but also the defining elements of such a contract type in the legal systems of Europe (France, Spain, Portugal, Great Britain), South America, the Middle East and the European Union.

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conducting of an activity or towards a different result of a work or provision. In the sense of this law service contracts fall into the categories enumerated in Annex II. Article 13 states that Annex II enumerates the cooperation contracts between the public and the private sector, amongst which the concession contract of public works of a certain computed value established by law.

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