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New Regulations on the Concession Contract Regarding the Natural Gas Supply. Connection to the Natural Gas Network in Romania

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ABSTRACT: The supply of natural gas and electricity continued to be a difficult goal for many household consumers in Romania, despite sufficient natural resources. The cause was represented by the existence of a monopoly over the provision of those two services, but, due to the liberalization of the market for the supply of natural gas and electricity, several benefits are to be implemented in this area. In this sense, both the primary and the secondary legislation have been already amended, and the future domestic and non-domestic customers expect the unblocking of the situation in the shortest possible time, issue that implies the efficient mobilization of all public authorities and of the system distribution operators. Therefore, we will analyze these new legal provisions and how they will influence the already concluded concession contracts, but also whether they will improve the quality of life of the applicants.

KEYWORDS: concession contract, public service, natural gas, applicant, operator

Public Service

It is worldwide known that the public service has been identified, as a rule, as an activity of general interest undertaken by the administration or by a private person who has the prerogatives of public power, in order to satisfy the public interest. The implications of the functioning of a public service are major, starting from its essential character of activity of general interest. That is why, through its decision, the Constitutional Court of Romania specified that the state must ensure the control mechanisms of private activities that fulfil attributions related to the organization of a public service.

The administration of the public service by an individual must always be aimed at *satisfying a public interest* (Avram 2003, 90; Goodnow 2005, 10), even if that individual obviously seeks to obtain a personal profit. In other words, the desired gain must not contradict the general interest and the concession must not lead to the destruction of public wealth and national heritage.

Currently, the Romanian legislator has given up the notion of public service, substituting it with the one of service, in accordance with the transposed Directive EU/23/2016, but this is only a terminological difference.

A second criterion for identifying the public service is *the entrustment* by the public authority of the performance of the public service. The public service can be performed exclusively by the public law authority that values the goods on the public domain, or it can function by involving a private activity.

With the increasing involvement of the state in specific activities of the private sector, but also with the involvement of private companies in areas that once represented the exclusive jurisdiction of the state (Dinu 2016, 251), the delimitation between public services that were either the attribute of direct implementation by public authorities or the attribute of accepting their realization through private structures, has been blurred.

In an extensive interpretation of the scope of public services that can be left to the management of the latter structures, G. Jéze (Dupuis, Guédon and Chrétien, 2011, 553) even admitted the concession to a private individual of the monopolized public service (for example, the manufacture of weapons for the defence of the country), arguing that public services, the

object of the concession, may be constituted in the form of a legal monopoly, a de facto monopoly or without any monopoly. However, certain public services remain the exclusive responsibility of the state, such as the right to mint money.

The selection of urgencies based exclusively on the decision of the doctor

Returning to more concrete and more relevant aspects of this analysis, we specify that, currently, the legal framework governing the service concession is represented by Law no. 100/2016 on works concessions and service concessions, with subsequent amendments and completions. The normative act transposes Directive EU/23/2016, whose ultimate goal is for the citizens of the Union to benefit from quality services at the best prices, by making optimal use of public money and contracting services from all economic operators in the Union.

According to paragraph 1 of the preamble to the Directive, the aim is to create an “adequate, balanced and flexible legal framework governing the award of concessions”, guaranteeing economic operators effective and non-discriminatory market access, “favouring public investment in strategic infrastructure and services for citizens” (Coldea 2017).

In the same idea, amendments were made to the special legislation governing certain subcategories of concession contracts - oil, natural gas, electricity, and Law no. 100/2016 has thus become the general legal framework for concessions of works and services.

The amendments of these normative acts have led to the unblocking of some investments of public interest, such as those regarding the connection of some localities to natural gas.

The exploitation of natural gas distribution is a public utility service, as provided by Order no. 18/10.03.2021 for the approval of the Regulation on the connection to the natural gas distribution system, issued by the president of ANRE.

According to the provisions of article 39, within the A.N.R.E. Order no. 18/10.03.2021, the authorized economic operator by A.N.R.E. will issue the necessary documents to start or continue the connection process for all submitted applications.

Thus, in the localities where the network is already executed, the local public administration authorities will initially take steps to the natural gas supply company in order to carry out the connection procedures, following which the natural gas distribution networks will be taken over by the distributor.

Recent measures regarding the connection to the natural gas network

According to a case study in this regard is the situation of Dridif village, Voila Commune, Braşov County, where, according to information from the written press, “gas pipes have been installed since 1997, but, from the entire Voila commune, only in the village of Vojvodeni (...) Money also came from the government, but the village (Dridif) also put money, man by man, to connect us to the big gas pipeline (...)”. People paid their share, being interested in the connection to natural gas (...). As it collected the money from the villagers, the company also put the pipes. In front of each house, the pipe ends can now be seen. Only the connection to the installation in the house is missing (Andrieş, Chirea and Nistor 2020, Libertatea.ro).

In some situations, the concession contracts were concluded many years ago, even under the incidence of Law no. 351/2004, subsequently repealed by Law no. 123/2012 regarding electricity and natural gas.

Law no.123/2012 was amended by Law no.290/2020, which entered into force on 19 December 2020, so that art.104 paragraph (6) of Law no.123 / 2012 provides the following, for the administrative-territorial units in which distributions are partially concessioned (leased):

a) The concessionaire is obliged to develop the natural gas distribution system in all localities belonging to an administrative-territorial unit within which for at least one locality it has concessioned (leased) the public utility service for natural gas distribution;

b) The concession contract for the provision of the public natural gas distribution service concluded with the concessionaire in the respective area shall be amended accordingly, within 60 calendar days from the entry into force of this article, by additional act, at the initiative of the concessionaire.

Therefore, the concessionaire in charge of natural gas distribution and the Romanian state, through the Ministry of Energy, must draw up additional documents to the concession contracts of the public natural gas distribution service for the neighboring localities, as is the case of Dridif village, exemplified above.

Supervision of the supply operator, a right or an obligation of the granting public authority?

In order to ensure the supply of natural gas to consumers, the concessionaire of the public natural gas distribution service has the obligations provided by art.105 of Law no.123/2012 on electricity and natural gas, with subsequent amendments and completions, according to which the grantor / the concessionaire of the public natural gas distribution service must ensure the follow-up of the execution of the works provided in the establishment authorization /concession contract, by its own personnel or by contractual personnel, authorized according to A.N.R.E. regulations.

In this sense, according to Annex 2 b) point 9.1. from the General Framework regarding the legal regime of the concession contracts of the public utility service for natural gas distribution, the procedures for granting concessions, the framework content of the specifications, approved by Government Decision no. 209/2019, during the concession contract, the grantor *has the right to verify compliance with the obligations assumed by the concessionaire*. Thus, the grantor has the right to inspect the goods, to verify the stage of realization of the investments, as well as the way in which the public interest is satisfied by carrying out the activity or public utility service of natural gas distribution.

Also, according to point 4.6 of the same Annex, for the objectives that were not specified by the concession contract of the public utility service for natural gas distribution in the delimited areas, the concessionaire has the obligation to proceed according to the legislation in force.

As a result, according to the legal provisions in force, the Ministry of Energy, as a grantor of the public gas distribution service, may follow the way in which the concessionaire of the natural gas supply service executes its legal obligation to develop the natural gas distribution system. Thus, the concessionaire must make investments in the development of the distribution system within a reasonable time, and the grantor, through the Ministry of Energy, will be able to control the concessionaire's investments.

Regarding the investments provided for by the concessionaire and the “maximum duration of the development of the natural gas distribution system”, the legislation does not provide a deadline, according to art.104 paragraph (6) of the Energy Law no.123/2012 electricity and natural gas, with subsequent amendments and completions, the concessionaire being obliged to develop the natural gas distribution system in all localities belonging to an administrative-territorial unit within which for at least one locality has concessioned the public gas distribution utility natural.

According to art.138 paragraph (1) letter a) of the same law, the natural gas distributor has the obligation to develop the distribution system in conditions of safety, economic efficiency and environmental protection. In order to respect those provisions, the Ministry of Energy must conclude additional acts for all the localities related to the concession contracts in which he has the quality of grantor.

At the same time, within the additional act, it can be provided that the distribution operator that has the quality of concessionaire has the obligation to carry out a technical-economic study elaborated on the basis of a feasibility study, made available in this sense by the administrative-territorial unit the authority of the local public administration, in order to analyze it and perform

the technical-economic calculations. As regards the manner in which control over the execution of the concessionaire's investments may be exercised, the grantor, in this case the Ministry of Energy may carry out all the checks necessary for the exercise of his rights and may take note on the spot or through copies of any document - technical or accounting.

We underline that the verification of the stage of completion of the investment works is a right and not an obligation of the public entity, as neither the concession contracts nor the legislation in force imperatively provide for the obligation to carry out this control by the grantor.

Such an example of public control exercised by the grantor after the conclusion of the contract is found in several countries, being a component of risk management (Dinu 2016, 251).

According to art.185 of Law no.123/2012, the investigation rights of the ANRE staff empowered in this respect are the following:

- a) To enter the spaces, lands or means of transport that the economic operators legally own;
- b) To examine any documents, registers, financial-accounting and commercial documents or other records related to the activity of economic operators, regardless of the place where they are stored;
- c) To request from any representative or employee of the economic operator explanations regarding the facts or documents related to the object and purpose of the investigation and to record or record its answers;
- d) To pick up or obtain in any form copies or extracts from any documents, registers, financial-accounting and commercial documents or from other records related to the activity of the economic operator;
- e) To seal any location intended for the activities of the economic operator and any documents, registers, financial-accounting and commercial documents or other records related to the activity of the economic operator, for the duration and to the extent necessary for the investigation.

The competent authority will proceed with the actions provided only if there are indications that documents can be found or information considered necessary for the fulfilment of its competences can be obtained, and the result of the investigation will be recorded in a report of finding and inventory.

The competent authority may make unannounced inspections and may request to be submitted within a reasonable time any information or justification related to the performance of the investigative powers, both on the spot and by convocation at its headquarters.

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