# THE AGREEMENT FOR THE CONCESSION OF PUBLIC ASSETS IN THE LIGHT OF THE ADMINISTRATIVE CODE

**Elena Emilia ȘTEFAN***

**Abstract**

*As of 5 July 2019, the content of the essential normative act in the field of public administration in our country, namely the Administrative Code has been regulated the legal regime of the public and private property of the state and of the administrative and territorial divisions. From this point of view, this paperwork aims to provide an overview on this topic as a result of the amendment of the legislation in this regard, without going into detail on the doctrinal disputes which emerged after the adoption of the Administrative Code. In this respect, the article will analyze one of the ways to exercise public property right on which we will focus, namely the concession of public assets, given that the Administrative Code repealed a normative act that regulated precisely this matter. From this perspective, the proposed topic is of interest and it is important for both legal theorists and legal practitioners who want to be informed on this topic.*

*Therefore, the main scope of this paperwork is to provide additional information on the normative regulation in the Administrative Code of the legal regime of the public property of the state and of the administrative and territorial divisions.*

*At the end of the paperwork, we will draw the conclusions emerged following the analysis of the current legislative framework on the proposed topic.*

**Keywords:** *Constitution, public property, Administrative Code, public assets concession, directive.*

## 1. Introduction

According to the case law of the Constitutional Court: "in order for the constitutional provisions to be effective, the legislator regulated a distinct legal regime of the assets contemplated by the public property of the state and of the administrative and territorial divisions"[1]. From this perspective, the object of regulation of the Administrative Code[2] is worded in the content of art. 1 as follows:

Para. (1): "*regulates the general framework for the organization and functioning of the authorities and institutions of public administration*[3]*, the statute of their personnel, administrative liability, public services, as well as certain specific rules on the public and private property of the state and of the administrative and territorial divisions*" and

Para. (2): "*This Code shall be supplemented by Law no. 287/2009 on the Civil Code*[4]*, republished, as further amended and by other common law regulations applicable in this field*".

The doctrine condemns[5] the fact that same matter is regulated by both the Civil and Administrative Code, but we will debate neither this subject, nor the issues[6] on the unconstitutionality[7] of this normative act. The two sections of the paperwork will detail how the Administrative Code regulates public and private property of the state, by operating a selection of the most important articles in the content of this normative act and by using research methods for law[8]. By way of

* Associate Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: stefanelena@univnt.ro).

[1] CCR Decision no. 384/2019, published in Official Gazette of Romania no. 499 of 20 June 2019.

[2] GEO no. 57/2019 on the Administrative Code, published in Official Gazette of Romania no. 555 of 5 July 2019, with latest amendments by GEO no. 1/2022 for the amendment and supplementation of GEO no. 121/2021 on the establishment of measures at the level of the central public administration and for the amendment and supplementation of some normative acts, as well as for the amendment of GEO no. 57/2019 on the Administrative Code, published in Official Gazette of Romania no. 41 of 13 January 2022.

[3] R. M. Popescu, *Jurisprudența CJUE on the term of "public administration" used in art. 45 par. (4) TFUE,* in the proceedings of CKS e-book 2017, pp. 528-532.

[4] Law no. 287/2009 on the Civil Code, published in Official Gazette of Romania no. 511 of 24 July 2009, republished in Official Gazette of Romania no. 505 of 15 July 2011, with latest amendments by Law no. 17/2017 (…), published in Official Gazette of Romania no. 196 of 21 March 2017.

[5] D. Apostol Tofan, *Tezele prealabile ale proiectului Codului administrativ. Proiectul Codului administrativ, Câteva reflecții,* in CJ no. 11/2016, p. 601 *apud* V. Vedinaș, *Codul administrativ adnotat. Noutăți. Examinare comparativă. Note explicative,* 2nd ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2020, p. 224.

[6] On the first control of the constitutionality of laws in Romania, see C. Ene-Dinu, *Istoria statului și dreptului românesc*, Universul Juridic Publishing House, Bucharest, 2020, pp. 265-266.

[7] More details on the exception of unconstitutionality in Barbu S.-G., A. Muraru A., V. Bărbățeanu V., *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021, pp. 74-106.

[8] On the research methods for law, see N. Popa (coord.), E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar,* 2nd ed., C.H. Beck Publishing House, Bucharest, 2014, pp. 14-18.

legal construction[9], the end of the paperwork will consist of the conclusions drawn up following the performance of this analysis.

## 2. Paperwork content

### 2.1. Regulation of Public and Private Property of the State and of the Administrative and Territorial Divisions in the Administrative Code

The Administrative Code regulates public and private property of the state in Part V – with marginal name "*Specific rules on the public and private property of the state and of the administrative and territorial divisions"*. This consists of two titles, as follows: Title I – *Exercising the right of public property of the state or of the administrative and territorial divisions* and Title II - *Exercising the right of private property of the state or of the administrative and territorial divisions*.

As we have shown on other occasion, "the adoption of the Administrative Code meant the repeal of Law no. 213/1998 on the legal regime of public property (with the exception of art. 6[10]), however, this normative act failed to clarify the issue of the regulation of this matter, given that this has already been provided by the new Civil Code[11]*"*.

The Administrative Code provides, on the one hand, the assets that make up the *public domain* of the state or of the administrative and territorial divisions and, on the other hand, the assets that make up the *private domain* of the state or of the administrative and territorial divisions. Therefore, in respect of the public domain, art. 286 para. (1) shall read as follows: "the public domain of the state or of the administrative and territorial divisions is made up of the assets referred to in art. 136 para. (3) of the Constitution, of those referred to in appendices 2-4 and of any other assets which, according to the law or by their nature are of public use or interest and are acquired by the state or by the administrative and territorial divisions by one of the means provided by the law".

In what concerns private domain, art. 354 shall read as follows: "it is made up of assets that are owned by them and that are not part of the public domain. The state and the administrative and territorial divisions shall have private property rights over these assets", and art. 355 provides the following: "the assets that are part of the private domain of state and of the administrative and territorial divisions are in the civil circuit and shall be subject to the rules provided by Law no. 287/2009 republished, as further amended and supplemented, unless the law provides otherwise".

Another aspect regulated by the Administrative Code refers to the *specific principles[12] of the public property right*. These are regulated by art. 285: "Public property right of the state or of the administrative and territorial units shall be exercised under the observance of the following principles:

a) the principle of public interest priority;

b) the principle of protection and conservation

c) the principle of efficient management;

d) the principle of transparency and publicity".

One of the most important provisions of the Administrative Code on the public property of the state and of the administrative and territorial divisions refers to the regulations of the *means to exercise public property right*. Specifically, they are nominated as such in the content of art. 297 para. (1):

„a) contracting out;

b) concession;

c) lease;

d) gratuitous use".

The previous legislation, now repealed, namely Law no. 213/1998, established "the following means to acquire public property right in art. 7:

a) by natural means, meaning movable and immovable accession;

b) by public procurement performed under the law;

c) by expropriation for reasons of public utility;

d) by donations or legacies accepted by the Government, the county council or the local council, as the case may be, if the respective asset falls under the public domain; by transferring an asset from the private domain of the state into the public domain thereof or from the private domain of an administrative and territorial division, into the public domain thereof, under the terms of the law;

e) by other means provided by the law"[13].

Furthermore, the Administrative Code is also concerned to determine which *entities exercise the right*

---

[9] Other details on the construction of the legal norm in M. Bădescu, *Teoria generală a dreptului*, Sitech Publishing House, Craiova, 2018, pp. 167-187 or N. Popa (coord.), E. Anghel, C. Ene - Dinu, L. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2017, pp. 197-202.

[10] D. Apostol Tofan, *Drept administrativ*, vol. II, 5th ed., C.H. Beck Publishing House, Bucharest, 2020, p. 230: "Almost 8 years late, the Administrative Code had its revenge, by taking over and developing under the dynamics of the activity of the public administration authorities, the provisions remaining in force of Law no. 213/1998, expressly repealed by art. 597 par. (2), except art. 6 (...)", *apud* E.E. Ștefan, *Drept administrativ Partea a II-a, Curs universitar*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2022, p. 253.

[11] E.E. Ștefan, *Drept administrativ, op. cit.*, 2022, pp. 252-253.

[12] On the principles of law, see E. Anghel, *General principles of law*, in LESIJ.JS XXIII no. 2/2016, Lex ET Scientia International Journal - Juridical Series, pp. 364-370.

[13] V. Negruț, *Drept administrativ, Serviciul public Proprietatea publică*, C.H. Beck Publishing House, Bucharest, 2020, pp. 59-60, *apud* E.E. Ștefan, *Drept administrativ, op. cit.*, 2022, p. 259.

*of public property of the state or of the administrative and territorial divisions.* In this respect, we indicate art. 287: "The exercise of the right of public property of the state or of the administrative and territorial divisions, except for the representation before the court of the Romanian state by the Ministry of Public Finance[14] in connection with the legal relations regarding property shall be carried out by the following bodies:

a) Government, by means of the line ministers or by the specialized bodies of the central public administration subordinated to the Government or to the line ministers, as the case may be, for the assets belonging to the public domain of the state;

b) Deliberative authorities of the local public administration, for the assets belonging to the public domain of the administrative and territorial divisions".

We do not intend to detail within this paperwork all the means of exercising public property right, but only concession. The legislator has dedicated a distinct number of articles to each of these means, as follows: contracting out (art. 298-301), concession (art. 302-331), lease (art. 332-348), gratuitous use (art. 349-353).

### 2.2. The Agreement for the Concession of Public Assets in the Light of the Administrative Code

The adoption by the legislator of the Administrative Code also meant the modification of the legal framework applicable to the legal regime of the agreements for the concession of assets. In this respect, we note that the national legislation is aware of the *concessions of public assets* which the Administrative Code is applicable on, as detailed in this section. Furthermore, the legal framework in this matter is also established by the Constitution[15] but also by the Civil Code. Prior to 5 July 2019, the date of the publication of the Administrative Code in the Official Gazette, the agreement for the concession of public assets was subject to the provisions of GEO no. 54/2006 on the agreement for the concession[16] of public assets[17], normative act repealed by the Administrative Code. It was pointed out on other occasion that the amendment of the national legislation was required by the fact that "the unification of the legislation in this field was started at the European level, three Directives which were to be transposed being adopted[18]: Directive 2014/23/EU on the award of concession contracts[19]; Directive 2014/24/EU on public procurement[20]; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors[21] and therefore national legislation has been harmonized with European legislation[22]". At this point in time, we prefer not to further develop European Union legislation[23] in this field.

The legislation also provides on the concession of services[24] or works, but they are subject to Law no. 100/2016 on the concessions of works and services[25] and not to the Administrative Code.

The concession[26] of public assets is developed in the 3rd Section – The concession of public assets of the 3rd Chapter – The means to exercise the right of public property of the state or of the administrative and territorial divisions, of Title I – The exercise of the right of public property of the state or of the administrative and territorial divisions, of Part V – Specific rules on the public and private property of the state or of the administrative and territorial divisions.

The Administrative Code defines the agreement for the concession of public assets in art. 303 par. (2): "the agreement for the concession of public assets is the agreement concluded in writing whereby a public authority, called concession provider, transfers the right and obligation to exploit a public property, on a fixed-term, to another person called concession holder, who

---

[14] An analysis from another perspective in R. Ciobanu, Z. Varga, *Romanian and hungarian fiscal systems. Regulations and fiscal apparatus*, Transilvania University of Brașov. Bulletin. Series VII: Social Sciences, Law, 2020, pp. 307-317.

[15] Art. 136 para. (4) of the Constitution.

[16] On the agreement for the concession of public assets under prior legislation, see M.C. Cliza, *Drept administrativ Partea a II-*a, Universul Juridic Publishing House, Bucharest, 2012, pp. 210-214.

[17] GEO no. 54/2006 on the regime of the agreements for the concession of public assets, published in Official Gazette of Romania no. 569 of 30 June 2006(...), currently *repealed*.

[18] On transposition, from another perspective, see M-C. Cliza, L-C. Spătaru-Negură, *Towards a Cleaner Planet – The Implementation of the Deposit Guarantee System in Romania*, in Perspectives of Law and Public Administration, vol. 10, no. 1/2021, pp. 54-64, online at http://www.adjuris.ro/revista/articole/an10nr1/5.%20Cliza,%20Spataru.pdf., visited on 19.02.2022.

[19] Available online at: http://eur-lex. europa. eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0023, visited on 1 February 2016.

[20] Available online at: http://eur-lex.europa. eu/legal-content/RO/TXT/?uri=celex%3A32014L0024, visited on 1 February 2016.

[21] Available online at: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0025, visited on 1 February 2016.

[22] E.E. Ștefan, *Drept administrativ, op. cit*., 2022, pp. 92-93.

[23] For other details, see A. Fuerea, *Manualul Uniunii Europene*, 4th ed., revised and supplemented after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2010, pp. 13 and the following; A-M. Conea, *Politicile Uniunii Europene. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2020, p. 290 or L-C. Spătaru-Negură, *Dreptul Uniunii Europene … o nouă tipologie juridică,* Hamangiu Publishing House, Bucharest, 2016, pp. 104-100.

[24] In what concerns public services prior to current regulations, see Roxana-Mariana Popescu, *Serviciile de interes general. Scurte considerații*, Annals of the University, Law Series, Pro Universitaria Publishing House, 2006, pp. 135-142.

[25] Law no. 100/2016 on the concessions of works and services, published in Official Gazette of Romania no. 393 of 23 May 2016, with latest amendment by GO no. 3/2021 for the amendment and supplementation of some normative acts in the field of public procurement, published in Official Gazette of Romania no. 821 of 27 August 2021.

[26] Other details on the topic in E.L. Cătană, *Drept administrativ*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2021, pp. 455-460.

acts at his own risk and responsibility, in exchange for a royalty".

In what concerns the price of the concession, this is called royalty, while the contracting parties are: the concession provider[27] and the concession holder. The Administrative Code provides in art. 311 the principles underlying the awarding of the agreements for the concession of public assets: "transparency, equal treatment, proportionality, non-discrimination and free competition".

The Administrative Code regulates two procedures for the awarding of the agreements for the concession of public assets: concession by public tender and concession by direct awarding. The documents on which the normative act provides are the preliminary study and the tender book. In this respect, the Administrative Code provides for example, that: "the concession initiative must be based on the performance of a preliminary study (...)" or "the tender book must include at least the following elements: general information on the scope of concession; general terms of concession; validity conditions that the tenders must fulfill; clauses on the termination of the agreement for the concession of public assets".

In what concerns the criteria for the awarding of the agreement for the concession of public assets, these are expressly regulated: "the highest level of royalty; economic and financial capacity of the tenderers; environmental protection; specific conditions imposed by the nature of the leased asset".

The Administrative Code provides as follows: "the term of the agreement for the concession of public assets shall not exceed 49 years, as of the date of its execution" however: "concessions which exceed 49 years can be established by special laws". Furthermore, the normative act established: "The agreement for the concession of public assets must include the regulatory part, which consists of the clauses referred to in the tender book and the clauses agreed by the contracting parties, in the supplementation of those in the tender book, without contravening the scopes of the concession provided in the tender book". At the same time: "the contractual relations between the succession provider and the succession holder shall be based on the principle of the financial balance of the concession between the rights granted to the concession holder and the obligations incumbent on it".

The last aspect to mention herein refers to litigations, regulated in art. 330: "the settlement of the litigations occurred in connection with the awarding, conclusion, execution, amendment and termination of the concession agreement, as well as those on damages shall be performed under the legislation on the contentious administrative[28]". Given this perspective, from the philosophy of Law no. 554/2004 on the contentious administrative, art. 2 lit. c^1) we note the following: **"**the agreements concluded by public authorities having as scope the improvement of public assets, the execution of public interest works, the provision of public services, public procurement shall be assimilated to administrative acts, for the purpose of this law; other categories of administrative agreements can be provided by special laws". In what concerns litigations, according to art. 8 para. (2) of Law no. 554/2005, we note that: "The court of contentious administrative shall have the jurisdiction to settle:

a) litigations that occur in the phases preceding the conclusion of an administrative agreement;

b) any litigation related to the conclusion of an administrative agreement;

c) litigations having as scope the annulment of an administrative agreement" while: "Civil courts of common law shall have jurisdiction to settle litigations arising from the execution of administrative agreements".

Therefore, the agreement for the concession of public assets is an administrative agreement[29], as follows from the above.

## 3. Conclusions

The Administrative Code currently regulates the legal regime of the public and private property of the state and of the administrative and territorial divisions. In this respect, we consider that the scope of this paperwork to present an overview of this matter has been fulfilled. In this way, on the one hand, we noted that the normative act dedicated to the topic in question Part V – with marginal name "*Specific rules on the public and private property of the state and of the administrative and territorial divisions"*, on the one hand. On the other hand, the concession of public assets is detailed in the Administrative Code in art. 302-331.

Following the analysis performed herein, the agreement for the concession of public assets is an administrative agreement with all the consequences arising from this legal qualification. Therefore, the competence to settle the litigations in this matter is the one granted by the legislation of the contentious

[27] For further details on public authorities of Romania, see M.C. Cliza, C.C. Ulariu, *Drept administrativ. Ediție revizuită conform modificărilor Codului administrativ*, Pro Universitaria Publishing House, Bucharest, 2021, pp. 7-22.

[28] Other details in E. Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, in CKS - eBook 2013, pp. 477-483, available online at: http://cks.univnt.ro/cks2013/CKS2013Articles.html, visited on 10.03.2022.

[29] Further details on administrative agreements in C.S. Săraru, *Contractele administrative. Reglementare, doctrină, jurisprudență*, C.H. Beck Publishing House, Bucharest, 2009, pp. 7-314.

administrative. The research on this matter remains open for a future analysis in terms of the case law[30].

**References**


- E. Anghel, *General principles of law*, in LESIJ.JS XXIII no. 2/2016, Lex ET Scientia International Journal - Juridical Series;
- E. Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, in CKS-eBook 2013, available online at: http://cks.univnt.ro/cks_2013/CKS_2013_Articles.html, visited on 10.03.2022;
- Barbu S.-G., A. Muraru A., V. Bărbățeanu V., *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021;
- M. Bădescu, *Teoria generală a dreptului*, Sitech Publishing House, Craiova, 2018;
- R. Ciobanu, Z. Varga, *Romanian and hungarian fiscal systems. Regulations and fiscal apparatus*, Transilvania University of Brașov. Bulletin. Series VII: Social Sciences, Law, 2020;
- M.C. Cliza, C.C. Ulariu, *Drept administrativ. Ediție revizuită conform modificărilor Codului administrativ*, Pro Universitaria Publishing House, Bucharest, 2021;
- M.C. Cliza, L.-C. Spătaru-Negură, *Towards a Cleaner Planet – The Implementation of the Deposit Guarantee System in Romania*, in Perspectives of Law and Public Administration, vol. 10, no. 1/2021, online at http://www.adjuris.ro/revista/articole/an10nr1/5.%20Cliza,%20Spataru.pdf., visited on 19.02.2022;
- M.C. Cliza, *Drept administrativ Partea a II*-a, Universul Juridic Publishing House, Bucharest, 2012;
- A.-M. Conea, *Politicile Uniunii Europene. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2020;
- E.L. Cătană, *Drept administrativ*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2021;
- C. Ene-Dinu, *Istoria statului și dreptului românesc*, Universul Juridic Publishing House, Bucharest, 2020;
- A. Fuerea, *Manualul Uniunii Europene*, 4th ed., revised and supplemented after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2010;
- V. Negruț, Drept administrativ, Serviciul public Proprietatea publică, C.H. Beck Publishing House, Bucharest, 2020;
- N. Popa (coord.), E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2017;
- N. Popa (coord.), E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2014;
- R.M. Popescu, *Jurisprudența CJUE on the term of "public administration" used in art. 45 par. (4) TFUE*, in the proceedings of CKS e-book 2017;
- R.-M. Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011;
- R.-M. Popescu, *Serviciile de interes general. Scurte considerații*, Annals of the University, Law Series, Pro Universitaria Publishing House, 2006;
- C.S. Săraru, *Contractele administrative. Reglementare, doctrină, jurisprudență*, C.H. Beck Publishing House, Bucharest, 2009;
- L.-C. Spătaru-Negură, *Dreptul Uniunii Europene ... o nouă tipologie juridică,* Hamangiu Publishing House, Bucharest, 2016;
- E.E. Ștefan, *Drept administrativ Partea a II-a, Curs universitar*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2022;
- D. Apostol Tofan, *Drept administrativ*, vol. II, 5th ed., C.H. Beck Publishing House, Bucharest, 2020;
- D. Apostol Tofan, Tezele prealabile ale proiectului Codului administrativ. Proiectul Codului administrativ, Câteva reflecții, in CJ no. 11/2016;
- V. Vedinaș, *Codul administrativ adnotat. Noutăți. Examinare comparativă. Note explicative,* 2nd ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2020;
- Law no. 100/2016 on the concessions of works and services, published in Official Gazette of Romania no. 393 of 23 May 2016, with latest amendment by GO no. 3/2021 for the amendment and supplementation of some normative acts in the field of public procurement, published in Official Gazette of Romania no. 821 of 27 August 2021;
- Law no. 287/2009 on the Civil Code, published in Official Gazette of Romania no. 511 of 24 July 2009, republished in Official Gazette of Romania. no. 505 of 15 July 2011, with latest amendments by Law no. 17/2017 (…), published in Official Gazette of Romania no. 196 of 21 March 2017;
- GEO no. 57/2019 on the Administrative Code, published in Official Gazette of Romania no. 555 of 5 July 2019, with latest amendments by GEO no. 1/2022 for the amendment and supplementation of GEO no. 121/2021 on the establishment of measures at the level of the central public administration and for the amendment and


[30] For details on the role of the case law in international law, in general, see: R.-M. Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p. 41.

supplementation of some normative acts, as well as for the amendment of GEO no. 57/2019 on the Administrative Code, published in Official Gazette of Romania no. 41 of 13 January 2022;
- GEO no. 54/2006 on the regime of the agreements for the concession of public assets, published in Official Gazette of Romania no. 569 of 30 June 2006 (...), currently *repealed*;
- CCR Decision no. 384/2019, published in the Official Gazette of Romania no. 499 of 20 June 2019;
- http://eur-lex. europa. eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0023, visited on 1 February 2016;
- http://eur-lex.europa. eu/legal-content/RO/TXT/?uri=celex%3A32014L0024, visited on 1 February 2016;
- http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0025, visited on 1 February 2016.