Contracting Out Public Property Assets

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Abstract: Public property assets are subject exclusively to the legal regime of public law, which are inalienable, imprescriptible and imperceptible. According to the law, publicly owned property can be contracted out or given into use and can be leased or rented. In this study we aimed at identifying, based on content analysis and a descriptive research, the owners of administration right, its way of being established, its content and the legal nature of the right to administrate the public property assets.

Keywords: assets; public property, administration right; self governing administration; public institutions

1. Regulating the Administration Right

According to article 136 paragraph (4) of the Constitution, the public property assets can be contracted out, in accordance with the law, to self- governing administration or public institutions. However, the New Civil Code establishes in article 861 par. (3) that "*according to the law, publicly owned property can be contracting out or in use and they can be leased or rented*".

And the local government law no. 215/2001 contains provisions on the administration right. Thus, article 123 par. (1) states that: "*The local and county councils decide that the assets belong to the public or private domain, of local or county interest, depending on the case, being contracted out the self- governing administrations and public institutions in order to be leased or rented. They decide on the purchase of assets or the sale of goods belonging to the private sector, local or county interest according to the law*."

Meanwhile, the New Civil Code, article 868, para. (1) states: "*The administration right belongs to* self- governing administration *or, where appropriate, to the local*

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or central public administration authorities and other public institutions of national, county or local interest."

As stated in the literature (Bălan, 2007, p. 101) the doctrine and positive law, before the entry into force of the new Civil Code, have outlined a unified and coherent view of the nature of the right to legal administration of autonomous administrations and public institutions on public domain assets, varying opinions among real derived right from public ownership right and the mere competence to household and management of assets of the public domain. (Oroveanu, 1994, p. 60)

The administration right is defined as resulting from the doctrine as "that real derived main right, constituted by an administrative act of authority over assets belonging to the State or its administrative-territorial units, having as title role the self- governing administrations, prefectures, public authorities and institutions, under which the holder of administration right may exercise the attributes of possession, use and, within certain limits, the attribute of the stipulation, according to the right of property of the holder of such right." (Merle, 2010, p. 190)

In accordance with article 866, the real public property rights are according to the administration right, the right to lease and right to use with title, free of charge. Therefore, the administration right is a real right.

2. Owners of Administration Right

Article 12 of Law no. 213/1998, repealed by the New Civil Code, provided that the subject of law that can receive in its administration a public property asset, that may be represented by: self-governing administrations, prefectures, central public administration authorities and local public institutions of national interest county or local level.

New Civil Code, article 868 stipulates the right of management to whom property belongs to the public domain, i.e., public utilities or, where appropriate, local or central government authorities and other public national, county or local institutions. Regarding the autonomous rules, by Law no. 15/1990, the state economic units were reorganized as self- governing administrations and companies. According to article 2 of this normative act, self- governing administrations are organized and operate in the strategic sectors of national economy, such as arms industry, energy, mining and gas exploitation, post and rail

transport, but in some areas they belong to other branches established by government.

Under this law, the autonomous rules, the legal entities that dependent on economic management and financial autonomy, may be established by Government decision, for the national interest, or by the decision of the county and municipal councils for those of local interest. (Albu, 2008, p. 143)

Areas where there can be organized self- governing administrations of local interest are: water supply, sewerage and wastewater treatment; production, transport and distribution of thermic energy; local public passenger transport; administration and maintenance of housing, markets, stock yards, fairs and roads and green spaces; construction, maintenance and modernizing roads and bridges of county interest.

By the act of establishing the administration it is established it activity objective, the property, the name and headquarters.

According to article 5 of Law, the self- governing administration is the owner of the assets of it patrimony, and in the exertion of the right of property it possesses, uses, and disposes, independently, of the assets of its patrimony or gathers the fruits, as appropriate, in order to achieve the purpose for which it was created.

The wording of Law no. 15/1990 "self- governing administration is the owner of the assets from its patrimony" shall consider only the assets that entered in its patrimony with the title of property, it does not include the assets that came into its patrimony with an administration title. (Stoica, 2004, p. 435)

By law, self- governing administrations are subordinated to a ministry of resort or a local public authority[1], by the act of which it was established and under which it functions.

In the patrimony of self- governing administrations, along with the administration right there are other real rights, namely, the right to private property and derived rights and other patrimonial rights.

They may be the bearer of the administration right of assets belonging to public property and the central or local administration authorities, also to the public institutions of national, county or local interest.

[1] Called tutorial public authority, under the Emergency Ordinance no. 109/2011, on the corporate governance of public enterprises.

In the case of the public administration authority (central or local) the things are clear, in terms of public institutions there are necessary some clarifications. Public institutions, public law subjects, are established by the Constitution, by laws or administrative acts of the state or local collectivities. More broadly, by the notion of a public institution we understand any public authority, that is authority of public administration.

In the narrow sense in the specialized literature (Tofan, 2008, p. 6; Petrescu, 2009, p. 23), it is mentioned that the term of public institution *refers only to subordinated structures of public administration authorities, operating from budget revenues, but also from extra-budgetary sources*.[1]

Usually, the public institutions' financial means of national interest are provided by the state budget and the financial resources means of public institutions of local interest are provided by local budgets.

The scope of services performed by local public institutions is much wider than that of the self-governing administrations of district or local interest. (Petrescu, 2009, p. 25)

Therefore, at local and county level the public institutions are more diversified. For example, there are organized and operate the *public educational institutions* (kindergartens, schools, colleges, etc.), *public cultural institutions* (theaters, libraries, theaters, opera), *public health institutions* (dispensaries, clinics, hospitals). (Preda, 2002, p. 286)

3. Establishment of Administration Right

The assets in the area of public property can be managed by individual administrative acts, that is a decision of the Government, county council or local board, as appropriate, as it states article 867 of the New Civil Code, these authorities having also the right to control the way of exercising the administration right.

Usually, between the holder of the public domain, the state and administrative-territorial units, on the one hand and the beneficiary of administration right, there are relations are hierarchical subordination, the assignment of administration rights

[1] For example, the Romanian Academy and research institutes from its subordination.

holder being achieved by the public domain holder through a legal act of public law.

4. The Content, the Legal Nature and Enforceability of Administration Right

The content of administration right can be determined by the content of public property right on which it was formed, without identifying with it. (Merlă, 2010, p. 207)

According to the New Civil Code, "*the holder of the administration right may use and dispose of the contracting out assets under the conditions established by law and, if appropriate, by the acts of incorporation*".

In the litigations on the administration right, the holder of this right will stand in court in its name (article 870 of the Civil Code). In the litigations relating to the right of ownership on asset, the holder of the administration right is obliged to show the court who is the holder of the property right, according to the Code of Civil Procedure.

In the litigations concerning the administration right, the state is represented by the Ministry of Finance and the administrative-territorial units are represented by the county councils, the General Council of Bucharest District or local councils, that give written mandate, in each case, to the county council president or the mayor. It may designate another state official or a lawyer that would represent him in court (article 12 paragraph (5) of Law no. 213/1998).

As regards the legal regime of the administration right, the legal features of public ownership (inalienability, indefeasibility and exemption from seizure) are also features of the administration right.

The legal features of the administration right are outlined in various normative acts. Thus, article 4 of the Government Ordinance no. 15/1993 on certain measures for restructuring the activity of self-governing administrations, determines that the assets of public property of self-governing administrations are inalienable. Also, the inalienable feature of the assets which form the object of administration right is deducted also by the Emergency Ordinance no. 30/1997 on the reorganization of self-governing administrations. According to article 4 (2) of this normative act, in the social capital of companies resulting from the reorganization of self-governing

administrations cannot be added assets which, under the Constitution, make the exclusive object of public property.

The inalienable nature of the administration right cannot be ensured without exemption from seizure and the indefeasibility of this right. (Merlă, 2010, p. 206)

Given that these legal characters, public property assets under the management of self-governing administrations should be highlighted separately in the patrimony of the administration, and where, by law, the public property assets are not included in the balance sheet as part of self-governing administration patrimony, the evaluation, distinction and their sizing will be achieved out of the accountancy, based on methodological norms approved by the Government. (Adam, 2000, pp. 124-125)

The administration right, as any real right, has an absolute feature, as being opposed *erga omnes*. A feature of this right refers to the unenforceability against the holder of public property right - state or administrative-territorial unit. Thus, regardless of the way of establishment, it may be revoked by a symmetric act of the primary act. Administrative law can be revoked only if its holder does not exercise the rights and it does not execute its basic obligations arising from the transmission act.

Also, note that "the administration right ceases with the cessation of public property right or by the act of revocation issued under the law, if the public interest so requires, by the body that established it." (article 869 of the New Civil Code)

In conclusion, the administration right of public domain assets is a real right, to which it applies a specific legal regime, the legal features of public property right (inalienability, indefeasibility and exemption from seizure) being also the features of the administration right.

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