

Contract for award in free usage (commodatum) of a public property asset

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Abstract

According to art. 136 para. (4) of the Constitution Revised Public property can be given free use of public institutions. Note that currently in Romania there is no framework law governing the award procedure for free use, rules of use of the asset, end use and the settlement of disputes. Article makes proposals for the regulation of some aspects of the content of the contract award free use of public property.

Keywords: public property, good, free use, public utility institution, administrative law.

JEL Classification: K23

1. Introductory notions

Contract for award in free usage (commodatum) of a public property asset is the contract concluded in written form whereby the public authority exercising the general administration of the public assets (government, county council, local council) or, where appropriate, the public institution/self-managed public company exercising the concrete administration of the public assets transmits over a given period, to an institution of public utility the right to use a public asset/some public assets, free of charge, under the terms established by law and the constitutive act².

The right to use free of charge is governed by art. 136 para. (4) of the revised Constitution, art. 866, 874 and 875 of the Civil Code and art. 124 of the Law on local public administration no. 215/2001³ (if awarded the free of charge use of a local public asset).

2. Contractual terms

2.1. The Contracting Parties

According to art. 874 para. (3) Civil Code in conjunction with Art. 867, the right of free use is established by Government, county council or, where appropriate, local council decision⁴. Based on this decision the parties will

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² See Cătălin-Silviu Săraru, *Cartea de contracte administrative. Modele. Comentarii. Explicații*, C.H. Beck Publishing House, Bucharest, 2013, p. 213; Emanuel Albu, *Dreptul administrativ al bunurilor*, Fundația România de Măine Publishing House, Bucharest, 2008, p. 176.

³ Republished in *Official Gazette of Romania* no. 123 of February 20, 2007, as amended.

⁴ C.T. Ungureanu, C. Voicu, M. Afrăsinei, G.C. Frențiu ș.a., *Noul Cod civil. Comentarii, doctrină, jurisprudență, vol. I (Art. 1-952)*, Hamangiu Publishing House, Bucharest, 2012; p. 1209, 1210; Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole. Art. 1-2664*, C.H. Beck Publishing House, Bucharest, 2012; p. 903, 904; A. Iorgovan,

conclude the contract for award in free usage (*commodatum*) of a public property asset.

The one who gives the use can be:

- Or an authority performing general administration of public assets, namely government for the public property assets of state, the county council for the public property assets of county or the local council for the public property assets of the municipality, town or village;
- Or an public institution or an self-managed public company if the asset is in their concrete administration.

Use of the asset may be awarded to an *institution of public utility*, a concept which covers associations and foundations recognized by the Government as a public utility under the terms of Government Ordinance No. 26/2000 regarding associations and foundations⁵. According to Art. 38¹ of Government Ordinance No. 26/2000, *public utility* means any activity that takes place in fields of general public interest or of communities.

2.2. Object of the contract

The object of the contract is the transfer to use free of charge of right over an asset/some assets movable or immovable from the state public domain or administrative units public domain⁶. The right to use free of charge on public assets is a principal real right corresponding to public property⁷, right constituted free of charge, for a limited time thereby conferring at the public utility institutions the ability to possess, use and dispose of asset, under the conditions set by law and contract.

The holder will exercise the asset possession but mastering as the holder of the right of use and not ownership.

Regarding the use of, the holder is entitled to use the asset in compliance with the destination set by contract and according to the purpose of the association/foundation of public utility. According to art. 874 para. (2) Civil Code, the holder of free usage will not reap the civil fruits of asset, except where this has been expressly provided in the contract. Given that this right is constituted by the public authority in order to achieve of the public interest, in the contract may provide that the holder may collect civil fruits only if they are increasingly being used in order to achieve the public interest (for example, the rent collected is used for a purpose of charity).

Tratat de drept administrativ, vol. II, 4th ed., All Beck Publishing House, Bucharest, 2005, p. 252, 253; Emil Bălan, *Dreptul administrative al bunurilor*, C.H. Beck Publishing House, Bucharest, 2007, p. 122-124.

⁵ C.T. Ungureanu, C. Voicu, M. Afrăsinei, G.C. Frențiu ș.a., *op. cit.*, p. 1209, 1210; Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit.* p. 903, 904; A. Iorgovan, *op. cit.*, p. 252, 253; Emanuel Albu, *op. cit.*, p. 177; Emil Bălan, *op. cit.*, p. 123, Eugen Chelaru, *Administrarea domeniului public și a domeniului privat*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2008, p. 107, 108.

⁶ See Emanuel Albu, *op. cit.*, p. 179.

⁷ See Eugen Chelaru, *op. cit.*, p. 108.

In the absence of a contrary stipulation, the holder will be able reap the natural and industrial fruits.

The holder does not have the juridical disposal of the asset given in the free of charge use. The holder will not be able to alienate the asset or subject to encumbrance, the public assets are inalienable, imprescriptible and can not be seized. In accordance with the contract, the holder will be able to benefit from the material disposal on the asset (the right to collect different products of at a coal mine, the right to build on public land etc.).

2.3. The duration of the contract

According to art. 874 para. (1) Civil Code., the right to free of charge use of public assets shall be granted for a limited period. The law does not specify a maximum duration that may be concluded the contract. The right of free use of public assets is a temporary right, not perpetual, being made up in a certain period of time, depending on the requirements to achieve in optimal conditions the public interest.

2.4. The rights and obligations of the parties

The one who receives the asset for free use has the obligation to use the asset as intended in the contract and according to the purpose of the association/foundation of public utility.

The one who receives the asset for free use has the right, but also the obligation to operate the asset at his own risk. Risk of exploitation consists in⁸:

a) availability risk respectively breach of performance and quality parameters in exploiting of the asset, clearly defined and measurable throughout the project life;

b) market risk, namely that end users will not use the asset operating results, under the conditions in which the quality and performance parameters are fully respected.

The right to free of charge use of public property assets has an administrative nature, the contracting public authority having the power to change the content of the contract or to unilaterally terminate the agreement when the public interest so requires.

The right to free of charge use of public property assets is a right *intuitu personae*, being made up in considering of a specific attribute of the user - of provider of a specific public utility activity⁹. Therefore, the user will not be able to transfer the contract without the written consent of the public authority.

Public property assets are inalienable, imprescriptible and can not be seized. Therefore, the user, under penalty of absolute nullity, will not be able alienate the asset and will not be able to provide real guarantees over the asset (pledge, mortgage, right of retention).

⁸ See Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*. CH Beck Publishing House, Bucharest, 2009, p. 267.

⁹ See Emil Bălan, *op. cit.*, p. 124.

The public authority has the right to verify during the the contract, the technical compliance, quality and performance parameters in exploiting the asset under the contract and law, and respect for other contractual obligations assumed by the user in operating of the asset. According to art. 865 para. (2). a) Civil Code., the user is obliged to inform the owner of any disturbance of the right to public property.

2.5. Termination of the contract

Contract shall terminate at expiry the duration established in the contract for award in free usage.

The contract may be terminated before the deadline, in case of unilateral termination by the public authority required by the public interest, in the case of termination for failure to perform culpable of the contract by one party, in case of impossibility objective to exploit the property or, in case of termination the public property right or of administration right of the asset given for free usage.

In case of unilateral termination, the compensation having previously character, the contract will cease only when the public authority pays the compensation to the user. The compensation should cover both the actual loss suffered (*damnum emergens*) and loss of earnings (*lucrum cessans*). The public authority shall notify its intention to terminate the contract and make mention of the reasons that led to this measure, and the parties will determine the amount of compensation due to the user and the manner their payment. In case of disagreement, they will be set by the juridical court or, where appropriate, by the arbitration court specified in the contract.

The party which has complied with its obligations under the contract may invoke the termination when there is a default attributable to the other party culpable and default is important enough to deprive by cause the execution of mutual obligations. In the case of judicial termination, the contract ceases on the date on which court decision becomes final in which upheld the action.

The contract may be terminated and at disappearance of a case of force majeure, of the asset given for free use or in the case the user's inability to exploit objective, by renunciation, without payment of compensation. The term *objective impossibility* has in view the impossibility of execution of obligations due to an external cause, which is not attributable to that party, encompassing both the force majeure and the fortuitous case¹⁰. Renunciation requires the prior notification to the public authority about the the fortuitous case or force majeure. If the renunciation is not immediately notified, the user may be obliged to repair the damage caused.

The termination of the right to public property over the asset given for free usage will determine also termination of the contract.

According to art. 864 Civil Code, the right to public property is extinguished if the asset has perished or has been transferred to the private domain if public use or interest ceased with the conditions provided by law.

¹⁰ See A. Sebeni, S. Gherghina, „Efectele și încetarea contractului de concesiune”, *Dreptul* no. 11/1999, p. 22

Transferring an asset of public domain to private domain is made as provided by art. 10 para. (2) of Law no. 213/1998 on public property assets¹¹. The public use or interest may cease, for example, in the case of refunding the confiscated property abusively where it fits in goods subject to Law no. 10/2001 *on the legal status of property abusively confiscated on March 6, 1945 - 22 December 1989*¹², as provided by the law.

The contract will terminate also if the asset which is the subject of the contract is transferred from the public domain of the state in the public domain of administrative territorial units or vice versa, as provided by art. 9 of Law no. 213/1998 on public property assets. Also, if the public authority has the asset in the concrete administration and the right of administration stops, it will terminate also the right to use constituted free of charge.

2.6. Litigation

According to art. 875 para. (1) Civil Code, the legal defense of the right to use free of charge is performed by the user. Starting from the fact that the use of public asset, according to the destination specified in the contract, is both a right and an obligation for user the legal defense in the litigations on the contesting the right to use free of charge or conditions for carrying it appears to be an obligation inherent for the quality of the user. If this requirement is not met, the contract for award in free usage (commodatum) of a public property asset may be terminated by the public authority.

The settlement of disputes arising in connection with the assignment, the conclusion, performance, amendment and termination of the contract for award in free usage (commodatum) of a public property asset, as well as those relating to award of damages shall be made in compliance with the provisions of Law no. 554/2004, as amended.

According to art. 865 para. (2). b) Civil Code., in the litigations with third parties regarding the ownership of the asset given for free use, the user is obliged to show the court who is the holder of the property, as provided in Code of Civil Procedure.

The free use right is a real right can thus be defended by an *confessor action* for free use, according to art. 875 para. (2) Civil Code conjunction with Art. 696 para. (1) Civil Code. Under the terms of the provisions of art. 873 para. (2) Civil Code conjunction with Art. 696 para. (1) Civil Code, the user can exercise the *confessor action* - action that may be brought by one who claims to be the holder of the free use, but has no physical possession of the asset against the person who has the material possession of the asset, thus preventing the exercise of right of free use, including against the public authority which claims that the right to free use is faded, asking the court to recognize the real right of use and order the defendant to return the material dominion of the asset¹³.

¹¹ Published in *Official Gazette of Romania* no. 448 of November 24, 1998, as amended.

¹² Published in *Official Gazette of Romania* no. 798 of September 2, 2005, as amended.

¹³ See C.T. Ungureanu, C. Voicu, M. Afrăsinei, G.C. Frențiu a.o., *op. cit.*, p. 1208, 1209.

The obstruction of the exercise of the right can be achieved, for example by the dispossession of the asset, prohibiting or restricting of access to asset, denial of the right etc.

The *confessor action* may be exercised by the user against third parties only if it were not transferred by contract also the prerogatives of public authority giving it more effective means of defense. Thus, if the user receives along with the asset also the right of contraventional sanctioning of the third parties that it disturbs in the exploitation of the asset, he will be able to use this means of defense more effective.

The *confessor action* may be brought against to third parties and against the public authority if disturbance is not achieved through administrative acts (eg administrative act by which the public authority terminates the contract on grounds of public interest), in which case the user will recourse to the action in litigation administratively under art. 1 of the Law no. 554/2004.

The *confessor action* will be resolved by court of common law. The *confessor action* is imprescriptible¹⁴ (because free use right is established on the basis of the public property right which is imprescriptible both extinctive and acquisitive) as long as it lasts right to use free of charge.

Conclusions

The public administration tasks can be successfully taken of public utility associations and foundations. They can get for free use of the public assets that they will use to achieve the public interest. Thus, the specific activities traditionally of the public sector get to be provided by private organizations.

This area event space where the actions of public services does not coincide with the public sector, being more numerous connections with private space, in the contemporary doctrine is called "organization space of collective functions"¹⁵. We consider that this concept explains the best the trend of rapprochement between public law and private law, under the conditions in which public administration seeking the agreement of its partners accepting the need of cost effectiveness and, in some cases, the existence of competition, will be placing their interventions into the market economy, using contractual procedures¹⁶.

¹⁴ See Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit.* p. 899.

¹⁵ Ioan Alexandru, *Curentele de gândire privind administrația publică*, Economic Publishing House, Bucharest, 2000, p. 108 et seq.

¹⁶ Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*. CH Beck Publishing House, Bucharest, 2009, p. 510.

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