

# CONCESSION

*The presentation hereby has in view the legal provisions in force on the 31<sup>st</sup> of March 2004*

## ***Applicable legislation in this field***

- Law no. 219/1998 on the concessions regime, published in the Official Gazette no. 459/30<sup>th</sup> of November 1998
- Government Decision no. 216/1999 for the approval of the framework of the Methodological Norms for the enforcement of Law no. 219/1998 on the regime of concessions, published in the Official Gazette no. 140/6<sup>th</sup> of April 1999
- Law no. 213/1998 on public property and the juridical regime applicable to it, published in the Official Gazette no. 448/24<sup>th</sup> of November 1998
- Law no. 326/2001 on community public services, published in the Official Gazette no. 359/4<sup>th</sup> of July 2001
- Law no. 268/2001 on the privatization of trade companies holding agricultural fields in the state public of private property and the establishment of the State Holding Agency, published in the Official Gazette no. 299/7<sup>th</sup> of June 2001
- Law no. 463/2001 for the approval of the Government Ordinance no. 60/2000 on the regulation of the activities in the field of natural gas, published in the Official Gazette no. 432/1<sup>st</sup> of August 2001
- Government Ordinance no. 86/2001 on passengers local public transportation services, published in the Official Gazette no. 544/1<sup>st</sup> of September 2001, approved by Law no. 284/2002
- Law of mines no. 85/18<sup>th</sup> of March 2003, published in the Official Gazette no. 197/27<sup>th</sup> of March 2003

## ***I. Scope of Legal Provisions in the Field of Concession***

Legal provisions regulating concession allow the concession of:

- assets that are public or private property of the State, county, town or village;
- public activities and services of national or local interest.

Government, county or local councils may approve by decision the concession of other assets, activities or services belonging to the private property of the state.

The right of private property of the state is exercised on goods from private domain of the state, namely on those goods in their property, but not part of the public domain.

Activities and public services from the fields stipulated under Art. 2, paragraph 2 from the Law no. 219/1998 on regime of concessions may be subject to concession.

### ***Specification***

The assets, public activities or services in connection with which no regulatory authority has yet been established, but whose approval is needed when setting prices or tariffs by concessionaires, may not be granted into concession.

## **II. Concession Contract**

### **1. Parties of the Concession Contract**

The conessor and the concessionaire are the parties of a concession contract.

On behalf of the state, county, town or village the following may have the capacity of **concessor**:

- a) The ministries or other specialized bodies of the central public administration for assets that are public or private property or for public activities and services of national interest;
- b) The county councils, local councils or public institutions at local level for assets that are public or private property of the county, town or village or for public activities or services of local interest.

Any Romanian or foreign natural or legal person of private law may have the capacity of **concessionaire**.

Foreign citizens cannot own land in Romania.

### **2. Concession procedure**

Any conessor or any interested investor may initiate the concession procedure.

The interested investor may initiate the concession procedure by submitting a written concession proposal to the conessor. The proposal shall be registered in the Registry of “Nominations and Offers”, stipulating the date and the hour.

Within 30 days from the reception of the concession proposal the conessor is obliged to proceed to the drawing up of the feasibility study. Law allow for the parties to establish another term too for the making of the decision regarding the concession.

The conessor and the concessionaire may convene upon the drawing up of the feasibility study by an independent consultancy firm, situation in which its cost shall be borne by the concessionaire.

The concession may be performed by public auction or by direct negotiation. The direct negotiation procedure is applicable if the public auction has not produced any winner.

### **3. Conclusion of the concession contract**

The concession contract should contain:

- a) a regulatory part, including mandatory clauses provided for in the tender book;
- b) other contractual clauses set out by the parties' consent.

Law provides for the obligation of conclusion of the concession contract in writing, under the sanction of complete nullity.

The contract is concluded within 30 days from the date in which the concessor has informed the offerer about the acceptance of his offer, if the tender book has not stipulated otherwise. The offerer is considered informed on the date of the reception of the registered letter with confirmation receipt, containing the acceptance of his offer.

#### ***Specification***

The refusal of the offerer declared as winner to conclude the concession contract is sanctioned with the losing of the filed security and, if necessary, payment of damages.

The concessionaire is obliged for, within 90 days from the date of the signing of the concession contract to file, as a security, a fixed amount representing a quota from the amount of the payment obligation to concessor, established by him and due for the first year of activity. If necessary, from this amount the penalties and the amounts due to the concessor shall be drawn, on the basis of the concession contract.

The concessionaire may constitute as security titles of credit too, on which the pledge shall be constituted, with concessor's consent. A similar security shall be constituted, depending on the necessity of covering the future costs, for the fulfillment of the obligations regarding the environment protection that may appear in the course of concession.

### ***4. Duration of the Concession Contract***

The concession contract shall be concluded for a period that may not exceed 49 years, starting from the date of its signing. The duration of concession is established depending on the amortization period of the investments that the concessionaire is going to make.

The concession contract may be extended for a period equal to no more than half of its initial duration, by a simple parties' tacit agreement.

If the parties do not agree on certain conditions regarding the prolongation of the concession contract, it shall unfold under the initially established conditions.

## **5. Royalty**

The royalty is the price that the concessionaire undertakes to pay in the exchange of the exploitation of the good, of the activity or public service, which is the object of the concession contract.

The computation method and the payment method of the royalty are established by the competent ministries or by the local public administration authorities, as the case may be.

The royalty obtained through concession becomes income for the state budget or the local budgets, as the case may be.

## **6. Effects of the Concession Contract**

### ➤ Concessionaire's rights and obligations

The concessionaire has the following rights:

- the right to exploit, directly, on his own risk and responsibility, the goods, activities and public services that are the object of the present contract, according to the objectives established by the concessor;
- the right to use and to collect the benefits of the goods that are the object of concession, according to the nature of the good and of the purpose established by the parties through the concession contract;
- the right to conclude contracts with third parties for the securing and valorizing the exploitation of goods, activities and public services that are the object of concession according to the law, without being able to transfer the rights obtained through the concession contract.

The concessionaire has the following obligations:

- the obligation to secure the effective exploitation in a continuity and permanency regime of the goods, activities or public services that are the object of concession;
- the obligation to exploit directly the goods, activities or public services that are the object of concession, without the sub-concession to other person, entirely or partly, of the object of concession;
- the obligation to pay the royalty;
- the obligation to restitute to the concessor, upon termination of the concession contract by reaching the term, the goods of return free of charge and free of any burdens;
- the obligation, upon termination of the concession contract, to conclude with the concessor a sale-purchase contract having as object the goods of taken over provided in the tender book and established through the concession contract, for which the concessor has expressed the desire of obtaining them;

- if the concession contract is terminated because of other causes than reaching the term, force majeure or fortuitous case, the concessionaire is obliged to secure the continuity of performing the activity or public service, under the conditions stipulated in the contract, until their taken over by the concessor.

➤ Concessor's rights and obligations

The concessor has the following rights:

- to verify the fulfillment of the obligations assumed by the concessionaire;
- the right to opt for the obtaining of the goods of taken over, upon the termination of the concession contract by reaching the term, by the conclusion of a sale-purchase contract with the concessionaire.

The concessor has the following obligations:

- not to disturb the concessionaire during the exercise of his rights resulted from the concession contract;
- not to modify unilaterally the concession contract, except the cases expressly provided by law;
- to notify the concessionaire on the occurrence of any circumstances that could harm his rights.

### ***Specification***

Failure to fulfill, by the contracting parties, of the obligations comprised in the concession contract, attracts the contractual responsibility of the guilty party.

## **7. Termination of the Concession Contract**

The termination of the concession contract may take place under the following situations:

- upon the expiration of the duration established in the concession contract, except the case in which parties do not agree, in writing, upon its prolongation according to law;
- if the national or local interest requires it, through the unilateral denunciation by the concessor, subject to a fair and prior compensation, in the concessor's burden; if the parties do not agree on the amount of compensation, it shall be established by the competent court of law.;
- in case of failure to fulfill the contractual obligations by the concessionaire, through the unilateral termination by the concessor, subject to payment of a compensation in the concessionaire's burden;
- in case of failure to comply with the contractual provisions by the concessor, through the unilateral termination by the concessionaire, subject to payment of compensations by the concessor;
- at the disappearance, because of a case of force majeure, of the good subject to concession or in the case of objective impossibility of the concessionaire to exploit it, by renunciation, without the payment of compensation;

- in other situations established by the parties, under the condition of not causing damage to the causes or conditions regulated by law.

### ***III. Sanctioning Regime***

Failure to comply, by the contracting parties, of the obligations from the concession contract, attracts the contractual responsibility of the guilty party:

The following are contraventions, if they have not been performed in such conditions as to be considered offences by the criminal law:

- a) violation by the conessor of the obligation to publish in the Romanian Official Gazette, IV<sup>th</sup> part, in a newspaper of national circulation and in one of local circulation of the announcement of open public auction, the announcement of reception of candidatures, in case of the open public auction procedure;
- b) violation by the conessor of the obligation to publish, under the same conditions as those above, the intention of resorting to the direct negotiation procedure.

Contraventions stipulated under the letter a) and b) are sanctioned with a fine from lei 5,000,000 to lei 25,000,000.

- c) failure to draw up by the conessor, within 30 days from the reception of the concession proposal, lodged by an interested investor, of the feasibility study;
- d) failure to comply with the obligation regarding the term of reception of the offers, which cannot be smaller than 20 calendar days and cannot exceed 60 calendar days, starting with the date of the publishing of the announcement of the open public auction;
- e) failure to comply, by the conessor, with the obligation to forward a copy of the minutes of evaluation of the offers, within 10 calendar days from the date of the receipt of the communication on rejection of their offers;
- f) failure to inform, within 5 calendar days, of the rejected candidates regarding the non-acceptance of their candidature;
- g) failure to comply with, by the conessor of the term of at least 20 calendar days and maximum 60 calendar days, in which the candidates whose candidatures have been accepted may present their offers;
- h) failure to comply with, by the concessionaire of the obligation for, within 90 days from the date of the signing of the concession contract, to file, as security, a fix amount representing a quota of the amount of the payment obligation to conessor, established by him and due for the first year of activity;
- i) failure to register, by the concessionaire, in the estate publicity registries, within 30 calendar days from the date of their conclusion, of the concession contract of the lands of any kind.

Contraventions stipulated under the letter c) – i) are sanctioned with a fine from lei 2,000,000 to lei 10,000,000.

- j) the substitution by the members of the evaluation committee, as well as by the concessor's employees of the documents included in the initial offers with other documents;
- k) disclosure of any information non-destined for publishing, by the concessor's employees as well as by any person involved in the process of establishing of a concession.

Contraventions stipulated under the letter j) – k) are sanctioned with a fine from lei 10,000,000 to lei 50,000,000.

The establishment of the contraventions stipulated and the enforcement of sanctions are made by certain powers duly empowered by the competent ministries.