# TRANSFER OF PROPERTY ASSETS

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**Abstract**

*Starting from the current jurisprudence on the transfer of property assets, in this article, using logical interpretation and also comparative analysis, we intend to investigate the conditions under which an asset from the private domain of the state can be transferred to its public or private domain of an administrative-territorial unit in its public domain, according to the law (article 863 letter d) of the Civil Code). Also, the analysis also concerns the transfer of an asset from the public domain to the private domain, under the conditions established by Law no. 213/1998 on publicly owned property. The recent amendments to this legislative act were also determined by the complex cases brought before the courts regarding the transfer of property assets.*

*In conclusion, if the asset belongs (according to its purpose, to the national or local public use or interest) to the national or local public domain, then the transfer is carried out according to the procedure established by art. 9 of the Law no. 213/1998, respectively by an administrative act of an individual character, a decision of the Government or a local council. If the object is the exclusive object of public property of the state, according to an organic law, it is also possible by law to transfer the public domain of the state to that of an administrative - territorial unit. It is about the organic laws of modifying the organic law by which the assets have been declared the exclusive object of public property of the state.*

**Keywords:** *public property; transfer; public domain; private domain; government.*

## 1. Introduction

The notion of a public domain reverts to a current notion after 1989, especially after the adoption of Law no. 18/1991, which establishes the categories of land belonging to the public domain, exempted from the rule of the reconstruction of private property right[1].

The notion of *public domineering* is the result of sustained research by doctrines, authors of public law and private law[2].

The well-known Professor Victor Prudhon, in his paper *Tratatul domeniului public/ The Treaty of Public Domain*, advocated the need to allow an exorbitant legal regime from civil law for certain public assets.[3] Prudhon has the merit of highlighting the relativity of the principle of the inalienability of the public domain, considering that it applies as long as it lasts the public service to which the asset of the public domain in question is assigned[4].

The theory of domineering is an essential change brought to property in civil law[5].

As the well-known professor Jean Vermeulen points out, "the discussions that arise around the notion of a public domain are not only of a theoretical, doctrinal interest, but of a practical interest, the public domain being subjected to a special legal regime that removes it not only from the legal regime of individual property, but also from the legal regime of the private domain of the state subject to the provisions of common law."[6]

Professor Ion Filipescu considered that all property subject to public property law are "domineering assets" and make up the "administrative" domain, within which some public property assets are of "public domain", while others are of "private domain"[7].

Professor Ion Filipescu's thesis takes into account the French legislation according to which public property designates all the assets belonging to public authorities or institutions[8].

In the specialized literature, it is appreciated that the notion of the public domain must be applied to "the

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[1] According to art. 5, par. (1) of the Law no. 18/1991, with subsequent modifications and additions, "it belongs to public domain the land on which there are buildings of public interest, markets, roads, street networks and public parks, ports and airports, forest land, river and river beds, the lakes of public interest, the bottom of the inland sea and the territorial sea, Black Sea shores, including beaches, lands for nature reserves and national parks, archaeological and historical monuments, ensembles and sites, nature monuments, lands for defense needs or other uses which, according to the law, are in the public domain or which by their nature are of public use or interest".

[2] Liviu Giurgiu, Domeniul public, Seria "Repere Juridice"/Public Domain, The series "Legal landmarks", Editura Tehnică, Bucharest, 1997, p. 12.

[3] Emil Bălan, Dreptul administrativ al bunurilor/ Administrative law of assets, Editura C. H. Beck, Bucharest, 2007, p. 8.

[4] Antonie Iorgovan, *Tratat de drept administrative/Treaty of administrative law*, vol. II, 4 Ed., Editura All Beck, Bucharest, 2005, p. 136.

[5] Liviu Giurgiu, *op. cit.*, 1997, p. 12.

[6] Jean Vermeulen, Curs de drept administrative/Course of administrative law, Bucharest, 1947, p. 181.

[7] Ion Filipescu, Domeniul public și privat al statului și al unităților administrativ-teritoriale/ The public and private domain of the state and of the administrative-territorial units, in Dreptul/The law no. 5-6/1994, pp. 75-76.

[8] Alexandru-Sorin Ciobanu, Drept administrativ. Activitatea administrației publice. Domeniul public/ Administrative law. Public administration activity. Public domain. Editura Universul Juridic, Bucharest, 2015, p. 170.

whole of the assets used or exploited by or for the human collectivities[9]".

The distinction between the public domain and the private domain was made on the basis of the provisions of art. 476 of the old Civil Code, considering that the public domain consists of the assets affected by the general and unsuspected use of being private property[10].

According to this article, "*the highways, small roads and streets that are in charge of the state, rivers and floating or floating rivers, shores, shore additions and seaports, natural or artificial ports, shores where the ships can be in general, all parts of Romania's land, which are not private property, are considered as being part of public domain.*"

After 1989, Law no. 18/1991 classifies lands in public domain lands and private domain lands.

The opinions expressed after 1990 on the notions of "public property" and "public domain" are found in several relevant theses: a) the thesis that the two notions are equivalent, supported both by authors of administrative law and by authors of civil law (Mircea Preda, Valentin Prisăcaru, Eugen Chelaru[11]); b) the thesis according to which the public domain is the exclusive object of the public property right (Corneliu Bîrsan, Valeriu Stoica, Marian Nicolae); c) the thesis which establishes the existence of a report from the whole, the notion of domain being wider than the notion of public property (Antonie Iorgovan)[12]; the identification of a broad and a narrow meaning of the notion of a public domain (Liviu Pop) [13].

In contemporary doctrine, the phrase "public domain" has a broader meaning[14], which includes not only public property assets, as listed in Law no. 213/1998, but also the categories of assets of private property which present a significance and importance that go beyond the interests of their holders, leading to the coexistence of two different regimes applicable to them, namely the common law (as it is about a right of private property) and an exorbitant regime that includes public power rules[15].

Therefore, the notion of a public domain is not limited only to assets belonging to the public property, but in some aspects it belongs to the public domain also the assets (mobile or immovable) which are private property[16]. These assets, which are subject to a mixed regime (private and public law) and which can be found in the property of any subject of law, are included in the national cultural patrimony, "being national values to be passed on from generation to generation" have always been the subject of special protection[17].

In André de Laubadère's view, all these special rules as a whole, derogations from common law are the "regime of domineering[18]".

In conclusion, the idea of domineering concerns, on the one hand, the assets of public property and, on the other hand, some assets of private property that are subject to special protection and security.

### 1.1. Definition of Public Property

The implementation of Law no. 287/2009 on the Civil Code (through Law No. 71/2011) imposed a new view of the matter, as by this normative act an important part of the Law no. 213/1998, which, until that date, was considered to be the main regulation, derogating from the common law, was designed for the legal regime applicable to public property.

In this respect, it was questioned the regulation of public property by the New Civil Code, which, in art. 2, par. (1) establishes the object of regulation of this normative act: "The provisions of this Code regulate the patrimonial and non-patrimonial relations between persons, as subjects of civil law"[19].

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[9] Mihai T. Oroveanu, *Tratat de drept administrative/Treaty of administrative law*, Editura Universitatea Creştină „Dimitrie Cantemir", Bucharest, 1994, p. 417.

[10] Idem.

[11] Eugen Chelaru, *Administrarea domeniului public şi a domeniului privat*/*Administration of the Public Domain and the Private Domain*, 2 Ed, CH Beck, Bucharest, 2008, p. 42. The author considers that "the notions of public domain and public property are equivalent, the first not doing anything other than determining the assets that are subject of public property law", concluding that ordinary laws could not use public and private terms in a meaning other than that given by the Constitution.

[12] Professor Corneliu Birsan denies the existence of a public domain in a broad sense. The author considers that the incorporation in the public domain of the assets comprising the "national forest fund", the "national archive fund", the "national cultural patrimony" and so on are not justified, even if they are subject to a special legal regime regarding their preservation, conservation, management and administration, regardless of the owner of the property right (Corneliu Bîrsan, *Drept civil. Drepturile reale principale/Civil Law, Main Real Rights*, All Beck, Bucharest, 2001, p. 97).

[13] Dana Apostol Tofan, *Drept administrative/Administrative Law*, vol. II, 4 Ed, C.H. Beck, Bucharest, 2017, p. 283.

[14] Professor Antonie Iorgovan defines the public domain as "those public or private assets which, by nature or express provision of the law, must be preserved and passed on to future generations, representing values intended to be used in the public interest, either directly or through a public service subject to an administrative regime or a mixed regime in which the regime of power is decisive, being owned or, as the case may be, guarded by the legal persons of public law" (Antonie Iorgovan, *Tratat de drept administrative*/Treaty of Administrative Law, vol. II, 4 Ed., All Beck, Bucharest, 2005, p. 173).

[15] Verginia Vedinaş, Alexandru Ciobanu, Reguli de protecţie domenială aplicabile unor bunuri proprietate private/Domain protection rules applicable to private property, Lumina Lex, Bucharest, 2001, p. 74.

[16] Antonie Iorgovan, Drept administrativ - tratat elementar/ Administrative law - elementary treaty, vol. III, Proarcadia, Bucharest, 1993, p. 47.

[17] Antonie Iorgovan, *op. cit.*, 2005, p.173.

[18] André de Laubadère, Yves de Gaudermett & Charles Venezia, *Manuel de droit administrative*/Course of administrative law, Paris, 1988, p. 336.

[19] The controversies in the doctrine, as well as the "parallelisms, the inconsistencies and the contradictions between the different normative acts in the field of property" have led to the inclusion in the Government Decision no. 196/2016 for the approval of the preliminary theses of the draft Administrative Code, of the chapter on the exercise of the public and private property right of the State and of the administrative-territorial units. We present some of the "dysfunctions" mentioned in the Government Decision no. 196/2016:

According to art. 858 of the Civil Code, "public property is the right of ownership belonging to the state or an administrative-territorial unit on assets which, by their nature or by the declaration of law, are of public use or interest, provided that they are acquired through one of the modes provided by law".

Under another wording, art. 554, par. (1) of the Civil Code has an almost similar content: "The property of the state and of the administrative-territorial units which, by their nature or by the law, are of public use or interest form the subject of public property, but only if they were legally acquired by them".

As it can be seen, the definition of public property, inspired by civilian doctrine, sets out two elements specific to the legal regime applicable to it[20]: the subjects of public property law (state and administrative-territorial units); the scope of public property, delimited on the basis of the criteria of domineering.

### 1.2. The Scope of Public Property

Law no. 213/1998, by the provisions of art. 3 generically governs the scope of public property. Thus, the public domain is made up of the assets provided in art. 136, par. (3) of the Constitution, as set out in the Annex, which is an integral part of Law no. 213/1998 and 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-territorial units in the ways provided by the law.

According to art. 859, par. (1) of the Civil Code, the exclusive object of public property is the public beneficial interest of the subsoil, the airspace, the water with potentially energetic potential, the national interest, the beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, other goods established by organic law. According to par. (2), the other assets belonging to the state or to the administrative-territorial units are, as the case may be, belonging to the public domain or their private domain, but only if they were also acquired in one of the ways provided by the law.

## 2. Transfer of Domineering Assets

As it results from the provisions of art. 136, par. (2) of the Constitution, the subjects of the public property law are the state or administrative-territorial units.

According to art. 8 of the Law no. 213/1998, which remained unchanged after the entry into force of the new Civil Code, the transfer of assets from the private domain of the state or of the administrative-territorial units in their public domain, shall be achieved, as the case may be, by a decision of the Government, of the county council, respectively the General Council of Bucharest or the local council. The law further specifies that the decision to transfer property may be appealed to the competent administrative court in whose territory the property is located (art. 8, par. (2) of Law No 213/1998).

It is worth mentioning that the transfer to the public domain of assets belonging to the patrimony of commercial companies, to which the state or an administrative-territorial unit is a shareholder, can be achieved only by payment and with the consent of the general meeting of the shareholders of the respective commercial company. In the absence of such agreement, the assets of the respective company may be transferred to the public domain only by the expropriation procedure for a public utility cause and after a fair and preliminary compensation (article 8, paragraph (3) of Law No. 213/1998).

The Civil Code, in Art. 860 par. (3) *states that assets which form the exclusive public property of a state or administrative-territorial units under an organic law cannot be transferred from the public domain of the state to the public domain of the administrative-territorial unit or vice versa, only as a result of the modification of the organic law. In other cases, passing an asset from the public domain of the state into the public domain of the administrative-territorial unit and vice versa is done under the law.*

It raises the question of what is the meaning of the expression *under the terms of the law* to which the text of the Civil Code refers. The doctrine states that the answer is found in article 9 of Law no. 213/1998, as amended by Law no 224/2016[21].

Clarifications are also brought by the Constitutional Court of Appeal, which stated that "the normative acts that can be used to pass the assets from the public domain of the state into the public domain of the administrative-territorial units are either the organic laws amending the organic law through which the assets have been declared the exclusive object of public property of the state, or the decisions of the Government, when the assets are not an exclusive object of the public property of the state" (Decision of

1. parallelisms on: holders of public property rights; the characters of public property assets; listing the types of assets included in the public domain;

2. contradictions regarding: the owners of the public property right (incorrectly including in this category the sectors of the Bucharest municipality, the local councils, the county councils or the mayors); inappropriate use of "inalienable" expression; persons who can use public property for free use; the right to represent administrative-territorial units in court in disputes concerning the right of public ownership;

3. incomplete regulation on some aspects regarding the legal regime of public and private property of the state and of the administrative-territorial units created the conditions for the proliferation of a non-unitary administrative and sometimes contradictory practice, while at the same time it deprived the private persons of a firm and unequivocal legal reference in their relations with the public administration.

[20] Dana Apostol Tofan, *op. cit*., 2015, p. 266.

[21] Verginia Vedinaș, *Drept administrative/Administrative Law*, X Ed., revised and updated, Ed. Universul Juridic, Bucharest, 2017, p. 487.

the Constitutional Court of Romania No. 406/2016)[22]. In fact, the Constitutional Court notes, as early as 2014, that "as far as the legal mechanism for passing an asset from the public property of the state into the public property of the administrative-territorial units, or vice versa, it must be distinguished, depending on the nature of the asset is passed between the mechanism of passing through the declaration of law or the mechanism of passing through individual acts. Thus, if the property belongs to the public domain according to a declaration of the law, it is also possible by law to make the inter-domain transfer, respectively between the public domain of the state and that of an administrative-territorial unit. However, if the asset belongs according to its purpose, namely the national or local public use or interest, to the national or local public domain, then the transfer is made according to the procedure established by art. 9 of the Law no. 213/1998, namely by means of an individual act, a decision of the Government or a local council, depending on the meaning of the transfer[23]".

Art. 9, par. (1) of the Law no. 213/1998 states that the transfer of an asset from the public domain of the state into the public domain of an administrative-territorial unit is made at the request of the county council, respectively of the General Council of Bucharest Municipality or of the local council, as the case may be, being declared to be an asset of national public interest turned into an asset of local or county public interest.

By decision of the county council, respectively of the General Council of the Bucharest Municipality or the local council, the transfer of an asset from the public domain of an administrative-territorial unit in the public domain of the state can be made at the request of the Government, being declared for an asset of local or county public interest turned into an asset of national public interest (art. 9, par. (2) of Law no. 213/1998).

Regarding the transfer of an asset from the public domain of the county to the public domain of an administrative-territorial unit within the territorial district of the respective county, this transfer is achieved at the request of the local council, by a decision of the county council, declaring an asset from county public interest into an asset of local public interest (art. 9, par. (2) of Law No. 213/1998).

*The legislator also envisaged the transfer of an asset from the public domain of an administrative-territorial unit of a county in the public domain of the respective county, that being achieved at the request of the county council, by decision of the local council, declaring from local public interest asset into county public interest (art. 9, par. (4) of Law No. 213/1998).*

*The transfer of an asset from the public domain of an administrative-territorial unit to the public domain of another administrative-territorial unit within the county is achieved at the request of the local council, by a decision of the local council of the commune, town or municipality in whose ownership there is the asset and by decision of the local council of the commune, city or municipality in whose ownership it is transmitted.*

Law no. 213/1998, as amended, contains regulations regarding the transfer of an asset from the public domain of a county to the public domain of another neighboring county. This passage is done *at the request of the county council, by a decision of the county council of the county in whose property the asset is and by decision of the county council of the county in whose ownership it is transmitted*.

The law expressly stipulates that the aforementioned passages are achieved only for a definite period, strictly for the purpose of carrying out investment objectives, *stipulated in the decision of the local council, the county council, respectively the municipality of Bucharest*.

We should mention that the amendment to art. 9 of the Law no. 213/1998 of art. 1, par. 1 of Law no 224/2016 was determined by the multitude and diversity of the issues raised before the administrative litigation courts in this domain.

Various interpretations have been given, both by theoreticians and by the courts, to Article 10 of Law no. 213/1998, which led to the declaration of an appeal in the interest of the law[24].

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[22] In the Decision of the Constitutional Court of Romania no. 406/2016 of June 15, 2016, published in the Official Monitor no. 533 dated July 15, 2016, it was stated that "according to art. 136, par. (3) the final thesis of the Basic Law, referring to art. 860, par. (3) the first thesis of the Civil Code, when the asset is the exclusive object of the public property of the state or of the administrative-territorial unit, under an organic law, the transition from the public domain of the state to the public domain of the administrative-territorial units or vice-versa only operates through a change in the organic law. At the same time, according to art. 136, par. (2) of the Constitution related to art. 860, par. (3) second thesis of the Civil Code, in other cases, namely when the asset may belong, either to the public domain of the state or to the public domain of the administrative-territorial units, the transition from the public domain of the state to that of the administrative-territorial units or vice versa may be achieved, according to the law, respectively under the conditions of art. 9 of the Law no. 213/1998 regarding the public property, with the subsequent modifications and completions, namely at the request of the county council, respectively of the General Council of the Bucharest Municipality or of the local council, as the case may be, by decision of the Government or, symmetrically, at the request of the Government, by decision of the county council, respectively of the General Council of the Bucharest Municipality or of the local council".

[23] Decision of the Constitutional Court no. 1 of 10 January 2014, published in the Official Monitor of Romania, Part I, no. 123 of 19 February 2014.

[24] Decision no. 23 of 17 October 2011 on the examination of the appeal in the interest of the law declared by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice regarding the interpretation and application of the provisions of art. 10 par. (2) of the Law no. 1/2000 and art. 10 par. (2) of the Law no. 213/1998 referring to the provisions of art. 55 par. (5) of the Law no. 45/2009 on the transfer of the lands under the administration of the institutions provided by art. 9 par. (1) and art. 9 par. (11) of the Law no. 1/2000 in the public domain of the state in the private domain of the administrative-territorial unit, by decisions of the county commissions for the establishment of the land ownership right, with the purpose of reconstructing the ownership right on the old sites in favor of the former owners or their heirs.

If, in the original form, this article concerned the termination of the right of ownership by the property's destruction or its transfer to the private domain after the entry into force of the New Civil Code, art. 10 of the Law no. 213/1998 regulates the transition from the public domain to the private domain, which is achieved, as the case may be, *by a decision of the Government, of the county council, respectively of the General Council of Bucharest Municipality or of the local council, unless otherwise stipulated by the Constitution or by law.*

In this case, the passing decision may be appealed, under the law, to the competent administrative court in whose territory the property is located (art. 8, par. (2) of Law No. 213/1998).

We emphasize that in French law various texts provide for real transfers of property belonging to the public domain from a public person to the benefit of another, by way of derogation from the principle of the inalienability of the public domain (for example, article L3113-1 of the General Code of Public Property or Law of Museums of France No 2002-5 of 4 January 2002) [25].

According to art. L.1 of the General Code of private Property, the holders of the property right are the "classical" public persons, respectively the state, the territorial collectivities and their forms of association, as well as the public institutions. The public domain of a public person referred to in article L.1 consists of goods which are affected for the direct use of the public or a public service, provided that in the latter case they are subject to essential (indispensable) development for the execution of the missions of this public service (art. L2111-1).

## 3. Conclusions

In conclusion, if the object is the exclusive object of public property of the state, according to an organic law, it is also possible by law to transfer the public domain of the state to that of an administrative - territorial unit. It is about the organic laws of modifying the organic law by which the assets have been declared the exclusive object of public property of the state.

If the asset belongs (according to its purpose, to the national or local public use or interest) to the national or local public domain, then the transfer is carried out according to the procedure established by art. 9 of the Law no. 213/1998, respectively by an administrative act of an individual character, a decision of the Government or a local council.

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[25] Odile de David Beauregard-Berthier, *Droit administratif des biens/Administrative law of goods*, 5e édition, Gualiano éditeur, EJA, Paris, 2007, p. 97.