

INVENTORY OF PUBLIC GOODS. CURRENT REGULATION AND NORMATIVE PERSPECTIVES

Dan Constantin MĂȚĂ*

Abstract

The Romanian Constitution of 1991, revised in 2003, does not explicitly regulate the notion of a public domain. The core of the regulation of this notion is found in several normative acts regarding the land fund, the local public administration or the public property. Public goods have a derogatory legal regime from common law based on the general public interest that the administration has the mission to accomplish. Generally, Article 860 paragraphs (1) - (2) of the Civil Code provides that the public goods belong to the national, county or, where appropriate, local public domain, and the appropriate delimitation is made under the law.

The public administration authorities have the obligation to draw up and update the inventory of goods in the public domain in accordance with the provisions of Articles 20-21 of Law no. 213/1998 on public property. The inventory procedure differs depending on the category of the public domain and the authority that centralizes the inventory. In the case of the inventory of goods in the public domain of the administrative-territorial units, it is also necessary to adopt a Government decision certifying the belongingness of the goods to the county or local public domain. The draft of the Administrative Code brings important changes in the procedure for inventorying the goods in the public domain of the administrative-territorial units by eliminating the requirement of attestation by a Government decision.

The article analyzes the current regulation of the inventory procedure for public goods and the impact of the changes envisaged by the adoption of the Administrative Code of Romania draft.

Keywords: public domain, inventory, attestation, Administrative Code.

1. Introduction

The 1991 Constitution of Romania does not explicitly regulate the notion of a public domain, but regulates the dualist regime of ownership right: private property and public property.

According to Article 136 paragraph (3) of the Constitution, the following categories of property are the sole object of public property: "Subsoil public riches, airspace, waters with potentially valuable energy, of national interest, beaches, territorial sea, natural resources of the economic area and of the continental plateau, as well as other assets established by means of the organic law, are the sole object of public property¹."

The constitutional text has been amended several times along with the revision of the fundamental law by Law no. 429/2003 on the revision of the Romanian Constitution². Compared to the original text on property, provided by Article 135 of the Constitution adopted in 1991, by the provisions of Article 1 section 69 of the Law no. 429/2003 provided the following:

a) from the listing of the assets that are the sole object of public property, communication channels have disappeared because some of them (gas or oil

pipelines, electricity lines) may also form the object of the private property right;

- b) the wording "riches of any kind in the subsoil" has been replaced by "riches of public interest of the subsoil";
- c) the requirement that the water with potentially energetic potential be "of national interest" was added;
- d) it has been established that any other assets which may be the sole object of public property, other than those provided for in the constitutional text, shall be determined by an "organic" law³.

From the current form of Article 136 paragraph (2) of the Constitution, two criteria may be identified for the classification of public property: the criterion of the destination of the assets (*the public interest or the national interest*) and the criterion of the law declaration (*and other assets established by organic law*)⁴.

The notions of public use and public interest are not defined in the legislation, falling into the category of indeterminate legal concepts, which allow a wide margin of appreciation from the central or local public administration authorities with attributions in the administration of the public domain⁵. In the case law of the European Court of Justice, notions of "public

* Lecturer, PhD, Faculty of Law, „Alexandru Ioan Cuza” University of Iași (e-mail: danmata@uaic.ro).

¹ In the same sense see the provisions of Article 859 paragraph (1) of the Law no. 287/2009 on the Civil Code (republished in the "Official Gazette of Romania", Part I, No. 505 of July 15, 2011), as subsequently amended and supplemented.

² Published in „The Official Gazette of Romania” Part I, no. 758 of October 29, 2003.

³ Alexandru-Sorin Ciobanu, *Drept administrativ, Activitatea administrației publice, Domeniul public* (Bucharest, Editura Universul Juridic, 2015), 157.

⁴ Dana Apostol Tofan, *Drept administrativ*, volumul II, 3rd edition (Bucharest, Editura C.H. Beck, 2015), 261.

⁵ Apostol Tofan, *Drept administrativ*, 286.

utility" and "public interest" are considered "blind concepts" that "have an elusive nature, being vague principles that are issued and redefined by court or other public authorities, in particular cases"⁶.

In the Romanian doctrine, the assets for public use are considered to be those assets accessible to all, because by their nature they are of general use: streets, public roads, public squares, public beaches, bridges. *Public assets* are assets which by their nature are intended to be used in a public service in order to carry out activities of interest to the community without being directly used by any person: schools, hospitals, theaters, museums, libraries, railroads⁷.

The normative origin of the notion of the *public domain* is found in several normative acts regarding the land fund, the local public administration or the public property.

The need to regulate the public domain by special rules, derogations from the rules of common law, is related to the purpose of ensuring the general public interest by public administration authorities⁸.

In a post-communist doctrine reference, the public domain was defined as "those goods, whether public or private, which, by nature or express provision of the law, must be preserved and transmitted to future generations, representing values intended to be used in the public interest, either directly or through a public service, and subject to an administrative regime or a mixed regime in which the regime of power is determined, being owned or, where appropriate, guarded by legal persons of public law"⁹.

This definition bases the theory of the public domain *lato sensu* in the doctrine of administrative law in the post-communist period by including in this notion some private property assets, due to their special importance in national patrimony, are governed by a regime of public law, of "guard and protection" of the public interest or, where appropriate, public use¹⁰.

In another perspective, to which we agree, the public domain was defined as "all movable or immovable assets belonging to the state or administrative-territorial units, which by law or by their nature are of use or of public interest, used directly by the public or dedicated to a public service and subject to the administrative legal regime"¹¹.

The notion of a public domain should not be mistaken for the notion of an *administrative domain*, the latter comprising all the movable or immovable assets belonging to the State and the territorial

administrative units, irrespective of whether they belong to the public domain or to the private domain¹². The administrative domain has a narrower content than the patrimony of the state and of the administrative-territorial units, comprising both the active side, consisting of patrimonial rights, as well as the passive side, consisting of the patrimonial obligations¹³.

The public domain assets are subject to a derogatory legal regime from the common law based on the public interest that the administration has the task of performing. Generally, Article 860 paragraphs (1) - (2) of the Civil Code provides that the public property belongs to the national, county or, where appropriate, local public domain, and the appropriate delimitation is made under the law.

In the doctrine, the following conditions for inclusion of assets in the public domain were highlighted¹⁴:

- a) the asset belongs to a community (state or administrative-territorial unit) being acquired in one of the ways provided by law;
- b) the asset is assigned to a general interest destination, through direct public use or through a public service.

2. Inventory of public assets

The public domain may be of national interest, when the ownership belongs to the state, or of local interest, when the ownership belongs to communes, towns, municipalities or counties¹⁵.

Law no. 213/1998 on the public property assets¹⁶, with the subsequent amendments and completions, stipulates in Article 3 paragraphs (2) - (4) the composition of the public domain categories:

- a) *the public domain of the state* is composed of the assets provided in Article 136 paragraph (3) of the Constitution, from those stipulated in section I of the annex to the Law no. 213/1998, as well as other assets of public national use or interest, declared as such by law;
- b) *the public domain of the counties* consists of the assets referred to in section II of the annex to the Law no. 213/1998 and other assets of national public use or interest, declared as such by a decision of the county council, unless there are declared by law assets of national public use or interest;

⁶Cătălin-Silviu Săraru, *Drept administrativ, Probleme fundamentale ale dreptului public* (Bucharest, Editura C.H. Beck, 2016), 335.

⁷ Emil Bălan, *Dreptul administrativ al bunurilor* (București, Editura C.H. Beck, 2007), 51.

⁸ Bălan, *Dreptul administrativ al bunurilor*, 4.

⁹ Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, *Forme de realizare a administrației publice. Domeniul public și serviciul public. Răspunderea în dreptul administrativ. Contenciosul administrativ* (Bucharest, Editura All Beck, 2005), 173.

¹⁰ Iorgovan, *Tratat de drept administrativ*, p. 173.

¹¹ Rodica Narcisa Petrescu, *Drept administrativ* (Bucharest, Editura Hamangiu, 2009), 263; Emilia Lucia Cătană, *Drept administrativ* (Bucharest, Editura C.H. Beck, 2017), 223.

¹² Ciobanu, *Drept administrativ*, 176.

¹³ Bălan, *Dreptul administrativ al bunurilor*, 40; Săraru, *Drept administrativ*, 327.

¹⁴ Cătană, *Drept administrativ*, 223.

¹⁵ Anton Trăilescu, *Drept administrativ*, 3rd edition (Bucharest, Editura C.H. Beck, 2008), 90.

¹⁶ Published in „The Official Gazette of Romania” Part I, no. 448 of November 24, 1998.

c) *the public domain of communes, towns and municipalities* is made up of the assets referred to in section III of the annex to the Law no. 213/1998 and other assets of local public use or interest, declared as such by a decision of the local council, if they are not declared by law assets of national or county public use or interest.

The belongingness of an asset to the public domain and the public interest to which it corresponds is done through a procedural operation called *domain classification*. This operation differs from the actual recording of an asset in a public domain of a holder, referred in the doctrine as *domain incorporation*, and which always follows the domain classification¹⁷.

According to the provisions of Article 23 of Law no. 213/1998 disputes regarding the demarcation of the public domain of the state, counties, communes, cities or municipalities are of the competence of the administrative courts.

Law no. 213/1998 regulates the possibility of transferring an asset from the public domain of the state or of the administrative-territorial units to another category of public domain¹⁸. According to Article 9 paragraphs (1) - (6) these are:

- a) *the transfer of an asset from the public domain of the state to the public domain of an administrative-territorial unit* shall be made 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 a decision of the Government, being turned from asset of national public interest into an asset of local or county public interest;
- b) *the transfer of an asset from the public domain of an administrative-territorial unit to the public domain of the state* is made at the request of the Government, by a decision of the county council, respectively of the General Council of Bucharest Municipality or of the local council, being turned from asset of county or local public interest into an asset of national public interest;
- c) 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 is made at the request of the local council, by a decision of the county council, being turned from asset of county public interest into an asset of local public interest;
- d) the transfer of an asset from the public domain of

an administrative-territorial unit from the territorial district of a county to the public domain of the respective county shall be made at the request of the county council, by a decision of the local council, being turned from asset of local public interest into an asset of county public interest;

- e) the transfer of a good from the public domain of an administrative-territorial unit to the public domain of another territorial-administrative unit within the county is made at the request of the local council, by decision of the local council of the commune, town or municipality which owns the asset and by decision of the local council of the commune, town or municipality to the ownership of which it is transmitted;
- f) *the transfer of an asset from the public domain of a county to the public domain of another limitrophe county* is done at the request of the county council, by a decision of the county council of the county in the ownership of which the asset is and by decision of the county council of the county in the ownership of which it is transmitted;
- g) *the transfer of an asset from the public domain of Bucharest Municipality to the public domain of Ilfov County* is made at the request of the county council, by a decision of the General Council of Bucharest Municipality and by a decision of the county council of Ilfov County¹⁹.

The public administration authorities have the obligation to draw up and update the inventory of public assets in accordance with the provisions of Articles 20-21 of Law no. 213/1998.

The state inventory of public assets is drawn up and amended, as the case may be, by the ministries, by the other specialized bodies of the central public administration, as well as by the local public administration authorities that manage such assets. The centralization of the inventory is carried out by the Ministry of Finance and is subject to approval by the Government²⁰.

The inventory of assets in the public domain of the administrative-territorial units shall be drafted and amended, as the case may be, by special commissions, chaired by the presidents of the county councils, by the mayor of Bucharest Municipality, by the mayors of the administrative-territorial units, as well as by the persons delegated by them²¹.

¹⁷ Bălan, Dreptul administrativ al bunurilor, 52.

¹⁸ In accordance with the provisions of Article 860 paragraph (2) of the Civil Code "the assets which form the exclusive object of the public property of the state or of the administrative-territorial units according to 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 after the amendment of the organic law".

¹⁹ The last three modalities are strictly carried out in order to develop certain fixed-term investment objectives, stipulated in the decision of the local council, the county council, respectively the Bucharest Municipality [Article 9 paragraph (8) of the Law no. 213/1998].

²⁰ See: Government Decision no. 1705/2006 for the approval of the centralized inventory of assets in the public domain of the state, published in the "Official Gazette of Romania", Part I, no. 1020 of December 21, 2006, as subsequently amended and supplemented; Order of the Minister of Public Finance for approval of the Statements regarding the drawing up and updating of the centralized inventory of public domain assets of the state no. 1718/2011, published in the "Official Gazette of Romania", Part I, no. 186 of March 17, 2011.

²¹ The composition of the special commissions for drawing up the inventory of assets that make up the public domain of communes, towns, municipalities and counties is provided in Article II of the Technical Norms for the drawing up of the inventory of assets that make up the

After drafting, the inventories are appropriated by the decision of the local public administration authorities and are centralized by the county council, respectively by the General Council of Bucharest Municipality. Subsequently, the inventories are sent to the Government in order to declare the belongingness of the assets to the county or local public domain

In the jurisprudence of the Supreme Court, the decisions of the local public administration authorities by which the inventory lists are acquired were considered to be the preparatory acts of the Government's decision to prove the belonging of the assets to the county or local public domain, without producing legal effects themselves and consequently, they cannot be the subject of a separate action in an administrative court²².

In the doctrine, this interpretation has been criticized by the main argument that regardless of the subject matter of a regulation "a Council decision can only be an administrative act, an act of authority which, by definition, produces certain legal effects, even if they rather have procedural impact"²³.

Regarding the Government's decision to certify the belongingness of the assets to the county or local public domain, also the jurisprudence of the High Court of Cassation and Justice, emphasized that "it has no constitutive ownership effect in favour of the administrative-territorial units" and "the legal effect of the document issued by the central authority is only an attestation of the legal regime of public property differentiated by the legal regime of private property, which belongs to the territorial-administrative unit"²⁴.

3. Regulating the inventory of public assets in the draft of the Administrative Code of Romania

The draft of the Administrative Code of Romania, in the form registered with the Romanian Senate on December 12, 2017²⁵, regulates the legal regime of the public domain in Title I of Part Five, entitled *Exercise of the public property right of the state or of the administrative-territorial units*.

Regarding the inventory of assets in the public domain of the state Article 292 paragraph (1) of the draft introduces the rule that it is drawn up and amended exclusively by the ministries or by the other specialized bodies of the central public administration, "both for the assets administered by them and for the assets administered by the units under the

subordination, coordination or under their authority and is approved by Government Decision".

Therefore, in the forthcoming regulation, the possibility of drawing up and amending the inventory on public assets in the state's public domain and by the local public administration authorities administering such assets is eliminated. On the other hand, the Administrative Code draft stipulates that "holders of the right of administration, concessionaires and public utility institutions exercising a real right over the public property of the state are obliged to include these real rights in the integrated cadastre and land registry system" [Article 292 paragraph (3)]²⁶.

Significant changes are envisaged in the regulation of the inventory of assets in the public domain of the administrative-territorial units.

Generally, Article 293 paragraph (1) of the draft provides that "all assets belonging to the administrative-territorial units shall be subject to annual inventory. The deliberative authority shall be provided annually by the executive authority with a report on the status of asset management."

Similarly to the current regulation, the inventory of the assets that make up the public domain of the administrative-territorial unit is drawn up and updated by a special commission, chaired by the mayor, respectively by the county council president or a person empowered by them. Once the inventory has been drawn up, it is approved by decision of the local council, respectively, by a decision of the county council.

Each decision shall be accompanied by two categories of documents: "a) Proof of ownership, accompanied by land book excerpts which shows the registration of the right of ownership in the land book and the fact that the property in question is not burdened; b) "statement on one's own responsibility of the secretary of the administrative-territorial unit that the property in question is not subject to disputes at the time of the decision" (Article 293 paragraph (6)).

The novelty is the fact that these decisions are no longer centralized by the county council, respectively the General Council of Bucharest Municipality, with a view to sending them to the Government. Also, the requirement for the Government to adopt a decision stating the belongingness of the assets to the county or local field disappears.

In the draft of the Administrative Code, however, it is stipulated that, after adoption, the decision of the deliberative authority of the territorial-administrative unit shall be communicated to the prefect and the ministry with attributions in the field of public

public domain of communes, towns, municipalities and counties, approved by GD no. 548/1999, published in the "Official Gazette of Romania", Part I, no. 334 of July 15, 1999.

²² Ciobanu, *Drept administrativ*, 180.

²³ Ciobanu, *Drept administrativ*, 180-181.

²⁴ Apud Cătană, *Drept administrativ*, 250-251.

²⁵ https://www.senat.ro/legis/lista.aspx?nr_cls=L132&an_cls=2018

²⁶ Regarding this article, we mention that the Government of Romania expressed its point of view in replacing the phrase "public utility institutions" with the phrase "the holder of the right to use free of charge". See:

https://www.senat.ro/legis/lista.aspx?nr_cls=L132&an_cls=2018

administration, together with the documents stipulated in Article 293 paragraph (6) of the project. The deadline for communication is no more than 10 working days after the date of the decision.

The communication is not made for the purpose of issuing or adopting an administrative act certifying the belongingness of the assets to the public domain of the administrative-territorial units, but for informing and drawing up a point of view on the decision and the accompanying documents. This point of view is issued by the ministry with attributions in the field of public administration within maximum 60 days from the registration of the communication of the decision. During this period, the Ministry may request information from the competent authorities and institutions, which are obliged to respond within 30 days of registration of the request.

Following the communication of the point of view by the ministry with attributions in the field of public administration, two options are possible: a) amendment of the decision of the deliberative authority of the administrative-territorial unit in order to ensure compliance with the legal norms, if the ministry has notified matters that are contrary to these norms; b) adoption of a decision of the deliberative authority of the territorial-administrative unit, which certifies the inventory of the public domain assets of the administrative-territorial unit, if the ministry did not notify matters that are contrary to the legal norms.

On the basis of the decision which certified the inventory of public domain assets of the administrative-territorial unit, the mayor and the chairman of the county council request the final registration of the goods in the land register.

A positive aspect of the Administrative Code draft is the express mention of the legal nature and effects of the decisions of the deliberative authorities of

the administrative-territorial units: "the decision regarding the approval of the inventory of the assets that make up the public domain of the administrative-territorial unit and the decision confirming the inventory of the asset / assets in the public domain of the administrative-territorial unit are of an individual character, becoming mandatory and producing effects from the date of communication by the secretary of the administrative-territorial unit to the executive authority" (Article 293 paragraph (6))²⁷.

3. Conclusions

Regulating the legal regime of the public domain is one of the constants of public law. The doctrine of administrative law in Romania has "recovered" the past two decades this traditional institution of administrative law by formulating critical remarks and *lex ferenda* proposals.

Regarding the inventory of public assets in the administrative-territorial units, several criticisms have been expressed regarding the legal nature of the decisions of the local public administration authorities, by which inventory lists (administrative act or preparatory act to the Government's decision to certify) are acquired. The matter has acquired practical relevance in the circumstances in which the supreme court practice has decided on the character of preparatory act of such a decision.

From this perspective, a beneficial aspect of the future regulation of the legal regime of public assets is the clarification of the legal nature and of the effects of the decisions of the local public administration authorities on the inventory of assets in the public domain of the administrative-territorial units.

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²⁷ Note that in section 61 of the Opinion of the Legislative Council regarding the legislative proposal on the Administrative Code of Romania the necessity to replace the phrase "are of an individual character" with the expression "have an individual character" was pointed out. See http://www.senat.ro/legis/lista.aspx?nr_cls=L132&an_cls=2018

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