

REAL ESTATE MARKET - A LEGAL OVERVIEW

Public Property of the State and of Cities

Since part of the real estate projects currently developed in Romania include a component which triggers either the exercise of the public authority or the economic use and exploitation of estates which belong to the State or to the cities, a few explanations may prove to be useful with respect to the legal framework applicable to such categories of lands and/or buildings, to the decision-making mechanism whereby the authorities dispose of or create encumbrances on such estates and to other related issues.

In principle, both the State and the administrative and territorial units (cities, communes etc.) hold properties consisting in estates which, according to certain principles, belong either to the public or to the private domain thereof. The public property category includes those estates which, under the law or by their nature, are of public use or interest. The State's public property includes, among other assets which are relevant for the real estate market, estates such as the beaches, the parks.

According to the principle set forth by the Constitution, the estates in the public domain (i) may not be alienated; (ii) may not be subject to enforcement procedures and may not be encumbered by real guarantees; and (iii) may not be acquired by other persons by other civil law means (usucapion/adverse possession) under penalty of absolute nullity.

The other real estates which belong to the State or to the administrative and territorial units (those which are not of public use) are comprised in the public property thereof, while the State and the cities act as private owner of such estates, which means that they can be alienated by sale.

We have realized, along our practice, that some of the private real estate projects or of the projects developed in partnership with local authorities involve a transfer of the lands and buildings from the public

property into the private property. The law imposes certain limitations as to such transfers. Thus, the public domain of departments and communes, cities and municipalities is regulated both by law (the estates which by their nature have a permanent public destination) and by decisions of the departmental or local council (estates which, basically, may be transferred from the public property into the private property or the other way around, according to the public interest).

As shown above, the transfer of the real estates from the public property of the State into the public property of, for instance, cities, and vice-versa is permitted by the law. Whenever the transfer is performed from the State's public property into the public property of an administrative and territorial unit it is necessary to have a request thereon from the local council while the actual transfer deed shall materialize in a Government decision.

In any case, the sale, concession or lease of such real estates shall always be achieved by means of a public tender. Exceptionally, the local councils may grant the use, free of charge, for a limited period of time, over real estates which belong to the local public or private property to non-profit-making legal entities which carry out a charitable or public utility activity (for instance, foundations) or to the public services companies.

Private Property

The private property represents the most common form of property which can be found in Romania. Basically, any estate may be subject to the private property right, except for those estates which, by their nature, belong to the public property of the State or of the administrative and territorial units, as described above.

The private property right may be acquired under the law, pursuant to a court order, by occupancy, by accession, by usucapion (adverse possession), by inheritance or by contract (sale and purchase, donation, change etc.).

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As a general rule, any legal or natural entity may be the holder of the private property right. However, the Constitution and the specific relevant law (Law no. 312/2005 on the right of foreign citizens and stateless individuals, as well as of foreign legal entities to acquire the private property right over lands) set forth limitations with respect to the acquisition by foreign citizens or by stateless individuals of the ownership over lands in Romania. Hence, according to the relevant regulations in force to date, foreign citizens or stateless individuals may not acquire the ownership over lands in Romania, except as a result of the legal inheritance. The practical tool available to foreign investors in order to acquire a land in Romania is the setting up of a vehicle, under the form of a limited liability company, where such investor shall be a shareholder. Such vehicle shall be entitled to acquire the ownership over lands without any restrictions.

In principle, the transfer of the ownership over private property estates is free. However, in case of certain categories of estates, the law sets forth restrictions in terms of their circulation (for instance, the circulation of real estates which belong to the cultural patrimony). What is particular about the transfers of ownership over lands is that the law imposes that the transfer deeds be concluded under authenticated form, under penalty of absolute nullity.

The private property real estates are in the civil circuit and are regulated by the principle of free circulation. However, exceptions from the rule on free circulation of lands were implemented based on specific enactments.

Hence, certain agricultural lands acquired in private property under Law no. 18/1991 by means of apportionment of property are removed on a temporary and partial basis from the general civil circuit and may not be alienated for a 10-year period, calculated as

of the beginning of the year following the year when the property was registered, under penalty of absolute nullity. Another restriction with respect to the free circulation of lands is introduced by the Forestry Code, which sets forth a pre-emption right upon purchase of forestry lands in favour of the State. Equally, whenever request for land retrocession are filed under the special enactments providing for such repair measures (as treated below) such lands are removed from the general civil circuit.

Exploitation of Public Property Estates

There is currently a multitude of ongoing large real estate projects (including office, retail and industrial parks) which, as mentioned above, trigger the exploitation of estates relating to the public domain of the State or of cities.

It is therefore useful to briefly present hereinafter the main legal methods by which a potential investor may achieve a real estate project based on public property estates. The concession (a less usual vehicle in the Anglo-Saxon law system) and the public-private partnership (similar to the ones existing in Europe, which recently began to be applicable in Romania) shall be the two following main topics. The concession regime is regulated by Law no. 219/1998 which sets forth, the granting of concessions over, among others, the public or private property estates of the State, department, city or commune.

The concession of estates is granted based on a concession agreement whereby the public authority (for instance, the local council) conveys to the investor, for a determined period of maximum 49 years (with the possibility to extend it for half more of this period, unless the parties agree to terminate the agreement) the right and the obligation to use/exploit a real estate in consideration of a royalty (the amount which the investor pays to the authority in consideration of the concession granted). The most usual example is the concession right granted over a land for the purpose of developing a real estate project which justifies its public utility (most of the times, parking sites, residen-

tial sites, cultural and sports sites, banks' headquarters etc.)

It is worth mentioning that the granting of a concession agreement is always subject to the public authority's being bound to observe certain principles such as: the transparency, the fair treatment for all participants to the tender, the proportionality, the non-discrimination and the fair competition, for the purpose of causing any potential investor, irrespective of its nationality, to be entitled to become a concessionaire. In practice, the concession over a real estate is granted pursuant to a public tender (which may be either open to any anyone who wishes to bid, or with pre-qualification, that is, open to only those bidders selected based on specific criteria), to direct negotiation or competitive dialogue.

Of particular interest is the issue regarding those rights which the investor acquires over the assets resulting from the investments performed on conceded lands. Basically, the law provides that upon expiry of the concession term, the concessionaire is bound to remit the full ownership, free of any charge, over the conceded estate, including the investments performed.

Hence, there exists a first category - the return assets - which shall be remitted by right, free of any charge and encumbrances to the conceding authority upon expiry of the concession agreement. The return assets include the assets subject to the concession as well as those resulting from the investments imposed in the tender book. Then there comes a second category - the take over assets - which, upon expiry of the concession agreement, may be remitted to the conceding authority if the latter expresses its intent to take over the said assets in consideration of a price. This category includes those assets which belonged to the investor and were used by it during the concession term. The third and final category - the investor's own assets - includes assets which, upon expiry of the concession agreement, remain the property of the investor.

The public-private partnerships (PPP) agreements, similar to those used in other European countries, are contracts over the concession of works for the execution or, as

the case may be, both the design and the execution of one or several construction works. In consideration of the works performed by the investor, the latter receives the right to totally or partially exploit the result of such works, and, if any, the payment of an amount. The principles which regulate the selection of offerors and the conclusion of the PPP agreements are identical with the ones regulating the granting of concessions.

Currently, the investors and the conceding authorities have the possibility to choose among five types of PPP projects which may be further adapted depending on the specifics of each project:

- (a) design-build-operate (DBO) - a contract between the public authority and the investor, whereby the design (starting with the technical layout stage), the construction and the operation are transferred to the investor for a certain period of time which may not exceed 49 years;
- (b) design-build-finance-operate (DBFO) - a contract between the public authority and the investor, whereby the investor undertakes to design, build, operate and totally or partially obtain the financial resources necessary for the purpose of achieving these objectives, for a maximum period of 49 years;
- (c) build-operate-rehabilitate (BOR) - a contract between the public authority and the investor, whereby the investor undertakes to finance, build and to provide for the costs of operation, maintenance and rehabilitation of the public assets for periods of times to be agreed under the agreement, for a maximum period of 49 years;
- (d) build - operate - transfer (BOT) - a contract between the public authority and the investor, whereby the investor undertakes to finance, build, operate and maintain a public assets for a maximum period of 49 years;
- (e) rehabilitate-operate-transfer (ROT) - a contract between the public authority and the investor, whereby the public asset already created is transferred to the investor as such. The investor undertakes to finance, rehabilitate, operate and maintain the public asset for a maximum period of 49 years.

Upon completion of the PPP agreement, the

public assets created thereunder are transferred free of charge to the public authority in good state, operable and free of any encumbrance or obligation. The State's private property estates resulting from the implementation of such projects and the lands occupied by said projects can only be alienated, mortgaged, pledged or set as collaterals for the benefit of third parties under approval of the owner, which means that, pursuant to negotiations with the conceding authority, the investor has, basically, the possibility to set such assets as collaterals in favour of the banks financing the project.

Claims on Properties Confiscated by the Former Communist Regime

Another critical issue which must be considered by the investors in the real estate field is the claims filed by former owners with respect to real estates abusively expropriated during the communist regime.

Starting with 1991, the Romanian parliament issued a series of enactments which regulate the issue of the restitution of such properties, such as Law no. 18/1991 on the land fund (which initially contemplated only the agricultural land and subsequently the forest lands), Law no. 1/2000 on the reconstitution of the ownership over agricultural and forest lands, Law no. 10/2001 which regulates the legal status of buildings abusively taken over by the State during March 6th, 1945 and December 22nd, 1989 (located *intra muros*), or Law no. 247/2005, which is purported to complete and harmonise the provisions of the other laws mentioned above. A common feature of these enactments is the fact that the fundamental principle they set forth is the retrocession in kind of the confiscated assets, respectively the reconstitution of the ownership right on the former locations/sites. As you may easily notice, such principle may have significant conse-

quences if, for instance, upon the date of the claim, the assets is found in the public domain of a city and, at the same time, is subject of a concession agreement granted to a real estate investor.

For this very reason, prior to initiating any real estate project, it is necessary to conduct a detailed legal due diligence investigation on the background of the ownership over the relevant asset (land and/or building). This approach is necessary irrespective whether the assets is currently in the State's public domain, in the private domain of a city or in the private property of a legal or natural entity (in this last case, there were laws which allowed certain categories of persons to acquire from the State confiscated buildings which are currently claimed by the former owners).

Real Estate Publicity

Another critical issue regarding real estate investments is the manner in which the rights related to real estates (the ownership right, the right of use, the mortgage etc.) become opposable to third parties. To this end, Romania has implemented the cadastre, as a unitary and mandatory system of technical, economic and legal record of all estates all over the national territory. The cadastre system record is based on information regarding the plot, the construction and the owner. Law no. 7/1996 on the cadastre and real estate publicity sets forth the manner in which the legal operations regarding real estates are published. The National Agency for Cadastre and Real Estate Publicity, set up at national level, is a public institution with legal personality. Accordingly, at the level of each department and of the Municipality of Bucharest there have been set up offices for cadastre and real estate publicity, as units with legal personality.

The real estate publicity based on the general cadastre record system is purported to record in the land book the legal acts

and facts related to the estates in the same administrative territory.

The land book provides for: a description of estates (the ordering number, the cadastral number of the estate, the estate surface, the destination, the categories of use and, as the case may be, the buildings and the location of the estate providing for neighbouring areas), aspects regarding the background of ownership (name of owner, the legal act or fact which gives rise to the ownership right, the property movements, the servitudes, the legal facts, the personal rights or other legal relations as well as the actions taken in connection with the property) as well as aspects regarding the background of the ownership right components separation (the right to use the land under the construction, the right to enjoy the fruits of, the right to use, the right to dwell on, the servitudes related to the land, the mortgages and the real estate privileges, the lease and assignment of income for more than 3 years, as well as the actions regarding real rights, garnishment, pursuit of the estate or of its proceeds). If a real right was recorded in the land book in favour of a third party, it is presumed that said right exists to the benefit of such person, if it was acquired or set up in good faith, unless proven otherwise. If a right was erased from the land book, it is presumed that said right does not exist.

In view of the above, the recording in the land book of rights acquired by the investor over the real estates of a project (for instance, the concession, the lease, the interdiction to alienate) is material in order to ensure the opposability and stability of the right so acquired. Furthermore, the review of records in the land book with respect to a real estate contemplated by the project may reveal issues which significantly influence the development of the project (for instance, the fact that the estate is subject to an interdiction to alienate and to set mortgages, the fact that the estate is conceded to a third party etc.).

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