THE OIL AND MINING CONCESSION IN EUROPEAN PERSPECTIVE

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Abstract

The importance of invoking national interest and dispute over natural resources has increased in direct proportion to the growing importance of these resources and decrease inversely with quantity. A dull but intense battle at this point characterizes natural resource, especially of oil and mining of precious metals. Therefore, we can say that the power exerted on natural resources establishes a hierarchy of states of the world economic power and living standards of the population. Use of natural resources as an effective weapon in the economic consolidation became state policy and the expansion of exploration and exploitation in foreign lands development of complex regulations imposed internationally. Therefore, a thorough study of this field involves an analytical perspective of all dimensions outlined in legislative terms, starting from the history and evolution of the Romanian legislation observation of foreign law - specific states with relevant impact on the exploitation of natural resources - and presenting characteristic of European law and international law. We analyze if both oil and mining concession concession covered by Directive 2004/17/EC and if we can identify a subset of works concession. We detail our study if this concession is a public works concession, according to the recognition of the public interest as the determining criterion administrative and membership contracts.

Keywords*: oil concession, mining concession, public-private partnership.*

JEL Classification: *K23*

1. The European legal framework of the oil and mining concession

Directive 2004/18/EC[2] lists in Annex I the activities provided at art. 1 par. (2) b1) that include under the category of „Constructions" also the preparation of mining sites. It is further mentioned that class 45.12, „Drilling and boring" does however not include the drilling of oil or natural gas wells. Class 45.12 also does not include services related to extracting oil and natural gas.

Directive 2004/17/EC[3] includes in class 45.12 „drilling for oil or gas wells" and mining is found in Annex XII of the same directive. According to art.1 par.(2) b) of Directive 2004/17/EC, the object of the work contracts are one or more of the activities mentioned in Annex XII. According to the same provisions, a work is the result of a set of construction works or civil engineering works with its own economic or technical function.

Based on art.1 par.(3) a), conceding works represents a contract of works concession type, the fact excepted, that the equivalent of the works consists in either the right to exploit that work, or in that right accompanied by a price.

According to art.7 of Directive 2004/17/EC, the exploitation of a geographical region with the aim of exploring for or extracting oil, coal, gas represent the very object of the directive. Nevertheless, art.18 provides that the same directive is not applicable to concessions of works and services assigned by contracting entities conducting one or more of the activities mentioned at art. 3-7, if these concessions are assigned for the activities under art.7, that concern exploring for and extracting of oil.

In conclusion it can be maintained that both oil and mining concessions are regulated by Directive 2004/17/EC and can be identified as a subcategory of works concession (although, as shown above, the oil concession, even though regulated, is not the object of either of the two directives). This study will discuss whether this concession is also a concession of public works,

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[2] Published in the Official Journal (OJ) of the European Union 32004L0018;

[3] Published in the Official Journal (OJ) of the European Union 32004L0017; For details, see Cătălin-Silviu Săraru, *Contractele administrative – Reglementare, doctrină, jurisprudență*, C.H.Beck Publishing House, Bucharest, 2009, p.442-446;

depending on the recognition of public interest as the decisive criterion pertaining to administrative contracts[4].

The preamble of Directive 2004/17/EC argues at paragraph 38 the requirement of an integrative legal framework such as "to forestall the proliferation of specific arrangements applicable to certain sectors only". Thus the replacement of specific arrangements with a general procedure is encouraged that allows excluding the sectors directly subject to competition. This will be without prejudice to Commission Decision 93/676/EEC of 10 December 1993 establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in the Netherlands an activity operating under special or exclusive rights. Decision 97/367/EC of the Commission has established similarly regarding Great Britain.

According to the *Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships* (IPPP) C(2007)6661 of 5 February 2008, the object of the regulations of the European Union (further EU) concerning public procurement and concessions is the reduction of costs by increased competition of all bidders wishing to participate in the tendering procedure based on a correct and transparent strategy that governs the internal European market.

The Green Paper on Public-Private Partnerships and community law on public contracts and concession[5] stipulates certain rules concerning the concession of works, referring to certain obligations of publicity and the minimum period for the reception of the work. The dysfunction of EU legislation concerning service concession is reiterated, as these are subject only to the principles provided by art.45 and art.49 of the EU Treaty. At that time only France, Italy and Spain had adopted the legislation referring to the concession of works and services. Also Romania, even though not yet an EU member, had specific relevant legislation in form of Concessions Law no.219/1998.

A legislative proposal was devised by the European Parliament and the Council regarding the award of concession contracts[6] aimed at integrating legislation. Also, according to the preamble of the proposal, the tendency of extending public procurement contracts to concessions has attracted criticism and was deemed counter-productive. Annex III par. 7 of the legislative project includes a symbiosis of the activities treated separately by the directives currently in force under category a) and b), respectively, and includes also activities concerning the exploitation of geographical areas for the purpose of: extracting oil or gas; prospecting for and extracting coal or other solid fuels.

Annex III is titled „Activities conducted by contracting entities as provided at art. 4". Art. 5 of the legislative proposal provides that the directive is applicable to concessions of at least 5,000,000 euros awarded by the contracting entities for one of the activities of Annex III. Consequently in a hopefully near future an integrated European regulation should come into force regulating solely concessions, including oil and mining concessions, as well as concession of services.

The recently closed *commercial agreement between the EU and its member states on one hand, and Columbia and Peru*[7] *on the other* concerns cooperation in commodities trade, including the closing of oil and mining concession contracts[8].

[4] In European law, the administrative contract is not defined and the phrase is not found in European regulations. The concept of the public, on the other hand, is often mentioned, but it is identified with procurement contracts and not necessarily those of the concession, resulting in unintended confusion between different types of administrative contracts. Moreover, European law has been influenced by British law trends within the system of common law and it does not know - as we shall see - specific procedures of administrative law, the suppression of the concession contract and assimilation of its acquisition or public-private, which also shall be referred to hereinafter;

[5] COM (2004) 327/30.04.2004;

[6] For details see www.eur-lex.europa.eu/LexUriServ, last time accesed on the 28th of February 2013;

[7] The commercial agreement was published in the Official Journal (OJ) of the European Union L354 on the 21st of December 2012, p.0003-2607;

[8] For details see www.eur-lex.europa.eu;

1.1. The judicial nature of concession related to the Institutionalised Public-Private Partnership (further IPPP)

While IPPP is a relatively new form of contract included by European regulations, we believe its origins to be in the mixed economy companies of French law.

European law recognises concession as a subcategory of IPPP, as it is a subcategory of Public-Private Partnerships. The private involvement in the case of IPPP does not consist only in the contribution of capital, but also in active involvement in the management and contracting of the mixed public-private entity.

IPPP is based on principles already consolidated at European level: of non-discrimination by ethnicity, free circulation of services, equal treatment, transparency, mutual recognition and proportionality.

The application of EU norms concerning concessions and public procurements is mandatory, according to Directives 2004/17/CE and 2004/18/CE[9], even when minority private participation within a public-private entity.

An IPPP is established by: a) the founding of a new company with capital held jointly by the contracting entity and the private partner, or, in certain cases, by the contracting entities and/or several private partners and awarding the newly founded public-private entity a public contract or concession; b) by participation of a private partner in an already existing state company that was awarded *in-house*[10] public contracts or concessions in the past.

In relation to the legal framework for selecting the private partner in the case of concessions, the Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to PPPs determines that in the case of a concession of works only partially regulated by Directive 2004/17/CE or Directive 2004/18/CE, the fundamental principles deriving from the EC Treaty are applicable[11].

The selection criteria of the private partner have to be made public in consideration of the principle of equal treatment[12].

After establishing of an IPPP, any essential amendments of the essential clauses of the contract that were not included by the documents initially requested from the tenderer, require a new procurement procedure[13], with the exception of situations not regulated by Directive 2004/17/CE or Directive 2004/18/CE. Thus derogation are applicable to concessions of services or to contracts not regulated by the directives – as are oil concessions – but only in exceptional and unpredictable situations, which evidently could not have been foreseen.

De lege ferenda, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnership and Community Law on Public Procurement and Concessions[14] proposed the devising of integrated European legislation for concessions, by including the following aspects: a clearer delimitation from the public procurement contract, establishing rules for adequate publicity of the intention of awarding a concession contract and strict criteria for the selection of concessionaires such as to maintain the principle of non-discrimination. We believe that the devising and coming into force of a directive to include all distinctive features of this type of contract is necessary also for facilitating the application of European regulations and the harmonisation of the Roman-German and Anglo-Saxon legal systems. Further, an exhaustive

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[9] For details see CJUE, Case C-26/03, *Stadt Halle*, ECR 2005, I-1, p.49; Case C-29/04, *Austria/Commission*, 2005, ECR I-9722-9738, p.34. It was found that those were applicable provisions of Directive 92/50 on procurement procedure because the Austrian authorities allowed the award of a public works contract by the municipality Mödling by a company that is separate from the municipality in-house. It was established by the European Court that a tender is not required if the other party is a separate legal entity over which the public authority exercises control similar to that which it exercises over its own departments;

[10] About the concept of *in-house* and the interdiction of its aplication in the case of IPPP, see also CJUE, Case C-410/04, ANAV, ECR 2006, I-3303, p.30;

[11] Case C-507/03, Commission/Ireland [2007], p.32;

[12] Case C-324/98, Telaustria, ECR 2000, I-10745, p.60-61 and case C-19/00, SIAC Constructions, ECR 2001, I-7725, p.41-45;

[13] Case C-337/98, Commission/France, ECR 2000, I-8377, p.50;

[14] COM (2005) 569 of 15 November 2005;

European legislative initiative could even mean the including of all administrative contracts, in order to prevent in future the current confusions of various contract types, regardless of concessions, public procurements or PPP[15]. Such an initiative can be found also in the Green Paper on Public-Private Partnerships and community law on public contracts and concessions. It was proposed to establish a distinctive legal basis for public procurements and concessions as forms of PPP, for the very reason of avoiding the difficulty of determining the judicial nature of the public contract. This would also have solved the issue of uncertainty regarding the categories of risks that can be transferred to the contracting partner[16].

To date the mentioned proposals of the Interpretative Communication have not been succeeded by such a legislative text.

The Green Paper on modernising public procurement strategies in the EU (Towards a More Efficient European Procurement Market) devised in 2011 suggests replacing the current classification of public procurements contracts (public contracts) by works contracts, procurement contracts and service contracts. The attention of the European legislator in improving legislation seems to have been focused exclusively on public procurement. Nevertheless, certain proposals also reflect on concession contracts: classification of the concept of contracting or public entity (body governed by public law) seen in the light of European Court of Law jurisprudence; the suggestion of eliminating the distinction between services A and B and applying the directives relating to public procurements to all services; elimination of category 27 „other services" by fill application of the directives as a rule. The date suggested for devising these proposals being the end of 2011, these were materialised in the same year in form of the Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts.

Returning to current EU legislation, Directive 94/22/EC needs mentioning, that references Directive 90/531/EC in relation to the definition of the concept of competent authority. A competent authority is responsible for awarding the authorisation and monitoring its use by another entity – natural person or legal body or any group of such that apply for, could most possibly apply for or hold such an authorisation.

According to art.1 par.3 of this directive 'authorization' means any law, regulation, administrative or contractual provision or instrument issued thereunder by which the competent authorities of a Member State entitle an entity to exercise, on its own behalf and at its own risk, the exclusive right to prospect or explore for or produce hydrocarbons in a geographical area.

Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors[17] provides at art.2 par.1 that it applies to contracting entities that are public authorities or entities under public control, or else include in their object of activity and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

According to art.2 par.2b (i) relevant activities for the purpose of this Directive are: exploring for or extracting oil, gas, coal or other solid fuels. The Member States may request the Commission to provide that the performed exploration/extraction activity shall not be considered as defined in art.2. Also, the directive does not apply to already initiated and on-going concessions.

This legal deed was succeeded by Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

[15] According to the Green Paper regrding PPP and the communitarian law in the public contracts and concessions law (2004), there are two forms of „pure contractual" PPP: the public procurement contract and the concession contract;
[16] For details, see www.eipa.eu/files/topics/PPP/ppp-february% 202011.pdf;
[17] Published on the Official Journal (OJ) of the European Communities (EC) L297 of 29 October 1990, P.0001-0048;

2. The concept of competitive dialogue in European law

Directive 2004/18/CE introduces to European law the innovative procedure of competitive dialogue for situations where the concession of works or services is completely regulated by the directive, what entails also taking into consideration the requirement of the contracting authority discussing all aspects of the contract with each candidates, namely: information about the concessions to be awarded to the future public-private entity, the articles of incorporation (statute of the partnership to be established), the founding deed, other elements of the contractual relationship between the contracting entity and the private partner, the contracting entity and the future public-private entity during the running time of the concession.

The Competitive Dialogue – Classic Directive CC/2005/04 of 5 October 2005 retains as complex the situation in which the contracting authorities cannot anticipate whether the economic agents will be ready to accept the economic risk of the contract being a concession or eventually becoming a "traditional" procurement contract. The contracting authority may encounter selection difficulties, should it be found, upon completion of the awarding procedure, that eventually the contract should be a procurement contract and not a concession one, as initially desired. In such situations it is competitive dialogue that allows avoiding such problems, as the procedural requirements would be satisfied regardless if the contract materializes in a concession or another public contract.

2.1.Principles governing the closing of concession contracts in European law

In the European Parliament Resolution on Public-Private Partnerships and Community law on public procurement and concessions (2006), the European Parliament deemed the legislative modification of public procurement as premature, opposing the establishing of a distinctive judicial regime for Public-Private Partnerships. It considered, however, that a legislative initiative was required in relation to concessions. The European Parliament requested the Commission to place emphasis on regional governmental interests related to concessions, thus inducing a relaxation of the strict awarding rules of contracts, implicitly acknowledging the necessity of derogations from the principle of competition viewed in an absolute manner, or at least of relativizing it. Thus the European Parliament considered that territorial-administrative units may be allowed derogations from the principles of competition, when they serve strictly local objectives that exclude any relation to the internal market. It was further considered that an IPPP cannot, by itself represent a concession, but can only be succeeded by a concession, unlike a PPP that can be recognised also in the form of concession.

The European Parliament adopted the Resolution of 15 January 2013[18] including recommendations to the Commission in relation to EU administrative procedure law, requesting it to present, based on art.298 of the Treaty on the functioning of the EU, a proposal of regulations according to the recommendations included in the Annex to the proposal. Thus, according to Recommendation no.2 on the relationship between the regulations and the sectorial instruments, the regulations should include **a universal set of principles** and establish the applicable procedure as a *de minimis* rule, in the absence of a special law. A series of principles are proposed, found also in public contracts, like the principle of non-discrimination, the principle of equal opportunities, the principle of proportionality and the principle of transparency[19].

The proposal of the European Parliament does, however, not include the setting of a basic practice of awarding public contracts, although this would be necessary subsequently to the extended range of these contracts.

[18] Text adopted P7_TA 2013/0004;

[19] For details, see the oficial site of Research Network on EU Adminsitrative Law, www.reneual.eu, accesed in the 20th of February 2013;

As no action has been taken in this respect[20], it is deemed that the insufficient distinction made between procurement contracts and concessions encourages a regime of shopping in the benefit of the contracting authority, which can make use of various regulations such as to elude the principle of transparency[21].

2.2.The principle of competition and derogations from this principle

Does European legislation stipulate that awarding of concessions should be open to competition? Although directives 2004/17/EC and 2004/18/EC do not regulate the concessions of services[22], these are subject to the principles of the EC Treaty that, *inter alia* include the principle of competition. Nevertheless, both practice and doctrine have shown that despite the classification provided by the European Court of Justice[23], the regulations of the treaty are interpreted in various ways, what has caused difficulties in their practical application, particularly by discouraging concessions and PPPs. It is thus difficult to understand why the concession of services, often used for projects of great value, is totally excluded from secondary EU legislation[24].

Returning to the application of this principle to concession contracts, we believe the specifics of oil and mining concessions require derogations, within certain limits, from this principle.

Also Directive 2004/17/EC provides at par.41 of the preamble that „Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned." It is thus specified, that the application by a member state of a directive, like Directive 94/22EC, to another sector, like coal, is a circumstance that should be taken into consideration. Further, par.40 provides that this directive should not apply to contracts intended to permit the performance of an activity referred to in Articles 3 to 7, wherefrom follows the necessity of a procedure that takes into consideration the effects of openness to competition. Let us recall that art.7 of Directive 2004/17/EC mentions the exploitation of a geographical region with the aim of exploring for or extracting oil, coal, gas. Consequently it is not contrary to European regulations to allow derogation from the application of the principle of competition under strict conditions and on the basis of well-defined criteria.

In Italian legislation, for example, derogations from the principle of competition are provided by art.11 co.II of Decree-Law no.1163/2006 in the case of administrative contracts closed by mixed economy companies (which have influenced the establishing of IPPPs at European level). Thus, if within the awarding procedure the administration has exactly and in a detailed manner indicated the activities to be conducted by the company, it is possible to award the contract for the works entailed by this activity directly to the mixed economy company, without a competition procedure[25].

3. Exploitation right

According to the Commission Interpretative Communication on Concessions, the exploitation right is a criterion revealing the aspects distinguishing a concession of works from a contract of public works. This right allows the concessionaire to require payment from those who

[20] See www.eipa.eu/files/topics/PPP/ppp-february% 202011.pdf;

[21] Case *Wasser/Eurawasser*, C-206/08, 2009, I-08377. This case reinvented the definition of the nature of risc which should be agreed by the concessionaire;

[22] It was considered by European researchers that there is poor enforcement of transparency, equal treatment and non-discrimination as a result of different practices of Member States. Also, the deficiency is maintained by the existence of imperfect protection of participants in the auction, and thus a truncated application of the principle of competition, since the services concession do not benefit of regulations unlike public works concession. See details pe www.eipa.eu/files/topics/PPP/ppp-february% 202011.pdf;

[23] *Case Telaustria* 2000, ECR I-10475;

[24] In the interest of satisfactory reasoning, PPP Green Paper argued that it is important to respect the principle of subsidiarity. European Commission on this issue but came back and found that partial regulation ccontractului concession not only create weaknesses in European law from the conflict that may arise between the Treaty principles and regulations of directives in the field.

[25] The Administrative Regional Court of Lombardia Milano, section I, 15 September 2008, n.4061; the Administrative Regional Court of Sicilia Catania, section III, 22 April 2008, n.164;

use the structure over a given period of time, wherefrom follows that the concessionaire does not obtain remuneration directly from the conceding authority, but is granted by this the right of receiving an income from the users. This right also entails the transfer of responsibilities to the concessionaire, who assumes not only the inherent risk of any construction, but also the inherent risk entailed by the management and utilisation of the facilities. Thus the risk of exploitation is assumed by the concessionaire[26], or, in other words, the risks entailed by the operation of the concession are transferred to the concessionaire at the same time with the exploitation right. Thus it is certain, that the **criterion of exploitation** is vital for identifying the concession[27].

But is this criterion found in the oil or mining concession contracts? An analysis of the identifying elements of a concession of public works would undoubtedly lead to including oil or mining concessions into this category and thus to the establishing of the judicial nature of this type of contract.

The exploitation criterion of a work or service is acknowledged as necessary also in the case of PPPs, according to the Green Paper on Public-Private Partnerships and community law on public contracts and concessions (2004).

Other specifications concerning the exploitation right are found in the above mentioned Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnership and Community Law on Public Procurement and Concessions. These consider that the concessionaire's exploitation right of the awarded work or service entails assuming of the risk by the concessionaire, this being a „key-stimulant" for the public authority to establish a public-private partnership. The European Commission signals the necessity of devising a more coherent legal framework at EU level for concessions, in particular for reducing transaction costs by decreasing the legal risks and, in general, for stimulating competition. The closeness of concessions to public-private partnerships or their inclusion by the PPP „species" while undoubted, resides in the content of an interpretative communication that has no mandatory effect[28].

Spanish doctrine[29] considers public works to have state character, what strengthens the administrative monopole and serves best the public interest requirements of the concession object. In order to be eligible for such a contract, the respective work needs to be susceptible of exploitation, as this is the only possibility of remunerating the concessionaire. The public work is susceptible of exploitation when the user pays the concessionaire the achieved investment[30].

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[26] The situation remains the same even though the contracting party bears only a part of the costs of operating the concession grantor to lower costs for users;

[27] Commission interpreted the legal nature of a contract as works or public works. When deducted analysis, a consortium composed of contractors and banks has taken over a project needs authority concession in exchange for reimbursement by this the loan taken by contractors from banks with profit private partners. Commission classified the contract as a public works contract, since the consortium has taken over the operation and thus no risks.

[28] Moreover, the real impact of interpretative communications is questioned. In this sense, examples where interpretative communication on concessions in 2000 that failed to explain in an unequivocal manner the implications of the principles laid down in the EC Treaty for the award of concessions.

[29] Adolfo Menéndez Menéndez, *Comentarios a la nueva Ley 13/2003, de 23 de Mayo, reguladora del contrato de concesión de obras públicas*, Ed.Thomson Civitas, p.92;

[30] Interesant este că autorul consideră că lucrarea efectuată de către concesionar poate fi utilizată de cetățeni în mod direct sau indirect, ceea ce înseamnă o interpretare a concesiunii în sens larg. Remunerația concesionarului provine în mod fundamental din tarifele pe care utilizatorul le plătește pentru folosirea lucrării. În anumite situații, nu utilizatorul este cel care plătește pentru uzul infrastructurii ci chiar administrația publică, cum este cazul așa-numitei "taxe în umbră" reglementată de legislația spaniolă, prin care administrația își asumă plata pentru utilizator. În consecință, retribuția depinde de caracterul aleatoriu al ulitizării lucrării de către public. Aceeași situație o întâlnim și în cazul concesiunii petroliere, în care compania își recuperează investiția din cota de producție rezultată din țițeiul extras cât și din prețul fixat asupra petrolului și care este plătit în final de către utilizator. Interestingly, the author believes that the work done by the concessionaire can be used by citizens directly or indirectly, which means a broad interpretation of the concession. Concessionaire's remuneration comes fundamentally from the user fees it pays to use the work. In some situations, it is the user who pays for the use of infrastructure but also public administration, such as the so-called "shadow fees" governed by Spanish law, which assumes the user administration. Accordingly, the fee depends on the randomness of use by the public. The same situation is seen with petroleum concession, the company recovers its investment share of output from oil extracted and fixed the price of oil, which is ultimately paid by the user.

Not all exploitation contracts of natural resources automatically entail the transfer of risks. Thus in Saudi Arabia, Kuwait, Qatar, Bahrain and Abu Dhabi, but also in Venezuela so-called „pure service agreements" (a derived form of concession contracts) are used, according to which risks and costs are assumed by the state.

3.1. The judicial nature of the exploitation right

At present it is deemed, considering the *exorbitant regime,* derogatory from common law[31], to which public property[32] is subjected, that wealth "of any kind" of the underground is the exclusive object of private property, as stipulated also by art.135 par.(3) of the Constitution of Romania, republished.

Subsequently to the revision of the Constitution, art.136 par. (3) defines the judicial regime of „public interest" wealth, so that this category of goods suffers a restriction concerning the range of public property right. *Per a contrario,* the underground can be object of private or public property, so that the owner of that ground and respective underground can alienate part of the underground. Thus the underground belongs to the owner „in its entire depth, to the centre of the Earth"[33].

Also signalled is the necessity of legislating a clear delimitation between wealth of national and wealth of local interest, a distinction not made by the phrase „wealth of public interest", which, as observed, was not necessary in the past. The Mining Law of 1924 for example attributed all underground wealth exclusively to the state, regardless of their nature or destination.

Relevant is also the distinction between the property right of the state or of the territorial-administrative units over the ground and underground in question and the property right over underground wealth on one hand, and the distinction between the latter and the exploitation right of the underground on the other. In this sense the state or territorial-administrative unit can exercise this *in rem* right as a public right[34].

According to art.L132-8 of the New Mining Code of France[35], the institution of concession creates an *in rem* right distinctive from the property of the surface, a right that cannot be mortgaged. As required by the exploitation, the concessionaire has the right to dispose of the non-assignable substances inevitably occurring in the works. The owner of the ground can claim the disposal of those substances that could not be used under these circumstances, by paying the mine operator an indemnification corresponding to the expenditure incurred by direct extraction.

4. Conclusion

Peoples' right to use and exploit their natural resources has been recognized by resolution 626 (VII) of 21 December 1952 the UN General Assembly. Subsequently, XVII General Assembly Resolution 1803 of the UN on 14 December 1962 acknowledged that the right of peoples to permanent sovereignty over natural resources must be exercised in the national interest.

Recognising the right of countries, particularly those in developing to secure and increase participation in the management of enterprises with foreign capital was mentioned by Resolution nr.2158 (XXI) of 1966 and the Charter of Economic Law and State requirements was developed by Resolution no.3281 (XXIX) of 12 December 1974 issued by the same UN General Assembly. Gradually, except for the U.S., states have waived the right to private property in public interest law and allowed to justify taking over the basement of the state. Romania followed the same trend.

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[31] For details on the view that the system of public law is another form of specific legal regime democratic and civilized society, see A.Iorgovan, *op.cit*., p.206;

[32] Corneliu-Liviu Popescu, *Regimul constituţional al subsolului României*, Dreptul Review no.3/1995, p.6;

[33] Corneliu-Liviu Popescu, *op.cit*., p.6;

[34] The right to use the subsoil is a simple prerogative of public ownership when the ground / basement is in the public domain or local government unit, "but if the land loses its character as public property, acquires the right its subsoil use " - Corneliu-Liviu Popescu, *op.cit*., p.11;

[35] The New Mining Code was adopted by Ordonance no. 2011-91 of 20 January 2011.

Nationalization of natural resources led to Romania the existence of the concession contract which replaced such contracts of a private nature[36].

In Europe, we reiterate that the development and enforcement of a directive covering the distinguishing features of this type of contract, it is necessary to facilitate the application of European rules and harmonization of the legal system at the Roman-Germanic Anglo -Saxon. Furthermore, a comprehensive European legislative initiative could mean even include all administrative contracts, in order to prevent further confusion existing between different types of contracts, whether we refer to concessions, procurement or PPP.

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