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Abstracting

CONCESSION AS A PRECONDITION FOR RELATIVELY RESERVED RIGHTS OF THE FOREIGNERS IN THE REPUBLIC OF MACEDONIA: THE CASE OF SMALL HYDROELECTRIC PLANTS

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Abstract

Concession as a precondition for relatively reserved right, gives the foreigners almost equal rights as domestic citizens of the Republic of Macedonia. Our goal is to address the legal aspects and the procedure of giving the right to concession. This paper is mainly qualitative research of desk work on International private Law, Law on public procurements, Law on concessions and public private partnership in the Republic of Macedonia along with a case study on Concession on power plants in the Republic of Macedonia. Renewable energies are the future, which is why law researchers and law makers need to contribute in making of better laws that adapt to upcoming events in the energy field.

Keywords: concession, public procurement, Republic of Macedonia, foreigners, small hydroelectric plants

INTRODUCTION

In this paper we will write about the concession as relatively reserved right for foreigners in the Republic of Macedonia. First we will explain the meaning of foreigner and the right of concession as relatively reserved right for foreigners. Second we will continue with the importance of concessions on renewable energies and the importance of water power. Then, we will give an example for concessions on small hydroelectric plants in the Republic of Macedonia. Finally we will give our conclusion on the topic and encourage future research in this field for improving the law on concessions and private partnerships.

THE RIGHTS OF FOREIGNERS

Foreigner is any natural person who does not have citizenship of the the Republic of Macedonia, i.e. legal entity that has no affiliation to the Republic of Macedonia. This means that the only criterion to distinguish the foreigners from domestic entities is the connection from legal character between the individual and the home country.

According to the international private law professors Poliksena Gavroska and Toni Deskoski (2011) in private legal relations arising in the territory of a country, foreigners can emerge as well as domestic natural and legal persons. For such relations, law experts say that the relations have a foreign element in their subject, related to the particular state by the fact that occur on its territory. The Government based on the right to sovereign authority on its territory and the people and things that are on it, legally regulates the possibility of such relations. In Roman law, this right of the state is expressed in the maxims: "*Quidquid est in teritorio, est etiam de teritorio*" and "*Qui in teritorio meo est, etiam meus subditus est*" (Fullmeth and Horwitz, 2011).

The foreigners are subjected to the rules of a state based on the fact that they have established relationship with its territory, apart from domestic entities that have established legal and related public-legal nature through nationality as natural persons, i.e. belonging to legal persons. When considering the relationship with the territory of a state which is much weaker than the legal relationship established by citizenship, it is clear that the right of foreigners to emerge as carriers of rights and obligations in private-legal relationship is not always equal to the right to home citizens as subjects of such relations.

The legal status of foreigners is the sum of legal norms that determine the possibility of foreign natural and legal entities to appear as holders of civil rights. This rules have general aim to determine whether foreigners on the territory of a country can acquire a family, inheritance, obligations and property rights, or to benefit from intellectual property rights.

The question is: whether and under what conditions foreigners can benefit certain private rights in the Republic of Macedonia? So this part of international law characterizes the use of the direct method of normalization of relations. Legislative authorities of certain countries, in principle are free in determining the content of their own rules on the legal status of foreigners. This means that it is up to the legislator whether a law will be made available to foreigners or not. Whether they (foreigners) will be able to benefit in full or in part and whether they need to meet some additional requirements and so on. Differentiation in the availability of private rights between domestic and foreign persons is not regarded as discrimination. Yet, such freedom of national legislative bodies is absolutely unlimited. They are associated with certain minimum civilized standards that are established primarily by sources of international public law, UN Charter, the Universal Declaration of human rights of 1948, Convention on the elimination of all Forms of racial discrimination of 1963, the European Convention on human rights in 1950 etc. In regulation, the legal status of foreigners is necessary to comply with the principles of public international law on one hand and with the principles of domestic law on the other hand, based on the principle of territorial sovereignty of the home, which means its right to regulate the legal position of all persons on its territory. In the legal theory there are many conditions for exercising relatively reserved rights of foreigners. Reciprocity, status of a refugee, decedent of certain ethnic group, special permission for inhabitation, actual domicile of home country and

special permission concession. In this paper we will focus on the right to concession as a condition for exercising the rights of foreigners. As Poliksena Gavroska and Toni Deskoski (2011) emphasized:

> Using relatively reserved right under this condition implies foreigner to obtain approval from the public national authority with a specific legal act. This authorization is called a permit if it's issuance does not precede the conclusion of the user agreement, and if that approval can be revoked by the state authority that issued it. If approval is preceded by the conclusion of a user or the approval comes a contractual relationship with the user then called concession.

Concession as relatively reserved right

The Law on concession (General assembly of the Republic of Macedonia, 2012) in our legal system is governed by two types of laws: General Law and special Laws. General systemic law is the Law on concessions and public private partnership in 2012 and it regulates the conditions, manner and procedure for granting concessions, and the content of the concession contract and the rights and obligations of the parties to the concession terms. The special law, however, is governed area in which the concession is granted and from it comes the possibility of granting a concession on certain goods of general interest or to perform construction of public interest or performing public services. Examples include the Law on forests, water, etc.

The Law on concession and public - private partnership

This law (General assembly of the Republic of Macedonia, 2012), governing the award of concession for goods of general interest and Treaty establishing a public-private partnership, legal protection any person who has or had an interest in getting a deal, and he risked or risks being harmed in the process of awarding such an agreement, and other issues related to the concessions of common goods interest and contracts establishing a public private partnership.

The purpose of this law is to enable engagement for financing concession goods of common interest and agreement on the establishment of public-private partnership based on the principles of equality, transparency, non-discrimination, proportionality, mutual recognition, protection environment and efficiency in the process of concluding a concession for goods of general interest and an agreement on establishing public private partnerships, as well as quality and efficient performance of activities and services contract signed concession agreement for the establishment of public - private partnership. By now, Macedonian law seems to be fully in line with the European law view, according to which concession is a contract. And this is true in relation to public works concessions, as well as to service concessions.The subject of the concession may be performing a construction of public interest, providing public services or use of goods of common interest for the Republic of Macedonia. Prof. Francesco Goisis (2011) stated:

> Public works concession is an onerous contract, to be executed in written, related to the realization, or executive design, or final design and realization of public works or of works of public utility, and of works to the former

> structurally and directly connected, together with their functional and economic management, of the same type as a public works contract except for the fact that the consideration for the works has to be carried out consists either solely in the right to exploit the work or in this right together with payment.

The concession for construction is subject to construction of buildings concession by right of their management, use and maintain, without payment, partial and full payment by the Grantor. About the service concession Goisis (2011) underlined: "service concession is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment".

The concession of public services is subject carrying out activities which are legally designated as public services and consists of 1. the right to provide service without paying the Grantor, 2. the right to carry out public service fully or partially against payment by the Grantor and 3. the right to perform a public service including the management, use and maintain the facilities of the concession necessary to perform the public service. As Goisis (2011) continues the third kind of concession is a concession for good of general interest. The concession for goods of general interest is a contract different from concession public works and concession for public service as its object is the award of right to use goods of general interest (Goisis, 2011). The concession for goods of general interest is subject to the use of goods of common interest of the Republic of Macedonia and is executed by means of the Concessionaire. The concession involves establishing concessional terms. Parties in the concession relationship: Grantor and Concessionaire.

The Law on concession clearly states that there are two parties at the concession agreement. The "Grantor" is an entity that awarded the concession for goods of general interest, such as: the Republic of Macedonia, the municipalities and the City of Skopje. "Concessionaire" is domestic or foreign legal entity or natural person or a consortium with which the Grantor after the concession award procedure has concluded the concession agreement. Also, the Law on Concession and public - private partnerships includes:

- **Conducting preparatory actions**

To initiate a procedure for granting concession for goods of general interest and agreement on the establishment of public-private partnership, Grantor or the public partner makes the decision to initiate the procedure of concession for goods of general interest. The decision of paragraph 1 of this Article shall be adopted by the Grantor or the public partner based on a study of Article 16 paragraph 2 point 3 of this Law. When the Grantor is Macedonia's decision under paragraph 1 of this Article shall be adopted by the Government on the proposal of Minister responsible for the area of the granted concession. When the Grantor or the public partner is municipality, municipality in Skopje or the city of Skopje, the decision of the Paragraph 1 of this Article shall be adopted by the Council of the municipality, the City of Skopje or the municipal council in the municipality as proposal from the Mayor.

- **Granting a concession (Article 18)**

The decision to initiate a procedure for granting concession for goods of general interest or contract establishing a public private partner contains:

- Explanation of the justification for granting concession for goods of general interest or contract establishing a public private partnership including explanation of the basis for identifying the type of contract, given the definition of a public private partnership of this law,
- Appointment of its objectives,
- Subject of the concession for goods of general interest or public-private partnership and the basic conditions for granting concession for goods of general interest or contract establishing a public private partnership
- The manner and the deadline will be conducted and the procedure
- The fee for issuance of tender documentation.

The form and content of the notice of award for public private partnership contract is realized as a public works concession or concession of public service by the Government of the Republic Macedonia and published according to the Law on public procurement (General assembly of the Republic of Macedonia, 2012).

- **The Commission for enforcement (Article 20)**

The Commission for enforcement proceedings (hereinafter: Commission), formed by the Government, on the proposal of the Minister of the area, for which the contract is awarded or by the mayor of municipality, the mayor of the City of Skopje or by the management body of certain institution. The Commission:

> Prepares the tender documents, including the draft contract; Defines the criteria for awarding the contract; Organizes the process of applying and the applications; Determines the ability of the candidates and determines the candidates who have right to continue participation in the procedure; Determines the ability of bidders; Gives explanations and submits additional information and documents; Reviewes and evaluates the bids and ranking of bidders in proposal for the first-ranked to be elected; Prepares a report on the evaluation of bids Proposal for annulment and Performs all other duties necessary for conducting the process (Article 21).

- **Contract (Article 40)**

The concession agreement regulates relations regarding the concession, the special purpose, subject and period of the concession; the form and conditions for the concession, and a description of the existing infrastructure, the rights and obligations of parties to the contract terms amount and method of payment of concession fee income, the share of income and sharing the risk of the concession; types, scope and deadlines for meeting the obligation to invest. The agreements prepared according to the Law of concessions shall be prepared in accordance with the tender documentation, advertisement or public

announcement and the decision to select the best possible offer. The Government may authorize the relevant minister to conclude the contract for concession for goods of general interest on behalf of the Government of the Republic of Macedonia. Municipal Council, the City Council and the municipal council in the city Skopje may authorize the Mayor to sign the concession contract for goods of common interest. The Law on obligations is *lex generalis* in terms of the Concession agreement and the Law on concessions and public private partnerships is a *lex specialis.*

- **Transmission of contract (Article 42)**

The concession contract for goods of general interest or agreement establishment of public-private partnership can be transferred by a written consent of the Grantor or the public partner, under the conditions set out in contract and without prejudice to the duration of the contract, unless special law otherwise provided. The contract for concession for goods of general interest can provide transfer rights and obligations under the contract, provided it does not jeopardize continuing operations and/or provision of service, quality of execution activity and price. In case of transfer of the concession for goods of general interest, the Grantor signs contract for transmission of the concession for goods of general interest under the terms and conditions set in the existing concession contract for goods of general interest. The transfer of shares or shares of the Concessionaire for the execution of the concession, can not be carried out without the written consent of the Grantor.

In this paper we will pay attention to the Concessions that are of interest for the Republic of Macedonia. We believe that the Energy sector has a big expansion now and will expand even more in the future, especially in the area of renewable recourses. According to the (EU Directive, 2001) for promotion of renewable resources energy for promotion of green energy in the domestic market, there are several types of renewable energies: the wind, solar energy, hydro energy, geothermal energy, etc.

- **Concession contracts on small hydroelectric plants**

The interest of small hydroelectric plants (further hydro's) in the Republic of Macedonia is significantly increased. The ministry of economy started publishing public acquisitions. Small hydro plants are the most important renewable resource of electric energy. Everywhere in the world these energies are considered clean, renewable, and for this purpose countries give benefits as grants, tax reliefs, and bigger prices for electrical energy so called preferential tariffs. In the Republic of Macedonia there is significant hydroelectric potential that hasn't been exploited. According to the World association of small hydroelectric generators, small hydroelectric plants have power to produce electricity till 10 MW. The Republic of Macedonia as an EU candidate country is facing the challenges for efficient reforms in the society system. The principles of cooperation with the EU in the energy sector is intended to reflect the principles of market economy and the Treaty on the European Energy Charter and to develop in the direction of gradual integration into the European energy markets. The Republic of Macedonia is a signatory to several international agreements and conventions in the field of energy and environmental protection: Energy Charter Treaty, the Treaty establishing the Energy Community

Framework Convention UN Climate Change, Kyoto Protocol, the Statute of IRENA (International Agency for Renewable energy) and so on. Energy Community Treaty has the greatest significance given the fact that the country has committed to adapt and implement national legislation with EU legislation in the fields of energy, environment, competition, renewable energy and energy efficiency, and oil reserves. Key state institutions to create an energy policy and law enforcement agencies are: Ministry of Economy (Department of Energy), Energy Regulatory Commission and the Energy Agency. Given that the new law on energy, compared to the situation before these institutions were given greater responsibilities, it is intensive work on building and increasing the capacity of these institutions. It is necessary to comply with Energy package of EU Directives and to ensure full liberalization of the markets for electricity and natural gas. Key documents for the design and implementation of energy policy are the strategic documents adopted by the Government:

- Strategy of Energy Development,
- Strategy for renewable energy in the Republic of Macedonia, and
- Strategy on Energy Efficiency.

The Republic of Macedonia is a country with exceptionally low energy consumption *per capita* and exceptionally high energy consumption especially electricity per unit of GDP. In this context, more intensive measures are necessary in order to improve the energy efficiency in generation, transmission and distribution and power consumption. The environmental protection in the energy sector means acting through the energy efficiency, renewable energy, range of energy and modern technologies in terms of environmental quality, legislation, education and public awareness etc. Approximately 71% of the earth's surface is covered with water (US Geological survey, 1993) a resource that has always been central to human development. Hydropower is currently the second most used renewable source, first being the biomass. Europe is the first in production of the electricity, and the second is Asia. In 1982 a study was published of possible small and mini hydro power plants in Macedonia. This study is relevant today. It completely covers the hydropower potential of small watercourses in Macedonia to elevation 1500 meters above sea level. It includes an energy and economic classification by presenting data on investments and energy value, unit investment value, and cost per kilowatt/hour produced for every possible small hydrocentral. The study provides useful insights, primarily for possible interest from potential investors and preliminary indicators. This means that when considering each possible location, you need a full engineering and economic approach with consideration of local topographic, hydrological and geodetic bases.

- **Public announcements**

With the help of the World Bank for Reconstruction and Development (IBRD, 2007) criterias for granting concessions for construction of small hydropower plants in Macedonia are defined. Participation is open to all domestic and foreign legal entities and natural persons that submit tender documentation and that fulfill the conditions according to the tender documentation. The period of collection of tender documents is 30 days from the date of publication in the public notice in the local and foreign media. The deadline for submission of bids is 90 days from the date of expiry for obtaining the tender

documentation. According to the public announcement the concession of water is given for 20 years with a possible extension for the next 20 years.

- **Tender documentation**

According to the Article 23 of the Law on concessions and public private partnerships of the Republic of Macedonia 2012 the tender documentation should include chapters on the tender procedure, the financial, economic capability of the bidder and availability of the bidder, and the method of forming the bid, required documents and the possibilities of the technical solution. Also tender documentation should include annexes relating the forms of bank guarantees, security and performance guarantees and concession offer. The locations of 406 small hydro plants and basic parameters are taken from the study since 1982. The tender documentation bidders are advised to visit the locations of the site themselves, to ensure accountability data for the preparation of the bid. Special attention should be paid to the guarantees required as follows: tender guarantee, bank guarantee, bank guarantee for a single fee, water and a guarantee of construction. Bidders must submit evidence of their capability, including:

- Document for registered activity issued by the competent authority,
- Information on the economic and financial situation of the subject in the last 3 years
- 3.Confirmation by a public authority in the country for paid taxes and other public charges,
- Document of the public authority that there is no procedure for bankruptcy,
- Document from public organ that there is no procedure for liquidation,
- Statements document that there are no criminal proceedings against the bidder,
- A statement that the person will be collectively and jointly responsible for the liability of the concession,
- Statement by the person applying interest or each member of the consortium that should they be awarded the concession, everyone will be collectively and solidary liable for the obligations of the concession.
- A document (by public authority) that the legal entity has not been imposed infringement proceedings for prohibiting the professional activity,
- Statement by the responsible person in the legal entity that the legal entity or a member of its managing or supervisory authority have not been convicted by a court for the following crimes: corruption, fraud and money laundering, certified by a public authority.
- A signed statement from all members of consortiums for joint participation in the tender.

The concession of water is given for a period of 23 years according to the Law on waters and the Law on concessions and public private partnerships. The obligations of the Concessionaire after the signing of the agreement are as follows:

- Preparation of project documentation for hydroelectric plant for which the offer is given,
- Providing all permits and meeting the requirements defined in the appropriate permits under legislation of the Republic of Macedonia
- Construction of the objectives according to the tender documentation,

- Providing the necessary permits for operation of hydroelectric plant, according to the legislation in the country,
- Management and maintenance of all facilities within the plant,
- According to the Law on concessions and public private partnerships the Concessionaire is obliged to pay:
    - One time fee for concession on water, within 30 days of signing the contract.
    - Annual concession fee amounting to 2% from the average price of electricity produced each year.

The purchase of eclectic energy is guaranteed. It will be bought by the operator of the electricity market. Tariffs for the purchase of electricity are approved by the Energy Regulatory Commission. The concession contract for construction was signed between the Grantor (Government) and the Concessionaire. The Grantor selects Concessionaire and granting them the right to use the water to produce electricity and to design, construct operate, maintain, and manage small hydro plants on site in accordance with the contract, the tender documentation, which is obliged to be answered for fulfillment of contractual obligations.

CONCLUSION

The relatively reserved rights for foreigners at the territory of the Republic of Macedonia give the foreigners the same rights as domestic citizens with few exceptions. Foreigners are not allowed to vote on elections or to be members in political parties. That means that foreigners can invest in small hydro plants as well as domestic citizens if the principle of reciprocity with the domestic country of the foreigner is met.

The procedure for getting the concession contract fully complies with the EU Directive on the award of concession contracts (European parliament and Council, 2014). Although, the procedure is not simple, it's necessary in order to protect the interest of the Republic of Macedonia and the private party. The biro on public procurements is responsible for implementing the Law on concession and public private partnerships and guarantees fair competition for domestic and foreign companies in the race for the right to concession. We hope that our research can help to review the whole investment possibilities on Small hydro plants in the Republic of Macedonia for future domestic and foreign investors. So far there are no bigger remarks on the Republic of Macedonian legislation, taking into account the modern trends of investing in foreign developing countries. Renewable energies are the future, which is why law researchers and law makers need to contribute in making of better laws that adapt to upcoming events in the energy field. 

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