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UNILATERAL TERMINATION OF A PUBLIC CONTRACT

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Abstract: *Public contract is a special type of administrative contract to which the rules of the law of obligations apply accordingly or in a subsidiary manner. This contract represents the basis of all public procurements, public-private partnerships, and, in certain form, concessions. Due to its specific legal nature, which is a consequence of the application of norms of both public and private law to this type of contract, it is called „hybrid" or sui generis contract. The combination of the application of the norms of public and private law is seen, also, in the example of regulating the termination of a public contract. In the European Union law, the unilateral termination of a public contract is mostly regulated in the public law, while unilateral termination of a public contract in the Serbian law is usually done in accordance with the rules of the private law (law of obligations). However, due to the harmonisation of the Serbian law with that of the European Union, public law elements have been introduced into the contractual relationship between the public and private partners, which is reflected, also, in the issue of termination of public contract. The aim of this paper is to stress the ambiguities that may arise on the occasion of a unilateral termination of a public contract in cases when there are no detailed provisions in the public contract itself on unilateral termination, as well as to contribute to eliminating legal uncertainty in this area through interpretation of the positive law.*

Keywords: *termination of a contract, public contract, public and private law, public-private partnership.*

INTRODUCTION

The contracting parties conclude the contract with the intention and expectation that each contracting party will fulfil its contractual obligation, namely that the contractual obligations shall cease to exist in a regular manner within the period stipulated in the contract. Any contract, and especially a contract with a longer implementation period, where obligations are performed through a longer lasting act or the obligations are performed by undertaking several successive acts (so-called contracts with permanent or successive prestations), is exposed to the risk of change or cessation of validity, which may come as a consequence of various circumstances. Serbian law adopts the view that a contract can be fairly amended or terminated, under precisely defined circumstances. We mainly draw information regarding the above circumstances from the Law of Contracts and Torts (Official Gazette of SFRY, Nos. 29/78, 39/85, 45/89 - Decision of the Constitutional Court of Yugoslavia and 57/89, Official Gazette of FRY, No. 31/93, Official Gazette of Serbia and Montenegro, No. 1/2003 - Constitutional Charter and Official Gazette of RS, No. 18/2020) - hereinafter: LCT, applying the adopted rules not only to civil (private law) contracts, but also to the so called public contracts, which, due to their *sui generis* legal nature, should have a special treatment in Serbian law.

According to the provisions of Serbian legislation, the termination of a public contract is very similar to the termination of a private contract. If we take into account that the institute of public contract is taken over from the European Union law and that the harmonisation of domestic regulations with Community law is aimed for, it was necessary when establishing the rules related to the termination of public contract, which are a part of the Law on Public-Private Partnerships and Concessions (Official Gazette of RS, Nos. 88/2011, 15/2016 and 104/2016) - hereinafter: LPPPC, to act more in the public law area. This is primarily because the contracting parties that conclude a public contract are essentially unequal, which is justified by the protection of the public interest.

Public contract is the basis of public procurements, public-private partnerships and concessions. This agreement emerged as a consequence of the introduction of a private law category in the public law area. [Vodinelić, 2016: 408] In the law of the European Union - hereinafter: EU, the provisions of Directive 2014/24/EU of the European Parliament and of the Council on Public Procurement

and repealing Directive 2004/18/EC - hereinafter: Directive 2014/24/EU, Directive 2014/23/EU of the European Parliament and of the Council on the Award of Concession Contracts – hereinafter: Directive 2014/23/EU and Directive 2014/25/EU of the European Parliament and of the Council on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and repealing Directive 2004/17/EC - hereinafter: Directive 2014/25/EU are relevant for the termination of a public contract. Directive 2014/24/EU obliges EU Member States to allow contracting authorities to „at least under the following circumstances" terminate a public contract during its implementation, whereby the contracting authority is given the right to terminate the contract. Similar provisions on contract termination are contained in Directive 2014/23/EU, which puts the right to terminate a concession within the framework of conditions prescribed by national law, directing Member States to grant this right to the contracting authority.

1. CONDITIONS FOR TERMINATING A PUBLIC CONTRACT IN THE LAW OF THE EUROPEAN UNION

Public contract is a special type of administrative contract to which the rules of the law of obligations are often applied accordingly or in a subsidiary manner. This combination of public and private law elements in one contract had an impact on the emergence of the term „hybrid" contract, which enabled including both private and public rules, but the norms of either private or public law are always applied on public contract in a prioritised manner.

In the EU law, the termination of a public contract is regulated in the public law. Therefore, termination may be requested by contracting authorities, if one of the following conditions is met:

1) substantial modification of the public contract, which requires a new procurement procedure, namely a change of the concession that requires a new concession awarding procedure;

2) the existence of facts at the time of awarding the contract on the basis of which the contractor should be excluded from the procurement procedure or the concession award procedure;

3) the existence of a serious infringement of the obligations established by TFEU and Directive by the contractor, as determined by the Court of Justice of the EU.[1]

EU Member States are obliged, „at least in these situations", to envisage the possibility of terminating a public contract when the conditions for terminating a public contract are implemented in the national legal system. They are obliged to it by the direct effect of the stated European directives. In some EU Member States, the contracting parties choose to include more detailed rules on the termination of a public contract in the very public contract, but these rules must be in line with the law of the EU.

In the Republic of Serbia, the new Law on Public Procurements (Official Gazette of the RS, No. 91/2019) - hereinafter LPP, by the method of „sheer implementation", Article 163 of the LPP took over the provision of Article 73 of Directive 2014/24/EU, and the Republic of Serbia, as a future EU Member State, has thus fulfilled the obligation that „at least in these situations" there is a possibility of termination of a public contract. However, public procurement is also carried out in the case of awarding a public contract in a public-private partnership, when LPPPC, containing provisions of a different character, is applied, as well, as a *lex specialis*, in addition to LPP.

2. UNILATERAL TERMINATION OF A PUBLIC CONTRACT AS A MANNER OF TERMINATING PUBLIC-PRIVATE PARTNERSHIP

Termination of a public contract is a manner of cessation of a public-private partnership. Apart from the termination of a public contract, the public-private partnership may also cease to exist if the following legal requirements are met: 1) upon the expiration of the term for which the public contract was concluded and 2) upon the death of the private partner, through the liquidation or bankruptcy of the private partner.[2] Considering that the first legal condition for the termination of a public-private partnership is also related to the termination of a public contract, it may be concluded that the termination of a public-private partnership is always associated with the termination of a public contract, except in a situation of death, namely cessation of existence of the private partner.

According to Serbian law, there are several ways to terminate a public contract: 1) termination of a public contract due to public interest; 2) agreed termination of a public contract; 3) unilateral termination of a public contract. A public contract may cease to be valid upon the expiration of the term for which it was concluded (by force of law) and by annulment (by a court decision), when the court declares the public contract null and void.[3] If the termination of the public contract due to the public interest is excluded, it may be stated that the types of termination of the public contract

[1] See Article 73 of Directive 2014/24/EU and Article 44 of Directive 2014/23/EU and Article 90 of Directive 2014/25/EU.

[2] Article 53, paragraph 2 of LPPPC. The Law envisages the exception that, in the case when at least one member of the consortium, through liquidation or bankruptcy, assumes unlimited joint and several liability to fulfil the part of the public contract of the consortium member who was liquidated, i.e. whose bankruptcy procedure was completed, with the prior consent of the public partner, the public-private partnership, with or without concession elements, does not have to cease.

[3] Article 53 of LPPPC.

are taken completely from the law of obligations. [Karanikić Mirić, 2020: 28-29] There is also, in the law of obligations, the termination of the contract by the force of law due to the impossibility of fulfilling the contractual obligation for which neither contracting party is responsible. [Karanikić Mirić, 2020: 29] LPPPC contains provisions governing the early termination of a public contract due to the failure of a private partner[4] and the early termination of a public contract due to the failure of a contracting authority,[5] which is also treated as unilateral termination of a public contract. It is important to stress that the failure of a private partner also pertains to the failure of one of its subcontractors. This means that private partners must anticipate various mechanisms that they can apply in the event of non-performance of the contractual obligation by the subcontractor, in order to avoid contract termination, or, if the contract termination occurs, that the subcontractor compensates the damage.

Public contract can be terminated by agreement, i.e. by expressing the mutual will of the contracting parties to withdraw from the contract before its fulfilment. The right to an agreed termination of the contract is a *ius dispositivum* of the contracting parties, which guarantees them the principle of autonomy of will. The reasons for the termination of a public contract may be different, and in any case, it is not the existence of a legal deficiency.

Unilateral (voluntary) termination of a public contract under domestic law is also possible for the protection of the public interest, although the legislator does not state the circumstances in which the public interest shall be considered violated. This possibility exists on the side of the contracting authority, and is justified by the fact that the contracting authority acts with a stronger will as a protector of the public interest, namely, that it acts *iure imperii*. In the European Union, several countries have regulated the possibility of terminating a public contract due to the protection of the public interest (Belgium, Bulgaria, France, Italy, Poland and Spain). [EPEC, 2013: 19] In Germany, unilateral termination of a public contract is allowed only if envisaged in the very public contract. [EPEC, 2013: 19] Unilateral termination of a public contract for any reason is allowed in the United Kingdom, the Czech Republic, Slovakia, Holland, Greece and Portugal. [EPEC, 2013: 19]

3. RULES OF SERBIAN LAW ON TERMINATION OF PUBLIC CONTRACT AND KEY DIFFERENCES IN RELATION TO EFFECTIVE RULES IN THE EUROPEAN UNION LAW

The rules on termination of a public contract in the law of the European Union (supranational level) are very limited and are reduced to only three cases in which termination is allowed. However, Member States are free to regulate the issue of termination of a public contract in a more detailed manner within their national legal systems. Some of the rules by which they expanded the institute of termination of a public contract were taken over from private law, while most of them regulated the termination of a public contract in the public law. It has been shown in countries that have applied private law rules to public contracts (Germany and the Nordic countries) that procurement rules have interfered in the contractual relationship between the contracting authority and the private partner, which has often been considered unreasonable and problematic. [Kirsi-Maria Halonen, 2021: 5] Contrary to these countries, in most EU member states, including France, Italy, Ireland and Spain, public law rules apply to public contracts, [Kirsi-Maria Halonen, 2021: 4] the consequence of which is a weak effect of the principle of *pacta sund servanda* as well as priority application of the principle of efficiency.

The rules of private (obligation) law are mostly applied to the unilateral termination of a public contract in domestic law. According to the law of obligations, the unilateral termination is the most common manner of terminating the contract due to non-fulfilment or irregular fulfilment of obligations of one party, in which case an out-of-court contract termination occurs. When one party fails to fulfil its obligation, the other party may demand the fulfilment of the obligation or, under certain conditions, terminate the contract with a simple statement, and in any case is entitled to compensation. In order for a contract to be terminated, a breach of contract must be „substantial." When the fulfilment within the term is not an essential component of the contract, the creditor who wishes to terminate the contract must leave the debtor a reasonable notice period for fulfilment, unless the debtor's conduct suggests that it will not fulfil its obligation even within the additional deadline.[6] A unilateral termination of a public contract may also occur due to changed circumstances that have led to injustice in the performance of the contract. In that case, it is necessary to file a lawsuit with the competent court with a request for judicial termination of the contract due to changed circumstances.

4.1. Reasonable notice period

In the law of the European Union, the termination of a public contract has immediate effect. The

[4] Article 54, paragraph 1 of LPPPC.
[5] Article 53 of LPPPC.
[6] See provisions on contract termination in LCT, Articles124-136.

other contracting party is not given a reasonable notice period for the fulfilment of the contractual obligation, which may make it more difficult for the contracting party to find a new contracting party. In order to avoid the risks of leaving the other contracting party in trouble, mechanisms have been devised in the law of the European Union, such as the so-called direct contract, a contracting authority step-in and assignment of the rights of a private partner.

The provision on unilateral termination of a public contract in the LPPPC, contrary to the rules accepted in the law of the European Union, obliges the contracting authority to „notify the private partner in writing of such an intention before the unilateral termination of the public contract and set an appropriate deadline for eliminating the reasons for termination of the public contract and for pronouncing upon these reasons," and „if the private partner does not eliminate the reasons for termination of the public contract within an additional period, the contracting authority shall terminate the contract."[7]

In the event of a unilateral termination of a public contract, a court decision is usually not required in order for the contract to be terminated in a valid manner. The exception is the termination of the contract due to changed circumstances. In the law of the European Union, there is no obligation to terminate a public contract even if the contract is terminated due to „substantial changes to the public contract", although in theory this is considered a risky legal position due to potential difficulties in proving substantial changes to public contract.

4.2. Compensation for termination

In the event of a unilateral termination of a public contract, the injured party is always entitled to compensation for the damage it suffers due to the termination of a public contract. In Serbian law, „in the event of a unilateral termination of a public contract by a contracting authority, the contracting authority has the right to compensation for the damage caused to it by the private partner."[8] The compensation for damage is determined according to the general rules of the law of obligations, and regular court is competent for determining the amount of the compensation for damage.

For this form of compensation in the event of a unilateral termination of a public contract, the so-called institute of termination (financial) compensation is used in the law of the European Union. Payment of the so called financial compensation is the payment of a fee by a contracting authority to a private partner. This amount of compensation covers the remaining contract value, decreased by a certain amount. Therefore, it is not a matter of compensation for actual damage, but of a predetermined amount of money that covers the costs of the other contracting party, which necessarily remain after the termination of a public contract. The amount of the fee differs depending on the phase in which a public contract is terminated.

In the EU Member States, this fee is paid in case of unilateral (voluntary) termination of a public contract by the contracting authority and in the case of termination of the public contract due to the prevailing fault of the contracting authority. The exception is France, where the mentioned fee is paid only in case of unilateral (voluntary) termination of a public contract by the contracting authority. [EPEC, 2013: 21] By paying a fair compensation to a private partner, it should be left in the same position it would have been in if the contract had not been terminated.

Although the LPPPC provisions envisage the payment of damages in the event of unilateral (voluntary) termination of a public contract, in the domestic practice of concluding public contracts, contracting for payment of „termination fee" or „termination compensation" is noted, which can be justified by rewriting public contracts concluded in the European Union, without adaptation to the provisions of Serbian law which represents a *lex specialis* in this area. On the other hand, termination compensation in the law of the European Union is paid exclusively by the contracting authority to the private partner, while in domestic contractual practice, payment is also made by the private partner to the contracting authority, which is allowed in Serbian law, bearing in mind that this issue is regulated in the private law.

4. CONFLICT BETWEEN PRIVATE AND PUBLIC LAW NORMS - IS A PUBLIC CONTRACT MORE OBLIGATORY OR ADMINISTRATIVE?

The institute of administrative contract exists in the Serbian law since 2016, when the new Law on General Administrative Procedure was adopted - hereinafter: LGAP (Official Gazette of RS, Nos. 18/2016 and 95/2018 - authentic interpretation). Although the administrative contract is legally regulated with only a few provisions, the emphasis is placed on the issue of amending and terminating this contract. In accordance with the rules of public law, an administrative contract can be terminated only by a public entity (body), while a private contracting party can only file an objection as a legal remedy[9] and only in the case when the public entity (body) fails to fulfil its contractual obligations. The reasons for unilateral termination of the administrative contract are almost the same

[7] Article 54, paragraph 3 of LPPPC.
[8] Article 54, paragraph 5 of LPPPC.
[9] Article 24-25 LGAP .

as the reasons for unilateral termination of a binding contract - non-fulfilment of contractual obligations or occurrence of changed circumstances. The administrative contract shall not be terminated if the party agrees to change the contract due to changed circumstances. If it does not give consent to that, the body terminates the administrative contract with a *decision*. An important difference in relation to a binding contract is that the administrative contract can be unilaterally terminated only by a public entity (body) and the fact that the body unilaterally terminates the administrative contract by a decision. In addition, the public entity (body) shall terminate the administrative contract if it is necessary to eliminate the serious and imminent danger to human life and health and public safety, public peace and public order or to eliminate economic disturbances, and it cannot be successfully eliminated by other means that affect the acquired rights less.[10]

The result of successful harmonisation of domestic regulations with the law of the European Union is reflected not only in the mere adoption of legal rules, but also in their harmonisation with the valid norms in the domestic legal system. Such inconsistency can be seen in the example of the third item of Article 24, paragraph 1 of LGAP which deviates from the decisions adopted somewhat earlier in LPPPC. The LPPPC stipulates that „a contracting authority may *deprive a private partner of the rights established by a public contract* if the private partner does not fulfil the obligations under the contract, for reasons of public safety, as well as in case when the concession activity endangers the environment and human health (...)“,[11] as well as that the contracting authority may "in order to protect the public interest as well as in the case of threat to public safety or endangering the environment and human health or breach of obligations of the private partner / concessionaire from the public contract, completely or partially terminate the contract or take over fulfilment of the respective obligations of the private partner / concessionaire",[12] which in theory is called "step-in of the contracting authority". Therefore, according to the LPPPC, if public safety, the environment and human health are endangered, the contracting authority may revoke the rights established by the public contract / the concession or step-in the position of a private partner, but not terminate the contract.

5. LEGAL CONSEQUENCES OF UNILATERAL TERMINATION OF A PUBLIC CONTRACT

We have seen that a unilateral termination of a public contract can occur due to the so-called „Justified reasons" arising. Domestic contract practice states that a contracting authority may unilaterally terminate a public contract due to a failure to provide or poor provision of public service by a private partner, providing untrue and inaccurate information that was decisive for selecting the best offer, failure to perform necessary actions, opening liquidation or bankruptcy proceedings over a private partner, etc. It is always further stated that a public contract may be terminated in other cases in accordance with the *law of obligations*.

If we conclude that the domestic legislator decided to regulate the issue of unilateral termination of a public contract mainly by applying the private law provisions, we believe that, guided by the principle of equality of the contracting parties, the right to unilateral termination of the contract should be recognised to the private partner too. Public contracts concluded in the Republic of Serbia stipulate that a private partner may unilaterally terminate a public contract if a contracting authority violates the obligations under the public contract (e.g. violation of the right to exclusivity, in case of expropriation, non-payment of a single annual fee or in a certain period of time, etc.) or in other cases that arise against the will of the contracting authority, and represent the basis for unilateral termination of the contract (e.g. force majeure). In practice, a harmful change in positive regulations that significantly prevents a private partner from fulfilling its obligations is also considered a reason for unilateral contract termination by a private partner, although the legislator states that in the event of such a change, the contract can only be „amended without restrictions“, and not terminated.

The rule applied in the law of obligations is that each party has the right to demand the return of what has been given, as well as the benefits that have arisen in the meantime from what the party is obliged to return. LPPPC prescribes that „in the event of termination of a public contract, facilities, devices, plants and other assets from the PPP subject be handed over to the contracting authority“,[13] „without encumbrances and in a condition that ensures their smooth use and functioning“,[14] namely, upon the termination of a public contract, facilities, devices, plants and other assets within the subject of PPP/concession become the property of a public body (Republic of Serbia, Autonomous Province, local self-government unit, public enterprise or special legal entity authorised by law). This does not apply to facilities that are not in the function of the subject of a public contract. Therefore, in the event of termination of a public, namely, concession contract, its public law element is activated and the public interest is protected. At the same time, the rules of the law of obligations regarding the effect of the public contract lose their significance.

[10] Article 24, paragraph 1 of LGAP.
[11] Article 56, paragraph 4 of LPPPC.
[12] Article 46, paragraph 2, item 27a of LPPPC.
[13] Article 56, paragraph 2 of LPPPC.
[14] Article 57, paragraph 2 of LPPPC.

CONCLUSION

In the law of the Republic of Serbia, unilateral termination of a public contract is an institute to which the norms of both private and public law are applied. Given that the provisions of several laws apply to the public contract at the same time (primarily those of the Law on Public Procurements, the Law on Public-Private Partnerships and Concessions, the Law on General Administrative Procedure, and, in a subsidiary manner, the Law of Contracts and Torts), legal uncertainties and ambiguities are possible on the occasion of a unilateral termination of a public contract. Therefore, it is recommended that the contracting parties always regulate their mutual contractual relations in detail in the very public contract, necessarily moving within the framework of the domestic legal system.

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