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NORMATIVE FRAMEWORK OF CONCESSIONS IN THE REPUBLIC OF SRPSKA

Summary*: Concessions, especially for the use of public goods and natural resources of both renewable and non-renewable resources, occupy an important place in the economy of The Republic of Srpska. Given that this area is very broad and dynamic, there are many controversies regarding the nature of concessions, justification of their award, the need to provide the public with the entire process, transparency, competitiveness and prevention of monopoly behavior, and especially protection of public interest in awarding and implementing concession contracts. As the field of concessionaire was dormant in the period of socialist Yugoslavia, it is still insufficiently developed in our country, so there is a need for continuous monitoring by analyzing and improving its normative framework. In addition to presenting the legal framework of concessions, the paper presents some practical problems, especially regarding the vagueness of positive law and insufficiently defined division of competencies of the bodies of Bosnia and Herzegovina and the Republic of Srpska, primarily the Concessions Commission of Bosnia and Herzegovina and the Concessions Commission of the Republic of Srpska as well as suggestions for solving some open problems in this area by amending the positive law.*

Key words: *concessions, administrative contract, public administration*

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INTRODUCTION

The concession, as a legal institute, is characterised by a complex structure, mostly mixed legal nature, exceptional social significance and dynamic, continuous development. It is known to all legal systems, in each of them it contains complex regulations and rich practice. However, there are differences in the legal regime of concessions in different systems, and in each of them it is of great importance. In this regard, certain standards of its normative framework have been developed.

The public administration concludes various contracts, both with other public law bodies and with private law entities. These are most often public procurement contracts, concession contracts, as well as public-private partnership contracts. Some of them are aimed at meeting the regular needs of public administration, while others are concluded in order to achieve a broader, public interest. Although they contain different elements, the former are dominated by elements of a private law contract, while the latter are characterized by elements of an administrative

contract, and are therefore subject to a different legal regime. In the law of Bosnia and Herzegovina (BiH) and The Republic of Srpska, contracts in which public law elements (administrative contracts) predominate are not specifically regulated as such, but they do exist. A concession contract is an example of a contract where there is a significant or dominant public law aspect. In BiH, in addition to issues related to the normative framework of concessions, its character, weaknesses, harmonisation of solutions within this complex state, etc, there is a problem concerning the distribution of competencies between different levels of government, which does not arise from the fact that the constitutional framework is not clear enough, but political problematization of the nature, scope and content of competencies of different levels of government.

The normative framework for concessions in BiH is defined by the law at the level of BiH, entity laws, the law of the Brcko District, and cantonal legislation. In addition to the law, the normative framework also includes documents on the concession award policy adopted at all levels of government, as well as bylaws in the form of rulebook on the procedure for granting concessions, rulebook on concession fees and other acts. The Laws on concessions at all levels within BiH regulate the modalities and conditions related to the award of concessions, competencies and institutional structure, the role of concession commissions as regulatory bodies, tender procedures, the content of concession contracts, rights and duties of concessionaires, etc.

Normative framework of concessions in the Republic of Srpska, in addition to the general issues that make up this institute, the legal nature, procedure, mutual relations of the parties, etc. they also determine issues related to the constitutional and unconstitutional distribution of competencies within BiH, and the practice of the Constitutional Court of BiH, which tends to impose itself as a special source of law. In this regard, in addition to general disputes arising from the unconstitutional expansion of BiH's competences, a special dispute is being created in the field of concessions, which repeatedly reflects on the concept and function of this institute and the application of its normative framework. Apart from disputes of a constitutional nature, The Republic of Srpska has a mostly complete system of concessions, with significant open issues within it, which are reflected in the functioning and effectiveness of its legal regime.

1. GENERAL THEORETICAL ISSUES OF CONCESSIONS

Concessions are a regular companion of the functioning of the modern state, especially conditioned by the need to build and maintain modern infrastructure that requires large financial resources, but also high technical and environmental standards and the interests of users. Also, the exploitation of natural resources, access to modern technologies, the use of state property, but also the performance of numerous activities of general interest, does not necessarily require and exclusively state engagement, but does not allow full privatization. The theoretical concept of administration at the end of the twentieth century is based on the complete transformation of administration and its adaptation to modern social trends. Thus, it is emphasised that the modern administration emerges from the position of a passive bureaucratic apparatus and becomes a responsible driver of social flows as a necessary factor for preserving its own legitimacy. (Mescheriahoff 1990, 305-325). In countries that do not have an enviable level of development, concessions are often an indispensable way to provide certain public services or modern infrastructure, and even more than that. There is a need for more significant involvement of private initiative in financing the construction and maintenance of infrastructure facilities, but also performing activities of general interest (Smith and Trigeorgis 2009, 79-100). Through them, a higher level of realization of public interest is provided, because the private sector contributes to reducing the costs of its realization through the application of knowledge, and financial support and market logic (Cvetkovic 2012, 11). In general, they represent a qualified form of public-private partnership, which is the result of public government policy, with the aim of better

provision of public services or public interest in general. At the same time, concessions represent both a chance and a danger, depending on the extent to which the public interest is left to private initiative, ie what are the protective mechanisms of the state. The answer to this question largely, not exclusively, provides a normative framework. Although a necessary and widespread tendency, the influence of the private sector in the provision of public services also raises justified suspicions. Many concession contracts between developing country governments and corporations have failed to produce the expected infrastructural and financial effects. These contracts partially fail because the contracting parties construct them as traditional private contracts (Miranda 2007, 510). At a time marked by periodic economic crises, where the liberal economic concept arouses justified suspicion, the overuse of private sector mechanisms and its influence in the field of public services is receiving increasing criticism. Therefore, this issue requires continuous problematization.

The term itself comes from the Latin word *concessio (concedere)* which means allowing, cession. This word has remained as a root in many other languages, English concession means concession, permission, privilege, granting, in German concession means approval, permission. In French, the term concession means permission, allowance, privilege. The concept and legal nature of concessions are the subject of different interpretations in theory, and they are accompanied by a range of different solutions to comparative law, which requires a much broader elaboration and exceeds the objectives of this paper. However, the concession as a legal institute also contains a certain common basis for various legal solutions, primarily those related to the subject and procedural aspect of the concession. Borkovic points out that the concession is marked as a permit, a certain authorization, approval, permission, which the public authority, as a rule, grants by some special act. In terms of content, a concession is a special legal instrument by which public authority allows a certain entity (natural or legal person) to exploit certain goods, perform certain tasks or perform certain activities (Borkovic 1995, 26). In comparative theory, the attitudes of French and then German legal doctrine are the most relevant, because in England the concession is subject to a private law regime. In the work "Transformations of Public Law", Leon Digi emphasises the public service as a constitutive element, and despite differences of opinion, defines the concession as an act by which a public body (state, province, municipality) puts, based on its consent, an individual, usually a company, in charge of ensuring the functioning of a *public service*, under certain conditions (Sikic and Stanicic 2011, 419).

Concession relations established between a public entity on the one hand and a private entity on the other, represent a significant form of cooperation between the public and private sectors. Ensuring the rights and interests of private individuals, whether foreign or domestic, is seen as a precondition for the successful implementation of concession relations through public-private partnership projects. It is especially emphasized that the national legislation should ensure the existence of these preconditions and that it is important that it is harmonized with international agreements. (Khatidze 2018, 95)

Citing the prevailing views in French legal theory and the practice of the Council of State, Derda states that the legal nature of concession contracts in French law is not disputable and that they are considered the most typical category of administrative contracts (Derda 2006, 120). This conclusion arises from the fact that the concession contract meets two key elements of the administrative contract. The first is that in the case of a concession contract, at least one contracting party is always a public entity, and the second is that the concession contract is concluded primarily with the aim of performing public services. These two elements determined the French Council of State to characterize the concession contract as an administrative contract in the decision in the ***Epoux Bertin*** case. *Maffei* states that other features of the concession contract show that these are administrative contracts, such as the legal regime of public law, the jurisdiction of administrative courts to resolve disputes, broad powers of public entities, including the right to unilaterally terminate or amend contractual provisions in the public interest (Derda

2006, 112). Today, the prevailing view is that the concession has a mixed nature - the contractual nature of the provisions relating to the financing of the service and relations between entities, and the normative nature of the provisions determining the conditions for the functioning of the service (Borkovic 2002, 39). The essence of the French understanding is the agreement of the will on an unequal legal basis, caused by the engagement of the public interest (Tomic 2016, 23). French theory refers to administrative concessions as the broadest concept of concessions, which are defined as "a procedure that allows the administration to grant a right to an individual or other legal entity under certain conditions, most often contained in a contract setting out the conditions for granting rights", concessions for performing public service are also mentioned, concessions for public works, for mines, etc. (Sikic and Stanicic 2011, 420).

In German law and theory, there are differences in relation to French law, both in the very definition of the content of the concession as an administrative contract, and in the meaning of the very concept of the concession. Thus, *Fischer* defined a concession as “a legal relationship between the state (grantor) and a legal or natural person (concessionaire) in which the state assigns to a legal or natural person the right to exploit a natural resource or perform a public service” (Fischer 1974, 35). A concession is, therefore, a time-limited license to perform a certain public work for the performance of which a special authorization is required. This author states that the concession in Germany also means a type of "craftsman activity", which is issued with the fulfillment of precisely determined personal and real assumptions, such as e.g. ability, reliability, ie construction or technical equipment, etc. ”A special subject of consideration of legal theory is the issue of the legal nature of the concession contract. Although the choice of concessionaire is not as strictly formal as in other administrative contracts, the opinion of a number of legal theorists is that the legal regime of administrative contracts applies to the concession contract. Some German authors also share this view, stating that the concession contract has elements of subjectivity that are reflected in the voluntary submission of a private person to the legal norms of public law. Therefore, according to them, this form of contract is closer to the concept of a unilateral act for which the condition of validity is the prior consent or acceptance of a private person, than it shares other features of a private contract, i.e. civil law (De Valles 1937, 579). Although the public interest, legal inequality, and the individual situation to which it refers are closer to an administrative act, the essential difference concerns the bilaterality of the concession as an administrative contract, which regulates mutual relations between public and private entities (Tomic 2016, 205).

2. CONCESSIONS IN THE LEGAL SYSTEM OF BIH - DISTRIBUTION OF JURISDICTION AND CONSTITUTIONAL DISPUTE

States with a complex state system, as a rule, have shared competence in the field of concessions, which follows the division of competences between different levels of government. In this regard, there is a possibility that at the federal level the legal regime of concessions is roughly regulated, ie that both the federal level and federal units level have their own normative framework for concessions that they decide on independently, depending on whose jurisdiction or property it may be subject of the concession. According to the Constitution, BiH institutions have limited competencies (Article 3.1), with the possibility of their expansion, primarily with the consent of the entities. The constitutional wording, but also the very nature of these competencies, leaves extremely limited the possibility for its institutions to decide on the award of concessions, if it is possible in practice at all, having in mind what can be its subject. However, the special, constitutional, or unconstitutional transfer of competencies from the entity level to the applicable BiH level has created some space for this issue to arise, albeit more as a possibility of dispute and destruction of entity competencies but for the sake of achieving the goals that concessions should serve (Blagojevic 2014).

The legal framework for concessions in BiH began to be established in 2002, when the laws on concessions at the level of BiH and the entities were adopted (Amovic and Ivanic and Slijepcevic 2014, 57). The Law on Concessions of BiH determines the conditions under which concessions may be awarded to domestic and foreign legal entities in sectors that are, according to the Constitution and laws under the jurisdiction of BiH and in the case of representing its international subjectivity, " *as well as when the concession good extends to the Federation of BiH and the Republic of Srpska* ""(Article 1). According to the Law, concessions are granted by BiH for the provision of infrastructure and services, exploitation of natural resources and facilities used for their exploitation, financing, design, construction, renovation, maintenance and / or management of infrastructure and related facilities. The possibility to decide on the award of concessions by BiH is very modest due to the limitations of its property or activities eligible for the concession, which fall within its competence. The only constitutional competence of BiH institutions in terms of which a concession could be reached is the establishment and functioning of joint and international communications, and possibly the competences that the entities would transfer to the BiH level by agreement (primarily energy sources and economic projects from Article 3.5 of the BiH Constitution). Regarding the legal determination of the goals for which concessions are granted, the question arises, what is the infrastructure, resources or services in the exclusive competence of BiH!? This legal provision can, therefore, be interpreted primarily in the case of a concession good that extends to both entities. The Law determines the competence of the Council of Ministers of BiH to make decisions on the type and subject of the concession, as well as the scope of the concession that is awarded, which must be confirmed by the Parliamentary Assembly of BiH. The case of joint competence of BiH and / or the Federation of BiH and / or The Republic of Srpska and / or the Brcko District for the award of concessions is also regulated, when the competent authorities harmonize the conditions and form of the concession award.

The Law on Concessions established the Commission for Concessions of BiH, and the functional division of competencies of the Commission was performed, so that it acts in the capacity of the Commission for Awarding Concessions when performing functions and exercising powers related to awarding concessions under the exclusive competence of BiH. It acts as the Joint Concessions Commission when performing functions and powers related to the award of concessions that are not within the exclusive competence of BiH or "in case disputes arise regarding the award of concessions between BiH and / or The Republic of Srpska" (Article 6). The provisions of the Law on Public Procurement of BiH are also relevant for certain issues related to concessions at the level of BiH, but not for concessions decided by the Republic of Srpska.

Bearing in mind that the Federation of BiH is a complex entity, consisting of 10 cantons - counties as federal units that are "equal in rights and responsibilities", the competence in matters of concessions is divided between them (Dmicic 2008, 44). The Law on Concessions of the Federation of BiH also regulates functional competence in a similar way, so that it acts as the Concessions Commission when performing functions and exercising powers regarding the award of concessions under the exclusive competence of the Federation, and as the Special Joint Concessions Commission when performing functions and powers in connection with the award of concessions which are under the joint competence of the Federation and the cantons, or in the case of disputes arising in connection with the competence for the award of concessions between the Federation and the cantons (Article 8). In The Republic of Srpska, after several amendments to the previous law from 2002, a new Law on Concessions was passed in 2013, which was amended twice.

Having in mind the goals and basic principles of legal solutions, one could conclude in principle that the basic commitment of the legislator was to provide transparent and non-discriminatory conditions under which domestic and foreign legal entities can be awarded concessions in BiH,

which would be in the function of development. infrastructure projects and support for foreign capital investment in certain sectors, as well as that similar provisions are incorporated in state, entity and cantonal laws and the law of the Brcko District on concessions (Amovic and Ivanic and Slijepcevic 2014, 57). However, disputes of a constitutional and political nature largely limit the achievement of these goals, expanding their scope to the level of concessions, although the constitutional solutions alone do not provide sufficient reasons for that.

Laws on concessions at all levels define what can be the subject of a concession, which should be crucially determined by the system of distribution of competencies and property within the complex constitutional system of this state, which is often changed by laws at the BiH level, without proper constitutional basis. In the most basic, the subject of the concession may be the use of natural resources, facilities of general interest or other public goods, primarily infrastructure, or performing activities of general interest. The existence of public law elements makes this institute special, which should be indicated in its legal definition. Therefore, we believe that the legal definition of concession at the level of BiH is fundamentally flawed. Namely, the terms and conditions for granting the concession are determined in advance and unilaterally, which is confirmed by the provisions of the law, although the legal definition states that the concession is granted "within the terms and conditions agreed between the grantor and the concessionaire."

The Laws on Concessions prescribe the tender procedure as well as the provisions on the approval of concession projects by the commissions and the most important elements required to obtain such approval. In general, the laws allow the initiation of proceedings on the initiative of the competent authority or the initiative of an interested person, and prescribes a public invitation (an invitation to tender) on the basis of which the most favorable bidder is selected. Exceptionally, without conducting a public invitation, a concession in The Republic of Srpska may be awarded through a negotiated procedure only in cases defined by law. In this regard, it is debatable to what extent the procedures defined by these laws are in accordance with the rules and directives of the European Union. Namely, it should be noted that, although the public invitation can be compared to the procedure related to prior notification as prescribed by the European Union Public Procurement Directive (2014/24 / EU), it lacks the obligation of international publication as required by European Union regulations. According to the law, an international invitation must be sent only in cases when the commission explicitly requests it. The decision on whether the commission will explicitly ask the grantor to publish an international invitation or not is left to the Concessions Commission itself, which is not entirely in the function of the principles of publicity, competitiveness, equality of bidders, etc. insisted on by EU rules.

However, although some authors positively assess the normative framework of concessions in BiH, guided primarily by its principles or individual procedural solutions, we believe that in practice it has been shown that the Law on Concessions of BiH is vague and difficult to apply. First of all, it is difficult to consider the legal provisions on concessions in line with the provisions of the BiH Constitution on the competencies of BiH institutions. Also, the legal provision that regulates the competence of the Commission for Concessions of BiH, especially "[...] *when the concession property extends to the Federation of BiH and The Republic of Srpska*", is vague and inapplicable in practice. It is disputable, especially, that positive regulations do not regulate when "the concession good extends to both entities".

The issue of the concession good has also become the subject of a constitutional court dispute between BiH and The Republic of Srpska, in which, although related, two separate issues - property and competencies for granting concessions on natural resources - are viewed together. The procedure before the Constitutional Court of BiH was initiated by the request of 24 members of the House of Representatives of the Parliamentary Assembly of BiH, regarding the decisions on concessions of the Republic of Srpska in the Drina River Basin. Issues concerning the concession good and the competence for their adoption are considered disputable. The

proponents claimed that it was the property of BiH, for which the BiH authorities are competent, while the position of the Republic of Srpska is that it is a part of its territory, because in that part the Drina River is not a state border or an entity border. The position of the Republic of Srpska is supported by the provisions of the Constitution of BiH, according to which all functions and powers that are not explicitly given to the institutions of BiH are within the competence of the entities. This should undoubtedly include the management of natural resources, performing activities of general interest beyond those reserved for BiH institutions, and deciding on granting concessions in all matters that are not explicitly within the competence of BiH.

In its decision in case No. U 16/20 of 16 July 2021, the Constitutional Court found that there was a dispute between the Republic of Srpska and BiH regarding the decisions on concessions in the Drina River Basin made by the Republic of Srpska, regarding the concession goods and competencies for their adoption, and determined the competence of the Commission for Concessions of BiH to resolve this dispute in the capacity of the Joint Commission. The Constitutional Court is bound by its decision in case No. U-1/11 of 13 July 2012, which assessed the constitutionality of the Law on the Status of State Property in the territory of The Republic of Srpska and the Decision in case No. U-9/19 of 6 February 2020, which assessed the constitutionality of the disputed provisions of the Law on Inland Waterways of the Republic of Srpska. With these decisions, the Constitutional Court challenged the right of the Republic of Srpska to independently regulate the status of property and management of river basins located on the territory of the Republic of Srpska, linking it to the so-called "The issue of state property" and determining (!) the competence of BiH to regulate this issue, regardless of the fact that it is naturally located on the territory of the entity and that even the most extensive interpretation of the competence of BiH has no constitutional basis for such a thing. In the response of the Government of The Republic of Srpska to the Constitutional Court to the request for assessment of the constitutionality of decisions on the award of these concessions, it was pointed out that the alleged dispute between BiH and The Republic of Srpska reduces to the question "whether BiH is exclusively competent to award concessions on all public goods in BiH". The RS government claims that such a decision has no basis in the BiH Constitution, decisions of the Constitutional Court, or laws regulating the field of concessions, and that the RS government is competent to adopt disputed acts that are consistent with the legal acts of BiH and the Republic of Srpska. The analysis of the application of all laws on concessions was further pointed out, which shows that "the competent bodies of the Federation of BiH, in accordance with the Law on Concessions of the Federation of BiH, awarded at least nine concessions, two of which are concessions for the construction of hydropower plants on the Bosna River (which extends to both entities), six procedures for the construction and use of hydropower plants in the Federation of BiH are underway, inter alia, on the Neretva and Bosna Rivers, which extend on the territory of both entities. The competent authorities of the cantons within the Federation of BiH have awarded at least 240 concessions, the competent authorities of The Republic of Srpska have awarded at least 320 concessions. Therefore, the adoption of the request would have the capacity to destroy the entire legal ancestor in the field of concessions in BiH, including all projects to which they have been awarded in that context. " In the response of the Government of The Republic of Srpska, it was emphasized that "the lack of a legal framework regulating state property cannot be transferred to the issue of granting concessions, which is already regulated by laws on concessions at the BiH and entity levels, and in accordance with BiH. Therefore, the issue of jurisdiction to regulate the status of state property should and must be considered separately from the issue of jurisdiction to grant a concession." Such decisions further complicated the situation, and the issue of the so-called "state property" or competences for the management of public goods in the territory of the entities, including the award of concessions, although the dispute in these matters is primarily political.

The Law on Concessions of BiH determines the competence of the Joint Commission for Concessions of BiH "when performing functions and powers related to the award of concessions that are not within the exclusive competence of BiH or in case of disputes related to the award of concessions between BiH and / or The Republic of Srpska." The Constitutional Court of BiH states in its Decision No. U-16/20 that the Law on Concessions of BiH "does not specify special provisions which would determine the manner and authorized subject for initiating a dispute within the competence of the Commission for Concessions of BiH as the Joint Commission for Concessions." It further states: "Therefore, there is a legal gap, which the Constitutional Court must, accordingly, fill in." It is clear from this that there is no legally authorized subject to initiate a dispute in this situation, which indicates that it is impossible to conduct that procedure. In the absence of normative solutions in practice, it has been shown that the Constitutional Court intervenes in the constitutional order with its individual decisions "filling legal gaps" which puts it in the role of a constitution maker, which is contrary to the basic principles of the rule of law and the division of power into executive, legislative and judicial power. Given the often emphasised political approach in the reasoning of decisions of constitutional court bodies, it is not uncommon for dissenting opinions on legal science to be the only ones worth noting. In a separate opinion on the Decision of the Constitutional Court No. U-1/11 of 13 July 2021, Judge Zlatko Knezevic states: "[...] However, he could not because nowhere does such authority exist in the Constitution, ie that he (Constitutional court) schedules the constitutional jurisdiction, nor to make a determining decision by which (the Constitutional Court) distributes the jurisdiction of different constitutional categories. Therefore, it is acceptable to me (whether or not I agree with the decision) to declare an article or articles or the entire law in question unconstitutional, but not to put the Constitutional Court in the role of constitution-maker and change the explicit provision of the Constitution on state competence and what (everything else) to the entities. [...] The task of the Constitutional Court is to interpret the Constitution, and not to extend the general constitutionality where it does not belong. "All these shortcomings in legal solutions have caused a situation in which the Concessions Commission has existed only on paper since its establishment and it spends significant financial resources for the accommodation of employees, salaries, allowances and other expenses, and so far it has not had a request for the award of a concession within its competence.

It is interesting to note that the Law on Concessions of BiH in Article 4, paragraph 3 provides that the Concessions Commission acts as a Joint Concessions Commission in case of disputes regarding the award of concessions between BiH and/or the Republic of Srpska, does not mention the Federation of BiH, which could imply the conclusion that there can be no dispute between Bosnia and Herzegovina and the Federation of BiH. Although it fails to provide for the possibility of a dispute between BiH and another entity, Article 7, paragraph 2 of the Law stipulates that members of the Federal Commission may participate in the Joint Commission, depending on the case, indicating complete inconsistency between the legislators and the equality in the rights and obligations of the entities.

3. CONCESSIONS IN THE POSITIVE LAW OF THE REPUBLIC OF SRPSKA

3.1. Normative framework

After the constitutional changes from the 1990s, changes in the economic system and the dominant form of ownership, concessions in the classical form and meaning opened the way to entering the legal system of the states of the former Yugoslavia. They have even become a desirable or irreplaceable way of providing funds for the construction or maintenance of infrastructure, but also the use of natural resources or public property. Achieving the goals that are to be provided through concessions, but also other forms of public-private partnerships, as

well as the willingness of the private sector to develop infrastructure projects depends on the legal and regulatory framework in which the project is realized (Kumaraswamy and Zhang 2001, 195).

In the law of The Republic of Srpska, the administrative contract is not explicitly defined. Yet it latently exists. Serbian legal theory, following the example of French theory and practice, also takes the position that, above all, concessions contracts for public services are administrative contracts by their legal nature. Numerous authors in Serbia and Croatia are of the opinion that all concessions, regardless of their form, are administrative contracts, although this is not explicitly stated in the law. These views will continue to be exposed to the court of the scientific public, as well as to the test of administrative and judicial practice. In this regard, the public-private partnership agreement without elements of concession, which has facilities or services of public importance (especially regulated in the positive law of Serbia), by its legal nature is a "twin brother" of concession contracts. Regarding the manner of regulating relevant issues of administrative contracts, Dimitrijevic states: "If we decide to extend the subject of the LAP to administrative contracts, then it is quite logical to expect that the procedural legal text (LAP) will contain provisions governing the procedure conclusion of these public-law contracts, or this special administrative procedure will be regulated in a special procedural law as a lex spetialis, or the administrative procedure will be applied ("accordingly") to the conclusion of administrative contracts, ie the same procedure for administrative acts and contracts of administration ”(Dimitrijevic 2014, 147). For the sake of illustration, in Serbia, the Law on General Administrative Procedure from 2016 regulates the basic elements of the administrative contract - conditions of its conclusion, contractual entities, changes and termination of the administrative contract, and subsidiary application of mandatory regulations (Articles 22-26). It is similar in the Law on General Administrative Procedure of Croatia from 2009 (Articles 150-154) and the Law on Administrative Procedure of Montenegro from 2014 (Articles 27-30). In this regard, there are significant remarks regarding the justification of the introduction of administrative contracts as substantive institutes in procedural law (Milkov 2013, 85-99).

In the procedure of awarding concessions, in addition to the Law on Concessions, other laws are applied in a subsidiary manner - the Law on Foreign Investments of The Republic of Srpska applies in the part related to provisions on rights and obligations of foreign investors when it comes to concessions, the Law on General Administrative Procedure of The Republic of Srpska, as a procedural law that the Concessions Commission applies when deciding in accordance with Article 57 of the Law on Concessions. In performing its work, the Commission also applies other positive regulations, including bylaws adopted within its competence, as well as bylaws of other competent bodies of the Republic (Government, line ministries, agencies), which regulate the area of concessions.

The Law on Concessions of The Republic of Srpska defines a concession as the right to perform economic activities using public goods, natural resources and other goods of general interest as well as the right to perform activities of general interest, in accordance with the Law. conditions prescribed by the said law, with the obligatory payment of the concession fee. The legal definition includes, therefore, all standard elements of the concession as a form of administrative contract - assignment of rights by public authorities, time limit, pre-prescribed conditions and fees. Therefore, everything that makes up an administrative contract is contained in the definition of a concession, although it is not explicitly qualified as such. The public interest, although a political category that cannot be normatively expressed in terms of content, which "gives life" to this institute, is legally defined as its constitutive element. Concessions are a typical form of public-private partnership (Gupta & Biswas 2010, 45). The legal regime of concessions, which includes the award procedure, form, relations of the parties to the concession relationship, dispute resolution, etc., makes its legal nature different from ordinary, private law contracts.

3.2. Review of the provisions of the Law on Concessions

Representation of concessions in the economic and legal life of a country is one of the segments of its overall policy (Karsenty and Garcia and Piketty and Singer 2008; Notteboom, 2006; Sivakumaran 2011; Steinberg and Zasloff 2005; Longobardo 2020; Wanga and Pallisbc and Notteboomde 2014; Shidan and Yang and Kuncheng 2017). Hence, the political framework of this issue is introduced into the law itself. The concession award policy is regulated by the Concession Award Policy Document. It contains a description of economic and other areas in which concessions can be awarded, goals and priorities, types of BOT and other models of concessions, elements for the study development, as well as measures and activities undertaken to achieve long-term goals in the field of concessions, determined by strategic and other planning documents. The policy document, in cooperation with the competent authorities, is prepared by the Concessions Commission. Although the political act, which by its nature falls within the competence of the government, is passed by the National Assembly on the proposal of the Concessions Commission. However, despite the existence of the Document, in each individual concession it is necessary to take into account the extent to which it is depicted to the public interest, as a variable and difficult to define category in advance, which would be presented as a "small policy".

The Law on Concessions determines what can be the subject of a concession, but this list, although expanded and more precise in relation to the old solutions, is not closed, because the subject of the concession may be the use of other goods of general interest and other public services which regulate a certain area. The list of issues explicitly stated in the Law includes: a) construction, use and maintenance of: 1) roads and related infrastructure facilities, 2) railways, waterways and ports, 3) airports, b) use of public water resources: 1) water for technological process in performing economic activities, 2) water and water land for use of hydroaccumulations, bathing areas, ponds, 3) water land for realisation of some of economic activities or for realisation of other objects of concession in accordance with this law, 4) for extraction of materials from watercourses (gravel, sand, stone) according to the watercourse management program, c) construction and use of energy facilities, except energy facilities on bio-mass, bio-gas and solar plants with photovoltaic cells on facilities regardless of installed capacity, as well as solar plants with photovoltaic cells on earth of installed power up to 250 kW; e) construction or reconstruction and use of oil pipelines, gas pipelines and facilities for storage, transport and distribution of oil and gas, e) exploration and exploitation of mineral resources, f) planned hunting of game with hunting and fishing, d) games of chance, h) postal and telecommunication services, except reserved postal services and common and international communications, i) passenger and freight railway transport, j) public transport by road, k) premises and facilities of natural, construction and cultural-historical heritage, l) communal activities, except water supply of the population, as well as construction, maintenance and use or reconstruction and modernization of communal facilities, l) management and processing of waste in accordance with special regulations, except waste provided by communal activities, m) construction or reconstruction and modernization of spa facilities and their use, construction of tourist infrastructure and superstructure facilities, n) activity in the field of catering, n) agricultural land and o) construction, use and maintenance of sports facilities. From the above, the conclusion follows about the special significance that the Law gives to the so-called BOT model (build, operate and transfer), as a model of project financing, especially important in the field of transport, energy and tourism infrastructure. This model, without the involvement of state funds, provides infrastructure of greater value, which is otherwise difficult to provide (Borojevic 2015, 297). In the BOT model, as a model of special importance for the construction of infrastructure, there are, with special interest and role, three parties - investors, who provide financial resources, build and manage infrastructure, public authorities and third parties, which

can be a wide range entities, such as banks, suppliers, subcontractors, etc. (David and Fernando 1995, 669-675). BOT projects, as instruments of modernization of transport or energy infrastructure, telecommunications, water supply, environmental protection, etc. can be considered as an alternative strategy for solving financial and social problems caused by financial deficit, which is often global (Vassileva and Ignjatijevic 2020, 23-36). Having in mind that the costs are ultimately borne by the users, that the income belongs to the concessionaire, It is necessary to keep in mind the extent to which the concession is a good (in) substitutable condition of normal life, and in connection with the conditions that must be prescribed in connection with the granting of such concessions.

The implementation of the concession award procedure is based on the principles of transparency, non-discrimination, market competition, equal treatment, freedom of movement of goods and services, protection of public interest, efficiency, economy, proportionality, environmental protection, autonomy of will and equality of the contracting parties. The procedure for awarding a concession may be initiated on the basis of: 1. the initiative of the competent authority, 2. the initiative of the interested person and 3. the offer in the negotiated procedure. Before proposing a decision on initiating the concession award procedure, the competent authority consults and obtains opinions of bodies, public companies and other institutions responsible for issuing approvals, permits and consents required for the implementation of the concession, the opinion of the local self-government unit on whose territory the concession activity will be performed. The decision to initiate the concession award is made by the Government, ie the assembly of the local self-government unit, which is published in the Official Gazette of The Republic of Srpska.

The competent authority may devolop a study or require the bidder in the public invitation to develop a study that must contain the elements prescribed by the Policy Document. The competent authority prepares the tender documentation containing the public invitation for submission of bids whose content is determined by law, description of the subject of the concession, study, if developed, and instructions to bidders for drawing up tender, criteria for evaluation and assessment of bids, draft concession contract and others conditions that the bidder must meet depending on the subject of the concession. The Concessions Commission shall issue a decision on giving consent to the tender documentation within 30 days from the day of receipt of the complete application. The law also lists bidders who cannot submit a bid to the public call for the concession award, namely: a bidder against whom bankruptcy or liquidation proceedings have been initiated, a bidder or related economic entities with which the concession contract was terminated due to the concessionaire's fault, a bidder who was declared responsible for a criminal offense in the performance of a registered activity, a bidder who has unpaid tax obligations, in accordance with the relevant regulations and a bidder who has ceded the concession to a third party or financial organisation.

The initiative of the interested person shall take place in such a way that he submits to the competent authority a proposal for initiating the concession award procedure, provided that the initiative does not relate to the concession for which the competent authority initiated the concession award procedure. The Commission for Concessions of The Republic of Srpska is obliged to adopt the Instruction on Public Interest Assessment, which prescribes the conditions, criteria, elements and manner of assessing the existence of public interest in the initiative of the interested person.

Exceptionally, without conducting a public call prescribed by law, the concession may be awarded through a negotiated procedure, in the case of a) a bid of a public enterprise performing an activity of general interest, which is the subject of a concession due to which it was established, a concession may be awarded in the areas provided for by law; b) a bid of a legal entity that has performed exploration of mineral resources on the basis of a concession contract or approval for exploration, and whose total value of exploration works exceeds BAM 5,000.000; c)

implementation of concluded agreements of the Government, which refer to the realization of the subject of concession provided by the Law on Concessions; g) increase of the installed capacity of the plant for which it was not necessary to obtain a An annex to the concession contract may be concluded through a negotiated procedure in the case of: a) the concessionaire's bid to extend the term for which the concession was granted and b) bids of the concessionaire for the exploitation of determined reserves of mineral raw materials located outside the area where the concession was granted, and which form presents an inseparable whole with the mineral raw material which is the subject of the concession contract. The annex to the contract defines the conditions under which the concession contract is implemented.

The Government of The Republic of Srpska is responsible for granting concessions, except for concessions for communal activities, water supply, as well as construction, maintenance and use or reconstruction and modernization of communal activities, for which the assembly of the local self-government unit is competent. Notwithstanding the above, the Government of The Republic of Srpska may authorize a local self-government unit to award concessions determined by law (Article 8), which is an extremely important solution, which is in favor of improving decentralization. The concession contract between the concessionaire and the grantor is concluded for a period that cannot be longer than fifty years. The term of the concession contract is determined depending on: the subject of the concession, the time required for the return of the invested capital and the realization of the planned profit on the basis of the concession activity. The concessionaire is obliged to pay the grantor a concession fee in the amount and in the manner determined by the concession contract.

The concession fee is a mandatory element of the contract. It is of a monetary nature, and consists of: 1) a fee for the assigned right, which is paid once when concluding the concession contract, and 2) a concession fee for use (Article 29). Concession fee for use, depending on the subject of the concession, is expressed depending on the type of concession activity in monetary value: per unit of measure; percentage of annual income from concession activity; that is, per hectare for agricultural land. The concession fee for the assigned right is the revenue of the budget of The Republic of Srpska, ie the budget of the local self-government unit, depending on the competence for granting the concession. The concession fee for use is divided between the budget of The Republic of Srpska and the budget of the local self-government unit on whose territory the concession activity is performed in the proportion prescribed by the Law on Concession.

The concession contract, which is concluded in writing, regulates the mutual rights and obligations of the grantor and the concessionaire in relation to the subject of the awarded concession, in accordance with the award documentation, submitted bid and decision on selection of the most favorable bidder. Some authors, guided by the experience of legal systems from which they come, believe that in terms of mutual rights and obligations of the parties in the concession relationship are equal, and consider this relationship "horizontal", as opposed to "vertical" where the authority of public authority prevails. (Wettenhall 2003, 90). However, in the continental legal system of states whose norms in this area rely more on French law, this position on the equality of the parties in the concession contract should be conditionally understood. Namely, when the concessionaire is a private legal entity, it is clear that his basic motive is private interest (most often the realization of profit), while the interest of the grantor is the realization of some common good, public interest. Therefore, clauses are often included in concession contracts that the public party may request a modification of the contract, to the detriment of the concessionaire, and even its termination without the fault of the concessionaire, if required by the public interest. These are cases where the public interest in terminating the contract outweighs the public interest in maintaining the existing cohesion contract. (Thus, for example, the concession contract for the use of agricultural land that was in the interest of the local community is terminated, if the government estimates that it is in the state interest to build a highway route through that concession good.) Of course, this implies the right of the

concessionaire to compensation, but most often not the right to lost profits because the public interest is more dominant than the private one. The obligatory content of the concession contract is prescribed by law, it consists of a number of issues that must be agreed. Depending on the subject, it contains: 1) the subject of the concession, including the nature and scope of works to be performed and services to be provided by the concessionaire and the location where the concession activity will be performed, 2) conditions and manner of using the concession object, 3) concession period, 4) commencement of concession activity, 5) ownership rights over property related to concession activity, including rights over land on which the concession activity will be performed and definition of ownership relations upon termination of the contract, 6) property provided for use by the grantor, 7) the amount, deadlines and manner of payment, as well as the manner of changing the amount of concession fee for use, 8) the manner and deadlines of providing funds for financing concession activities and investment dynamics, 9) minimum quality standards, criteria and methods for determining prices and tariffs for end-users of services, 10) minimum technical standards to be applied in the protection of life 11) rehabilitation and reclamation of areas degraded by performing concession activities, k) right of supervision by the grantor, 12) scope and manner of reporting on fulfillment of contractual obligations, 13) right of grantor to approve project documentation, as well as contracts concluded by the concessionaire, especially with owners 14) type, amount and manner of providing a guarantee for the performance of the concession contract, as well as insurance policies that the concessionaire must maintain during the concession, 15) legal remedies in case of default of any of the contracting parties, 16) description for events considered to be changed circumstances and force majeure, as well as conditions for change or termination of the contract in case of their occurrence, 17) rights and obligations of the contracting parties regarding confidential information, 18) right to assign the concession contract and change the ownership structure of the concessionaire, 19) manner of amending the concession contract, 20) conditions for termination of the concession contract, 21) the manner of handing over real estate, devices and facilities to the grantor in the condition in which they must be handed over after the concession period, 22) the manner of regulating mutual relations in case of termination of the contract and 23) other elements relevant to the concession (Art. 33). Having in mind the award procedure, and the contracting procedure and the content of the contract, the attitudes of complexity but also incompleteness of public-private partnership contracts are confirmed, especially of concession contracts, which justify their subject and goals, but can also cause uncertainty in both contracts. parties, and to reduce the level of trust in the parties (Rufín and Santos 2012, 1634-1654).

The specificity of administrative contracts, which derives from their subject matter and connection to the public interest, is the possibility of unilateral termination by the public authority. The unilateral possibility of terminating an administrative contract is one of its most important features in the original model of an administrative contract, it is one of the basic elements of the legal regime that makes it special. The grantor may unilaterally terminate the contract in cases if: 1) the concessionaire does not perform or fails to perform the necessary actions within the agreed time or through its own fault does not start performing the concession activity within the agreed time, 2) The Concessionaire does not perform the concession activity in accordance with in the concession contract, except in case of unforeseen circumstances or force majeure, 3) the performance of the concession activity endangers the environment and human health or legally protected public goods, through permitted and prescribed standards, 4) the concessionaire does not provide public services in accordance with agreed standards, 5) the concessionaire fails to pay the concession fee three times in a row or pays it improperly, 6) the concessionaire transfers the concession contract, changes the ownership structure or disposes of property contrary to the provisions of this Law and 7) in other cases in accordance with the concession contract. The criteria on the basis of which the grantor determines the existence of reasons for termination of the concession contract are determined by the concession contract.

Prior to initiating the procedure of unilateral termination of the concession contract, the grantor is obliged to warn the concessionaire in writing and set a reasonable deadline for the execution of contractual obligations that are the reason for termination of the contract. If the concessionaire does not eliminate the reasons for termination of the contract within the deadline, the grantor terminates the concession contract. The inequality of the parties is, therefore, mitigated by the above provisions. The position of the other contracting party is protected by the obligation of the body to make a decision on the termination of the contract, which must be explained and against which an administrative dispute may be initiated. The concessionaire, on the other hand, may unilaterally terminate the contract in accordance with the provisions of the concession contract and the general rules of the law of obligations. In case of termination of the concession contract, the parties are entitled to compensation in accordance with the rules of the law of obligations.
The Law on Concessions also defines the institutional structure. Ministries whose scope includes the subject of the concession participate in this procedure, as well city mayors, the Attorney General's Office, public companies, other bodies and institutions, local assemblies and the Government. The Concessions Commission has a special role in the procedure of awarding concessions and controlling the performance of concession activities in accordance with the concession contract, as well as the termination of the contract. It is defined as a permanent and independent regulatory body with the status of a legal entity. It has five members who are prominent experts in the field of law, economics, technical and other relevant professions, appointed by the National Assembly, at the proposal of the Government, after a public competition, for a period of five years with the possibility of re-election.
The Concessions Commission performs numerous tasks, it has significant public powers, and its role is much more important and meaningful compared to a similar body in Serbia, which is only an advisory body formed by the Government. The Concessions Commission of The Republic of Srpska, within its competence, performs the following tasks: 1) prepares the Policy Document and proposes its adoption in the National Assembly, 2) monitors the execution of the Policy Document, 3) approves the economic feasibility study, 4) approves the documentation for public bidding, 5) gives a proposal of the decision on selection of the most favorable bidder and award of concession, 6) opens and evaluates the received bids according to the public invitation for award of concession, 7) gives consent to the proposal of concession contract and annex to concession contract, 8) approves terms and conditions of the standard contract for the provision of public services to users, 9) checks the entire work of the concessionaire, in accordance with the concession contract, including special continuous supply of services, quality of services, application of tariffs and other conditions of the contract, 10) decides on complaints of service users; regarding the amount of the fee and other conditions under which the concessionaire provides public services, if by a special law it is not within the competence of another body, 11) gives consent to the assignment of the concession contract and change of ownership structure in the concessionaire, 12) gives prior consent to establish a lien in favor of the financial organization, 13) keeps a register of concession contracts and 14) decides other requirements, in accordance with the competencies determined by the Law on Concessions.

3.3. Legal protection and dispute resolution

Legislation in BiH in public law contracts constituting some form of concession provides for the possibility that a participant in the procedure of selecting the most favorable bidder for a concession may file a complaint with the competent Concessions Commission, as a remonstrative remedy. No appeal is allowed against the decision of the Commission, as a specialized, independent regulatory body, but an administrative dispute may be initiated before the competent court, thus meeting the minimum standard of legal protection. The Law on Concessions of BiH determines the jurisdiction of the Court of BiH to conduct an administrative dispute against the

decisions of the Concessions Commission of BiH (Article 18). The Law on Concessions of The Republic of Srpska stipulates that the decision on the selection of the most favorable bidder is an administrative act (Articles 21 and 22), while the Rules of Procedure of the Concessions Commission of The Republic of Srpska stipulate that the Commission's decisions are final, that no appeal is allowed against them, but an administrative dispute may be initiated against them (Article 39). The provisions of the Law on General Administrative Procedure shall apply to the procedures carried out by the Concessions Commission within its competences, unless otherwise prescribed by laws of a given level. Having in mind the specifics of the case, it is certainly a matter of similar application, while a significant number of procedural issues are still regulated by the laws on concessions, which are not enough to regulate a wide range of different situations in practice in concessions. The grantor terminates the concession contract by a decision, and an administrative dispute may be initiated against it. For resolving disputes arising on the basis of concession contracts, the courts have territorial jurisdiction according to the seat of the public entity, if it is an entity concession. These provisions do not apply if the parties have agreed on the arbitral settlement of disputes arising from concession contracts.

The jurisdiction of its courts is exclusive to resolving disputes arising in connection with real estate concession contracts in The Republic of Srpska. The territorial jurisdiction of the court in disputes whose subject is real estate rights is regulated by the provisions of the Law on Civil Procedure. For resolving disputes arising from the exercise of other mutual rights and obligations, the grantor and the concessionaire may agree on the jurisdiction of domestic arbitration, and if the concessionaire is a foreign person, the jurisdiction of international arbitration. The contracting parties may agree to settle any disputes with the Commission Arbitration. If the contracting parties agree, the Concessions Commission may mediate in the peaceful settlement of disputes arising from the concession contract. The contracting parties are obliged to define extremely precisely the jurisdiction of the arbitration by the contract if they accept it or to accept the jurisdiction of the domestic court in all disputes arising from the concession contract.

Therefore, when it comes to decisions made by a public body in the procedure prior to the conclusion of the concession contract, positive law in BiH and The Republic of Srpska determines the competence of the administration and administrative procedure, both in their adoption and on complaints or appeals, except when special law regulates it differently. For decisions for which the law does not provide for the possibility of filing an appeal, the possibility of initiating an administrative dispute before the competent court is provided. When it comes to disputes related to concession contracts, the jurisdiction of courts of general jurisdiction has been determined, according to the rules of private law.

3.4. Critical review of individual solutions

In the current application of the Law on Concessions, certain shortcomings have been noticed, both in terms of substantive law and in terms of provisions concerning the procedure, as well as in terms of inconsistency of certain solutions contained in this and other laws. In its regular annual reports to the National Assembly, the Concessions Commission has repeatedly objected to the Law on Concessions. These remarks primarily refer to the institute of "public interest". The Commission justifiably emphasized the need for the public interest as a legal institution to play a key role in the system of awarding concessions, having in mind the subjects of concession law, as well as the goals of establishing concession relations. Namely, the Law on Concessions stipulates that the public interest is assessed only when making a decision on initiating the procedure of awarding a concession on the basis of the initiative of the interested person. The public interest should be the basic fact for the establishment of all modalities of concession relations. By regulating the procedure that precedes the decision to initiate the concession award procedure, which includes consulting a wider range of entities, later study development, but also the

assumption that government bodies ex officio take into account the public interest in all situations, in some way public interest is assumed to be determined. However, the Commission rightly considers that it is necessary to legally regulate the explicit obligation to determine the existence of public interest in the concession award procedure for all procedures, that the act of the competent authority on determining the public interest in all concession award modalities must be constitutive for each individual case of concession award, regardless of whether the concession award procedure is initiated by the competent authority, at the initiative of the interested person, or in a negotiated procedure. Concession, as a form of public-private partnership, by its nature implies that public and private interest, although placed in partnership, still remain in latent competition. It is not inconceivable (nor rare) situations when it is not possible to realize both interests at the same time or in parallel, so the public law interest, having in mind the subject of the concession, should be considered a first-class interest. It is rightly pointed out that the need to ensure the public interest is a parameter for the legal and economic preparation of conditions and procedures for the selection of the most favorable bid for the concession award. This is done by defining the criteria in the process of selecting the most favorable bid of a private partner, and the second aspect (which depends on the first) is to provide elements in the contract for adequate control of public interest (Ciric and Cvetkovic 2016, 147).

The main goal of passing the existing Law was a more efficient and functional procedure for awarding and implementing concessions (Malbasic and Kovacevic 2013, 86). In this regard, somewhat hybrid solutions were once approached. The law envisages the possibility of assigning a concession contract and changing the ownership structure in a percentage of more than 50% with the consent of the Concessions Commission (Articles 40-41). The procedure for ceding a concession, ie changing the ownership structure, is regulated in more detail by a special Rulebook on the procedure for ceding a concession contract and changing the ownership structure of a concessionaire, adopted by the Concessions Commission. This Rulebook regulates the issue of protection of the legal interest of financial organizations as creditors in concession relations, which is achieved by submitting a request for giving consent to assign a concession contract on its own behalf, and for the account of the acquirer when the Concessionaire fails to fulfill its obligations to the financial organization on the basis of the concession project loan agreement. In this way, the right of active legitimacy is given to financial organizations to initiate the procedure for assigning a concession contract to a new concessionaire, but not to acquire the right of concession on the basis of assigning a concession contract. The Concessions Commission states in its reports that Article 40 of the Law on Concessions, which defines the assignment of concession contracts, in the part related to the assignment of contracts to financial organizations, is in conflict with laws governing this area (Law on Banks, Law on Microcredit organizations, the Law on Savings and Loan Organizations, etc.). Namely, the mentioned laws regulate the activities of financial organizations that are exclusively of a financial nature. We believe that the legal decision on the assignment of concession contracts, the application of which is elaborated in the Rulebook, calls into question the proclaimed principles of concessions, such as the principles of transparency, non-discrimination, market competition, equal treatment and more. Giving opportunities to third parties to obtain a concession without the standard procedure prescribed by the Law on Concessions cannot be justified only by economic reasons, especially when it comes to the possibility of a financial organization as a creditor to propose a third party to take over the concession. Such legal solutions can produce more harm than good and are contrary to modern principles on which concessions are based in developed countries, and they should be removed from the legislation or significantly revised.

In its reports to the National Assembly of The Republic of Srpska, the Concessions Commission also states specific problems it encounters in its work, including the lack of normative regulations. First of all, it is about the lack of legal provisions that would regulate the status, organization, competence and other issues related to regulatory bodies in The Republic of Srpska.

Due to the non-regulation of the status of these bodies, there are numerous doubts regarding their functioning, internal organization, status of Commission members and employees, as well as relations with other public entities and institutions of The Republic of Srpska. Also, the problem of lack of procedural regulations that would be applied in the procedure of opening bids and selecting the most favorable bidder in the public call for concessions is highlighted. Namely, the Law on Concessions of The Republic of Srpska does not, as is the case with the Law on Concessions of BiH, provide for the procedure of awarding concessions by applying the Law on Public Procurement, which regulates all phases of the procedure, thus eliminating possible misunderstandings and ambiguities. The Law on Concessions of the Republic of Srpska only stipulates that the Commission, in performing tasks within its competence, resolves requests in accordance with the regulations on general administrative procedure, as well as that decisions and other acts issued by the Concessions Commission in administrative procedure are final and that an administrative dispute may be instituted against them before the competent court (Art. 57). The Law on General Administrative Procedure is not suitable for conducting a public invitation procedure due to a number of material and procedural restrictions, because this procedure is not envisaged for the public bidding procedure, and is therefore of limited scope. Another problem is the lack of two-level administrative procedure according to the decisions of the Concessions Commission, which lacks administrative control of administrative acts of the Commission and the possibility of judicial control only if initiated by an authorized entity, which significantly reduces the possibility of correcting errors and bad practices in the work of the Commission. In addition, given the proclaimed independence, the nature of the work performed, the need to reduce the political approach in the work itself, and provide a higher level of expertise and protection of the public interest, there is an opinion that independent regulators should have a sufficient degree of independence in passing bylaws and in financing its work, so that this independence can be maintained. Namely, the Concessions Commission adopts all important bylaws with the consent of the Government of the Republic of Srpska (Statute, Rulebook on internal organization and systematization of jobs, Rulebook on salaries and compensations of members and other employees, Rulebook on assignment of concession contract and change of ownership structure of concessionaire, Rulebook on the content and manner of keeping the register of concession contracts and the Instruction on public interest assessment). The budget of the Commission is not adopted by the National Assembly as is the case with similar regulatory bodies (eg the Energy Regulatory Commission), but the funds are disposed of through the competent government body, which is in some way inconsistent with the decision according to which the election of its members is made by the National Assembly, to which it is responsible for its work. The financial independence of the regulatory body (which could, for example, be financed from the funds collected from the concession fee) is one of the essential preconditions for impartial and objective decision-making. Insufficient staff training (only 5 members of the Commission and several employees, hundreds of concessionaires) and at the same time insufficient financial resources for hiring experts or authorized institutions when assessing the justification of more complex requirements and studies of justification of concessions, make it much more difficult to work and make quality decisions. This is one, but not the most important reason (because there are subjective reasons in the organization of the Commission itself), inconsistency of bylaws with the current Law on Concessions, as well as failure to adopt a new Policy Document, which should be adopted by the National Assembly every three years and the last one was passed in 2006.

CONCLUSION

In The Republic of Srpska, there is a relatively complete system of concessions in terms of normative solutions. These solutions are based on the standard concept of long-term public-private partnership, with the necessary preconditions for the protection of the public interest in it. The institutionalization of a special regulatory body - the Concessions Commission, with significant public powers, has reduced the direct political influence on the normative level, and enabled expert control during the procedure. However, the existing solutions contain significant shortcomings that should be remedied by legal interventions. Also, we consider it necessary to timely adopt planning documents, without which the policy in the field of concessions can be opposed to the goals set by law. Particularly problematic is the challenge to the competence of The Republic of Srpska to manage natural resources on its territory through concessions, which shifts the entire concept of concessions in BiH in the field of law and economy to the field of political abuse, even when legal means are used.

The concession contract has characteristics that determine their legal nature. Namely, one contracting entity is always a public body in this case the Government, ie a unit of local self-government, while the other entity can also be a public body, but most often a private entity. The subject of the concession are goods of general interest, natural resources, activities of general interest, ie public services. The law regulates the award procedure, as well as numerous other issues related to them. The law prescribes the obligation to adopt a planning act that would frame the policy of awarding concessions, whose general objectives are determined by law.

In these contracts, the public law body, according to legal provisions, has a privileged position. This is manifested in determining the terms of the contract, choosing the content of the public invitation, passing an administrative act that precedes the conclusion of the contract, but also certain rights regarding the termination of the contract. The extraordinary clause represents the possibility of unilateral amendment of the contract, as well as unilateral termination of the contract by the public authority, if required by the public interest. The main goal of the contract is to protect the public interest. With regard to its legal regulation, there are certain shortcomings, which should be taken into account, because it is not uncommon for the public interest not to be the basic guiding criterion for the use of the public good, in accordance with the law.

We can conclude that concession contracts, especially concessions that have as their object the performance of a public service, contain elements of an administrative contract in the legislation of Bosnia and Herzegovina and The Republic of Srpska. However, the actual jurisdiction of courts of general jurisdiction to resolve disputes between contracting parties, although present in comparative legislation, is not characteristic of the classical theory of administrative contract, which provides for the jurisdiction of specialized administrative courts for this type of dispute. Unfortunately, the positive law of The Republic of Srpska still does not know the concept of administrative contract, although it is latently present in domestic legislation, and in most countries in the region it is explicitly introduced into the legal system. Explicit standardization of the administrative contract in domestic law would significantly help to better understand the legal nature of the concession contract and its better normative regulation.

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