

Draft Law for Amending and Supplementing Government Emergency Ordinance no. 57/2019 on the Administrative Code

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Introduction

Developers in the real estate and energy sectors will be able to conclude superficies agreements concerning the assets belonging to the private property of administrative-territorial units, based on a draft law registered with the Senate under no. B156/2025 on 23 April 2025 (the "**Draft Law**").

The Draft Law proposes amendments and supplements to Government Emergency Ordinance no. 57/2019 on the Administrative Code (the "**Administrative Code**"), aiming to valorize the assets that make the object matter of the private property of administrative-territorial units by expressly introducing the possibility of establishing a superficies right over such assets within the Administrative Code. The initiative intends to put an end to a non-uniform practice regarding the methods of valorizing the private property rights of the state and administrative-territorial units.

The superficies right is regulated by Law no. 287 of 17 July 2009 on the Civil Code (the "**Civil Code**"), as right *in rem* that grants its beneficiary the ability to own or erect a construction on another's land, above or below the ground, for which the beneficiary acquires a right of use. Based on such a superficies right, developers will be able to erect buildings, subsequently obtaining ownership rights over them, as well as usage rights over the land.

Background

In the context of the current legislation, the Administrative Code stipulates, as a basic principle, that assets belonging to the private domain of the state and of the administrative-territorial units are in the civil circuit and are subject to the rules provided by the Civil Code, unless otherwise stipulated by law. At first glance, it could be argued that, on the basis of this provision, it is possible to establish a right *in rem* - in particular a superficies right - over certain lands that constitute the private domain of the state or of the administrative-territorial units.

This simplistic interpretation has recently been followed by some local public authorities, which have passed local council resolutions approving the establishment of superficies rights, for a fee, over lands belonging to the private domain of the administrative-territorial unit, in favor of the owners of the buildings located on

such land. However, it should be noted that these resolutions were adopted despite the fact that, in the context of the current legislation, the Administrative Code does not grant local councils the power to decide on the establishment of such rights. Accordingly, such resolutions are liable to be annulled in court, due to the absence of an appropriate legal basis [a fact recently confirmed by a court judgment pronounced on 09.01.2025 by the Constanța Court].

However, such an interpretation is not frequently encountered in practice and has generated extensive doctrinal debate. The majority opinion is that such an interpretation cannot be accepted, including but not limited to Art. 362 para. (1) of the Administrative Code, which expressly provides that the exercise of private property rights of the state and administrative-territorial units is carried out through administration, concession, lease and free use, thus excluding the real estate related rights (*i.e.*, rights in rem) regulated by the Civil Code, which apply to the private property of individuals and legal entities, including the right of superficies.

Consequently, given the predominant position adopted by the legal doctrine, which excludes the possibility of establishing a right of superficies over the assets belonging to the private property of the state and the administrative-territorial units, the most common solution encountered in practice for the valorization of such assets remains the concession agreement, defined as the act by which the grantor conveys to the concessionaire, for a maximum period of 49 years, in exchange for a royalty, the right and obligation to exploit the asset, service or activity, at the latter's risk and liability.

Provisions of the Draft Law

The Draft Law provides for specific amendments to the Administrative Code, as follows:

i. Amendment to Article 362 paragraph (1) of the Administrative Code

The main new element of the Draft Law consists in the express inclusion of the superficies right as a way of exercising the private property rights of the state and administrative-territorial units, in addition to the already regulated forms - concession, administration, lease and free use - by amending Art. 362 para. (1) of the Administrative Code. This addition aims to extend the existing regulatory framework, offering a clear and additional option for the valorization of the assets.

ii. Amendment to Article 108 letter e) of the Administrative Code

Currently, Article 108 letter e) of the Administrative Code states that it is within the competence of local and county councils to decide on the valorization of assets belonging to the private county and local domain by "other means provided by law", an ambiguous wording that may lead to inconsistencies.

The Draft Law proposes to amend this wording by giving (local and county) councils the power to decide that the assets belonging to the private local and county domain can be "*valorized by establishing a superficies right in favor of persons who have acquired ownership of a building erected on the private domain of the administrative-territorial unit, without also having a right of use over the land*".

iii. Amendment to Article 129 paragraph (6) letter b) of the Administrative Code

The Draft Law proposes extending the competencies of local councils regarding the administration of the private domain of communes, towns, and municipalities by expressly including their competence to establish superficies rights. Thus, local councils will, for the first time, have a clear legal basis for granting such rights in favor of interested individuals and legal entities.

However, we note that the Draft Law does not extend the competences of the county councils with regard to the establishment of such a right of superficies, although from the explanatory memorandum and the content of the regulations we believe that the intention of the initiators was that this right could be established with regard to the assets that constitute the private property of the administrative-territorial unit - a notion which, according to the Administrative Code, includes the county. In the case of the private domain of communes, towns and municipalities, the Draft Law clearly regulates the competence of local councils but fails to provide a corresponding provision for the private property of counties. Thus, we wonder whether the initiators had in mind only the assets belonging to the private domain of the basic administrative-territorial units (commune and city) or whether they simply overlooked the need to also extend the competences of the county councils.

iv. Introduction of paragraph 4 to Article 362 of the Administrative Code

With regard to the legal framework applicable to the newly introduced right of superficies, the Draft Law expressly provides for the application of the general legal regime governing this right under the Civil Code. Thus, its establishment and exercise will be carried out in accordance with the provisions and procedure of general law, unlike the other methods of valorization of the assets belonging to the private property of the state or of administrative-territorial units, which, according to para. 3 of the same article, mainly follow the legal regime applicable to assets belonging to the public domain. Therefore, it can be seen that the initiators of the Draft Law, seeking to simplify as much as possible the procedures for optimizing the exploitation of the private domain and to create a balance between the interests of local authorities versus the private business environment, deviated from the general rule according to which the valorization of the assets belonging to the private property of the state and of the administrative-territorial units is carried out through public tender, opting instead for a more flexible regime in the case of the superficies right.

Conclusion

The Draft Law has the potential to broaden the regulatory framework for the valorization of assets belonging to the private property of the state and the administrative-territorial units, by expressly introducing the right of superficies as an additional legal instrument, with the aim of stimulating investments in strategic areas. However, the proposed provisions are not without criticism, particularly with regard to the direct application of the provisions of the Civil Code, with the exclusion of the public tender procedure - an approach that may give rise to risks of abuse and doctrinal debate. Moreover, the omission of an explicit provision regarding the competence of county councils risks compromising the coherence and uniform applicability of the new provisions.

The Real Estate team at KPMG Legal – Toncescu și Asociații SPRL is co-led by Alexandru Mocanescu, who brings a wealth of expertise and strategic insight to the practice, and Ioana Grigoriu, who has over 16 years of professional experience in a broad range of real estate and M&A legal matters.

Together with them, the real estate team includes five additional lawyers, who contribute deep knowledge and experience, ensuring client expectations are consistently met with confidence, timeliness, and reliability. The team operates with a strong foundation of independence, a commitment to high-quality legal work, and a clear client-oriented focus.