PUBLIC PROCUREMENT IN THE LIGHT OF THE NEW LEGISLATIVE CHANGES

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Abstract

The package of laws on public procurement and concessions of Romania which entered into force in May 2016 came with many new elements. Therefore, in this study, we aim to present the new conception of the lawmaker towards this subject. Not least, we will analyze the role of the National Council for Solving Complaints in the procedure for the award of public procurement agreements and other elements in what concerns the complaints in the field of public procurement.

Keywords: *National Council for Solving Complaints, public procurement, remedies, law, aggrieved party.*

1. Introduction

In May 2016 a new package of laws on public procurement and concessions was published in the Official Journal of Romania, as follows: Law no. 98/2016 on public procurement[1]; Law no. 99/2016 on sectorial procurement[2]; Law no. 100/2016 on the concessions of works and services[3]; Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectorial agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints[4].

Following the adoption of this package of laws in the field of public procurement, Government Emergency Ordinance no. 34/2006 on the award of public procurement agreements, public works concession agreements and service concession agreements was repealed[5]. Currently, there is not a case law established based on these legislative changes yet. In the current historical context in which the humanity escalates a new stage of civilization, thus embracing the „unity in diversity", the role of the general principles of law, a legal expression of the fundamental relations of the society, is amplified[6].

On another occasion we showed that, at European level, currently, there are tendencies of unification of the legislation in this field, three Directives being adopted, the Member States having to amend the legislation so that to ensure their implementation at national level[7]:

- Directive 2014/23/EU on the award of concession contracts[8];
- Directive 2014/24/EU on public procurement[9];
- Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors[10].

The primacy of the European Union law[11] requires to the national courts, in particular, to guarantee to the litigants the rights which arise from its directives, when the national law precludes the fulfillment thereof[12]. As we have recently shown, the European Union law embraces the theory of monism, namely the existence of a single legal order comprising the international law and the domestic law in an unitary system[13]. Every state has enacted its law according to own socio-political requirements, traditions and values proclaimed by it[14]. Therefore, no state has a legislation

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[1] Law no. 98/2016 on public procurement, published in the Official Journal no. 390/2016.

[2] Law no. 99/2016 on sectorial procurement, published in the Official Journal no. 391/2016.

[3] Law no. 100/2016 on the concession of works and services, published in the Official Journal no. 392/2016.

[4] Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectoral agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints, published in the Official Journal no. 393/2016.

[5] Government Emergency Ordinance no. 34/2006 on the award of public procurement agreements, public works concession agreements and service concession agreements, published in the Official Journal no. 418/2006- (currently *repealed*).

[6] Elena Anghel, *The importance of principles in the present context of law recodifying*, in proceeding CKS e-Book 2015, p. 753-762

[7] Elena Emilia Ștefan, *Drept administrativ Partea a II-a.Curs*, Universul Juridic Publishing House, Bucharest, 2016, p.63.

[8] Available online at: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0023, accessed on February 1st, 2016.

[9] Available online at: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32014L0024, accessed on February 1st, 2016.

[10] Available online at: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0025, accessed on February 1st, 2016.

[11] In what concerns the primacy of EU law see Roxana-Mariana Popescu, Specificul aplicării prioritare a dreptului comunitar european în dreptul intern, în raport cu aplicarea prioritară a dreptului internațional, Revista Română de Drept Comunitar, no. 3/2005, pag. 11-21.

[12] Dumitru-Daniel Șerban, *Achizițiile publice. Jurisprudența Curții Europene de Justiție*, Hamangiu Publishing House, Bucharest, 2011, p. 4. The failure to comply with the EU legal regulations results in the initiation of the infringement procedure in this respect, see Roxana-Mariana Popescu, *General aspects of the infringement procedure,* Lex et Scientia, International Journal, no.2/2010, Pro Universitaria Publishing House, pag. 59-67.

[13] Laura Cristiana Spătaru Negură, *Dreptul Uniunii Europene- o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p.190.

[14] See Elena Anghel, *Constant aspects of law*, in proceedings CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011, p. 594.

that is valid for all times[15], the national lawmaker being always focused on social life and on discovering the needs of the society, thus proceeding with the amendment of the legislative framework.

In this context, we mention that, in what concerns national law, Law no. 554/2004 introduces as a ground for revision, in art. 21 para.(2): the ruling of final and irrevocable judgments by violating the principle of precedence of Community law (...)[16]. As the doctrine showed, the new ground for revision (...) was designed as a domestic remedy, in case of final and irrevocable judgments, pronounced by means of the violation of the principle of precedence of the European Union law, regulated by art. 148 para. (2) of the Constitution of Romania, for the purpose of fulfilling the general obligation incumbent on the Member States under art. 10 of the Treaty[17] establishing the European Community[18].

2. Content

2.1. Public procurement concept

A number of vulnerabilities of the public procurement system of Romania, both legislative and practical, was found in a project[19], and we hereby list selectively a few of them: incomplete and unstable legislation marked by ambiguity, non-transparent ministry orders, the lack of sanctions for public authorities, limited practice regarding appeals due to high costs and lack of confidence in the effectiveness of the appeals. In the last two decades, the case law of the Court of Justice and the European Union Tribunal in the field of public procurement proved to be extremely rich, more than 200 specific cases being registered on the dockets of the two courts[20].

In what concerns public procurement and concessions, we must provide the following: the concessions of goods are still subject to Government Emergency Ordinance no. 54/2006 on the regime of the agreements of public property goods concession and the concessions of services[21], works, sectoral procurement are subject to the package of laws of 2016. A summary of the new package of laws has been recently published on A.N.A.P.[22] (the National Agency for Public Procurement) official site. A.N.A.P. was established by Government Emergency Ordinance no. 13/2015[23].

The concept of public procurement is defined by art.3 para.(1) of Law no. 98/2016 on classic public procurement, as follows: "the procurement of works, products or services under a public procurement agreement by one or more contracting authorities from economic operators designated by them, regardless if the works, products or services are intended for the fulfillment of a public interest".

According to art. 7 of the law, the contracting authority shall be entitled to purchase directly products or services if the estimated value of the procurement, VAT excluded, is less than RON 132,519, respectively works, if the estimated value of the procurement, VAT excluded, is less than RON 441,730.

Throughout the application of the award procedure, the contracting entity shall be bound to take all the measures in order to prevent and to identify conflict of interest situations, in order to avoid distortion of competition and to ensure equal treatment for all economic operators.

Law no. 98/2016 on public procurement regulates the following procedures for the award of public procurement agreement: open tendering, restricted tendering, competitive negotiation, competitive dialogue, partnership for innovation, negotiation without prior publication, design contest, simplified procedure, procedure applicable in case of social services and other specific services: *open tendering*; *restricted tendering*; *competitive negotiation; competitive dialogue*; *Partnership for innovation*; *Negotiation without prior publication; Design contest*. Furthermore, the law also refers to the *procedure applicable in case of social services and other specific services* as well as to the *simplified procedure* which is initiated by publishing a simplified contract notice in SEAP, accompanied by the relating award documentation.

The new elements are, among others, the right of the contracting authority to resort to the award of public procurement agreement in case of division into lots, provided that this information is included in the procurement documents; the awarding criteria, in order to establish the most advantageous offer, are the

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[15] Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, in proceedings CKS-eBook 2014, Pro Universitaria Publishing House, Bucharest, 2014, p. 354.

[16] Law no. 554/2004 of the contentious administrative, published in the Official Journal no. 1154/2004 (latest amendment by Law no. 138/2014 for the amendment and supplementation of Law no. 134/2010 on the Code of civil procedure, as well as for the amendment and supplementation of related normative acts, published in the Official Journal no.753/2014).

[17] In what concerns the Treaty on European Union, see Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene,* Universul Juridic Publishing House, Bucharest, 2011, p. 62-63.

[18] Gabriela Bogasiu*, Law of the contentious administrative,* edition III, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2015, p.545.

[19] https://www.transparency.org.ro/proiecte/proiecte_incheiate/2010/proiect_3/Riscuri%20de%20coruptie%20in%20achizitii%20publice.pdf

[20] Dumitru- Daniel Șerban*, Achizițiile publice. Jurisprudența Curții Europene de Justiție*, Hamangiu Publishing House, Bucharest, 2011, p. 1

[21] For further details on the concession of public property goods, see Marta Claudia Cliza*, Drept administrativ, Partea a II-a,* ProUniversitaria Publishing House, Bucharest, 2011, p.208

[22] http://anap.gov.ro/web/wp-content/uploads/2016/01/0-Informatii-principale-pachet-legi-modificat.pdf, accessed on January 31st 2017.

[23] Government Emergency Ordinance no. 13/2015 on the establishment, organization and functioning of the National Agency for Public Procurement, published in the Official Journal no. 362/2015.

following: lowest price, lowest cost, best value for money, best value for cost.

The concept of ESPD was introduced – the European Single Procurement Document which refers to the fact that the updated declaration on own risk, as preliminary evidence, instead of certificates issued by public authorities or third parties certifies that the economic operator meets the following conditions:

a) He/she is not in any of the exclusion situations (...)
b) He/she fulfills the capacity criteria, as requested by the contracting authority
c) If the case may be, he/she fulfills the selection criteria established by the contracting authority, according to the provisions of this law.

In what concerns sectoral procurement, Law no. 99/2016 defines it as follows: "the procurement of works, products or services under a sectoral agreement, by one or more contracting authorities from economic operators designated by them, provided that the purchased works, products or services are intended for the performance of one of the relevant activities: gas and thermal energy, electric power, water, transport services, ports and airports, postal services, extraction of oil and natural gas – exploration and extraction of coal or other solid fuels".

2.2. National Council for Solving Complaints

Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectoral agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints, regulates matters related to the membership of the Council, status of the personnel of the Council, complaints settlement procedure, the remedy against the decisions of the Council etc.

The National Council for Solving Complaints is an independent body with administrative – jurisdictional activity and legal personality and operates according to Law no. 101/2016. The Council has a web page which can be accessed[24] and where we can find information such as: activity reports, complaints submission form, decisions etc.

The National Council for Solving Complaints has 36 members, selected by competition and appointed by the decision of the Prime Minister. The members of the Council are special status public official called: *counselors for solving complaints in the field of public procurement.*

The new law introduces the obligation of the aggrieved party to deliver a prior notification, before the submission of the complaint. Under the penalty of rejection the complaint as inadmissible, which can be claimed ex officio, before resorting to the N.C.S.C. or to the court of law, the party which deems itself aggrieved shall be bound to notify the contracting authority on the request of remedy in full or in part of the alleged violation of the legislation on public procurement or concessions within 10 days or 5 days.

2.3. The aggrieved party concept

Further on, we will clarify the concept of aggrieved party, according to the new legislation in the filed of public procurement

Therefore, the concept of aggrieved party under this law is defined as follows: "Any person who considers himself/herself aggrieved in his/her right or legitimate interest by an act of a contracting authority or by the failure to solve a request within the legal deadline can claim the annulment of the act, the obligation of the contracting authority to issue an act or to adopt remedy measures, the recognition of the claimed right or legitimate interest, by administrative jurisdictional or judiciary means, according to the provisions of this law".

On the other hand, art. 52 para.1) of the Constitution establishes the fundamental right of any person aggrieved in his/her legitimate rights or interests by a public authority, by means of an administrative act or by the failure of a public authority to solve his/her request within the legal deadline, shall be entitled to the acknowledgement of his/her claimed right or legitimate interest, the annulment of the act and settlement of the damage, a right which represents the guarantee for citizens' protection against public authorities abuses and for free access to justice[25].

Free access to justice is established by art. 21 of the Constitution and consists in that every person is entitled to bring cases before the law for the defense of his/her legitimate rights, freedoms and interests[26].

Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements, sectoral agreements and of works concession agreements and service concession agreements, and for the organization and functioning of the National Council for Solving Complaints defines in art. 3 para.(1) letter f) the meaning of aggrieved party: "any economic operator who fulfill the following conditions:

- has or had an interest in connection with the award procedure;
- suffered, suffers or is likely to suffer damage as consequence of an act of the contracting authority, likely to cause legal effects or, as a consequence of the failure to solve within the legal deadline a request on the award procedure". Therefore, the concept of aggrieved party has a broader meaning in the sense of the new package of laws on public procurement compared to art. 52 of the Constitution.

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[24] http://www.cnsc.ro/, accessed on January 31st 2017.
[25] Decision no.168/2011 of the Constitutional Court, published in the Official Journal no. 261/2011.
[26] Mihai Bădescu, *Drept constituţional şi instituţii politice*, second edition revised and supplemented, V.I.S.Print, Bucharest, 2002, p.237.

2.4. The law applicable to litigations in the field of public procurement

Hereinafter, we will analyze if the provisions of Law no. 554/2004 of the contentious administrative or of Law no. 101/2016 on remedies and appeals concerning the award of public procurement agreements (...) are applicable in what concerns litigations which occur in public procurement procedure.

In the field of public procurement, as a remedy measure, by way of derogation from art. 1 para.(6) of Law no. 554/2004, the contracting authority can revoke / cancel own acts or the entire award procedure following the receipt of a notification the authority finds substantiated[27].

In what concerns the means chosen for complaints, Law no. 101/2016 establishes the alternative jurisdiction, the aggrieved party being allowed to choose the administrative-jurisdictional means, respectively by resorting to the N.C.S.C. or the judiciary means, by resorting to the tribunal, the division of the contentious administrative and fiscal. In this case it is easy to note that this is an alternative jurisdiction.

The difference between the two options of the aggrieved person is that, in case of the judiciary complaint, the applicant shall be bound to pay a stamp duty, unlike the other option, where no fee has to be paid. According to the Constitution, art. 21 par.(4), administrative special jurisdiction is optional and free of charge, excluding the administrative appeals28. No constitutional provision prohibits the legal establishment of a prior administrative procedure, without jurisdictional nature, such as graceful or hierarchical administrative appeal procedure[29].

Given that Law no. 101/2016 is a law dedicated to complaints and appeals in the field of public procurement, the possibility of aggrieved parties to resort to court actions brought against the acts of the contracting authorities in this field is removed under Law no. 554/2004, this special law of remedies derogates from[30].

The fulfillment of the law depends on whether it is accepted and assumed as a value and a rule by the members of the society. In this regard, the understanding of the fulfillment of the law is an act of assessment and search of the justice and of the other acknowledged values [31].

3. Conclusions

As the title of this study is called, we hereby analyzed a large bibliographic material in order to identify the new legislative elements of the public procurement field. If before 2016 there was a single normative act, respectively a Government Ordinance, nowadays, we have a package of laws applicable to public procurement procedures and concessions.

Although the public procurement legislation was harmonized with the European legislation, according to an official announcement, in 2016, a large number of fraud cases were found in this field[32]. Therefore, the Romanian Police declared that, in 2016, by means of the Directorate for Investigation of Economic Crimes, after checking the lawfulness of the conclusion and performance of public procurement agreements, they filed 946 criminal cases. The damage caused to the state budget, according to the respective announcement, by illegal performance of public procurement agreements, amounted to more than 5 billion RON, and for the recovery of such amount precautionary measures were ordered amounting to 1.7 billion RON.

Not least, a great competition[33] is noted between the economic operators participating in public procurement procedure.

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[27] Dumitru Daniel Șerban, *Noua legislație privind achizițiile publice*, Hamangiu Publishing House, Bucharest, 2016, p. 49.

[28] Decision no. 478/2004 of the Constitutional Court, published in the Official Journal no. 69/2005, Toader Tudorel, *Constituția României reflectată în jurisprudența constituțională*, Hamangiu Publishing House, Bucharest, 2011, p. 72.

[29] Decision no. 670/2005 of the Constitutional Court, published in the Official Journal no.77/2006, Toader Tudorel, *op.cit.*, 2011, p.72.

[30] Dumitru Daniel Șerban, *Noua legislație privind achizițiile publice,* Hamangiu Publishing House, Bucharest, 2016, p.35.

[31] Elena Anghel, *Values and valorization*, in LESIJ 2/2015; p. 103-113.

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[33] For further details on the concept of competition, see Laura Lazăr, *Abuzul de poziție dominantă. Evoluții și perspective în dreptul european și național al concurenței*, C.H.Beck Publishing House, Bucharest, 2013, 272 p.

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