Exclusion from the Procedure for the Award of the Public Procurement Contracts of the Candidate/Tenderer Convicted/Investigated for Committing an Offence

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Abstract: Law no. 98/2016 on public procurement provides in Chapter IV entitled Organization and conduct of the award procedure - Section 6 Qualification and selection criteria – the grounds for the exclusion of the candidate tenderer (paragraph 2). Some of these grounds may be found in the old regulation, but others take into consideration legal situations not covered by the old legislator as a basis for exclusion. These situations have already generated different ways of interpretation in practice, a circumstance that justifies the opportunity and usefulness of this approach. It should be noted that not all the reasons for exclusion shall be subject of this analysis; the content of Paragraph 2 of Section 6 of Law 98/2016 takes into account only the reasons relating to the commission or the alleged commission by the economic operator involved in the procedure of an offense belonging to those expressly mentioned in Art. 164 par. (1) letters a) - g).

Keywords: public procurement; grounds for exclusion; investigation judicial procedure; foreseeability of the law; presumption of innocence

Regulation. Cases. Rule of Exclusion. Exceptions

Referring to the content of art. 164 and art. 167 of Law 98/2016[2], we find that the legislator regulated the grounds for exclusion for the purpose of determining the

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[2] Published in the Official Gazette No. 390 of 23 May 2016, as amended on 28 June 2017, (Official Gazette 492 of 28 June 2017). The law transposes the Directive 2014/24/EU on public procurement into the national legislation and repeals the Directive 2004/18/EC. The law is part of a legislative package transposing the new European legislation in the field of public procurement, which includes along with this normative act and Law no. 99/2016 on sectorial acquisitions (Law No 99/2016), Law no. 100/2016 on concession of works and concession of services, as well as Law no. 101/2016 on remedies and appeals concerning the award of public procurement contracts, sectorial contracts and concession contracts, and for the organization and functioning of the National Council for Solving Complaints, normative acts that have replaced the legislative framework of public procurement.

economic operator's conduct of a criminal nature[1] from the perspective of two de facto and de jure circumstances, namely:

I. The existence of a final judgment of conviction imposed on the economic operator for the offenses expressly listed (Article 164 (1) (a) to (g)[2] and (2) of Law 98/2016).

II. The existence of a judicial investigation procedure in connection with the commission of one/some of the facts provided in art. 164 par. (1), an ongoing investigation not finalized by a final conviction (Article 167(1), (3) and (4) of Law 98/2016).

The Existence of a Final Judgment of Conviction

I. As regards the first assumption, the text is imperative by establishing the obligation of contracting authority to exclude from the award procedure of the public procurement/framework agreement any economic operator found, after the analysis of the information and documents submitted by the contracting authority

[1] For the old regulation, see art. 180-181 of Government Emergency Ordinance 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts.

[2] According to art. 164 par. (1) of the Law no. 98/2016, letter a) - g), the offenses are as follows:
a) the constitution of an organized criminal group, provided by art. 367 of the Law no. 286/2009 on the Criminal Code, as subsequently amended and supplemented, or by the corresponding provisions of the criminal law of the state where the economic operator has been convicted;
b) the offenses of corruption provided by art. 289-294 of the Law no. 286/2009, as subsequently amended and supplemented, and the offences assimilated to the corruption offenses referred to in art. 10-13 of the Law no. 78/2000 on preventing, discovering and sanctioning the corruption offences, as subsequently amended and supplemented, or by the corresponding provisions of the criminal law of the state in which the economic operator was convicted;
c) offenses against the financial interests of the European Union, provided by art. 181-185 of Law no. 78/2000, subsequent amendments or additions, or the corresponding provisions of the criminal law of the State in which the economic operator was convicted;
d) acts of terrorism provided by art. 32-35 and art. 37-38 of Law no. 535/2004 on the prevention and combating of terrorism, with the subsequent amendments or completions, or by the corresponding provisions of the criminal law of the state in which the economic operator was convicted;
e) money laundering, provided by art. 29 of the Law no. 656/2002 on preventing and sanctioning of money laundering, and instituting measures for preventing and fighting against financing of terrorism, republished, with subsequent modifications, or the financing of terrorism, provided by art. 36 of the Law no. 535/2004, as subsequently amended and supplemented, or by the corresponding provisions of the criminal law of the state where the economic operator was convicted;
f) trafficking and exploitation of vulnerable persons, provided by art. 209-217 of the Law no. 286/2009, as subsequently amended or supplemented, or by the corresponding provisions of the criminal law of the State where the economic operator was convicted;
g) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests of 27 November 1995.

or by any other way, that it was convicted by a final judgment of a court for committing the offenses set forth in subparagraph (a) to (g) of the same Article...[1] (Article 164(1) of Law 98/2016).

However, the law provides exceptions to this rule, as follows:

A. In exceptional cases, the contracting authority has the right not to exclude from the awarding procedure an economic operator covered by one of the situations referred to Article 164 par. (1) and (2) for overriding reasons of general interest, such as public health or the protection of the environment.

With regard to this first exception to the rule of exclusion, we note that the text concern, firstly, the existence of exceptional cases, without outlining the benchmarks to be used by the authority in order to classify a case as exceptional or not.

Secondly, the reasons for which the exclusion is not required must be overriding reasons of general interest; but the notion of imperative reason is also not cleared out and it cannot be deduced whether it is mandatory for the general interest to be laid down in an imperative rule or whether the reason must have a certain configuration so that, according to the subjective assessment of a person, can be qualified as mandatory, respectively by the contracting authority.

Thirdly, we note that the legislator has exemplified two such reasons of general interest: *public health* or *environmental protection*. But the enumeration is not exhaustive and it can be inferred that other overriding reasons of general interest may be the basis of the decision of the contracting authority not to exclude from the procedure the economic operator convicted by a final criminal judgment for committing any of the offenses stipulated in art. 164 par. (1) of the Law no. 98/2016.

Although the wording "overriding reasons of general interest" is not explained in the content of this law, it is defined in other normative acts.

Thus, according to art. 2 lit. k) of GEO no. 49/2009 on the freedom of establishment of service providers and freedom to provide services in Romania[2],

[1] It should be clear that this obligation to exclude an economic operator from the award procedure, in accordance with the provisions of paragraph (1) shall also apply if the person convicted by a final judgment is a member of the administrative, management or supervisory body of the said economic operator or has the power to represent, decide or control within it (Article 164(2) of Law 98/2016).
[2] Published in the Official Gazette number 366 of 1 June 2009.

overriding reasons of general interest mean public order, public safety, public health, maintaining the financial balance of the social security system, protection of consumers, recipients of services and workers, loyalty of commercial transactions, fighting against fraud, environmental protection, animal health, intellectual property, preservation of national and artistic patrimony, objectives of social policy and cultural policy, as well as any other considerations qualified as overriding reasons of general interest by the Court of Justice of the European Communities in case-law[1], any other causes.

Fourthly, we wish to point out that, according to art. 166 of Law no. 98/2016, the option not to exclude from the award procedure of an economic operator on grounds of general interest is enshrined as a right of the contracting authority and not as an obligation on that entity, even in the exceptional cases provided for in that article; much less, it may be expected that the article establishes a correlative right of the economic operator in the exclusion situation provided by art. 164 par. (1) and (2).

B. The second exception to the exclusion rule of the operator irrevocably sentenced of one of the offenses expressly provided is established by art. 171 of Law 98/2016, conferring the contacting authority the possibility not to take such a measure against the economic operator who is able to provide evidences intended to demonstrate that the measures taken by it are sufficient to demonstrate its credibility by reference to the reasons for exclusion.

a) The evidence that the economic operator can provide are stated by the legislator, some of which are intrinsic to the case in which the conviction was pronounced, others concerning the circumstances after the judgment has been delivered.

Thus, according to par. (3) of Article 173 of Law 98/2016, that evidence relates to the payment made by the economic operator or the assumption by the economic operator of the obligation to pay damages in respect of any damage caused by an offense or by another unlawful act, the economic operator clarifying in full the

[1] For example, the protection of works is among the overriding reasons of public interest recognized by the Court; see paragraph 77 of Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union versus Viking - Line, having as object a reference for a preliminary ruling under Article 234 EC from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) by judgment of 23 November 2005, received by the Court on 6 December 2005, point 103 – Lawel Decision; the guarantee of road safety is also an overriding reason of general interest recognized by the Court, see Court Decision (Fifth Chamber) 20 March 2014, Case C-639/11 European Commission versus Republic of Poland (paragraph 53), having as its object an action under Article 258 TFEU for failure to fulfill obligations, brought on 13 December 2011.

facts and circumstances in which the offense or other unlawful act was committed, by cooperating actively with the investigating authorities and by adopting suitable effective measures at technical, organizational and staff-related levels, such as the removal of links with people and organizations involved in the inappropriate behavior, staff reorganization measures, implementation of control and reporting systems, creation of an internal audit structure to verify the compliance with legal provisions and other rules or the adoption of internal rules on liability and payment of compensation in order to prevent the commission of new offenses or other unlawful acts.

With regard to the evidences brought by the economic operators to fully clarify the facts and circumstances in which the offense or other unlawful act was committed, through active cooperation with the investigating authorities, the legislator does not indicate the documentary evidence meant to prove such a circumstance; it would appear that although the economic operator was irrevocably sentenced, it may present a "*good behavior certificate*"; in the absence of an express indication of the nature of the document able to prove such a fact, we could deduce that the attitude of recognition and assumption of the act committed and indicated in the indictment, if retained in the content of the judgment, could represent such a supporting document.

Regarding the adoption by the economic operator of concrete and appropriate measures at technical, organizational and personnel level, we also find that the terms of the law are very broad and unclear, and the economic operator is not expressly informed about the documents intended to make incident the non-exclusion situation provided for in art. 171.

We note that in the legislative context created, the contracting authority is granted wide discretionary powers whereas the law operates with subjective notions and landmarks, namely: "the authority considers", "sufficient evidence", "concrete demonstration of credibility".

Thus, while art. 168 of Law no. 98/2016 states, by way of example, the nature of the documents meant to prove that the economic operator does not fall into one of the situations provided by art. 164, 165 and 167, (certificates, criminal records, other equivalent documents issued by the competent authorities of that country, information from the competent authority itself), art. 171 is referring to the hypothesis in which it has already been proved that the economic operator is in any of the situations provided by art. 164 and 167 which lead to exclusion and, in view

of this circumstance, additional evidence is to be provided to demonstrate that the economic operator has taken sufficient measures to demonstrate its credibility by reference to the grounds for exclusion.

Also, the law does not foresee the moment when such proof is possible and appropriate (shall be provided only at the request of the contracting authority or of its own volition, without prior request?), given that according to art. 193-195 of Law 98/2016, as well as art. 202-204 of Law 99/2016, the participants in the procedure use the DUAE (Single European Procurement Document)[1] on a compulsory basis.

However, the possibility of providing such evidence is subject to the condition that a court's final judgment was not pronounced on the measure prohibiting the participation of the economic operator in the procedure for the award of a public procurement/framework agreement or a concession contract with effect in Romania for the entire period of exclusion established by that decision (paragraph (4) of Article 172).

If, however, the prohibition on participation in the procedure for the award of a public procurement/framework agreement or a concession contract for a certain period was not applied to the economic operator, the exclusion situations provided for in Article 164 of Law 98/2016 does not apply if a period of 5 years has elapsed since the date of the final conviction (Article 171(5) letter a) of Law 98/2016).

From the texts mentioned above results that:

- situations of exclusion may be combated with the evidence provided in paragraph

[1]ESPD (European Single Procurement Document) is an instrument designed to facilitate the participation of economic operators in public/sectoral procurement procedures and to reduce the administrative burdens for the contracting authorities/entities, being established at the European Union level by the Commission Implementing Regulation (EU) no. 2016/7 establishing the standard form for the European Single Procurement Document, published on 6 January 2016 in the Official Journal of the European Union, L 3/16. According to the legal texts mentioned above (Law No 98/2016 and Law No 99/2016), this is mandatory to be used both by the contracting authorities/entities and by the economic operators participating in the award procedures (depending on the position they have in the awarding procedure - candidate, bidder, third party, subcontractor) as of its entry into force. The electronic version of ESPD (e ESPD) is provided on-line as online form by the European Commission at the dedicated website – https://ec.europa.eu/growth/tools-databases/espd/filter. DUAE is a self-declaration issued by the economic operators stating that they are not in one of the exclusion situations provided for by national law and meet the qualification and selection criteria specified by the contracting authority/entity at the level of the acquisition data sheet, as well as, as appropriate, they comply with the objective rules and criteria established in order to limit the number of qualified candidates to be invited to participate in the multi-stage award procedures.

(3) of art. 171, within a 5 year period from the date of the final conviction (irrespective of the length of the sentenced carried out), provided that the measure of prohibition was not applied to the economic operator or, if it was imposed, the economic operator is not in the period of exclusion established by decision; if the five years since the date of the final conviction has expired, the prohibition to participate in the proceedings shall be removed ope legis, provided that the prohibition has not been applied to it or, if it has been enforced, the prohibition period was not longer than 5 years.

Existence of a Judicial Investigation Procedure Involving the Economic Operator

II. As regards the second situation stated in this work, namely the economic operator involved in the proceedings is the subject of a judicial investigation procedure in connection with the commission of one or some of the facts provided by art. 164 par. (1), Law no. 98/2016 also provides that such a situation is a ground for the exclusion of the economic operator. The prohibition to participate is incident even if the person subject to the investigation procedure is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control within that body.[1]

The conclusion lies in the express provisions of the law. Thus, according to art. 167 par. (1) lit. c) of Law no. 98/2016, *the contracting authority shall exclude from the award procedure of the public procurement/framework agreement any economic operator who is in any of the following situations: c) has committed a serious professional misconduct that put into question its integrity and the contracting authority is able to demonstrate this by any appropriate means of proof, such as a decision of a court or administrative authority*, according to paragraph (3) and (4) of the same Article:

(3) For the purposes of the provisions of paragraph (1) letter (c) serious professional misconduct means any offense committed by the economic operator which affects its professional reputation, such as cartel-type infringements of the competition rules which aim at faking the auctions or infringements of intellectual property rights, committed intentionally or with serious negligence.

[1] It is worth mentioning that such an interdiction is imposed also under the Law no. 100/2016 on concessions of works and concession of services (published by the Official Gazette No. 392/23 May 2016, respectively in art. 81 para. (1) letter c) and para. (4).

(4) The provisions of paragraph (1) letter c) are also applicable if the economic operator or one of the persons mentioned in art. 164 par. (2) is subject to a judicial investigation procedure in connection with the commission of one or some of the facts referred to in art. 164 par. (1).

Thus, the existence of an investigative judicial procedure in connection with the commission of one of the facts expressly provided is, in the opinion of the legislator, equivalent to a serious professional misconduct committed by the economic operator, which call into question its integrity.

As regards this ground of exclusion, some clarifications are also required:

- First of all, we note that the term "*judicial investigation procedure*" is not clear, since there are no corresponding terms between those used by the legislator so far. In our opinion, the legislator intended to include in this phrase not only judicial investigation procedures of a criminal nature, but any judicial investigation procedure. However, given that this investigation would be carried out in connection with the commission of one of the facts provided by art. 164 par. (1), it may be concluded that the text concerns, in particular, criminal proceedings.

- Secondly, we find that it is not clear from the perspective of criminal law whether it is necessary for the case to have started the criminal prosecution, the prosecution has begun *in rem* or *in personam*, the criminal action has been initiated, the court has been notified, the judicial investigation procedure is pending before the court, etc.

Thus, the judicial practice considered that the concept of judicial investigation procedure does not have a legal definition and, for that reason, the meaning must be determined having regard to the aim pursued by the legislator by regulating the exclusion from the procurement procedure of an economic operator, namely to ensure the participation in the procurement procedure only for economic operators whose integrity is not called into question by the existence of a judicial investigation procedure.[1]

[1] See the civil decision no. 1500/3 April 2017 of the Bucharest Court of Appeal, the Administrative and Fiscal Contentious Chamber, delivered in File no. 1676/2/2017. This decision admitted the complaint made by the petitioner and CNSC decision no. 362/C1/220/17.02.2017, for the annulment of the letter by which the result of the proceedings have been communicated and to compel the defendant to conclude the public procurement contract with the petitioner, which had previously been excluded from the proceedings on the grounds of the existence of an investigation procedure initiated against it. The decision of the Bucharest Court of Appeal was not published, but CNSC Decision no.

The concrete analysis of the matter whether an order extending the criminal prosecution to the petitioner represents an appropriate means of proving the existence of an investigation procedure, the Bucharest Court of Appeal concludes, by reference to the provisions of Art. 285[1] Criminal Procedure Code, Art. 305 par. (1) and (2)[2] Criminal Procedure Code, art. 309[3] Criminal Procedure Code and Art. 311 par. (5)[4] Criminal Procedure Code, that the answer is negative.

The argument forward was that "*the procedural act of initiating criminal prosecution does not constitute a sufficient certainty regarding the existence of the criminal offense and criminal liability of the person against whom the measure is ordered, which would justify an exclusion measure in the course of the procurement procedure, taking into consideration that the opening of a criminal investigation against a person does not automatically imply to bring the criminal proceedings against him, a procedural act involving a much higher standard of proof, namely the existence of evidences regarding the commission of an offence, and not of some simple indications of committing a criminal act*".

362/C1/220/17.02.2017 can be viewed by accessing the following link: http://portal.cnsc.ro/buletinoficial.html?a=search&DPD:NumarBuletinSite=bo2017_2701#.

[1] According to art. 285) of Criminal Procedure Code, (1) The object of criminal investigation is to gather the necessary evidence regarding the existence of the offenses, to identify the persons who committed an offense and to determine their criminal responsibility, in order to decide whether or not their arraignment.

(2). The procedure during the prosecution is not public.

[2] According to art. 305 par. (1) and (2) of Criminal Procedure Code, (1) When the document instituting the proceedings fulfills the conditions stipulated by law and it is established that there are no cases that prevent the criminal action provided for in art. 16 par. (1), the criminal investigation authority shall decide the opening of criminal prosecution with regard to the criminal act.

(2). The opening of criminal prosecution shall be decided by an order, including, as the case may be, the stipulations provided by art. 286 par. (2) letters a)-c) and g).

[3] According to art. 309 of Criminal Procedure Code, (1) The criminal action is set in motion by the prosecutor by an order, during the criminal prosecution, when he finds that there is evidence that a person has committed an offense and there is none of the cases of obstruction referred to in art. 16 par. (1);

(2) The initiation of the criminal action shall be communicated to the defendant by the criminal investigative authority calling him/her for further hearing. The provisions of art. 108 shall be applied accordingly, and a minute shall be drawn up.

(3) Upon request, the defendant shall be given a copy of the order by which the measure was ordered.

(4) Where necessary, the prosecutor may personally hear the defendant and assist to the communication provided in paragraph (2).

(5) The criminal prosecution authority shall continue the prosecution even without hearing the defendant in case of his unjustifiably missing, absconding or disappearance.

[4] According to art. 311 par. (5) of Criminal Procedure Code, following the extension of the criminal prosecution or ex officio regarding the hypotheses provided in par. (1), the prosecutor notified by the investigating authority may order the extension of criminal proceedings in respect of the new matters.

It may be inferred from the above-mentioned reasoning that, in the Court's view, only the act of initiating the criminal proceedings represents the sufficient evidence for demonstrating the serious professional misconduct of the economic operator against whom an investigative judicial procedure is conducted.

As far as we are concerned, we consider that the mere finding of the unclear and unpredictable nature of the rule does not define the notion of judicial investigation procedure an represents for the courts, at this time, sufficient grounds to remove the applicability of this text, which is obviously in breach of the principle of legal certainty[1] and the principle of legitimate trust, by failing to observe the requirement of predictability in the law, which must provide the basis for any rule of law.[2]

On the other hand, this legal text was criticized in its entirety for the violation of the presumption of innocence and the principle of proportionality.

Thus, it was judiciously stated in the doctrine[3] that "*the only measures that may be taken during a criminal trial and which may affect the exercise of the rights and*

[1] The principle of legal certainty comprise, in particular, the following requirements: the non-retroactivity of the law, accessibility and predictability of the law, the unitary interpretation of the law - see Ion Predescu, Marieta Safta, Principiul securității juridice, fundament al statului de drept. Repere jurisprudențiale/The Principle of Legal Security, the Foundation of the Rule of Law. Highlights jurisprudential, article available on the internet, https://www.ccr.ro/uploads/Publicatii%20si%20statistici/Buletin%202009/predescu.pdf, see Ioan Chelaru, Claritatea, precizia şi previzibilitatea actelor normative – Condiţii de constituţionalitate a acestora/ Clarity, accuracy and predictability of normative acts - Conditions of constitutionality, article available on the internet, http://revista.universuljuridic.ro/wp-content/uploads/2016/07/04_ Revista_Universul_Juridic_ nr_02-2016_PAGINAT_BT_I_Chelaru.pdf.

[2] The rule of law is defined in the European doctrine as a legal system with the following properties:
a) to formulate of legal rules sufficiently precise to be applicable;
b) to allow a clear orientation of the recipients;
c) the conformity of their implementation in respect of reference standards must be capable of being verified; and
d) the procedures shall allow the effective control of the compliance of the applied rules with the higher ones.
See (Honore, 1990) cited by M. Voicu, Preeminența dreptului într-o societate democratică, Raportul dintre dreptul Uniunii Europene și dreptul național al statelor membre. România, 10 ani de la aderarea la UE/ The Pre-eminence of the Right in a Democratic Society, The Relationship between European Union Law and the National Law of the Member States. Romania, 10 years after joining the EU, article available by accessing the following link: https://juridice.ro/essentials/1149/preeminenta-dreptului-intr-o-societate-democratica-raportul-dintre-dreptul-uniunii-europene-si-dreptul-national-al-statelor-membre-romania-10-ani-de-la-aderarea-la-ue.

[3] See M – Hotca, Prezumția de nevinovăție și principiul proporționalității. Două cazuri recente de încălcare a acestor principia/The presumption of innocence and the principle of proportionality. Two recent cases of violation of these principles, article available on internet, accessing the link: http://htcp.eu/prezumtia-de-nevinovatie-si-principiul-proportionalitatii-doua-cazuri-recente-de-incalcare-a-acestor-principii/.

freedoms of suspects or defendants are preventive or precautionary and if they are necessary for the proper conduct of the criminal process and whether they are proportionate.

The judge is the only one who may, in accordance with the law, provisionally and temporarily order the prohibition to participate in the procedure for awarding the public procurement contract, concession contract or framework agreement.

The existence of a pending criminal trial where a legal person has the status of a defendant is a circumstance which, by its very nature, cannot lead to the exclusion of an economic operator from the procedure of awarding a public procurement contract, concession contract or framework agreement."

We also notice that, surprisingly, the legislator did not have the same approach when drafting Law no. 99/2016 on sector acquisitions.[1]

When reviewing the content of art. 180 par. (1) letter c) [2] of Law 99/2016, we shall notice that it is identical to the provisions of Law 98/2016 which states the exclusion reason of the economic operator who committed a serious professional misconduct. What is missing, however, is the text which would have allowed the existence of an investigation procedure with regard to the facts expressly provided by Art. 177 par. (1) lit. (a) to (g) of Law 99/2016 to be assimilated to the misconduct of the economic operator.

Thus, although the law is incidental to areas considered by its text to be relevant[3], and as a consequence, the contracts are superior in terms of value, the economic operators participating in such procedures cannot be excluded on the basis

[1] Published in the Official Gazette number 391 dated May 23, 2016. According to art. 1 par. (1) and (2) of Law 99/2016, according to art. 3 par. (1) letter (a), the notion of sectoral acquisition shall be understood as the purchase of works, products or services by means of a sectoral contract by one or more contracting entities from economic operators designated by them, provided that the works, products or services purchased are intended for the performance of one of the relevant activities referred to in of art. 5-11;

[2] According to art.180 par. (1) letter c) 1 of Law 99/2016, (1) The contracting entity shall exclude from the procedure for awarding the sectoral agreement/framework agreement any economic operator who is in any of the following situations: a) has breached the obligations established according to art. 64 par. (1) and the adjudicating entity can demonstrate this by any appropriate means of proof, such as decisions by competent entities by which the breaches of such obligations has been established; (c) has committed a serious professional misconduct that questions its integrity and the contracting entity can demonstrate this by any appropriate means of proof, such as a decision of a court, an administrative authority or an international organization;

[3] Gas and heating, electricity, water, transport services, ports and airports, postal services, oil and gas extraction, exploration for and extraction of coal or other solid fuels (Articles 5 to 11 of Law 99/2016).

indicated above.

This way of regulating is unlikely to represent a mere omission of the legislator; however, it is very difficult to explain such inconsistency, starting from the belief that the edict of the law was done in good faith; in our opinion, at the time of drafting art. 167 par. (4) of Law 98/2016, the legislator was convinced neither of the correctness of this rule.

Returning to the content of the exclusion reason to be analyzed and this paragraph, we find that art. 171 of Law 98/2016 also refers to art. 167, which means that there are exceptions to the rule of exclusion on the grounds of the existence of a judicial investigation procedure

The first exception concerns the provision of evidence by the economic operator showing that the measures taken by the entity are sufficient to prove its credibility.

This time, the legislator request the economic operator under an investigative procedure to make the payment of potential compensation or to assume this obligation, to fully clarify the circumstances under which the offenses were committed, to cooperate actively with the authorities carrying out the investigation to identify the persons and organizations with inappropriate behavior (to be able to remove the relations with them, etc.)

Of course, this regulation naturally raises a number of questions: How "*active*" do you have to cooperate with the authorities carrying out the investigation? Does this cooperation only refer to the attitude of admission of its own facts or should the cooperation be so active as to circumscribe to denunciations? What is the attestation of this active cooperation? What authority is competent to issue such an act and under which legal provisions? And the list of questions goes on.

In addition, we have to show that according to art. 171 par. (5) letter (b) of Law 98/2016, *in the event that the measure prohibiting the participation in procedures for the award of a public procurement/framework agreement or a contract concession for a certain period was not applied to the economic operator has not been enforced by the final judgment of a court, the situations of exclusion provided in art. (...) art. 167 shall not be applied:*

(b) if, in the event of situations, facts or events (...), a period of three years has elapsed since the occurrence of the situation, the commission of the deed or the occurrence of the relevant event.

We do not know which of the assumptions provided in art. 167 are, in the opinion

of the legislator, relevant facts, situations or events; in these circumstances, it is difficult to determine how the method of calculating the term established by the legislator should be calculated; in the case of a judicial investigation procedure, those three years are calculated from the date on which the offence was committed, even if the defendant is at the stage of the trial, for example? Is these three years calculated from the date of commencement of the criminal prosecution or from the date of criminal proceeding opening?

And above all, there is a question that needs to be answered: Which operator will fill in the field "*Guilty of serious professional misconduct*" in the DUAE, given that the document refers to the definitions from national law but, in the procedure investigation, whatever its nature, it is presumed innocent?.

Conclusions

All the above arguments lead to the conclusion that legislative intervention is needed to remedy all the reported shortcomings.

Of course, these shortcomings have already been claimed in one way or another[1]. There is even a legislative initiative in this regard and the Ordinance for the modification and completion of some normative acts with impact in the field of public procurement[2], whichwas launched in public debate. However, the economic operators subject to a judicial investigation procedure are excluded from the proceedings from the date when the law enters into force.

It remains for the state to answer the question of whether there are sufficient resorts and whether a fair repair may be provided if it turns out, on the one hand, that unclear law texts have not allowed the economic operators (but also contracting authorities) to regulate their conduct and, on the other hand, that the judicial investigation procedure was not finalized by a decision/judgment indicating the economic operator's guilt.

In our view, this is because the invoked legislation may have irreparable adverse effects due the consequences caused to economic operators.

[1] For example, the Constitutional Court has been notified of the exception of unconstitutionality of the provisions of Article 167 (1) (c) and (4), Article 164 of Law No.98/2016, see, http://portal.just.ro/54/SitePages/Dosar.aspx?id_dosar=5400000000167699&id_inst=54.

[2] The version was published on 3.05.2017 and is available on www.anap.gov.ro; According to this project, para. (4) of art. 167 of Law 98/2016 is proposed to be repealed.

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