

**THE SUBJECTS OF THE PUBLIC PROCUREMENT  
CONTRACT - ABOUT DISCRIMINATION AND ITS  
CONSEQUENCES IN THE PUBLIC-PRIVATE RELATION**

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**ABSTRACT:** *In this paper, the authors want to approach a subject which affirms its actuality even after the promulgation of a new set of public procurement legislation in May and June 2016: in what way the principle of equal and non-discriminative treatment between the participants at this type of procedure can be applied. The issue of the implementation of these rules is caused, among other things, by the fact that Law 98/2016 is vague, because it only establishes that two of the most important principles of public procurement are the ones of non-discrimination and equal treatment, in application of which each contracting authority has the obligation to avoid breaches in fair competition. Thus, the legislature must establish clear criteria and rules in order to detail the way public procurement principles (which are concisely presented in the primary legislation) are to be implemented in order to avoid a disloyal competition between the economic operators which are involved in the execution of public procurement contracts.*

**KEYWORDS:** *public procurement; principles of equal treatment and non-discrimination; competition; Law no. 98/2016; remedies and sanctions for discrimination in public procurement.*

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1. The procedure of public procurement represents a topic of actuality and interest for the business entities, public contracting authorities and final beneficiaries of public procurement. The interest for this matter is justified by the effects that public procurement can have on national economies and international relations. At national level, public procurement represents, for the public authorities, a necessary instrument to ensure a good function of public services in the benefit of citizens, as well as a way to implement options of public politics. Also, public procurement represents a modality to consolidate the European Union's Single Market and an instrument to facilitate the cross border exchanges (Rațiu, 2017).

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2. Regarding the principal legal rules on public procurement, it can be mentioned that the Treaty establishing the European Economic Community signed at Rome on March 25<sup>th</sup> 1957 and the subsequent treaties that modified the Treaty of Rome established the main principles to be applied in this matter. Even though the Treaty of Rome does not refer *expressis verbis* to the award of public procurement contracts, the Treaty establishes the initial conditions applicable in this procedure. On one hand, the Treaty states the free movement of goods and services as fundamental rules of European commerce (Mazilu, 2007), principles that apply also in public procurement matter, and on the other hand, Treaty of Rome forbids discrimination between the nationals of Member States and, especially, discrimination on the grounds of nationality<sup>1</sup>.

At European Union level, first legal rules on the award of public procurement contracts were mentioned by Directives 71/305/CEE<sup>2</sup> and 77/62/CEE<sup>3</sup>. Subsequently, Directive 92/50/CEE<sup>4</sup> stated the necessity to respect the principles of free competition in public procurement matter. According to art. 8 of this Directive, contracts which had as object services listed in Annex I A had to be awarded in accordance with the provisions of Titles III to VI<sup>5</sup>, which were mostly legal rules regarding free competition and publicity. Also, Directives 2004/17/CE<sup>6</sup> and 2004/18/CE<sup>7</sup> imposed new sets of legal rules in order to ensure the respect of European Union's principles of free circulation of goods and services and also the respect of loyal competition in public procurement procedure (D. - D. Șerban, 2008).

Nowadays, in the European Union, Directives 2014/25/UE<sup>8</sup> and 2014/24/UE<sup>9</sup> adopted by the European Parliament and Council legislate the public procurement matter, taking

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<sup>1</sup> Art. 7 para. (1) and (2), art. 36 and art. 37 para. (1) of Treaty establishing the European Economic Community signed at Rome on March 25<sup>th</sup>, 1957, available at: [https://ec.europa.eu/romania/sites/romania/files/tratatul\\_de\\_la\\_roma.pdf](https://ec.europa.eu/romania/sites/romania/files/tratatul_de_la_roma.pdf), [Accessed 21 Sept. 2017].

<sup>2</sup> Council Directive 71/305/CEE of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, published in Official Journal of the European Communities L no. 185 of 25 august 1971, in present abrogated.

<sup>3</sup> Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, published in Official Journal of the European Communities L no. 13 of 15 January 1977, in present abrogated.

<sup>4</sup> Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, published in Official Journal of the European Communities L no. 209 of 24 July 1992, in present abrogated.

<sup>5</sup> Paragraph 4 of Judgment of the Court (First Chamber) of 11 January 2005, Case C-26/03, Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall-und Energieverwertungsanlage TREA Leuna, available at: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49805&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=451296> [Accessed 19 sept. 2017].

<sup>6</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, published in Official Journal of the European Union L no. 134 of 30 April 2004, abrogated by Directive 2014/25/EU of 26 February 2014.

<sup>7</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, published in Official Journal of the European Union L no. 134 of 30 April 2004, abrogated by Directive 2014/24/EU.

<sup>8</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, published in Official Journal of the European Union L no. 94 of 28 March 2014.

into consideration the principles mentioned by the Treaties of the European Union. Directive 2014/24/EU states, in its preamble, that “The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency”<sup>9</sup>.

The mechanism of remedies that should be applied in case of infringements of Directive 2014/24/EU and other European Union's legal dispositions in the matter of public procurement is presented by Directive 89/665/EEC<sup>11</sup>. In the interpretation of art. 2 și art. 3 to preamble of Directive 89/665/EEC, the Court of Justice of the European Union states, in the motivation of a decision from January 2005 that the Directive's purpose is to ensure the application of the Community rules on public procurement by means of effective and rapid remedies, particularly at a stage when infringements can be corrected, given that the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination<sup>12</sup>.

3. In Romania, the equality between the participants at public procurement procedure and the existence of loyal competition among them are guaranteed, at constitutional level, by art. 135 par. (2) lit. a) of Romanian Constitution, according to which Romanian public authorities have the obligation to ensure “the liberty of commerce, the protection of fair competition, the creation of favourable conditions in order to value all production factors”.

Also, from the analysis of legal provisions adopted since 1993 by Romanian legislature in the matter of public procurement, it results that both the previous legislation, currently repealed (Government Ordinance no. 12/1993<sup>13</sup>, Government Ordinance no. 118/1999<sup>14</sup>, Government Emergency Ordinance no. 60/2001<sup>15</sup> and Government

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<sup>9</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC published in Official Journal of the European Union L no. 94 of 28 March 2014.

<sup>10</sup> Point 1 of preamble to Directive 2014/24/EU.

<sup>11</sup> Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, published in Official Journal of the European Communities L no. 395/33 of 30 December 1989.

<sup>12</sup> Paragraph 7 of Judgment of the Court (First Chamber) of 11 January 2005, Case C-26/03, Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall-und Energieverwertungsanlage TREA Leuna, available at: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49805&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=451296> [Accessed 19 Sept. 2017].

<sup>13</sup> Government Ordinance no. 12/1993 on public procurement, approved and modified by Law no. 83/1994 and amended by the Government Ordinance no. 19/1995, approved by Law no. 96/1995, supplemented by the Government Ordinance no. 55/1998 and repealed by art. 113 par. (1) of the Government Ordinance no. 118/1999

<sup>14</sup> Government Ordinance no. 118/1999 on public procurement, published in Official Journal of Romania, Part I, no. 431 of August 31st, 1999, modified and supplemented by Government Emergency Ordinance no. 202/1999 and the Government Emergency Ordinance no. 122/2000, repealed by art. 111 point (1) of the Government Emergency Ordinance no. 60/2001 on public procurement.

<sup>15</sup> Government Emergency Ordinance no. 60/2001 on public procurement, published in Official Journal of Romania, Part I, no. 241 of May 11, 2001, approved with amendments by Law no. 212/2002 and repealed by art. 305 lit. b) of Government Emergency Ordinance no. 34/2006.

Emergency Ordinance no. 34/2006<sup>16</sup>), as well as the current legislation (Law no. 98/2016<sup>17</sup> and Law no. 101/2016<sup>18</sup>) recognize, in various forms, the economic operators' right to equal and non-discriminatory treatment, as well as to a loyal competitive environment. The special legislation governing public procurement is corroborated with the dispositions of Law no. 21/1996<sup>19</sup> and Law no. 11/1991<sup>20</sup> regarding the economic operators' right to effective competition in the procedure for the award of public procurement contracts and on the penalties that should be applied in case of unfair competition.

4. Although public procurement seems to be a Romanian legislature' priority, in reality neither the legislation after 1993, nor the current legislation contain a complete and clear definition of the concept of public procurement and of the principles for the award of public procurement contracts.

In the following, we shall present the most relevant dispositions of the normative acts adopted since 1993 and which state, even though tangentially, the principles of non-discrimination and equal treatment and, in the same time, certain ways of violating them.

Government Ordinance no. 12/1993, which is the first normative act regulating the public procurement procedure after 1989, does not expressly state the principles applicable to public procurement. Art. 3 par. (4)<sup>21</sup> and art. 6 par. (3)<sup>22</sup> only forbid the contracting authority to establish discriminatory criteria, while art. 3 par. (1) lit. a) of the Ordinance refers to the equal treatment of participants in the public procurement procedure.

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<sup>16</sup> Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession' contracts and services concession' contracts, published in the Official Journal of Romania, Part I, no. 418 of May 15<sup>th</sup>, 2006, approved with amendments by Law no. 337/2006 and repealed by art. 238 lit. a) of Law no. 98/2016

<sup>17</sup> Law no. 98/2016 on public procurement, published in the Official Journal of Romania, Part I, no. 390 of May 23<sup>rd</sup>, 2016, modified and supplemented by the Government Emergency Ordinance no. 80/2016 and Law no. 80/2017.

<sup>18</sup> Law no. 101/2016 on remedies and means of appeal in the award of public procurement contracts, utilities contracts and concession contracts and on the organization and operation of the National Council for Solving Complaints, published in Official Journal of Romania, Part I, no. 393 of May 23<sup>rd</sup>, 2016.

<sup>19</sup> Competition Law no. 21/1996, published in the Official Journal of Romania, Part I, no. 88 of 30 April 1996, republished (r1) in the Official Journal of Romania, Part I, no. 240 of April 3<sup>rd</sup>, 2014, subsequently modified and completed by Government Ordinance no. 12/2014, Government Emergency Ordinance no. 77/2014 and by Government Emergency Ordinance no. 31/2015, republished (r2) in the Official Journal of Romania, Part I, no. 153 of February 29<sup>th</sup>, 2016

<sup>20</sup> Law no. 11/1991 on combating unfair competition, published in the Official Journal of Romania, Part I, no. 24 of January 30<sup>th</sup>, 1991

<sup>21</sup> According to art. 3 par. (4) lit. a) and b) of Government Ordinance no. 12/1993, the contracting authority shall not establish, as to the qualification of the contractors, any criteria, condition or procedure that would create a discrimination between the Romanian and the foreign contractors. Also, the contracting authority will not establish, as to the qualification of contractors, any criteria, condition or procedure that would create a discrimination between contractors representing private companies and contractors representing state-owned companies.

<sup>22</sup> Article 6, paragraph (3) of the Government Ordinance no. 12/1993 states that: „The acquiring legal person shall not discriminate between the contractors in terms of the form in which they send or receive documents, notifications, decisions or other communications”.

Attempts to define the notion of „equal treatment” are to be found in the dispositions of art. 2 lit. d) Government Ordinance no. 118/1999<sup>23</sup> and art. 2 lit. d) of Government Emergency Ordinance no. 60/2001<sup>24</sup>. We consider that these dispositions are incomplete because, in their content, the Government Ordinance no. 118/1999 and Government Emergency Ordinance no. 60/2001 do not provide further details on the meaning of “equal treatment”. Moreover, according to the legal texts mentioned above, “equal treatment” is defined by reference to the notion of “non-discrimination”, without the latter being defined by Government Ordinance no. 118/1999 or the Government Emergency Ordinance no. 60/2001.

Government Emergency Ordinance no. 34/2006 limited to state at art. 2 that the promotion of competition among economic operators, the guarantee of equal treatment and the non-discrimination of economic operators were the goals of this normative act<sup>25</sup>, and that the principles of non-discrimination and equal treatment were to be respected at the award of the public procurement contract<sup>26</sup>.

These legal dispositions represented a regression to those of Government Emergency Ordinance no. 60/2001, taking into account, *inter alia*, the following aspects:

- Government Emergency Ordinance no. 34/2006 did not expressly regulate the principle of free competition.
- The previous normative act transformed free competition into a principle on the award of public procurement contract (Șerban, 2012)<sup>27</sup>.
- Free competition in public procurement is a guarantee of compliance with the principles of non-discrimination and equal treatment, because in the absence of such a guarantee contracting authority may discriminate a participant / participants in a public procurement procedure through anti-competition practices.

Taking into considerations these gaps of Government Emergency Ordinance no. 34/2006, the National Authority for Regulation and Monitoring of Public Procurement issued the “Guide for the award of public procurement contracts”<sup>28</sup>, which defined, in Chapter II „Public Procurement Principles”, the notions of non-discrimination and equal treatment. But, as the doctrine pointed out (Șerban, 2012), this guide had an indicative value, because, on the one hand, it was a guiding tool and, on the other hand, it used concepts and notions of reference and exemplification.

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<sup>23</sup> That legal disposition stated that one of the principles of the award of public procurement contract is equal treatment, namely the „non-discriminatory application of the selection criteria and criteria for the award of the public procurement contract so that any supplier of products, works contractor or service provider have equal opportunities to be awarded the contract”.

<sup>24</sup> According to that legal text, one of the principles of awarding the public procurement contract is equal treatment, namely „the non-discriminatory application of the selection criteria and the criteria for the award of the public procurement contract, so that any supplier of products, works or service provider have equal chances to be awarded the contract”.

<sup>25</sup> Art. 2 par. (1) lit. a) and b) of Government Emergency Ordinance no. 34/2006.

<sup>26</sup> Art. 2 par. (1) lit. a) and b) of Government Emergency Ordinance no. 34/2006.

<sup>27</sup> Art. 2 par. (1) lit. a) of Government Emergency Ordinance no. 34/2006.

<sup>28</sup> The Guide for the award of public procurement contracts approved by the Order of the President of the National Authority for Regulation and Monitoring of Public Procurement no. 155/2006, published in Official Journal of Romania, Part I, no. 894-bis of 2 november 2006 and repealed by Order no. 80/2009.

For the reasons mentioned above, we appreciate that the conclusions of the “Corruption Risks in Public Procurement” report<sup>29</sup>, conducted by Transparency International Romania in 2010, are justified at least in part. This report highlights the legislative vulnerabilities in the public procurement system, with explicit reference to incomplete, unstable, ambiguous, non-uniform and non-transparent legislation. According to the report authors, the vulnerabilities identified in this area create the premises for the “corruption” in the public procurement procedure, which can have as consequences: the decrease of the population's trust in the central and local public administration authorities and, also, the distortion of competition and economic growth.

5. Regarding the legislation currently applicable, one can notice that Law no. 98/2016 does not provide a definition of the two principles mentioned in art. 2 lit. a) and b).

Romanian legislature is only stipulating, in the methodological norms for the application of Law no. 98/2016, the contracting authority's obligation, during the application of the award procedure, to take “all the necessary measures to avoid the occurrence of circumstances liable to determine [...] the prevention, restriction or distortion of competition”<sup>30</sup>.

We consider that this legal text does not provide real guarantees that the contracting authority will respect the right of any person to participate in the public procurement procedure, right which results from the dispositions of art. 3 par. (1) point 36.jj) of Law no. 98/2016. According to this article, economic operator is “any natural or legal person, whether governed by public or by private law, or a group or association of such persons, which lawfully offers on the market the execution of works and / or construction, the supply of goods or the provision of services, including any temporary association formed by two or more of these entities”. We appreciate that the law should state, in an express and limited way, any limitation of the right recognized by art. 3 par. (1) point 36.jj), in order to avoid contracting authority' arbitrary and discriminatory interpretations.

Isolated references to situations in which the contracting authority violates the principles of non-discrimination and equal treatment result from the interpretation of art. 83 of Law no. 98/2016 and art. 34 of Law no. 101/2016, as follows:

- a) The contracting authority provides information in a manner that could give one / some of the participants an advantage over the others<sup>31</sup>;
- b) The contracting authority includes discriminatory technical, economic or financial specifications in the participation notice, award documentation or other documents issued in connection with the award procedure<sup>32</sup>.

6. Because of the lack of legal definitions of the principles stated in art. 2 par. (2) lit. a) and b) of Law no. 98/2016, as well as the lack of clear and complete rules to ensure their

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<sup>29</sup> Report co-funded by European Commission - European Anti-Fraud Office; report available at: [https://www.transparency.org.ro/proiecte/proiecte\\_incheiate/2010/proiect\\_3/Riscuri%20de%20coruptie%20in%20achizitii%20publice.pdf](https://www.transparency.org.ro/proiecte/proiecte_incheiate/2010/proiect_3/Riscuri%20de%20coruptie%20in%20achizitii%20publice.pdf) [accessed on 17 Sept. 2017].

<sup>30</sup> Art. 1 par. (2) of the Methodological Norms of 2 June 2016 on the application of the provisions regarding the award of the public procurement / framework agreement in Law no. 98/2016 on public procurement, published in the Official Journal of Romania, Part I, no. 423 of June 6th, 2016.

<sup>31</sup> Art. 85 par. (3) of Law no. 98/2016.

<sup>32</sup> Art. 34 paragraph. (1) lit. c) of Law no. 101/2016.

effectiveness, the legislator himself violates these principles, through the other provisions of Law no. 98/2016, as well as through the Methodological Norms for application. Also, the contracting authority still has the possibility, established by previous legislation, to impose arbitrary and discriminatory criteria for registration and participation at public procurement procedure, whilst the person who suffers a prejudice does not have the means to prove the limitation of the rights guaranteed by art. 2 par. (2) lit. a) and b) of Law no. 98/2016.

A person's discrimination in relation to other participants in a public procurement procedure results from the provisions of art. 167 par. (1) lit. b) of Law no. 98/2016<sup>33</sup>, in conjunction with art. 165 par. (1) and par. (2) of the same law<sup>34</sup>.

According to these legal texts, the contracting authority has the obligation to exclude from the award procedure the economic operator in insolvency or reorganisation, whether the economic operator has paid or not its taxes, duties or contributions to the consolidated general budget. Taking into account the content of art. 167 par. (1) lit. b), it is obvious that contracting authority has no choice but to exclude the economic operator in insolvency or reorganisation, if this operator does not fall under one of the exceptions provided by art. 167 para. (2).

For the reasons mentioned above, we appreciate that the dispositions of art. 167 par. (1) lit. b) and par. (2) of Law no. 98/2016 represent breach of the principles stipulated at art. 2 par. (2) lit. a) and b) of same law, because:

a) Provisions of art. 167 par. (2) of Law 98/2016<sup>35</sup> do not provide sufficient guarantees to the economic operator in insolvency / reorganisation that the contracting authority shall analyze the information and / or documents submitted by the debtor in an objective and transparent way and in compliance with the principles of non-discrimination and equal treatment

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<sup>33</sup> Art. 167 par. (1) lit. b) of Law no. 98/2016 states that: „the contracting authority excludes from the award procedure of the public procurement / framework agreement any economic operator who [...] is in insolvency or in liquidation, under judicial supervision or in cessation of activity [...]”.

<sup>34</sup> Article 165, par. (1) and par. (2) of the Law no. 98/2016 provides as follows: „(1) The contracting authority shall exclude from the award procedure any economic operator about whom the authority has information that it has breached its obligations to pay taxes, duties or contributions to the general consolidated budget, and this fact has been determined by a definitive and mandatory court order or administrative decision according to the law of the State in which the economic operator is established. (2) The contracting authority shall exclude from the award procedure an economic operator if it can demonstrate by any appropriate means that the economic operator has breached its obligations regarding the payment of taxes, duties or contributions to the general consolidated budget”. Art. 166 par. (2) of the Law no. 98/2016 provides for two exceptions to the provisions of art. 165 par. (1) and par. (2) of the Law, as follows: „(2) As an exception of the provisions of art. 165 par. (1) and (2), an economic operator is not excluded from the award procedure when the amount of taxes, duties and contributions to the general consolidated budget which are due and payable meets one of the following conditions: a) the amount is less than RON 4.000; b) it is higher than RON 4.000 and less than 5% of the total taxes, duties and contributions owed by the economic operator to their most recent due date.”

<sup>35</sup> Art. 167 par. (2) of the Law provides that „by exception to the provisions of par. (1) lit. (b), the contracting authority shall not exclude from the award procedure an economic operator against whom the general insolvency procedure has been opened when, analysing the information and / or documents submitted by the economic operator concerned, the contracting authority establishes that the economic operator has the capacity to execute the public procurement contract / agreement. This implies that either the economic operator is in the observation phase and has taken the necessary steps to draw up a feasible reorganisation plan that allows a sustainable continuation of the current activity, or the economic operator is within the judicial reorganisation phase and fully respects the programme of the reorganisation plan' implementation, approved by the court.”

Thus, this legal text does not lay down objective and unitary criteria that the contracting authority must take into account when determining the feasibility of a reorganization plan.

b) Insolvency does not affect the debtor's ability to meet the criteria for awarding the public procurement contract, provided by art. 187 par. (3) of Law 98/2016.

c) Economic operators in insolvency, who have no budget debts, are discriminated against in relation to economic agents who, although not in insolvency, have debts to the state budget in the amount stipulated in art. 165 par. (1) and par. (2) of Law.

d) The right of the debtor in insolvency to an effective opportunity to recover one's economic activity is violated as one does not have the chance to be awarded the contract as a result of one's participation in the public procurement procedure.

e) Art. 167 par. (1) lit. b) of Law no. 98/2016 is contrary to the provisions of Law no. 85/2006 (now repealed)<sup>36</sup> and of Law no. 85/2014<sup>37</sup>, and to the principles of free and fair competition.

The reasoning behind these claims is that, according to art. 2 of Law no. 85/2006, the purpose of this law is to establish a collective procedure for covering the debtor's liabilities items. Art. 2 Law no. 85/2014 complements the above-mentioned provisions, stating that when possible, the debtor should be given the chance to restore the activity. Thus, the ultimate goal pursued by the legislature through these normative acts is the debtor's reintegration into the economic circuit, a goal which is achievable if the person in insolvency faces just a temporary insufficiency of the available funds for the payment of certain, liquid and payable debts<sup>38</sup>.

Also, the contracting authority may discriminate participants in the public procurement procedure by setting minimum criteria on the basis of the provisions of art. 31 par. (2) and (3) of the Methodological Norms for the application of Law no. 98/2016.

According to art. 31 par. (1) and (2) of the Methodological Norms, the contracting authority is not entitled to restrict participation to the award of the public procurement contract by introducing minimum qualification criteria [art. 31 par. (1) of the Methodological Norms], but can establish as a minimum qualification requirement a certain level of economic or financial indicators, if these indicators have a concrete link with a possible risk of non-fulfillment of the contract [art. 31 par. (2) of the Methodological Norms]. The latter legal text may lead to arbitrary and therefore discriminatory interpretations of the contracting authority, since it gives the authority a right to apply minimum economic qualification requirements, without defining the concept of "risk of default of the contract".

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<sup>36</sup> Law no. 85/2006 on insolvency procedure, published in the Official Journal of Romania, Part I, no. 359 of 21 April 2006, repealed on June 28<sup>th</sup>, 2014 by art. 344 lit. a) of Law no. 85/2014 on insolvency and insolvency prevention procedures

<sup>37</sup> Law No. 85/2014 on insolvency prevention procedures and on insolvency procedure, published in the Official Journal of Romania, Part I, no. 466 June 25<sup>th</sup>, 2014, amended by Law no. 312/2015, Law no. 62/2016 and Law no. 1/2017.

<sup>38</sup> Art. 5 pct. 29 of Law no. 85/2014 defines insolvency as „that state of the debtor's patrimony characterized by insufficient funds available for the payment of certain, liquid and due debts, as follows: a) the debtor's insolvency is presumed when the debtor, after 60 days from maturity, does not paid its debt to the creditor; the assumption is relative; b) insolvency is imminent when it is proved that the debtor cannot pay at maturity the liabilities incurred with the funds available on the due date”.

Moreover, the right provided by art. 31 par. (2) of the Methodological Norms may be arbitrarily exercised by the contracting authority because:

(1) it has the possibility to identify, on its own criteria, the existence of a risk of default of the contract;

(2) it is sufficient for the risk of non-fulfilment of the contract to be „possible”, that is not a real risk or at least a foreseeable one. Consequently, the contracting authority may establish additional economic criteria on the basis of presumptions, and not on objective and foreseeable grounds both for the economic operators participating in the public procurement procedure and for those who are interested in participating at this type of procedure.

Art. 31 par. (2) of the Methodological Norms offers the contracting authority the right to impose to each economic operator who participate together at the award procedure to demonstrate the fulfilment of a level of the economic and financial criteria, as well as a level the technical and professional capacity proportionally to the involvement in the execution of the future contract.

In the interpretation of these legal texts, together with the provisions of art. 54 par. (3) - (5) of Law no. 98/2016<sup>39</sup>, we find that the contracting authority has the right to set economic and technical criteria taking into account objective reasons and respecting the principle of proportionality. Because the law makes no reference to the other conditions which the contracting authority must take into account, it can be concluded that these economic and technical criteria may circumvent the general principles of public procurement.

Thus, art. 54 par. (3) - (5) of the Law no. 98/2016 and art. 31 par. (2) and (3) of the Methodological Norms do not in any way refer to the obligation of the contracting authority to respect, in establishing the economic and technical criteria, the right to equal and non-discriminatory treatment of the economic operators participating in the award procedure.

Taking into account that the irregularities mentioned above reveal, in our opinion, the inconsistency of the legislator regarding the effective application of the principles provided by art. 2 par. (2) of Law no.98/2016, we believe that this legal text should provide, in addition to a list of the principles of awarding public procurement, complete and unequivocal definitions of these rules.

7. In the absence of these legal definitions, we believe that it is the responsibility of the doctrine and the jurisprudence to define, in the interpretation and the application of law,

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<sup>39</sup> Art. 54 par. (3) to par. (5) of Law no. 98/2016 states as following: „(3) The contracting authority has the right to establish through the awarding documentation, where it is necessary and justified for objective reasons, how economic operators are to meet the requirements of economic and financial capacity and technical and professional capacity in case of joint participation in the award procedure, respecting the principle of proportionality. (4) The contracting authority has the right to establish through the awarding documentation certain conditions for the execution of the public procurement contract / framework agreement if the economic operators participate together in the award procedure, conditions that are to be different from those applicable to the individual participants, are to be justified by objective reasons and respect the principle of proportionality. (5) The methodological norms for the application of this law shall lay down standard provisions or requirements regarding the modalities of fulfilment, by the economic operators who participate together at awarding procedure, of the requirements regarding the economic and financial capacity and the technical and professional capacity.”

the notions of “non-discrimination” and “equal treatment”, as well as the remedies to be applied in case of breach of the principles in the procedure public procurement.

According to the doctrine, the principle of non-discrimination involves the assurance of the conditions for an effective competition between economic operators, so that they have the opportunity to take part in a procedure for the award of a public procurement contract and to conclude this contract (Cimpoeru, 2017; Șerban, 2012). In the same way, the jurisprudence reveals that, in order to respect the non-discriminatory principle, each economic operator's chance must be an effective one, in the sense that each participant's offer must be analyzed in an objective way, and not in a formal one<sup>40</sup>.

On the other hand, compliance with fair treatment requires the contracting authority to apply the same rules, conditions and criteria to all economic operators who have registered a public procurement procedure or aspire to participate in that procedure (Cimpoeru, 2017; Șerban, 2012)<sup>41</sup>.

In its jurisprudence, the Court of Justice of the European Union reveals also that the principle of equal treatment requires that similar situations are not to be treated differently and that different situations are not to be treated in the same way unless such treatment is objectively justified<sup>42</sup>. This opinion is shared by European Court of Human Rights, which mentions, in the motivation of a decision from 2000, that “the right not to be discriminated against is violated not only when a State treats differently persons in analogous situations without providing an objective and reasonable justification, but also when a State, without an objective and reasonable justification, fails to treat differently persons whose situations are different”<sup>43</sup>.

Also, according to the Court of Justice of the European Union the principle of equal treatment of economic operators and the obligation of transparency prohibit the contracting authority from rejecting a participant's offer on grounds which are not provided for in the award notice and which are invoked subsequently to the submission of that participant<sup>44</sup>. Taking into consideration these arguments, the Court has stated the “The contracting authority cannot, therefore, after publication of a contract notice, amend

<sup>40</sup> Court of Appeal Bacau, 2<sup>nd</sup> Civil Division, judgement no. 59/2009, available at: [www.idrept.ro](http://www.idrept.ro) and [http://portal.just.ro/32/SitePages/Dosar.aspx?id\\_dosar=3200000000010227&id\\_inst=32](http://portal.just.ro/32/SitePages/Dosar.aspx?id_dosar=3200000000010227&id_inst=32) [Accessed on 15 Sept. 2017].

<sup>41</sup> Par. 107-108 of Judgement of the Court of October 5<sup>th</sup>, 2000, Case C-16/98, *Commission of the European Communities v France*, available at: <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30d6d0616948e8cf4ddaa730a1df5591f79a.e34KaxiLc3qMb40Rch0SaxyMbh0?text=&docid=45712&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1650983> [Accessed on 15 Sept. 2017].

<sup>42</sup> Par. 27 of Judgement of the Court (second Chamber) of march 3<sup>rd</sup> 2005, in Joined Cases C-21/03 an C-34/03, *Fabricom SA v État belge*, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62003CJ0021&from=EN> [Accessed on 15 Sept. 2017].

<sup>43</sup> Par. 38 of Decision of European Court of Human Rights (Grand Chamber) of April 6<sup>th</sup>, 2000, Case *Thlimmenos v. Greece* (Application no. 34369/97) available at: [https://hudoc.echr.coe.int/eng#{"fulltext":\["Thlimmenos"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-58561"\]}](https://hudoc.echr.coe.int/eng#{) [Accessed on 19 Sept. 2017]. In same way, Decision of European Court of Human Rights (Grand Chamber) of April 29<sup>th</sup>, 2008, Case *Burden v United Kingdom* (Application no. 13378/05), available at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-78427"\]}](https://hudoc.echr.coe.int/eng#{) [Accessed on 19 Sept. 2017].

<sup>44</sup> Par. 53 - 54 of Judgement of the Court (Grand Chamber) of June 14<sup>th</sup>, 2007, Case C-6/05, *Medipac-Kazantzidis AE v Venizeleio - Pananeio (PE. S. Y. KRITIS)*, available at: <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30d6393ddd6f347f41129e66d3161db1aed7.e34KaxiLc3qMb40Rch0SaxyLbN50?text=&docid=61004&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=272947> [Accessed on 16.09.2017].

the technical specification in respect of an element of the contract in breach of the principles of equal treatment and of non-discrimination and the obligation of transparency. It is irrelevant, in that regard, whether or not the element to which that specification refers is still in production or available on the market.”<sup>45</sup>

For the reasons mentioned above, we can summarise that non-discrimination principle in public procurement requirements are broken if the contracting authority issues any type of acts and adopts any kind of measures to which can be applied at least one of the following situations:

(1) The economic, financial and / or technical conditions set out in the announcement and / or the specifications violate or restrict the right of any person interested to register and effectively participate in the procurement procedure;

(2) The economic, financial and / or technical conditions mentioned in the announcement and / or the specifications are set out in favour of a particular participant / a group of particular participant;

(3) The conditions and ways of awarding the contract are stipulated in an unclear, imprecise and interpretable manner<sup>46</sup>;

(4) At least one participant benefits, in elaborating the offer, of a better chance than other competitors<sup>47</sup>, as a result of the additional information / documents provided by the contracting authority, but not communicated to the other participants in the public procurement procedure.

<sup>45</sup> Par. 29 of Judgement of the Court (Fifth Chamber) of April 16<sup>th</sup>, 2015, Case C-278/14, *Enterprise Focused Solutions S.R.L. v Emergency County Hospital Alba Iulia*, available at: <http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0278&lang1=en&type=TXT&ancre=> [accessed on 16 Sept. 2017].

<sup>46</sup> Judgment of the Court of First Instance (Sixth Chamber) of September 9<sup>th</sup> 2009, *Brink's Security Luxembourg SA v Commission of the European Communities, Case T-437/05*, available at: <http://curia.europa.eu/juris/celex.jsf?celex=62005TJ0437&lang1=en&type=TXT&ancre=> [Accessed on 16 Sept. 2017]. According to par. 115 of the judgement, „the principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents”.

<sup>47</sup> According to par. 113 of Judgment of the Court of First Instance (Sixth Chamber) of September 9<sup>th</sup> 2009, *Brink's Security Luxembourg SA v Commission of the European Communities, Case T-437/05*, „the contracting authority must, at each stage of the tendering procedure, act in accordance with the principle of equal treatment of tenderers and, in consequence, ensure that all tenderers have an equal chance”. In the motivation of this decision, the Court invokes the following judgements:

a) Par. 108 of Judgement of the Court (Fifth Chamber) of April 29<sup>th</sup> 2004, Case C-496/99 P, *Commission v CAS Succhi di Frutta*, pct. 108, available at: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49126&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1725071> [Accessed on 16 Sept. 2017].

b) Par. 85 of Judgment of the Court of First Instance (Fourth Chamber) of December 17<sup>th</sup> 1998, case T-203/96, *Embassy Limousines & Services v Parliament*, available, in summary, at: <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30db14f9ad2c4b7d47119473be34a67485b1.e34KaxiLc3qMb40Rch0SaxuLchf0?text=&docid=103941&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=33601> [Accessed on 16 Sept. 2017]

c) Par. 45 of Judgment of the Court of First Instance of July 12 2007, Case T-250/05, *Evropaiki Dynamiki v Comision*, available, in summary, at: <http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:62005TJ0250&from=EN> [Accessed on 16 Sept. 2017].

These types of discriminatory acts and measures adopted by contracting authority violate honest practice<sup>48</sup> and the principle of good faith, while the loyal and effective competition between the participants at public procurement is completely broken.

Also, establishing unfair and inappropriate conditions violates the rights and interests of the local community as economic operators with professional experience in public procurement will not join the procedure or, if they participate, they will object to the contractual conditions considered to be discriminatory<sup>49</sup>. In these circumstances, we consider that keeping the provisions of Law no. 98/2016 and methodological implementing rules will have at least one of the following consequences:

- a) Decrease of competition in public procurement procedures;
- b) The contracting authority will have to accept a higher price in awarding the contract;
- c) Qualitative and / or quantitative decrease of the results obtained following the execution of the public procurement contract.

8. In order to remedy the effects caused by the acts and deeds of the contracting authority that have violated the principles provided by art. 2 of the Law no. 98/2016 and for reparation of the damage caused by these acts and deeds, the interested person may appeal to one of the remedies provided by the Law no. 101/2016. According to it, the person who considers himself / herself to be injured has the right to file an appeal, registered either with the National Council for Solving Complaints or with the competent administrative court according to Law no. 554/2004<sup>50</sup>.

In the interpretation of art. 3 of Law no. 98/2016 we can assume that any natural or legal person, whether governed by public or by private law, or a group or association of such persons, which lawfully offers on the market the execution of works and / or construction, the supply of goods or the provision of services, may be harmed as a result of discriminatory treatment by the contracting authority in the public procurement procedure and may, therefore, lodge an appeal against the discriminatory acts, under the provisions of Law no. 101/2016.

According to art. 3 par. (1) lit. f) and art. 6 par. (1) of Law no. 101/2016 the conditions for a complaint to be admissible are the following: a) the person who formulates the appeal is an economic operator according to art. 3 par. (1) par. 36.jj) of Law no. 98/2016; b) this person has or has had an interest in an award procedure<sup>51</sup>; c) this person has

<sup>48</sup> According to art. 1<sup>1</sup> lit. c) of Law no. 11/1991 on combating unfair competition, honest practice represents „a set of generally recognized rules which apply to business relations between professionals in order to prevent the infringement of their legitimate rights”.

<sup>49</sup> These aspects have been presented by the National Council for Solving Complaints in the decision to resolve the appeal against the procedure for the award of the works contract (design and execution) having as object „New desulphurization plant (DESOX) in CET2 ...”, CPV codes 45253200-7 - Desulphurisation plant construction work (Rev.2), 71320000-7 - Technical design services (Rev.2), available at: [http://www.cnsr.ro/wp-content/uploads/bo/2013/BO2013\\_0410.pdf](http://www.cnsr.ro/wp-content/uploads/bo/2013/BO2013_0410.pdf), [Accessed on 19.09.2017]. By this decision, the Council partially accepted the complaint and ordered the contracting authority to issue a clarification address (in SEAP) with the indication of mandatory contractual clauses while removing, from the content of the purchase data sheet, the obligation to submit the contract form signed for its closure.

<sup>50</sup> Law no. 554/2004 of the administrative contentious, published in the Official Journal of Romania, Part I, no. 1154 of December 7<sup>th</sup> 2004, subsequently modified and supplemented.

<sup>51</sup> According to art. 33 par. (1) C.pr.civ., the interest, as a condition for the exercise of the judicial process, must be determined, legitimate, personal and actual.

suffered, suffers or is likely to suffer prejudice as a consequence of an act of the contracting authority which is likely to produce legal effects or as a result of the failure to resolve within a legal time a request regarding an award procedure; d) the preliminary procedure mentioned by art. 6 of the Law is completed (Cimpoeru, 2017).<sup>52</sup>

According to the doctrine, the interest justifies, on one hand, the relation between the party's juridical situation and the procedural means chosen by the party, and on the other hand, the goal of judicial process, meaning the moral or material "profit" (Ch. Debbasch, *Contentieux administratif*, 3e ed. Dalloz, Paris, 1981, nr. 265, p. 209 - 210, apud Deleanu, 2005).

If the person who considers that has been prejudiced by the answer given by the contracting authority to the prior notification or who has not received any reply within the legal deadline stipulated in art. 6 par. (4) of the Law no. 101/2016, as well as any person who considers that has been injured by the remedial measures taken by the contracting authority may lodge an appeal with the National Council for Solving Complaints, according to art. 8 par. (1) of the Law, or the competent administrative court, according to art. 49 par. (1) of the Law no. 101/2016.

Art. 53 par. (1) of Law states that the administrative court is also competent to decide upon other matters, like compensation claims for the damage caused in the course of the award procedure and claims regarding enforcement, cancellation, nullity or termination of public procurement contracts.

9. In conclusion, we find that although important changes should have been made in the way public procurement is regulated, in order to guarantee the access to this procedure of as many economic operators as possible, the Romanian legislation continues to offer contracting authorities the possibility to set arbitrary criteria or not relevant to the subject-matter of public procurement, which has as effect restricting the right of all persons concerned to register and participate in this procedure.

Because Law no. 98/2016 does not provide real guarantees regarding compliance with the principles stipulated in art. 2 of the Law, we estimate a decline of business environment confidence in the public authorities competence to organise public procurement procedures, as well as a decrease of the number of economic operators to register and participate effectively in public procurement. This presumption is supported, among others, by the conclusions of a study made between April - May 2017 by Kantar TNS, at the request of Romanian Chamber of Commerce and Industry, "Business environment perceptions on the economy"<sup>53</sup>. According to this study, 34% of economic operators that responded to the study participated to public procurement procedure, the activity of these operators being mainly in agriculture or industry. Also, 43% of the participants at public procurement procedure considered that the award documentation was made in the advantage of certain companies, while 29% of these participants considered that the conditions established by the award documentation were "very difficult to achieve". Taking into consideration the conclusions of this study, we believe,

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<sup>52</sup> According to art. 7 par. (1) of Law no. 101/2016, the registration of the notification within the legal deadline suspends the right to conclude the contract.

<sup>53</sup> Analysis report made between 5 April 2017 - 9 May 2017, having 501 participants, available at: [http://www.cciabr.ro/media/pagini/home/Studiu\\_Perceptia\\_mediului\\_de\\_afaceri\\_asupra\\_economiei.pdf](http://www.cciabr.ro/media/pagini/home/Studiu_Perceptia_mediului_de_afaceri_asupra_economiei.pdf) [accessed at 17.09.2017].

along with other theoreticians of law, that the legislation must guarantee the highest possible accessibility of the information and criteria used by the contracting authority in the preparation of the awarding documentation, so that they can be interpreted “at the level of an average economic operator” (Șerban, 2008).

10. In order to correct the irregularities regarding the application of equal and non-discriminatory treatment, we consider that, *de lege ferenda*, it is absolutely necessary to remove from the content of Law no. 98/2016 and of the Methodological Norms the legal provisions that allow contracting authorities to prohibit access to the procurement procedure.

In our opinion, at least the following changes to the law are required:

- Clear and complete definitions of all principles applicable to the award of public procurement should be mentioned;
- Distinct provisions on the circumstances and means by which these principles may be violated, should also be mentioned.
- The legal provisions obliging the contracting authority to remove from the public procurement procedure the economic operators who are in certain economic and legal situations, such as those provided by art. 167 par. (1) lit. c) and d), should be removed from the Law.
- The amount of penalties imposed on contracting authorities as a result of breaching the principles of Law no. 98/2016<sup>54</sup> should be higher, in order to become effective, proportionate and discouraging<sup>55</sup>.
- These penalties should be applied both to the contracting authorities and to any person who has violated the principles of public procurement by guilt<sup>56</sup>.

We also consider as necessary an adaptation of Methodological Norms' provisions to the rules of Law no. 98/2016, in order to present more details regarding the principles governing the public procurement procedure, as well as to exemplify the situations that may lead to the violation of these legal rules.

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<sup>54</sup> According to art. 224 par. (1) lit. b) corroborated with art. 224 par. (2) of the Law no. 98/2016, any violation of its provisions having as effect the violating the provisions of art. 2 of the Law, constitutes a contravention provided that, from the perspective of the criminal law, these facts are not considered crimes, the contravention being sanctioned with a fine between 5.000 RON and 30.000 RON.

<sup>55</sup> Art. 58 par. (4) of Law no. 101/2016.

<sup>56</sup> According to art. 227 par. (1) of the Law no. 98/2016, the contravention sanction is applied to the contracting authority, which, depending on the concrete situation, takes measures against the persons involved in the public procurement procedure that was the subject of the contravention. From the analysis of this legal text, it can be understood that, in the case of the contracting authority's breach of the principle of non-discrimination in the public procurement procedure, the authority has only the option, and not the legal obligation, to appeal against the guilty persons.

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