Book Review: *Remedies and Appeals in the field of Public Procurement. Law no. 101/2016-genesis, interpretation, limits, perspectives*

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Remedies and Appeals in the field of Public Procurement. Law no. 101/2016-genesis, interpretation, limits, perspectives by Dumitru-Daniel Şerban, 2019, Bucharest, Romania: Ed. Hamangiu.

In 2019, Hamangiu Publishing House issued *Remedii şi căi de atac în domeniul achiziţiilor publice. Legea nr. 101/2016-geneză,* ***interpretare****, limite, perspective (Remedies and Appeals in the Field of Public Procurement. Law no. 101/2016 – genesis, interpretation, limits, perspectives*), written by Mr. Dumitru Daniel Şerban, appeal resolution counsellor in the field of public procurement with the National Council for Appeal Resolution, with a doctorate of law awarded by The Faculty of Law of Bucharest University, under the supervision of Professor Dana Apostol Tofan, PhD.

In the beginning, we note the importance of the topic analysed in the book, as well as the interest such a scientific work holds for the doctrine and for public procurement practitioners. From its first pages, this work proves its relevance in the context in which public procurement is a continuous challenge for researchers, largely determined by frequent legislative fluctuations, which force one to create and adapt works to legislative changes, but also to analyse them according to current doctrine and jurisprudence.

The book is the result of a consistent scientific approach on the part of the author, known as a public procurement practitioner with vast experience in the administrative-jurisdictional activity of the Council for Appeal Resolution; his experience is all the more notable given that it is doubled by rigorous scientific and academic training in the field of law.

In the introduction of our analysis, we note the book's coherent structure, consisting of three parts, beginning with introductory aspects, continuing with a detailed commentary on Law 101/2016 and on unconstitutionality breaches in the remedy law.

Among the aspects we consider to be strengths of this work, we note: an analysis from the perspective of current legislation and consecrated doctrine in the field, while emphasising the author's opinions, with the purpose of underlining the necessity to identify reforming solutions in public procurement (such as, for instance, the author's proposal to create a Code of Public Procurement); an analysis of Law no. 101/2016

both from the point of view of its provisions and of Romanian and European court doctrine and jurisprudence; a special regard given by the author to decisions passed by the Constitutional Court as well as by the High Court of Cassation and Justice on remedies at law, but also in untangling certain issues of law.

In the **Introductory Part**, the author treats the concept of rule of law, stating that the book systematises, in an original manner, not only national and European relevant regulations, but also the jurisprudence of the Court of Justice of the European Union, the High Court of Cassation and Justice, other judicial courts, as well as, last but not least, of the National Council for Appeal Resolution, together with elements of inconsistency and controversy, accompanied by the author's clarifications.

Part II of the paper gives a detailed commentary of Law no. 101/2016 on appeals and remedies in the matter of assigning public procurement contracts, sectorial contracts and works and services concession contracts, as well as with regard to the organisation and operation if the National Council for Appeal Resolution[1)].

Referring to the regulation object of this law, the author emphasises (at page 89) that the existence of a derogatory regulation, consecrated by the provisions of the law of remedies, forces the interested party to follow the procedure regulated by this normative act, and not the procedure provided by common law, contained in the Law of Administrative Contentious or in the Code of Civil Procedure.

The author also emphasises (page 90) that, by extending their sphere of application, the procedural norms of framework-law 101/2016 are general norms in the matter of litigation regarding the assignment, execution, annulment, resolution, cancellation or unilateral termination of public/ sectorial/ concession procurement contracts (with some exceptions), but, related to the procedural norms (including jurisdictional competence) of Law 554/2004, they become special norms exclusively dedicated to the aforementioned litigations. The particular norms of the first law, and not only, are an application of the *specialia generalibus derogant* rule, with regard to the competence assigned to the lawmaker by article 126 paragraph (2) of the Constitution, which, in extraordinary circumstances, can institute special rules regarding establishing the competence of courts and trial procedure.

In this context, the author makes reference to the European directive on remedies – Council Directive of December 21, 1989 regarding the coordination of acts with the

[1)] This law was published in the Official Gazette no. 393 of 23/05/2016, and was later altered and completed by the following normative acts: Emergency Government Ordinance no. 107/2017 for the alteration and completion of certain normative acts with an impact in the field of public procurement (published in the Official Gazette, Part I n. 1022 of December 2, 2017), EGO no. 45/2018 for the alteration and completion of certain normative acts with an impact on the public procurement system (published in the Official Gazette, Part I no. 459 of June 04, 2018), Law no. 212/2018 for the alteration and completion of the Law of Administrative Contentious no. 554/2004 and other normative acts (public shed in the Official Gazette, Part I no. 658 of July 30, 2018); the most recent alterations and completions to Law 101/2016 are included in the recent EGO no. 23/2020 for the alteration and completion of certain normative acts with an impact on the system of public procurement (published in the Official Gazette, Part I no. 106 of February 12, 2020).

power of law and of administrative acts regarding the application of procedures relevant to remedies at law in the matter of assigning public procurement contracts for goods and for works (89/665/CEE) (referring to a wide European jurisprudence), as well as to the National Strategy in the field of public procurement[2)].

We highlight the rich jurisprudence accompanying the author's commentary of each provision of Law 101/2016, both from Romanian and from European courts, as well as decisions of the Constitutional Court.

Among the author's ideas, notable in the not very abundant literature in the field of appeal and remedy law analysis, we have already underlined one regarding the necessity to combine the four laws regulating public procurement in Romania – Laws no. 98-101 of 2016 – in a Code of Public Procurement. We share this opinion and we consider the idea to be a natural endeavour, after adopting the Administrative Code[3)].

We also subscribe to the author's opinion that the law of remedies does not only regulate procedural deadlines, but also other time limits, such as: deadlines for the contracting authority or the National Agency for Public Procurement (ANAP) to post the decision of the Council and the decision of the court of appeal into the SEAP (art.27 par. 11 and art.35 par. 5); waiting periods for concluding a contract, established by article 59; the due date for notifying ANAP of actions by which one requests ascertainment of absolute contract nullity (art. 60 par.2); deadline for convening a Council plenum meeting by its president (art. 63 par.3); deadline for adopting Government decision to supplement the number of posts for judicial courts (art. 71).

Special attention was granted by the author to the administrative-jurisdictional procedure before the National Council for Appeal Resolution (CNSC, the Council), which is explicable given the expertise acquired by the author as appeal councillor in this independent body conducting administrative-jurisdictional activities in public procurement, a virtual first court in this matter by specialised panels, whose specialists carry out their work with integrity, professionalism and professional expertise.

A pertinent idea is that double appeal of the same act, both by CNSC and in court, is rather a theoretical move, the author stating that he does not see '*the reason why an aggrieved party would be inclined to constitute recognizance twice (or pay judicial fees as well)*' (page 201).

The author also notes a hypothesis which the lawmaker omitted in the stage of administrative-jurisdictional appeal, namely the deadline for contesting acts which are not communicated by the authority to the participants in the assignment procedure. The typical example given by the author is that of the procedure report, which is not sent to the bidders. The answer to the question becomes complicated, according to the author, when the public procurement file is consulted by an economic operator with a legitimate interest after a long period of time, for instance three months from

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2) The national strategy in the field of public procurement was approved by Government Decision no. 901/2015, published in the Official Gazette, Part I no. 881 of November 25, 2015.

3) The Administrative Code was adopted by EGO no. 57/2019, published in the O.G. no. 555 of July 05, 2019.

when the bid result was announced, a situation which the law should have prevented or resolved (pages 261-263)

We have also noted the author's opinion, also correct, that the Council cannot itself declare a winning offer – with certain waivers – taking into account that one of the evaluation committee's attributions is to establish the winning bid (including those which were unacceptable/ inconsistent/ admissible), and through such an intrusion of the Council into the committee's responsibilities, the principle of separation and balance of powers in a state would be breached (page 585).

A correct opinion on the author's part is also that according to which parties can agree that litigation related to the interpretation, conclusion, execution, alteration and termination of contracts be resolved by arbitration, a possibility which cannot be extended to litigation related to acts of the authority during the contract assignment procedure (pre-contractual), which are reserved for administrative-jurisdictional or judicial remedy at law. For investing the arbitral body with resolving a conflict, a preliminary procedure is not required (page 822).

The author takes notice of the unconstitutional aspects of article 56, paragraph (1) of Law 101/2016, regarding the percentages of judicial stamp fees established by this article. Thus, claims the author, *'it is unheard of that a claim taxable based on value for an object estimated to be worth up to 100,000,000 RON be taxed more (double) than a claim with an object whose value exceeds 100,000,000 RON, respectively that the tax decrease (not even stay the same, if not progressively increase)*'(page 827).

Part III of the work analyses unconstitutionality breaches in the law of remedies; here the author details personal opinions, such as the one referring to the bail established by article 61^1, regarding which he believes that freezing the financial assets of a person who considers itself the aggrieved party has the potential to hinder or at least reduce the attractiveness of free service provision, as it is guaranteed by the Treaty on the Functioning of the European Union (page 957).

Part IV of the work contains the author's conclusions, both generally and compared to the normative framework in force before Law 101/2016, with his final opinions regarding the litigant's option to go through an administrative-jurisdictional procedure or directly seek resolution in court.

In conclusion, we recommend this work, the importance of the field proving that public procurement is a permanent challenge for researchers and practitioners alike.

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