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The Limits within which the Contracting Authority may Proceed with the Forced Execution of the Winning Association in the Public Procurement Procedure

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Abstract: This article deals with the possibility for awarding entities to proceed with the forced execution of all members of an association set up for the performance of public or sectoral procurement contracts provided for by Law 98/2016 and Law 99/2016, in the event that, on the basis of a damage inspection report issued by a judicial public authority, the court definitively grants a judgment in favour of the awarding entity.
Unlike commercial companies with legal personality, joint ventures are governed only by contractual clauses and are exempt from any incorporation formalities, as they do not benefit from legal personality.
The purpose of the article is to highlight the misinterpretation of substantive law rules when concrete situations arise in which the awarding entity benefits from an enforceable title represented by a final court decision by which it executes all the members of the association although the documents underlying the signature and execution of the works or services contract specify an individual liability.

Keywords: *joint venture; awarding entity; public procurement; forced execution; service contract; works execution contract; joint tender.*

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According to Article 3 para. 1 letter jj) of Law 98/2016 (Romanian Parliament, 2016a) on public procurement, the economic operator is "*any natural or legal person, whether governed by public or private law, or group or association of such persons, including any temporary association formed between two or more of these entities, which offers on the market the execution of works, the supply of products or the provision of services on a competitive basis*".

The legislator has regulated the right of association to submit a joint tender without imposing certain rules on the content, form and number of members of the association.

In the absence of a specific regulation in the special law, the rules stipulated by the Civil Code (Romanian Parliament, 2009) concerning the partnership agreement are applicable, rules which are not restrictive, so we consider that the partnership agreement can have any form and scope, can include any kind of usual clauses such as the grounds for its dissolution and liquidation, but also certain arbitration clauses concerning the settlement of possible disputes and can be subject to any applicable law established by the parties.

According to Article 1949 of the Civil Code, "A joint venture contract is a contract by which a person grants one or more persons a share in the profits and losses of one or more operations which he undertakes" (Romanian Parliament, 2009).

The joint venture cannot acquire legal personality and does not constitute a person distinct from the partners in relation to third parties, the third party having no rights in relation to the joint venture and being bound only to the partner with whom it has contracted.

According to the provisions of Article 1953 of the Civil Code, "Associates, even acting on behalf of the association, contract and commit themselves in their own name vis-à-vis third parties" (Romanian Parliament, 2009).

If the partners act in this capacity towards third parties, they are jointly and severally liable for the acts concluded by any of them. The partners shall exercise all the rights arising from contracts concluded by any of them, but the third party shall be bound exclusively towards the partner with whom he has entered into the contract, unless the latter has declared his capacity at the time of conclusion of the act.

The essence of the joint venture contract is the sharing of the benefits, or, if applicable, the losses, between the contractual partners. The sharing of profits and losses follows from the very definition of this contract in the Civil Code. If a partner is excluded from profits or participation in

losses, or if participation in losses is provided for to a derisory extent, the contract is null and void (Article 1.953 para. (5) of the New Civil Code).

A joint venture is therefore a contract whereby a trader grants (all those who operate an enterprise according to the provisions of art. 3 para. (2) C.civ.) one or more persons or companies a share in the profits and losses of one or more operations or even of his entire trade.

Unlike companies with legal personality, joint ventures are governed only by contractual clauses and are exempt from any formalities of incorporation because they do not have legal personality.

In practice, this partnership agreement between two or more entities with a view to joint participation in a procurement procedure is concluded under private signature and contains, in addition to the names of the entities, the conditions for the management and direction of the association, in particular the powers of the leader of the association and the duration of the association, the manner of communication between the contracting authority and the association, but also two very important aspects, namely the financial/technical/professional contribution of each party to the performance of the public procurement contract and the physical, value and percentage distribution of the public procurement contract taken over by each partner for the execution of the objective put out to tender.

Unlike the old public procurement regulation in the current regulations, the associations are not under any obligation to have the act of association legalised before a notary public, the agreement being fully applicable and valid as long as it is signed by the legal representatives of the associating entities and endorsed by the awarding entity.

A different situation is provided for in Art. 54 para. (2) of Law 98/2016 , according to which, *"The awarding entity shall have the right to require the economic operators participating jointly in the tender procedure whose tender has been designated the winner to adopt or establish a particular legal form, provided that this has been provided for in the contract notice and tender documentation and to the extent that such modification is necessary for the proper performance of the public procurement contract"* (Romanian Parliament, 2016a).

Therefore, in this situation, although at the stage of submission and evaluation of tenders we are talking about a joint venture agreement concluded under private signature, after the designation of the joint venture as the successful bidder, the entities of the joint venture must adopt or incorporate a certain legal form. We consider that, depending on the subject matter of the contract, legal forms may be constituted in the form of a company, organisation, other legal forms (according to NAFA, List of Legal

Forms (used for registration declarations) or the provisions of Law 31/1990 on companies.)

In the doctrine and specialized literature, it is considered that the partnership agreement does not lead to the creation of a separate legal person, the members of the association preserving their individuality as legal subjects (with which we agree), but they are obliged to be jointly and severally liable to the awarding entity for the way in which they fulfil their contractual obligations.

It is also considered that in the case of a grouping of tenderers, the awarding entity which has suffered damage may take action against any member of the grouping (as a rule against the most creditworthy) to recover the damage suffered, even if the damage was caused or generated by the action or inaction of another member of the grouping.

On the basis of these legal provisions, we intend to clarify a few aspects relating to the situations in which, by virtue of the terms of a public procurement contract, the subsequent intervention of a control body or a final court decision, the public authority may carry out forced execution on each member of the association or only on the leader of the association, in order to recover existing debts in the form of undue payments.

In this respect, if we are talking about a final decision of the court, it is irrelevant whether it is based on tort liability or civil agreement liability.

Thus, Article 1349 of the Civil Code defines tort liability: *(1) Every person has the duty to respect the rules of conduct that the law or custom of the place imposes and not to prejudice, by his actions or inactions, the rights or legitimate interests of other persons. (2) A person who, with good judgment, violates this duty shall be liable for all damage caused and shall be obliged to make full reparation* (Romanian Parliament, 2009).

Tort liability is the obligation of a person to make good the damage caused to another person by a tort/delict or, as the case may be, the damage for which he is called upon by law to account (Pop, 1998, p. 171).

In order to incur tort liability, several cumulative conditions must be met: the existence of an injury, a wrongful act, a causal relationship between the wrongful act and the injury, fault (guilt of the perpetrator) and the tort capacity.

When the obligation to repair the damage is the result of non-compliance or violation of some obligations previously assumed, through a contract, the liability that will be triggered will be contractual.

Contractual civil liability has in its content the duty of the debtor of an obligation arising from a contract to make good the damage caused to his

creditor by the non-performance lato sensu of the performance due. By this failure to perform in the broad sense of the term, it is meant both late performance and improper performance or non-performance in whole or in part (Pop, 1998, p. 171).

Firstly, the legal nature of this forced execution in the case of public procurement contracts (Romanian Government, 2006) needs to be clarified in order to establish whether the legal procedure is the one provided for in the Civil Code or the derogatory one provided for in the Code of Fiscal Procedure (Romanian Parliament, 2015).

Thus, according to the provisions of Article 623 of the Code of Civil Procedure, *"Forced execution of any enforceable title, with the exception of those concerning revenues due to the general consolidated budget or the budget of the European Union and the budget of the European Atomic Energy Community, shall be carried out only by the judicial executor, even if special laws provide otherwise"* (Romanian Parliament, 2010).

According to Article 220 (3) and (5) of the Fiscal Procedure Code *"Tax receivables which, according to the law, are administered by public authorities or institutions, including those representing own revenues, may be enforced by tax executors organized in specialized departments, who are empowered to carry out enforcement measures and to carry out the enforcement procedure, according to the provisions of this Code. The enforcing bodies are also competent for the forced execution of receivables referred to in Article 226 para. (3)"* (Romanian Parliament, 2015).

According to the provisions of Article 226 paragraph (3) of the Tax Code, *"Forced execution of tax receivables resulting from contractual legal relationships shall be carried out on the basis of a court decision or another document which, according to the law, constitutes an enforceable title."*

By Decision No 66 of 2 October 2017 , the High Court of Cassation and Justice established that, in interpreting the provisions of Article 623 of the Code of Civil Procedure in relation to Article 220 para. (3) and (5) and art. 226 para. (3) of Law No. 207/2015 on the Tax Code, as amended, Art. 3 para. (1) of the Law no. 273/2006 on local public finances, as amended and supplemented, and art. 3, item 18 of the Law on fiscal-budgetary responsibility no. 69/2010, the forced execution of enforceable titles - court decisions on tax receivables, due under contractual legal relationships that are made to the consolidated state budget, is carried out by tax executors, as state enforcement bodies.

Therefore, in view of the above, the legal nature of forced execution in the case of public procurement contracts is that provided for in the Tax Code.

Secondly, according to the provisions of the Tax Code, forced execution by an awarded entity must be based on an enforceable title. According to Article 632 et seq. of the Code of Civil Procedure, enforceable titles are enforceable decisions, final decisions and any other decisions or documents which, according to the law, may be enforced. Arbitral decisions may be enforced, even if they are challenged with an action for annulment, as well as other decisions of bodies with jurisdictional powers that have become final, following their non-appeal before the competent court. Likewise, European Enforcement Orders in respect of which European Union law does not require prior recognition in the Member State of enforcement are enforceable by operation of law, without any other prior formality.

The following are also enforceable titles and may be enforced: the conclusions and minutes drawn up by judicial executors which, according to the law, constitute enforceable titles, authentic instruments, credit deeds or other documents which the law recognises as enforceable.

Also, bills of exchange, promissory notes and cheques, as well as other debt instruments constitute enforceable titles, if they meet the conditions laid down in the special law.

We substantiate this statement by the provisions of Decision No 793 of 21 November 2021 of the Constitutional Court on the exception of unconstitutionality of the provisions of Article 1 para. (1), art. 2 letter n) and art. 33 para. (3) of Law No 94/1992 on the organisation and functioning of the Court of Auditors which, according to its operative part *"In view of the criticisms raised in the case, the Constitutional Court notes that by Decision No 13 of 6 March 2017 of the High Court of Cassation and Justice - Complex for the resolution of questions of law, published in Monitorul Oficial al României, Part I, No 419 of 7 June 2017, this court held that "Art. 33 para. (3) of Law no. 94/1992 regulates the manner of recovery of audit reports in situations where deviations from legality and regularity are found to have caused damage. Such a situation shall be communicated to the audited public entity, a conclusion which follows from the content of Art. 33 para. (3) first sentence of Law no. 94/1992. The text of Art. 33 para. (3), final sentence, of Law 94/1992 requires the audited entity to determine the extent of the damage and order measures to recover it. Analysis of the content of Art. 33 para. The final sentence of Article 33(3) does not provide any indication as to the course of action to be taken, leaving it to the audited entity to choose the most effective and appropriate means of recovering the damage. The explanation lies in the fact that the audited entities (which, according to Article 2(j) of Law 94/1992, may be public authorities, national companies/ corporations, autonomous corporations, companies governed by Company Law 31/1990, republished, as subsequently amended and supplemented, in which the State or an*

administrative-territorial unit holds, alone or jointly, all or more than half of the share capital) may be in a multitude of legal relationships, so that, given their diverse nature, Article 33(3)(b) of Law 94/1992 is not applicable. (3), final sentence, does not even provide by way of example the nature of the procedural or administrative procedure to be followed for the recovery of the damage found". The Supreme Court stated that "public institutions may be involved in various legal relationships, such as, for example, employment, administrative, contractual, procurement, etc. Depending on the nature of the legal relationship in which the public institution is involved and on the specific situation in which the damage was caused, or the unlawful payment was made from the budget of the public institution, the recovery of the damage may be different, and the choice of the method for recovering the damage is a matter for the management of the audited entity".

Therefore, in view of the above, in the case of a forced execution initiated by a contracting authority, taking into account all the conditions of substance and form of a public procurement contract, as defined by the specific legislation, as well as the ways in which the specific legislation establishes procedurally the method of settlement of the works carried out or services rendered, **we consider that an enforceable title in this matter can only be represented by a final court judgment.**

The third aspect, *Article 225 of the Tax Code provides that "for the enforcement of tax debts owed by an association without legal personality, even if there is an enforceable title in the name of the association, both movable and immovable property of the association and the personal property of its members may be enforced.*

In the light of the provisions of this article, we consider that, in this respect, the forced execution of the association is unlawful. Thus, starting from the text of the law, we must consider the following aspects:

a) The existence of an unincorporated association - which, from the point of view of public procurement law exists;

b) According to the provisions of the Tax Code, in the absence of an enforceable title, we cannot talk about a forced execution so that the phrase presented in Article 225 of the Code of Tax Procedure "even if there is an enforceable title in the name of the association" cannot be applied because, per a contrario, the association could be enforced even in the absence of an enforceable title, contrary to what is stated in this article and provided by the specific legislation..

c) The aspects relating to the execution of the "personal property of its members" are nowhere to be found in the legal provisions of the association's documents. As we have pointed out, the association agreement does not lead to the creation of a separate legal person, the members of the association retaining their individuality as legal subjects. Moreover, in the absence of an express provision in the public procurement laws concerning

the clauses of the association agreement relating to a public procurement contract, we consider that the express waiver by the associate of the provisions of Article 2294 of the Civil Code relating to the benefit of discussion and of Article 2298 of the Civil Code relating to the benefit of division should be clearly recorded in the association agreement for the purpose of submitting a tender to a awarding entity, which is not required in practice.

Moreover, in practice, after winning a public works or service contract where we are part of a joint venture established under specific legislation, the awarding entity issues notifications only to the leader of the joint venture.

Thus, the order to start work is sent only to the leader, who is obliged to send it to the members of the association, the work is settled only after the site supervisor has given his opinion and sends the documents to the leader of the association, who in turn sends them to the awarding entity and, most importantly, the awarding entity makes payments only on behalf of the leader of the association, who is obliged to distribute the money to the members on the basis of the invoices drawn up by them, which must correspond to the statements of work.

Also, in practice, when discussing road works contracts in particular, the leader of the association submits to the awarding entity the method of dividing the road[4] sections for which the members of the association are responsible among the members of the association.

Moreover, in practice, final judgments have been issued against an association because, depending on the way in which the tasks relating to the execution of certain sections of road have been divided, the Court of Auditors of Romania has found that unlawful payments have been made by the awarding entity to only one member of the association and only for the section of road established for that member by the association contract and by the act of division of tasks. In such a situation, even if the court decides by final judgment that the members of the association must pay the unlawful payments made by the contracting authority, we consider that enforcement can only be towards the leader of the association, leaving it to him to return with an action for recourse to the member/members of the association who had responsibility for the sections of road for which unlawful payments were made.

We believe that this is also true if, in addition to the members of the association, the leader is also at fault, certainly in compliance with the liability established by the controlling body.

In view of these aspects, we consider that, on behalf of the contracting authority, the issuance of a payment notice to all members of the association with the legal basis provided for in Article 230 of the Fiscal Procedure Code, with the notification that if *"within 15 days of receipt of this notice you will not pay the amounts mentioned for which the legal term of payment has expired or you will not provide proof of their settlement, based on the provisions of Article 230 paragraph (l) of Law No. 207/2015 on the Tax Code, as amended, the enforcement measures will proceed. All the expenses incurred in the settlement of the above mentioned amounts, including those generated by the communication of this summons by post, will be borne by you."* is profoundly unlawful and unreasonable.

Therefore, from the interpretation of the legal texts presented, we consider that a forced execution by the contracting authority of an association, when there is an enforceable title represented by a final and enforceable court decision, can only be made against the leader of the association.

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