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COMPLIANCE WITH THE PRINCIPLE OF EQUAL TREATMENT IN PUBLIC PROCUREMENT LAW THROUGH THE PROTECTION OF PERSONAL DATA

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Abstract

This study aims to summarize the application of the principle of equal treatment in public procurement law within the legislation of the European Union and in the legal system in Romania and also the fair processing of personal data as an expression of the principle of equal treatment by actors involved in public procurement in Romania and in public procurement litigation as reflected in doctrine, legislation and judicial practice.

The research method chosen is epistemological and empirical analysis, whilst highlighting legislation incidents pertaining to the chosen subject and of the judicial practice, resulting in the improvement of the research topic addressed, for a better understanding and application of the legal provisions in the matter of respecting the principle of equal treatment and that of protection personal data in public procurement law. In the end, the study highlights the conclusions reported to the analysis of the topic dealt with.

Keywords: public procurement, equal treatment, personal data.

INTRODUCTION

I. THEORETICAL ASPECTS OF THE PRINCIPLE OF EQUAL TREATMENT IN PUBLIC PROCUREMENT LAW

The legal significance of public procurement regulation has been well applied and interpreted by the case law of the Court of Justice of the European Union (hereafter CJEU). The liberalization of public procurement underlines the need to eliminate preferential and discriminatory patterns in the public sector and to create direct business models between the public and private sectors. Procurement by Member States and their contracting authorities was often susceptible to an approach and policy that tended to favor indigenous companies and national champions (*Bovis, 2012, p.6*). Although the principle of equal treatment was unequivocally derived from the Treaty on the Functioning of the European Union¹ (hereafter TFEU), subsequent public procurement directives have strengthened and clarified its provisions.

Over time, the approach of EU public procurement regulations and directives² reflect ways to facilitate the functioning of the common market, alongside economic arguments, legal arguments have emerged in support of public procurement regulation as a necessary ingredient of the fundamental principles of the Treaties, such as the free movement of goods and services, the right to stability and the prohibition of discrimination. Thus, no tenderer can be restricted in his right to participate in procurement procedures, regardless of his country of origin.

Among the principles of European administration applicable to administrative decisions at EU level, the European Parliament's 2012 report³ mentions the principle of non-discrimination and equal treatment, according to which the EU administration avoids unfounded discrimination between people based on nationality, race, color or motivated by social origin, political beliefs, sexual orientation or other such criteria. Thus, similar situations will be treated in a similar way, only the objective characteristics of the matter in question being able to justify the differentiated treatment. *"The implementation of the aforesaid principles makes it possible to achieve one of the fundamental goals of the procurement procedures, which is to remain competitive"* (Stankiewicz, p. 361).

In the field of public procurement, the respect for the principle of equality between tenderers and, also, the concern to ensure effective competition must be taken into account, the implementation and fulfilment of the objective of favouring openness to the widest possible competition can only be achieved if economic

¹ Treaty on the Functioning of the European Union (OJEU No C 326 of 26 October 2012).

² Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC (OJEU No L94 of 28 March 2014); Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJEU No L94 of 28 March 2014).

³ European Parliament, Committee on Legal Affairs, Report with recommendations to the Commission on European Union administrative procedural law, 2012/2024 (INI).

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operators participating in the procurement procedure are treated equally, without the shadow of any discrimination⁴.

According to the general views on the matter, the application of the principle in question in public procurement procedures must be approached from the perspective of the objectives it pursues, it is not a concrete goal, it is a desideratum to be achieved through the correct management of procedures⁵ and "*the main purpose of public procurement is not the protection of human or fundamental rights, but the efficient use of public funds. However, by adopting the new concept of procurement, there is room for the penetration of such rights in public procurement*" (Blažo, Kováčiková, 2019, p. 135).

II. THE PRINCIPLE OF EQUAL TREATMENT IN PUBLIC PROCUREMENT LAW

II.1. *The principle of equal treatment in EU law*

The principle of transparency, equal treatment and non-discrimination derives from Articles 18, 56 and 64 TFEU and is referred to in Articles 18 and 76 of Directive 2014/24/EU, according to which Member States impose their own stipulations for the award of contracts in order to treat all economic operators equally and are free to establish the applicable procedural rules, ensuring that these rules allow the contracting authorities to take account of the specific nature of the services concerned⁶.

Named the principle of equal treatment, such principle is established in Article 18 of Directive 2014/24/EU and contains both the general principle of non-discrimination and the general requirement to treat economic operators equally. Although the principle of non-discrimination on grounds of nationality is found in the TFEU, CJEU case law has held that this principle is rather an expression of the general principle of equal treatment (*Risvig Hamer, Andhov, 2021, p. 189*).

According to Article 18 of Directive 2014/24/EU⁷ authorities are obliged to treat all economic operators equally and Recital (90) of the same Directive

⁴ Opinion of Advocate General Mengozzi, *Mt Højgaard and Züblin*, Case C-396/14, ECLI:EU:C:2015:774.

⁵ Judgment of the CJEU of 10 October 2013 *Ministeriet for Forskning, Innovation og Videregående Uddannelser and Manova A/S*, Case C-336/12, EU:C:2013:647.

⁶ Directive 2014/24/EU, Article 76, Principles for the award of contracts.

⁷ (1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The concept of procurement may not be made with the intention of excluding it from the scope of this Directive or artificially restricting competition. It shall be considered an artificial restriction of competition if the concept of acquisition is made with the intention of unduly favouring or disadvantaging certain economic operators.

(2) Member States shall take appropriate measures to ensure that, when performing public contracts, economic operators comply with the applicable environmental, social and labour law

provides that when awarding contracts Member States must take into account objective criteria ensuring compliance with the principles in order to select, under conditions of effective competition, the tender which presents best value for money.

The CJEU has defined the principle as follows: *"the principle of equal treatment requires that comparable situations should not be treated differently and that different situations should not be treated in the same way unless such treatment is objectively justified"*⁸. In its other decisions the Court has made a number of clarifications, showing that the principle applies not only to firms which have actually participated in a tendering procedure but also to those which hope to participate, and the idea of equal treatment does not only mean that other tenderers in the European Union must be treated equally with domestic tenderers but that all tenderers must be treated equally.

As a condition for compliance with the principle of equal treatment Directive 2014/24/EU establishes the obligation for contracting authorities to inform all tenderers of the award criteria to be applied and their weighting in the procurement in paragraph (90) of the preamble, with derogation from the obligation to indicate the weighting of criteria in justified cases, when the descending order of importance of the criteria shall be indicated.

Under EU law the qualification criteria must be limited to an assessment of whether the grounds for exclusion have been met and an assessment of the economic operator's ability to provide services, its economic and financial situation and its technical and/or professional capacity. Over time various qualification criteria have been considered by the CJEU in its case law, depending on the situation, such as giving preference to economic operators having their principal place of business in the region where the works to be procured are to be carried out, excluding tenderers from the procedure simply because they receive a public subsidy, the condition that the tenderer must have an office open to the public in the area where the service is to be provided, or requirements which are unrelated to the products, services or works to be procured or requirements which are disproportionate and cannot be met by only a limited number of economic operators.

Another situation arises when participation in the procurement procedure is restricted because the tenderer has committed serious professional misconduct likely to call into question the integrity or reliability of the tenderer, without the misconduct being confirmed following the outcome of a process⁹.

obligations established by Union law, national law, collective agreements or international environmental, social and labour law provisions listed in Annex X.

⁸ Case C-434/02, *Arnold André GmbH & Co KG v. Landrat des Kreises Herford*, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-434/02>

⁹ Order of 20 November 2019 (Case C-552/18) ECLI:EU:C:2019:997, which orders that: - *Article 57(4)(c) and (g) of Directive 2014/24/EU of the European Parliament and of the Council of 26*

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Infringement of the principle of equal treatment also occurs where there is no legal and material identity between the shortlisted economic operators and those submitting tenders in a restricted procedure. However, if a pre-selected candidate undertakes to absorb another pre-selected candidate, it may submit a tender with certain conditions: only the respective economic operator fulfills the requirements initially established by the contracting authority and its continued participation in the respective procedure does not entail a deterioration in the competitive situation of the other tenderers. Thus, the CJEU has held that, in the context of a negotiated procedure, in the event of the dissolution of a group preselected as such, of which two economic operators were members, one of them can continue the procedure in question by replacing the initial group without infringing the principle of equality¹⁰.

II.2. The principle of equal treatment in national law

First of all, the principle derives from the provisions of the fundamental law: "*all citizens are equal before the law and the public authorities, without privileges and without discrimination*", according to Article 16, para. (1) of the Constitution¹¹.

Also, the principle of equal treatment is generally provided for in Article 7 of The Government's Emergency Ordinance (GEO) No. 57/2019 on the Administrative Code¹², according to which the beneficiaries of the activity of public administration authorities have the right to be treated equally and in a non-discriminatory manner. Also, public administration authorities and institutions have the obligation to treat all beneficiaries without discrimination based on nationality, gender, social origin, language, religion or belief, political opinion, disability, age, sexual orientation or other criteria provided by law.

For Member States, the European Union has imposed the transposition of the public procurement directives, which is monitored by the European Commission and sanctioned by the CJEU for non-implementation or late implementation. The strict public procurement rules laid down in the directives are reflected in the procedures for awarding, concluding, amending and terminating public procurement contracts. The notion of a public procurement

February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as precluding national legislation under which legal action may be brought against a decision to terminate a public procurement contract adopted by a contracting authority on grounds of 'grave professional misconduct', which occurred at the time of performance of that contract, prevents the contracting authority which launches a new call for tenders from excluding an operator, at the stage of the selection of tenderers, on the basis of an assessment of the reliability of that operator.

¹⁰ Judgment of the CJEU of 11 July 2019, *Telecom Italia SpA AND Ministero dello Sviluppo Economico*, Case C-697/17, ECLI:EU:C:2019:599.

¹¹ Constitution of Romania, published in M. of., Part I no. 767 of 31 October 2003.

¹² GEO No 57/2019 on the Administrative Code, published in the M. of., Part I No 555 of 05 July 2019.

contract and its amendment was not adequately regulated in the first generations of directives, as they focused on award procedures, but in the following generations of directives, and as a result of multiple rulings by the CJEU, the entire field of public procurement has been legislated.

2016 brought the adoption in Romania of two legal acts transposing Directive 2014/24/EU: Law no. 98/2016 on public procurement and The Government Decision (GD) no. 395/2016¹³. *"In order to fulfil the object of Law 98/2016, this normative document specifies that the purposes of this law are to promote competition between economic operators, to guarantee equal treatment and lack of discrimination, to ensure the transparency and integrity of the public procurement process and to ensure that public funds are efficiently used by applying awarding procedures"* (Franc, Cătană, 2023, p.101).

GEO No 25/2021¹⁴ transposes the provisions of Article 25 of Directive 2014/24/ EU and Article 43 of Directive 2014/25/EU. The amendments aim to define the categories of economic operators that may take part in tendering procedures according to their State of origin, by including, inter alia, even those non-EU operators from countries that have ratified the World Trade Organisation Agreement on Government Procurement.

Also, those economic operators who are not included in the list provided for in the Ordinance will be automatically excluded from the tender procedure.

The amendments introduced by GEO no. 25/2021 aims to extend the definition of "economic operator" so that they can come from a Member State of the EU, a member of the EEA¹⁵, from third countries that have ratified the GPA¹⁶, to the extent that the sector contract awarded is specifically covered by the Annexes set out in Appendix I of the European Union to that Agreement, from third countries in the process of accession to the EU or from third countries which are not covered by the GPA but which are signatories to other international agreements for open market access in the field of public procurement.

GEO 25/2021 stipulates the obligation of contracting authorities and entities to treat all economic operators as defined above equally, transparently and proportionately, and to grant *"equal treatment with works, products, services and economic operators in the European Union"*.

¹³ Government Decision No 395/2016 approving the Methodological Rules for the application of the provisions on the award of the public procurement contract/framework agreement of Law No 98/2016 on public procurement.

¹⁴ GEO no. 25/2021 on the amendment and completion of some normative acts in the field of public procurement, published in M. of., Part I, no. 346 of 5 April 2021.

¹⁵ European Economic Area

¹⁶ World Trade Organisation Agreement on Government Procurement

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III. FAIR PROCESSING OF PERSONAL DATA IN PUBLIC PROCUREMENT LAW- EXPRESSION OF THE PRINCIPLE OF EQUAL TREATMENT

The right to the fair processing of personal data and the protection of individuals regarding it is a fundamental right. Provided for in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁷ and Article 16(1) TFEU, this right is also guaranteed under Article 8(1) of the Charter of Fundamental Rights of the European Union¹⁸.

While Regulation (EU) 2016/679¹⁹ (hereafter GDPR), lays down general rules regarding the processing and the free flow of personal data, Directive (EU) 2016/680²⁰ lays down specific rules to protect individuals and to ensure the free communication of such data within the Union in the areas of judicial and police cooperation and in criminal matters.

Regulation (EU) 2018/1725²¹ applies to the processing of personal data by all Union institutions and bodies excepting Chapter IX of the Regulation which refers to "operational personal data" done by offices and agencies when they carry out specific activities²².

According to Regulation (EU) 2018/1725 personal data means information that leads to the identification of a natural person. A person who can be identified by a specific element, as a name or an identification number is an identifiable natural person. Also, location data or an online identifier can be identification elements, any element of the physical, mental or economic identity of the respective person also falling into the same category.

For European Union public procurement, the European Commission uses a model privacy statement for all data processing operations related to calls for

¹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950 in Rome and entered into force on 3 September 1953.

¹⁸ Charter of Fundamental Rights of the European Union (OJEU No C83 of 3 March 2010).

¹⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC EC - General Data Protection Regulation - (OJEU No L119 of 27 April 2016).

²⁰ Directive (EU) 2016/680 on the protection of individuals with regard to the processing of personal data by competent authorities for the purpose of the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHA (OJEU No L119 of 27 April).

²¹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJEU No L295 of 23 October 2018).

²² The Chapter 4 or Chapter 5 of Title V of Part Three of the TFEU - The chapters deal with judicial cooperation in criminal matters and police cooperation.

expression of interest for the selection of experts and tender/grant procedures²³. The European Commission also uses a standard contractual clause ensuring that personal data included in public procurement contracts, grant agreements and grant award decisions signed by the European Commission are protected as provided for in Regulation (EU) 2018/1725²⁴.

But the right in question is not an absolute right, according to GDPR, and must be evaluated in relation to its role in society and in accordance with fundamental rights, also respecting the principle of proportionality. Thus we can say that fair processing of data of all those involved in the public procurement process is also in line with art. 18 of Directive 2014/24/EU in the sense that contracting authorities must grant equal treatment to economic operators and act in a transparent, fair and proportionate manner.

III.1. Fair processing of personal data by contracting authorities

The principles are of major importance in the field of public procurement, in particular because any situation which cannot be resolved by a concrete regulation could be analysed by reference to the principles underlying the public procurement contracts. Thus, according to Article 1 of GD no. 395/2016²⁵: *"In the process of carrying out public procurement, any situation for which there is no explicit regulation shall be interpreted in the light of the principles set out in Article 2 para. (2) of Law No. 98/2016 on public procurement"*. There is also the reverse situation, when a specific legal provision is not violated but a principle is violated. Some of the fundamental principles of public procurement are transparency and equal treatment, regulated at Union level by paragraph (1) of Directive 2014/24/EU and at national level by Article 2, para. (2) (b) and (d) of Law no. 98/2016²⁶.

However, the legislation has limitations in the situation in which persons involved in procurement procedures (officials, representatives of economic operators, experts, etc.), with the principle of transparency for example provided for by the legislation sometimes appearing as the complete opposite of data protection as far as such persons are concerned.

According to Article 217, para. (4) of Law 98/2016, after completion of the award procedure, the public procurement file is a public document, but access to this information is subject to the deadlines and procedures laid down by the legal regulations on unrestricted access to information of public interest, and may

²³ https://commission.europa.eu/funding-tenders/procedures-guidelines-tenders/data-protection-public-procurement-procedures_ro, accessed 11 October 2023.

²⁴ The clause referred to can be found at https://commission.europa.eu/system/files/2018-12/contractual_clauses_en.pdf, accessed 11 October 2023.

²⁵ GD no. 395/2016 for the approval of the Methodological Rules for the application of the provisions on the award of the public procurement contract/framework agreement of Law no. 98/2016 on public procurement published in the Official Gazette Part I no. 423 of 06 June 2016.

²⁶ Law No 98/2016 on public procurement, published in the M. of., Part I, No 390 of 23 May 2016.

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be limited to the extent that this information is, according to law, confidential or protected by an intellectual property right. The personal data of the members of the evaluation committee is public data, the disclosure of the composition of the evaluation committee does not jeopardize the privacy of those persons²⁷, but if a contract is awarded to a natural person, certain data will be made public in accordance with the obligation to publish information on the outcome of the procurement procedure.

Although the rules do not regulate the processing of data relating to companies or other legal entities, in the case of single-person companies, they may constitute personal data if they allow identification of a natural person. The rules also apply to all personal data relating to natural persons in the course of a professional activity, such as employees of a company, such as business e-mail addresses or telephone numbers of employees. European case law provides that Member States shall lay down in specific legislation whether employees may request that, after a sufficiently long period following the dissolution of the company concerned, access to personal data relating to them recorded in this register be restricted to third parties justifying a specific interest in consulting those data²⁸.

EU case law also specifies how the contracting authority must communicate the essential content of the information, in a neutral form, maintaining as far as possible data confidentiality. In this respect, it may in particular communicate in a summarised form certain aspects of an application or a tender, as well as its technical characteristics, so that confidential information cannot be identified. For the same purpose, it may also ask the operator whose tender has been rejected to provide it with the confidential documents in a non-confidential version²⁹.

To be lawful, the processing should be based on the necessity for the Union institutions to carry out a task in the exercise of official authority vested in them or in the public interest, the need to fulfill a legal obligation incumbent on the controller or another legitimate ground under Regulation (EU) 2018/1725 (including the necessity of processing for a contract, the need to go through the stages preceding a contract) and, the most important, on the consent of the data subject.

Union law precludes national legislation requiring the disclosure of any information communicated by tenderers, with the sole exception of trade secrets, as such legislation is likely to prevent the contracting authority from withholding certain information which, although not constituting trade secrets, must remain

²⁷ See Judgment of the Court of First Instance of 9 September 2009, Case T-437/05, ECLI:EU:T:2009:318.

²⁸ Judgment of the CJEU of 9 March 2017, Case C-398/15, ECLI:EU:C:2017:197.

²⁹ CJEU judgment of 7 September 2021, Case C-927/19, ECLI:EU:C:2021:700.

inaccessible. Thus, with regard to information concerning natural or legal persons, including subcontractors, on whom a tenderer states that it relies for the performance of the contract, the CJEU distinguishes between data which enable such persons to be identified and those which relate solely to their professional qualifications or abilities³⁰.

As mentioned above, the processing of personal data is lawful only if certain conditions apply. In public procurement, in the case of contracting authorities, the condition of Article (6)(e) of GDPR is applicable, which provides for the situation where the processing is carried out in order to fulfill a task that serves a public interest or in the exercise of the public authority, but this is not a reason that measures, internal data management policies, training of employees, limitation of access to personal data, contractual and confidentiality clauses should not be developed at the authority level.

Also informing data subjects about such processing and adding contractual clauses as annexes to contracts with suppliers, defining how personal data are processed, is one of the obligations of contracting authorities.

According to Directive 2014/24/EU, when drawing up technical specifications, the contracting authorities should take into account the data protection requirements deriving from Union law, especially in relation to the data protection by design. The management of personal data submitted by all tenderers in public procurement procedures must be carried out in compliance with the principle of equal treatment, taking into account that access to the procurement file is given to both personal data and commercial data, which may be confidential, secret, etc. Personal data, e.g. CVs or even sensitive data (e.g. biometric data), must be processed with the consent or information of the data subjects (*Șandru, Alexe, 2020, p. 229*). Accordingly, the contracting authority must be prepared to carry out the information of all data subjects in accordance with Article 13 or, where applicable, Article 14 of GDPR, as well as the management of their data in an equal manner, having the same rules and requirements for all economic operators.

GDPR defines the data subject's consent as any manifestation of free will, by which it accepts, through a statement or an unequivocal action, that the personal data concerning him be processed. Consent must be specific, informed and unequivocal, the expression of the will of the data subject, after prior information of the data subject. According to CJEU case law, a contract is not capable of demonstrating that the data subject has been informed and has validly given his consent to the collection and storage of personal data when the box referring to this clause has been ticked, prior to the signing of this contract, by the data controller. Thus consent is not validly given when the storage of information or the acquisition of access to information is authorised by means of a previously

³⁰ CJEU judgment of 17 November 2022, Case C-54/21, ECLI:EU:C:2022:888.

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ticked box³¹ or when the situation requires the data subject to fill in, in order to express his or her refusal to consent to such processing, an additional form stating such refusal³².

In Romania, Law no. 102/2005³³, the normative act establishing the National Authority for the Supervision of Personal Data Processing, an authority whose objective is to protect the fundamental rights to private life, tangentially legislates the right to protection of personal data and the way in which compliance with this right is achieved and verified based on European legislation, and Law no. 190/2018³⁴ contains the actual rules implementing GDPR.

III.2. Fair processing of personal data in public procurement litigation

The preamble to GDPR, in paragraph (20) states that although it *”applies, inter alia, to the activities of courts and other judicial authorities, Union or Member State law may specify the processing operations and procedures with regard to the processing of personal data by courts and other judicial authorities. The processing of personal data should not fall within the competence of supervisory authorities when courts are exercising their judicial functions, in order to guarantee the independence of the judiciary in the performance of its judicial tasks, including decision-making. It should be possible to entrust the supervision of such data processing operations to specific bodies within the judicial system of the Member State, which should in particular ensure compliance with the rules laid down in this Regulation, raise awareness among members of the judiciary of their obligations under this Regulation and deal with complaints in relation to such data processing operations”*, so if we refer to public procurement litigation the Regulation applies to the courts as regards the processing of personal data in the exercise of their specific tasks, and a specific supervisory body is required.

In Romania, the competent authority within the meaning of Articles 51-59 of GDPR for the supervision of personal data processing operations by the courts in the exercise of their judicial functions is the Superior Council of Magistracy (SCM). On 14 September 2023, the SCM plenary approved the modification of

³¹ CJEU judgment of 1 October 2019, Planet49, C-673/17, ECLI:EU:C:2019:801.

³² CJEU judgment of 11 November 2020, Orange Romania, C-61/19, EU:C:2020:901.

³³ Law No 102/2005 on the establishment, organization and functioning of the National Authority for Personal Data Processing Supervision republished in M. of., Part I No 947 of 09 November 2018.

³⁴ Law No 190/2018 on measures implementing Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) published in M. of., Part I No 651 of 26 July 2018.

the organizational structure of the SCM's own apparatus by setting up the Personal Data Protection Department³⁵.

Any person who considers that he or she has been harmed by an act of a contracting authority or by failure to comply with a request within the legal time-limit may seek the annulment of the act, an order that the contracting authority take an act or take measures to remedy the situation, or recognition of the claimed right or legitimate interest, by administrative or judicial means in accordance with Article 2(2). (1) of Law No 101/2016³⁶.

The competent national administrative-jurisdictional body is the National Council for the Settlement of Complaints (hereinafter referred to as CNSC), an independent body whose organisation and functioning are regulated by Law no. 101/2016³⁷.

The CJEU qualifies the CNSC as a "national court" within the understanding of Article 267 TFEU³⁸. As any independent body with legal personality the CNSC processes personal data pursuant to a legal obligation or insofar as necessary for the performance of its tasks carried out in the public interest and in the exercise of official authority vested in it, respecting key principles such as fair and lawful processing, purpose limitation, data minimization and data retention. When processing under the law, this law should already ensure compliance with these principles (e.g. types of data, storage period and appropriate safeguards) and obviously prior to processing personal data, individuals must be informed about the processing, its purposes, the types of data collected, the recipients and their data protection rights.

CONCLUSIONS

The general rule of direct or indirect non-discrimination in accordance with the principle of equal treatment must be respected in all public procurement. Any public procurement must be based on the relevant European and national legislation, involving evaluation according to the same set of criteria to ensure optimal use of financial resources, but also on the fair processing of personal data. Non-compliance with the principle of equal treatment may also consist in a procedural irregularity affecting the right to information of interested parties insofar as contracting authorities process personal data regarding a natural person in public procurement and in the selection and use of external experts.

³⁵ SCM Decision No 139 of 14 September 2023, available at <http://old.csm1909.ro/csm/index.php?cmd=0301&tc=s>

³⁶ Law No 101/2016 on remedies and appeals in the award of public procurement contracts, sectoral contracts and works concession and service concession contracts, as well as on the organisation and functioning of the National Council for the Settlement of Disputes published in M. of. Part I Part I No 393 of 23 May 2016.

³⁷ Idem, Article 37 - Article 481

³⁸ CJEU judgment of 26 January 2023, C-403/21, ECLI:EU:C:2023:47.

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Although Law no. 190/2018 has been in force for five years, the application of GDPR in Romania is not yet a general practice, especially in the field of public procurement, but we believe that the importance of fair and transparent processing of personal data will become increasingly significant, especially where bidders are individuals or in the case of experts contracted by economic operators with legal personality, any specialists involved in activities subject to public procurement.

Representatives of the contracting authorities involved in the procedures will have to acquire, possibly through internal procedures, correct guidelines for the interpretation of the GDPR provisions which interfere with specific public procurement legislation in order to apply the legal rules in both areas in a uniform manner.

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