LEGAL AND TAX TREATMENT OF THE ASSOCIATIONS FOR THE PARTICIPATION IN TENDERS

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Abstract

The participation of groups of economic operators with joint tender to public procurement procedures requires the conclusion of association agreements published together with the procurement documents by the contracting authorities. The contracting authorities often require these temporary associations specific legal forms, similar to joint ventures, or certain conditions concerning their organisation and functioning. This present study analyses the associations for participation to public tenders in light of public procurement and fiscal legislation, trying to asses if these contracts are joint venture agreements, to what extent the clauses comprised in the drafts imposed in the procuremnt documents are compatible with the public procurement and fiscal laws and if they may be challenged by the economic operators.

Keywords: *temporary association for participation to public tenders, public procurement, fiscal treatment of associations for participation to public procurement procedures.*

JEL Classification: K23, K 34.

1. Introduction

This study analyses the association for the participation in public procurement procedures from the perspective of public procurement legislation and related legislation concerning payment from public funds, from the perspective of the New Civil Code, and in terms of tax treatment. The purpose of this article is to determine the legal nature of the association agreement and legal ways the economic operators can request the amendment of the clauses in the framework association agreement introduced by the contracting authorities in the procurement documentation.

The reasoning is based on the explanations provided by the European legislator in the preamble of Directive 2014/24/EU of the European Parliament and of The Council on public procurement and repealing Directive 2004/18/EC, from which results the purpose of regulating the right of the economic operator to participate with a joint offer and what are the limits of the obligations the contracting authorities can impose on the economic operators.

2. Regulations specific to public procurement

The Law no. 98/2016 on public procurement, the Law no. 99/2016 on sectoral procurement and the Law no. 100/2016 on works and services concessions stipulate the possibility for the economic operators to form an association in order to participate in the procedure of awarding public procurement contracts.

The provisions which allow the association for the participation in public procurement procedures can be found in two places in the Law no. 98/2016, namely in the definition of the economic operator and in the conditions for participation in the procedures.

Thus, the economic operator may be any ”natural *or legal person, of public or private law or a group or an* ***association of such persons****, who legally offer on the market the execution of works and/or of a construction, the supply of products or the provision of services, including* ***any temporary association formed between two or several of these entities;”*** (art. 3 para. 1 point 36. jj) of Law no. 98/2016).

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The same definition of the economic operator can be found in the Law no. 99/2016 in art. 3 para. 1 point 35.ii) and in the Law no. 100/2016, art. 5 para. 1 point 24 x), being taken over from the new European Directives on public procurement of 2014.[3]

Art. 39 of Law no. 98/2016 and art. 53 of Law no. 99/2016, which have almost identical contents, stipulate that *"Any economic operator has the **right to participate** in the tender procedure as a bidder or candidate, individually or **jointly with other economic operators, including in forms of temporary association established with the purpose of participating in the tender procedure,** […]".*

The economic operators' right to participate with a joint bid also existed in the old provisions of the Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, of the public works concession contracts and of the services concession contracts in art. 44:*"(1) Several economic operators have the right to establish an association with the purpose of **submitting a joint candidature or bid, without being obliged to formally legalize their association.** (2) The contracting authority has the right to request that the association should be legalized only if the joint bid is declared successful and only if such measure represents a condition necessary for the proper fulfilment of the contract."*

In the current legislation on public procurement **there are no regulations concerning the contents of the rights and obligations of the members of the association**, the way of administration, management, termination or liquidation of the association, but only **some provisions which concern the relationship between the association and the members of the association with the contracting authority.**

In terms of legal qualification, the association agreement for tender participation resembles the joint venture agreement, but without identifying itself in all the cases to this type of agreement.

Regarding the participation in public procurement procedures, the law stipulates **an interdiction for the contracting authorities to require the economic operators who jointly participate** in the tender procedure *"to adopt or to establish a specific legal form for the submission of a bid/request to participate."* (art. 40 para. 1 of Law no. 98/2016, art. 54 para. 1 of Law no. 99/2016, art. 40 para. 1 of Law no. 100/2016).

This article translates into the fact that the authorities have no right to impose a specific form of agreement (such as the joint venture agreement) for the participation in public procurement procedures or to require the economic operators wishing to jointly participate in the procedure to establish any form of association with legal personality.

In this context, the enforcing of the applicable law is not congruent with the interdiction stipulated by the law, the more so as there is a variety of legal forms of association in various countries where the participating economic operators have residence and according to which the operators may form an association in order to participate in the tender.

If, in terms of participation, the rules are quite clear, art. 54 para. 2 of Law no. 98/2016 gives the acquirer the right to require the association declared successful to adopt or to establish a legal form if two cumulative conditions are met: (1) the requirement has been **set forth in the contract notice** and in the tender documentation and (2) such **modification is necessary for the proper performance** of the contract.

Art. 54 para. 2 of Law no. 98/2016 stipulates that "*The contracting authority has the right to require the economic operators jointly participating in the tender procedure whose bid has been declared successful to adopt or to establish a specific legal form, provided that this has been set forth in the contract notice and in the tender documentation and **to the extent that such modification is necessary** for the proper execution of the public procurement contract*."

Similar provisions can be found in art. 67 para. 1 of Law no. 99/2016 and art. 40 para. 2 of Law 100/2016.

[3] Article 2 para. 1 point 10 of the EU Directive/24/2014 defines the "economic operator" as being *any natural or legal person or a public entity or a group of such persons and/or entities, including any temporary association of enterprises which offer the execution of works and/or a work, the supply of products or the provision of services on the market.*

The phrase "*to the extent that the modification is necessary*" is explained by way of an example by the European legislator in the preamble of the Directive 2014/24/EU: *"(15) It should be clarified that groups of economic operators, including where they have come together in the form of a temporary association, may participate in award procedures without it being necessary for them to take on a specific legal form. To the extent this is necessary, for instance* ***where joint and several liability is required, a specific form may be required*** *when such groups are awarded the contract. […]".*

In terms of participation in a procurement procedure, the economic operators outline the following elements in their legal relationship: they submit a joint bid, they establish the tender guarantee, they empower one of the partners to sign the bid, to sign with electronic signature, to upload the bid in ESPP, to answer clarifications, to sign the contract in case of winning the tender.

None of these provisions leads to the legal qualification of the associations for tender participation as joint ventures. However, even the legal provision forbids the authority to impose the conclusion of a joint venture agreement for the participation in the tender.

Although the public procurement legislation does not stipulate anything with regards to the contents which an agreement/contract of association between the economic operators should have, the contracting authorities impose in the tender documentation the obligation to fill in and to submit some forms, among which forms with template association agreements can also be found.

Such template agreements contain mentions according to which the respective clauses will be mandatory, and the economic operators are free to provide other clauses concerning their understanding.

The contracting authorities impose either only standard clauses for the association for tender participation or clauses which also regulate the legal relationships between the associates during the period of execution of the contract.

If for the tender participation the contracting authority cannot impose any legal form of association, meaning either a specific form of contract, specific clauses or even the acquisition of legal personality, **in case of execution of the public procurement contract, the authority may impose some conditions, but with certain limits.**

The right of the authority to impose certain conditions for the performance of a contract by a group of economic operators, different from those imposed on the economic operators who are individual participants, is set forth in the text of art. 19 para. 2 (3) of the Directive 2014/24/EU: "*Any conditions for the performance of a contract by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate."*

The preamble of the Directive 24 explains that the performance of the contracts by groups of economic operators may require the establishment of conditions which are not imposed on individual participants, but they must be justified by **objective reasons and they must be proportionate**. These conditions "*may include, for example, the requirement to appoint joint representatives or a lead partner for the procurement procedure or the request for information on their status*."

Given that the association agreement is the legal instrument by which the parties agree to participate in the tender procedure with a joint bid and undertake to be jointly liable for the implementation of the contract if the bid is declared successful, it must be examined **whether the other types of clauses imposed by the public acquirers are compatible or not with art. 40 and 54 of Law no. 98/2016**.

3. The legal nature of the association agreement for tender participation

Under the influence of the Government Emergency Ordinance no. 34/2006, the public acquirers have imposed template association agreements drafted under art. 251 of the old Commercial Code or subsequent, after the appearance of the New Civil Code (NCC), based on art. 1949 and subsequent. The template agreements contained a few binding clauses on the members'

share of participation on profit and loss, the contribution of each partner in the fulfilment of the public procurement contract, the joint liability of the associates towards the contracting authority in the execution of the public procurement contract, the appointment of the leader, etc.

A number of binding clauses of the association agreements imposed by the acquirers which may be found in the Electronic System of Public Procurement are identical to those mentioned, and they may lead to the idea that the authorities impose the conclusion of joint venture agreements.

The joint venture agreements are defined in art. 1949 NCC as "*the agreement by which a person grants to one or several persons a share in the profit and loss of one or several operations which he/she undertakes."*

The definition does not differ from the notion of joint venture in art. 251 of the old Commercial Code according to which "*The joint venture occurs when a trader or a commercial company grants to one or several persons or companies a share in the profit and loss of one or several operations, or even in the entire trade*."

The novelty brought by the New Civil Code compared to the old Commercial Code is given by art. 1953 which nuances the issue of the relationships between associates and third parties. Art. 253 of the old Commercial Code regulated with regards to the relationships with third parties that they did not acquire rights, or they committed themselves only towards the one with whom they contracted:*"The joint venture does not represent, with regards to third parties, a legal person different from the person of those concerned. The third parties have no right and commit themselves only towards the one with whom they contracted*."

According to the doctrine[4], the joint venture is usually an occult association. The New Civil Code comes to show what are the relationships between the non-signatory associate and the third parties when the association is made known to the contracting third party: *"(1) The associates, even acting on account of the association, contract and undertake on their own behalf towards third parties. (2) However, if the associates act in this capacity towards third parties, they are jointly held liable by the acts concluded by any of them*."

Since the third parties are not aware of the existence of the associate of the one with whom they contract, the rule enshrined in Article 1953 of the NCC is that according to which the associates contract and undertake on their own behalf towards third parties even if they act on account of the association. The premise is that the third party does not know the circumstance in which there would be an association.

For the case in which the associates inform the contracting third party about the capacity in which they act, the Civil Code provides the rule of the joint liability of the associates towards the third party, and if the information occurs precisely upon conclusion of the contract, the third party will be liable towards all the members of the association.

In case of associations for joint tender participation, the Romanian legislator has opted for the mandatory joint liability of the members of the association towards the contracting authority, which would lead to the idea that the association for the fulfilment of the contract could be legally treated as a joint venture within the meaning of the NCC.

Art. 185 para. 1 of Law no. 98/2016 stipulates that "*In case when several economic operators jointly participate in the award procedure, the fulfilment of the criteria concerning the technical and professional capacity is demonstrated by taking into consideration the resources of all the group members and the contracting authority requires that they should be jointly liable for the execution of the public procurement contract/framework agreement*."

Art. 1953 para. 3 of the NCC complements the regulation: *"The associates exercise all the rights arising from the contracts concluded by either of them, but the third party is exclusively held liable towards the associate with whom it has contracted, unless the latter has declared its capacity at the time when the act was concluded."*

[4] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod Civil - Comentariu pe articole,* C.H. Beck publishing house, Bucharest, 2012, page 1964.

The major difference from art. 1953 para. 3 of the NCC is that within the associations which win public procurement procedures, **the joint liability** for the performance of the contract agreed by the leader with the beneficiary, **entails the passive capacity to stand trial** in the actions filed by the beneficiary in the fulfilment of the contractual obligations, **but not also the active capacity to stand trial**.

Art. 1953 para. 3 of the NCC stipulates that the associates exercise all the rights arising from the contracts concluded by any of them, and the third party is also held liable towards the non-contracting associate if the signatory associate has declared its capacity upon the conclusion of the act. In case of public contracts, it is hard to believe that the members of the association who did not sign the public procurement contract could successfully exercise the rights towards the acquirer since they are not holders of the binding relation. In this regard, the courts of law have also acknowledged[5]: "*In the matter of public procurement, which falls within public law, characterized by the inequality of the parties and by the priority of the public interest, in case of successful bids submitted by associations, the elements which are retained for the verification of the capacity to stand trial of the members of the association differ whether it is about active or passive capacity to stand trial*." and "*the active capacity to stand trial in case of contractual claims necessarily belongs only to the parties to the contract*."

In terms of the active capacity to stand trial of the associates of an association/consortium during the procurement procedure, the practice of the National Council for Solving Complaints and of the courts was non-unitary with regards to the admission of the thesis that the associates may file an appeal against the acts of the contracting authority under art. 255 of the Government Emergency Ordinance no.34/2006, as persons injured in a legitimate right or interest.[6]

The legal standing of any associate, leader or not, to challenge acts within the award procedure has been recently defined by the provisions of art. 2 para. 2 of Law no. 101/2016 on the remedies regarding the awarding of public procurement contracts, of sectoral contracts, and of works and services concessions, as well as for the organsation and operation of the National Council for Solving Complaints: "*Any member of an association of economic operators, without legal personality, may file any means of appeal regulated by this law*."

This article does not extend the active capacity to stand trial of the non-signatory members of the association if the dispute arises after the conclusion of the contract, the active capacity to stand trial in case of contractual claims necessarily belongs only to the parties to the contract.

The legal relationships between the members of the association, materialized in the association agreement, are not relevant in terms of establishing the holder of the right to action against the beneficiary based on the public procurement contract on which the action is based.

There comes the idea that in case of a public procurement contract the members of the association who are not signatories of the contract could not exercise the rights under the contract towards the contracting authority: for example, to claim the payment, to request the acceptance, to issue claims against the beneficiary (in case of FIDIC contracts), to terminate the contract.

Another legal argument for the inapplicability of art. 1953 para. 3 of the NCC arises from the provisions of Order no. 1792/2001 *approving the Methodological Norms of 24 December 2002 on the commitment, validation, authorization and payment of the expenditure of public institutions and the organization, registration and reporting of budgetary and legal commitments*, according to

[5] The sentence no. 1603/2015 issued by Iasi Court of Appeal on 21 January 2015 in the case file no. 310/99/2014.

[6] In the sense that any economic operator member of an association who has participated in the public procurement procedure has the capacity to file a complaint, which is considered as belonging to all the members of the association, see: CNSC Decision no. 2180 of 30 May 2011, Civil Decision no. 1875 of 26 September 2011 of Bucharest Court of Appeal – Division VIII of administrative and tax contentious, Decision no. 2717 of 17 May 2012 of Ploiești Court of Appeal – Civil Division II of administrative and tax contentious - *apud* D.D. Șerban, *Case law commented in the matter of public procurement. Volume III*, Hamangiu Publishing House, Bucharest, 2012, p. 115-118. See also the CNSC Decision no. 256 of 24.02.2016. For the opinion according to which the complaint filed by only one of the associates is considered as being filed only on his own behalf, see the Civil Decision no. 4025 of 25 October 2011 of Cluj Court of Appeal – Commercial, administrative and tax contentious division - *apud* D.D. Șerban, *op. cit.*, p. 259-260. See also the CNSC Decision no. 1321 of 14 April 2013.

which in order to make payments the public authorities must comply with all the 4 phases of the budgetary implementation.

Thus, "*the payment authorization must contain data on [...] – identification data of the payment beneficiary;" "the payment of the expenditure is made [...] within the limits of the budgetary credits and destinations approved under the legal provisions, through the public treasury and accounting units where they have opened their accounts, except for the payments in foreign currency, which are carried out through banks or other payments required by law to be made by means of the banks*" and only if "*the beneficiary of the amounts is entitled according to the documents attesting the service performed*".

The methodological norms also stipulate **the interdiction** to make the payment when "*the beneficiary is not the one towards whom the institution has obligations*", in other words the public acquirer is unable to make payments to the non-signatory associate of the contract.

However, if the public procurement contract were signed by all the members of the association and there was the provision that certain operations may be fulfilled by them, they could exercise rights arising from the contract and they would also have the legal standing in case of dispute.

There is no interdiction in the law for the signature of the public procurement contract by all the members of the association, and the contracting authorities must justify the objective and proportionate reasons to impose the obligation to appoint a representative of the association who should sign the contract, to whom it recognizes the authority, to whom it may give the related instructions, and to whom it should make the payment, **to the extent necessary** for the proper performance of the contract.

The aspects most frequently invoked by the public acquirers to oppose the signature of the public procurement contract by all the members of the association so that each should be paid for the part of the contract that it executes, arise either from the fact that the tender documentation is standardized (approved by Order, Instruction, Government Decision, etc.), that all the payments are made through the treasury or the fact that depending on the type of contract there may be, in addition to the payments for the works/services performed, various types of other payments which could be quite difficult to associate/allocate, directly and distinctly, only to one of the associates, such as the payment of the advance, the repayment of the amounts withheld, etc. under the FIDIC contracts, or such payment method to each partner would cause disadvantageous conditions for the authority.

A public authority cannot make payments to an account opened in the name of the association or to an account opened in the name of the non-signatory associate or to an escrow account because it would breach the Government Emergency Ordinance no. 146/2002 *on the establishment and use of resources through the state treasury*.

The payments to the economic operators can be made **only to their accounts opened with the treasury** according to art. 5 para. 1 of the Government Emergency Ordinance no. 146/2002 "*The public institutions, irrespective of the financing and subordination system, carry out the collection and payment operations through the state treasury units*".

Art. 6 para. 1 of the same Emergency Ordinance also stipulates that "*The public institutions, irrespective of the financing system, **are obliged to pay the amounts representing the value of the goods purchased, of the services performed or of the works executed to the accounts of the beneficiary economic operators**, opened with **the state treasury units** in whose area they are fiscally registered."*

The methodological norms for the application of the Government Emergency Ordinance no. 146/2002 may serve to explain the reason why some public authorities impose in the template association agreements **the obligation for the leader of the association to issue invoices through its branch in Romania**, when it is a non-resident legal entity.

According to point 6.1.1. of the Norms of the Government Emergency Ordinance no. 146/2002 "***An economic operator**, within the meaning of art. 6 of the Emergency Ordinance, means*: ***autonomous public entities, enterprises*** or ***national companies and commercial companies***

legal entities fiscally registered in Romania, *including their* ***branches, subsidiaries*** *or other* ***secondary offices***."

From the reading of the text it results that a member of the association who is a non-resident legal person signatory of the public procurement contract must **be fiscally registered in Romania in order to be able to open an account with the treasury**, but without being limited to the type of subsidiary which he must set up.

Points 6.1.5. and 6.1.6. of the Norms support this thesis: "*Since 1 January 2004 the public institutions will pay for the value of the goods purchased, of the services performed or of the works executed to cash accounts opened with the State Treasury units only on the name of the economic operators set forth in point 6.1.1.*

6.1.6. In order to comply with the principles of non-discrimination and equal treatment set forth in art. 2 para. (2) letters a) and b) of the Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts, approved with amendments by Law no. 337/2006, the public institutions cannot impose the condition of having accounts opened with the State Treasury on the economic operators interested in participating in the procedure of awarding public procurement contracts.

The value of the goods purchased, of the services performed or of the works executed to the public institutions by the economic operators organized as professional corporations, foundations, non-governmental organizations, cooperatives or other forms of association, other natural or legal persons who do not fall within the provisions of point 6.1.1 is paid to their cash accounts opened with credit institutions."

The Law no. 277/2015 *regarding the Tax Code* with subsequent amendments and supplements establishes a set of **additional rules for associations**, which will apply depending on the legal qualification of the association agreement.

The legal qualification of the association agreement as a joint venture must **start from the features** which are of the essence of such contract. The joint venture is a form of company regulated by the Civil Code, namely a joint venture, which has features that are of the essence of the legal institution: affectio societatis – the intention to jointly carry out an activity in order to obtain benefits, the contribution to the achievement of the common goal, the cooperation and participation in profit and loss.

These features are common to those of the commercial companies, but without granting other attributes, such as legal personality, patrimony, premises, etc.

The Civil Code provides a series of rules for unnamed contracts, to which, in addition to the mandatory provisions in the matter of public procurement and public finance, the provisions of art. 1168 of the NCC will apply: *'The provisions of this chapter shall apply to the contracts which are not regulated by the law, and, if these are not sufficient, the special rules concerning the contract to which it resembles the most".*

Therefore, if, according to the association agreement, there is a contribution in goods, services or money which is made available to the association, and the members of the association share revenues and expenses, the rules of the joint ventures will apply to the extent compatible with the public procurement rules.

There are situations, such as in case of public procurement contracts for supply and service or design and execution or other contracts in which each participant in the association executes its part of the procurement contract by its own resources, namely when the members of the association do not share expenses, do not bring as contribution goods and services in the association, but they rather invoice each other the deliveries of goods and services which will be subsequently delivered to the public acquirer by the leader of the association signatory of the public contract.

From such particularities it rather results that the legal relationship between the members of the association is characterized as being a contractor or a supply contract.

4. The fiscal perspective regarding the association agreement for tender participation

The Tax Code is more offering in terms of associations without legal personality, **distinguishing between the joint venture and other forms of association without legal personality**, such as joint venture, consortiums and others[7], offering more instruments for determining the rules applicable to the association agreements for the execution of public procurement contracts.

Also, the **Tax Code** and the accounting regulations **provide explanations** for some of the clauses inserted by the contracting authorities in the template association agreement included in the procurement documentation.

The enforcing of the Romanian law as the law governing the association can often be noticed, but such clause exceeds the framework imposed by art. 54 para. 2 of Law no. 98/2016 since the authority needs only to make sure of the joint liability of the members of the association for the fulfilment of the public procurement contract.

The requirement to specify the part of the contract which each member of the association will fulfil is given by the public procurement legislation and by the provisions of the Tax Code, on the other hand.

Regarding the share of participation of each associate, there is not always an univoqual relationship between the works/services performed by an associate and its share of participation, and in nearly most cases there is no mechanism of breakdown of the price lists by each associate in the association agreements presented to the authority.

The associations are established to meet the qualification requirements related to the financial and economic situation and the technical and professional capacity in case when several specialties (service and supply, design and execution, etc.) are needed for the fulfilment of the contract.

From the analysis of the texts of the Law no. 98/2016 and of its methodological norms it results that the association agreement which is part of the bid should indicate rather the actual part of the object of the contract which each member of the association will execute.

For example, when the authority requires the submission of specific authorization to execute a certain part of the public procurement contract and only one of the members of the association holds it, then that member will have to execute the part of the contract, and the association agreement becomes the instrument by which the authority can control this condition.

The hypothesis is set forth in art. 51 para. 1 of the Government Decision no. 395/2016 for the approval of the methodological rules for implementing the provisions regarding the awarding of the public procurement contract/framework agreement of Law no. 98/2016 on public procurement: "*In case when the contracting authority requests the submission of specific authorizations within the criteria related to the capacity of carrying out the professional activity and/or the technical and professional capacity, the requirement is deemed to be fulfilled in case of the economic operators jointly participating in the award procedure if they demonstrate that they have the respective authorized resources and/or that one of the members of the association has the requested authorization, as appropriate, provided that the respective member executes the part of the contract for which that authorization is requested*."

Another text which sustains the rule that the members of the association must notify the authority of the part of contract which they will execute is art. 186 of Law no. 98/2016 for the case in which the authority may require that certain essential tasks should be performed by a certain member of the association: "*In case of public procurement contracts for works or services and of the works or operations for location or installation within a contract for the public procurement of goods, the contracting authority may require that some essential tasks should be performed directly*

[7] Even from the chapter of the definitions, the Tax Code mentions that *the fiscally transparent entity, with/without legal personality is any association, joint venture, association based on the contracts for joint operations, group of economic interest, professional corporation or other entity which is not a separate taxable person, each associate/participant being a taxation subject within the meaning of the profit or income tax, as appropriate*.

by the bidder or, in case of a bid submitted by an association of economic operators, by a specific member of the association."

From these provisions, in conjunction with the provisions of the Tax Code in the matter of associations, we consider that when the members of a consortium participating together in public tenders do not intend to conclude a joint venture contract and they will not share revenues and expenses, they are not obliged to declare a percentage share of participation, but only the actual part of the public procurement contract which they will execute.

The appointment of a leader, who should sign the public procurement contract, should be the account holder, should issue invoices, should collect all the payments from the beneficiary and should carry out the financial and accounting operations, concentrates the control of money in the hands of one member of the association, and for this reason in practice this model is not preferred.
From the tax and accounting point of view, the appointment of one of the members of the association for the fulfilment of the legal obligations is mandatory.

If the association agreement operates as a joint venture, whether it is concluded between Romanian legal entities or it is concluded between Romanian and foreign legal entities, in terms of the Accounting regulations[8] *"The expenses and revenues determined by the operations of the joint ventures are accounted for separately by one of the associates, according to the provisions of the contract of association in compliance with the provisions of point 6*" and "*At the end of the reporting period, the expenses and revenues recorded by types are sent based on a statement to each associate for their registration in their own accounts*."

The appointment of a member of the joint venture to record the financial and accounting operations is therefore mandatory, irrespective whether a clause is set forth as such in the association agreement made available by the contracting authority.

Regarding the applicable VAT system, in the contents of the provisions of art. 269 para. 11 of the Tax Code, it is decided that the associations such as joint venture, consortium or other forms of association for commercial purposes, which have no legal personality and are established under the law, **irrespective whether they are treated as joint ventures or not,** do not give rise to a separate taxable person.

Therefore, the tax legislation makes a distinction between the joint ventures and the similar associations, on the one hand, and other types of associations, on the other hand. In this regard, the methodological norms for the application of the Tax Code approved by Government Decision 1/2016 bring by point 102 the necessary clarifications, detailing the conditions which are necessary to be met in order to qualify an association as a joint venture or a similar association.

Thus, in order to fall under the scope of the specific norms governing the rules in the field of VAT of the operations carried out within an association, the cumulative fulfilment of the conditions listed in the contents of point 102 para. 1 of the Methodological Norms for the application of the Tax Code is required, namely:

a) the revenues and expenses of the association are accounted for by the administrator associate and are distributed based on statement to each associate corresponding to its share of participation in the association;

b) the person appointed by the agreement concluded between the parties to represent the association, hereinafter referred to as the administrator associate, is the person who issues invoices on his/her own behalf to third parties for the deliveries of goods and the provision of services made by the association;

c) the purpose of the association is the delivery of goods/the provision of services to third parties. This condition is considered to be fulfilled including in the case where, in addition to the delivery of goods/the provision of services to third parties, deliveries/provisions between the associate members are also made.

[8] The accounting regulations concerning the individual annual financial statements and the consolidated annual financial statements approved by the Ministry of Public Finance Order no. 1.802/2014 - Section 4.14 Accounting of the operations carried out within the joint venture agreements.

In the event that these conditions are cumulatively fulfilled, a special VAT regime will be applied, mainly considering that both the goods made available to the association by its members free of charge, as a contribution to the association within the limit of the share of participation established by the contract, do not represent a delivery of goods with payment, as well the services which are performed by the members of an association corresponding to the part which was allocated to each of them in that contract, which are meant to lead to the achievement of a joint result, do not represent services performed against payment.

Also, the distribution based on statement of the revenues of the association within the limit of the share of participation established by the contract by the administrator associate to the members of the association is not considered to be a payment for the goods/services delivered/performed for the common purpose of the association. The distribution of the expenses of the association by the associate administrator based on statement, within the limit of the share of participation established by the contract, do not represent operations within the scope of VAT.

The special rules set forth in the matter of joint ventures defined in the contents of paragraphs 3-16 of point 102 of the Methodological Norms for the application of the Tax Code, being of strict interpretation and application, will not be incidental in the event that the conditions mentioned in paragraph 1 in the same point are not fulfilled. In this case, the rules of common law concerning VAT will apply with regards to the operations carried out between the members of the association.

This conclusion, namely the fact that in the event that there are no common revenues and expenses, no distribution of revenues and expenses based on the share of participation agreed or a common purpose pursued by the participants through the operations carried out, the operations will represent deliveries of goods or provisions of services made against payment, by case, within the scope of VAT, results both from the *per a contrario* interpretation of the provisions of paragraphs 3-5 and expressly from paragraph 17 of the text point 102 mentioned above.

We consider that this regulation implies some difficulties in consideration of the provisions of art. 34 of the Tax Code in the matter of profit tax, which refer to associations in a broad sense, and not to joint ventures or similar associations such as they are defined in the matter of VAT. The legal text invoked stipulates, *inter alia*, that the revenues and expenses determined by the operations of the association are sent to each associate based on a statement.[9]

Title VI of the Tax Code treats among others the tax on the revenues obtained in Romania by non-residents and the tax on the representative offices of the foreign companies established in Romania, and in chapter II it establishes rules for associations/entities which operate/obtain revenues in/from Romania, which have incidence when **there are also non-resident persons within the association** for the execution of a public procurement contract.

In such case the Tax Code distinguishes between the fiscally transparent associations/entities incorporated under the Romanian law operating in Romania and the fiscally transparent non-resident associations/entities established under the laws of a foreign state, operating in Romania/obtaining revenues in Romania.

When the association agreement for the execution of a public procurement contract is concluded according to Romanian law, and there is at least a non-resident in the association, the members of the association are required to appoint one of the associates for the fulfilment of all tax obligations.

The contents of art. 233 of the Tax Code governing the regime of fiscally transparent associations/entities without legal personality with the particularity of participation of non-resident persons, establishes rules to be met by these entities. Among these it is stated that the appointed participant member will also be responsible for the maintenance and submission to the competent

[9] "*the revenues and expenses registered are assigned to each associate, according to the provisions of the association agreement"* and paragraph 2 according to which *"The revenues and expenses determined by the operations of the association, sent based on statement to each associate, according to the applicable accounting regulations, are taken into account for the determination of the taxable profit of each associate. The supporting documents related to the operations of the association are those based on which the person appointed by the associates has made the bookkeeping, according to the provisions of the association agreement."*

authority in Romania of the association agreement, which includes data related to the contracting parties, the scope of activity of the association/entity, the share of participation in the association/entity of each associate/ participant, the proof of registration of the permanent establishment of the non-resident associate/participant with the relevant tax authority in Romania and the tax residence certificate of each non-resident associate/participant. The association agreement is registered with the competent tax authority in whose area the associate designated for the fulfilment of the tax obligations of the association is registered.

If the association is incorporated under the laws of a foreign state and operates/obtains revenues in/from Romania and it is not treated as resident for tax purposes in the foreign country where it is registered, according to art. 234 of the Tax Code, it will be considered to be a transparent association/entity without legal personality from the tax point of view in Romania and the rules listed shall apply if at least one of the non-resident participants operates in Romania through a permanent establishment or obtains revenues for which Romania has the taxation right.

In this regard, the conclusion that a non-resident person participating in an association which operates in Romania should automatically register a permanent establishment, independently of the fulfilment of the conditions laid down in art. 8 of the Fiscal Code or not, respectively of the conventions on avoidance of double taxation might be retained.

We do not share such interpretation, considering that the regulation of the permanent establishment has the character of an exception and it cannot be extended beyond the requirements expressly laid down in the norms especially established in the field, including their interpretation according to the Comments of the Organization for Economic Cooperation and Development (OECD) on the template Convention for avoidance of double taxation globally defined in the legislation of the vast majority of the member states of the organization.

Moreover, even from the text of art. 233 of the Tax Code it might be concluded that it is not mandatory for the participant in an association –a non-resident person to set up a permanent establishment. Thus, the provisions of paragraph 2 letter e) in conjunction with those of paragraph 4 of the said article establish rules of calculation of withholding and payment of the tax due on the revenues from the association, distinguishing between the rule of withholding at source for non-residents and the calculation, the payment and the direct declaration on their own behalf by non-residents operating in Romania through a permanent establishment. Therefore, both hypotheses are recognized as possible.

In the same respect, we mention the provisions of art. 224 para. 2 of the Tax Code which stipulate that the tax owed by non-residents, members of the fiscally transparent association/entity, which operates in Romania, for taxable revenues obtained in Romania, is calculated, withheld, paid to the state budget and it is declared by the designated person within the fiscally transparent association/entity. The withholding at source is not applicable in case of non-resident taxpayers whose activity in the fiscally transparent association/entity generates a permanent establishment in Romania.

According to the Tax Code, the permanent establishment is a place by which the activity of a non-resident is fully or partially carried out, either directly or through a dependent agent. The comments from art. 5 "Permanent establishment" of the template convention for avoidance of double taxation of OECD[10] are taken into consideration when defining the permanent establishment.

The definition of the term of permanent establishment continues by the inclusion of a place of management, a subsidiary, an office, a factory, a store, a workshop, as well as a mine, a crude oil or gas well, a quarry or other places of extraction of natural resources, etc.

Also, a permanent establishment implies a construction site, a construction project, an assembly or installation or supervision activities in connection therewith only if the site, the project or the activities last for more than 6 months.

[10] *Convenția fiscală. Model privind impozitele pe venit și capital. Versiune condensată*, Irecson Publishing House, 2009, p. 91.

The detailing of the criteria which lead to the qualification of a form of economic activity on the territory of Romania as a permanent establishment continues, the details, the exceptions and the examples listed being large both in the contents of the Tax Code and in the methodological norms for application. We reiterate that the above-mentioned OECD comments whose applicability has been in fact expressly recognized by the Tax Code in force are valuable in the matter.

Consequently, we consider that the determination of a permanent establishment in Romania should be made by correlating the norms of art. 8 of the Tax Code with the actual activity performed by the non-resident participant depending on the particularities of each association. For example, in the event that one of the participants in the association assumed exclusively the delivery of goods which will be subsequently reused for the purpose of the association, without performing any other provision and without sharing any revenues and expenses, it is obvious that the conditions for permanent establishment cannot be deemed to be fulfilled.

From the point of view of the Tax Code, no association without legal personality established for commercial purposes creates a taxable person in terms of VAT: thus, according to art. 269 para. 11 of the Tax Code "*The joint ventures do not give rise to a separate taxable person. The associations such as joint venture, consortium or other forms of association for commercial purposes, which have no legal personality and are established under the law, irrespective whether they are treated as joint ventures or not, do not give rise to a separate taxable person*."

Art. 321 para. 5 of the Tax Code stipulates that in case of joint ventures the legal rights and obligations concerning the VAT belong to the associate who accounts for the revenues and expenses, according to the contract concluded between the parties.

Art. 321 para. 5 comes with an important clarification: only the associations in which the administrator associate shares revenues and expenses with his partner and whose purpose is the delivery of goods/provision of services to third parties are considered to be joint ventures. The regulation is congruent with the provisions of the Civil Code which define the main legal features of the joint ventures: affectio societatis, the contribution, the share on benefit and loss.

The conclusion of our analysis is that depending on the type of contract which the members of an association specifically conclude to participate and to execute a public procurement contract and depending on the concrete object of the public contract, the template association agreements imposed by the contracting authorities in the form of joint ventures or certain clauses regarding the organisation and operation of associations are unlawful or even restrictive, and may be changed by means of the requests for clarification, prior notices and, possibly, by means of complaints.

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