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THE REFORM OF THE PUBLIC PROCUREMENT SYSTEM – A PREMISE OF INCREASING ABSORPTION OF EUROPEAN FUNDS AND FOSTERING COMPETITION ON THE SINGLE MARKET

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Abstract

Under the auspices of the two Acts on the Single Market (2011, 2012) and the Europe 2020 Strategy, and given that the financial risks involved and the tight connection between the public and private environments may transform public procurement into a vulnerable area faced with unfair commercial practices, with the 2007-2013 programming period providing numerous such examples in Romania, there has been a need for a new approach to procurement. This has implied, on the one hand, the adoption of clear, coherent, stable and predictable legislation (transposed from European legislation), and on the other hand, the reconfiguring and broadening of granting procedures.

Keywords: public procurement, value thresholds, subcontractors, direct payments, competition, granting criteria

The creation of the Single Market, the core and principal economic engine of the European Union, is a permanent exercise and a central element in the European programme of measures aiming to overcome the severe economic crisis over the last years. In this context, in 2011, the European Commission adopted the Single Market Act (I), through which it launched 12 levers for growth, competitiveness and social progress, one of which pertained to public procurement. The latter aimed to modernise the European and national legislative framework, so as to implement a balanced policy, capable of sustaining the demand for goods and services which

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respect the environment, are socially responsible and innovative, in order to provide contracting authorities with simpler, more flexible procedures, and to facilitate the access of SMEs to the market.

The year 2012 saw the adoption by the Commission of a second set of measures (the Single Market Act II), marking one more step in the evolution towards a well-developed, integrated Single Market.

The 2020 Strategy presented in the Communication from the Commission of 3 March 2010, entitled "Europe 2020, A European strategy for smart, sustainable and inclusive growth, ecological and favourable to inclusion" is one more market instrument employed so as to attain intelligent, sustainable growth, supporting inclusion and ensuring a more effective use of public funds[1]. The strategy promotes the idea of a competitive, environmentally-friendly economy, based on science and innovation, with high levels of employment, productivity and social cohesion, oriented towards the efficient consumption of resources. Nevertheless, strengthening the Single Market also depends on the existence of healthy, well-connected national markets, on which competition and the access of consumers can stimulate economic activity and innovation.

Amid the two Acts on the Single Market and the Europe 2020 Strategy, and given the financial risks involved and the tight connection between the public and private environments, public procurement is likely to turn into a vulnerable area, confronted with unfair commercial practices. The 2007-2013 programming period provided numerous examples in this respect, in the case of Romania. This made it necessary to have a new approach to procurement, which involved, on the one hand, the adoption of clear, coherent, stable and predictable legislation (transposed from European legislation) and on the other hand, the reconfiguring and broadening of granting procedures.

At European level, the legal framework in the area of public procurement was reformed with the entry into force of three normative documents: Directive 2014/24/UE of the European Parliament and the Council on public procurement, Directive 2014/23/UE of the European

[1] See, for more details: Adrian-Gabriel Corpădean, "Europe 2020 – A 'Soft' Agenda for Central and Eastern Europe?", in *The EU as a Model of Soft Power in the Eastern Neighbourhood*, EURINT Conference Proceedings, Ed. of Al. I. Cuza University, Iaşi, 2013. Editors: Ramona Frunză, Gabriela Pascariu, Teodor Moga, pp. 220-230.

Parliament and the Council on granting concession contracts, and Directive 2014/25/UE of the European Parliament and the Council on acquisitions made by entities conducting their activity in the sectors of water, energy, transport and postal services[2].

Transposing European legislation[3], on 26 May 2016, Romania adopted the legislative package pertaining to public procurement, as follows: Law no. 98/2016 on public procurement[4], Law no. 99/2016 on sectoral acquisitions[5], Law no. 100/2016 on concession of works and of services[6], and Law no. 101/2016 on remedies and means of appeal in matters of granting public procurement contracts, sectoral contracts, and contracts on concession of works and services.[7]

The general objective of the National strategy in the area of public procurement[8] is to efficiently spend public funds, by increasing the quality of the procurement process and by enhancing administrative capacity. This strategy proposes a new approach in matters of public procurement in Romania, by shifting the emphasis from procedure to process, from the value of the contract per se to the value-for-money principle and to the cost of the entire lifecycle of a purchase, from overregulation to supple legislation built on three levels: primary legislation (classic, sectoral acquisitions, concessions, remedies), secondary (application norms) and tertiary (guides), thus engendering a coherent vision, in a key moment, in which the new directives in the field required member states to shift to a new paradigm, considering public procurement as the main instrument for unlocking economic growth at European level.

In retrospect, we can state that the public procurement system built under the auspices of E.G.O. no. 34/2006 was confronted with the inability of contracting authorities to conduct public procurement procedures,

[2] All of which were published in the Official Journal of the EU no. L94 of 28 March 2014.
[3] The deadline for transposing it into national legislation was 18 April 2016.
[4] Published in Official Journal no. 390/23.05.2016.
[5] Published in Official Journal no. 390/23.05.2016.
[6] Published in Official Journal no. 392/23.05.2016.
[7] Published in Official Journal no. 393/2016.
[8] The strategy was approved through G.O. no. 901/2005, published in Official Journal no. 881/2005. The strategy can be consulted at [http://anap.gov.ro/web/wp-content/uploads/2015/12/Strategia-Nationala-Achizitii-Publice-final.pdf], 15.09.2016

corroborated with intricate legislation, which was difficult to use and interpret in a unitary fashion, frequent legislative change[9], and the lack of transparency and effectiveness of investments.

However, it cannot go unnoticed that albeit it was desired that the current primary legislative packet be supple, as well as extremely loyal to the Directives, with operational and guidance details in secondary legislation, i.e. the online system of guides, one cannot speak of a simplification of public procurement legislation, given that the primary package amounts to over 400 pages, meant to replace the 130 pages of E.G.O. no. 34/2006. This excess of regulation is not solely the fault of the Romanian lawmaker, as it is also prompted by the large amount of information from the Directives that have been transposed. These have not only substantially altered the previous legal framework, but have also created new juridical institutions (for instance, the innovative partnership, the European Single Procurement Document etc.), or enshrined the jurisprudence of the Court of Justice of the European Union (e.g. the provisions referring to the modification of public procurement contracts have incorporated the conditions of the Pressetext ruling into the text of the Directive[10]).

Our aim here is not to present *in extenso* the entire Romanian legislative package, as the length of this study does not allow it, but to analyse the impact of certain legislative changes in matters of public procurement on granting contracts financed from European funds.

Firstly, it is to be noted that the value thresholds are set in lei, not in euros, which is meant to counter the negative effects of currency rate fluctuations. For example, contracting authorities are entitled to directly purchase products or services when the estimated value of the contract is

[9] For instance, before it was abolished, E.G.O. no. 34/2006 suffered 20 modifications.

[10] Through its decision of 13 March 2008 in the matter C-454/06 of Pressetext Nachrichtenagentur GmbH, the European Court of Justice ruled on the conditions in which the modifications brought to an existing contract constitute a new grant of a public procurement service contract, having as a consequence the fact that prior to that, there may have to take place a new granting procedure. The Court rules that not every change, be it insignificant, brought to public procurement service contracts, requires a prior granting procedure, unless there occur substantial changes, which, concretely, are likely to engender unfair competition on that market and provide the trading partner of the contracting authority with preferential treatment compared to other potential service providers. This alone justifies a new granting procedure. The decision can be consulted at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006CC0454:RO:HTML], 15.09.2016.

below 132.519 lei. In the case of works, direct procurement may be carried out if the estimated value is below the 441.730 lei threshold (art. 7 par. 4 of Law no. 98/2016) [11].

Another novelty element is the possibility to make direct payments to subcontractors. Given the lack of a distinction depending on the type of contract[12], direct payment to subcontractors is allowed not only in the case of works and service contracts, but also of those for the supply of products.

Thus, when the procurement contract includes a clause on debt cessation in favour of subcontractors pertaining to the part(s) of the contract which are fulfilled by the latter, a contracting authority will be able to make payments directly to subcontractors. This occurs on condition that their work is confirmed through documents accepted by all three parties involved, namely the contracting authority, the contractor and the subcontractor, or the contracting authority and the subcontractor, when the contractor unjustifiably blocks the confirmation of fulfilment of obligations assumed by the subcontractor (art. 218 par. 1 and 2 of Law no. 98/2016).

The advantages of this payment mechanism are incontestable, since the subcontractor is not obliged to wait for the complete execution of the procurement contract and the receipt of payment by the contractor, so that the latter would subsequently honour its obligations to the subcontractor. Starting from the premise that in many situations, the subcontractors are SMEs, it is our view that the creation of this mechanism indirectly eases the access of this type of business actors to the public procurement market.

It is to be noted that this provision, obstinately claimed by the business environment, can lead in certain cases to an administrative overload of the contracting authority, which could be faced with the

[11] According to E.G.O. no. 34/2006, direct procurement was allowed only if the estimated value was lower than the 30.000-euro threshold, for products and services, and 100.000 euros, for works.

[12] In the light of the provisions of art. 45 par. (1) – (2), and art. 188 par. (2) lett. h) and par. (3) lett. g) of E.G.O. no. 34/2006, in the doctrine we encounter the opinion that subcontracting is possible only in the case of service and works contracts, and not just in that of supply contracts, where the use of subcontractors is more justified. See Călin Alexa, *Participarea subcontractanţilor în procedurile de achiziţie publică - când şi în ce condiţii este posibilă*, [http://www.avocatnet.ro/content/articles/id_32645/Participarea/subcontractantilor/in/procedurile/de/achizitie/publica/-/cand/si/in/ce/conditii/este/posibila.html], accessed on 20.09.2016.

situation of managing not only the procurement contract signed with the entrepreneur that has several subcontractors, but also the contractual ties with the latter. This would occur in terms of both payment and the fulfilment of obligations assumed by the subcontractors.

Like under the auspices of E.G.O. no. 34/2006, the lawmaker did not limit in any way the quota allocated to the subcontractor, who could theoretically carry out as much as 99,9% of the contract, as long as the requirements in the granting documents are fulfilled, in which case the main contractor will only have the ability to manage the contract.

Ending the controversy triggered by E.G.O. no. 34/2006 regarding the possibility to subsequently name subcontractors[13], Law no. 98/2016 allows not only to replace, but also to involve new subcontractors in the implementation period of the contract, with the fulfilment of the following requirements: the works/services that are about to be subcontracted have been stipulated in the offer without initially indicating the option of their subcontracting (art. 151 lett. b) of the norms); the contracts concluded between the contractor and the subsequently declared subcontractors mandatorily include at least the following elements: the activities to be subcontracted, names, contact details, legal representatives of the new subcontractors, the value of the work carried out by the new subcontractors; the contracts concluded with the subcontractors are to be presented to the contracting authorities upon their request (art. 152 of the norms); the presentation by the new subcontractors of a statement on honour through which they assume the provisions of the tender book and technical proposal submitted by the contractor, pertaining to the activity subjected to subcontracting; the existence of an agreement by the contracting authority on the involvement of new subcontractors (art. 156 of the norms).

[13] Art. 96 par. 2 of G.O. no. 925/2006 clearly provided only for the possibility to replace the initial subcontractor chosen through the offer, which led to restrictive doctrinary interpretations, with respect to the inadmissibility of subsequent nominations. It has been shown that admitting to the contrary, when the initial offer did not mention the existence of subcontractors, would imply the alteration of this initial offer, given that the candidate took full responsibility for the risks of carrying out contractual obligations through its own means. See *idem*.

Anticipating that subcontracting in the implementation period of the project, when the initial offer did not include the option of subcontracting works/services, is a potential source of competition distortion, the Romanian lawmaker conditions the right to involve new subcontractors during the execution phase of the contract by the unsubstantial modification[14] of the public procurement contract (art. 159 of the norms).

It also becomes apparent that the new law encourages the division of contracts onto lots, so as to facilitate the access of SMEs to public procurement contracts, as it is known that such economic agents, with a low number of employees, reduced financial resources, and relatively little experience with major contracts, are unable to compete with large companies. Hence, the contracting authority that does not resort to granting the contract based on lots has the obligation to justify this decision.

The division of the contract onto lots does not, however, alter the procurement procedure that needs to be followed for granting each lot (art. 11 par. 2 of Law no. 98/2016), the estimated value of the purchase being the combined estimated value of all lots (art. 17 corroborated with art. 18 of the law). Moreover, one acknowledges the right of contracting authorities to set a limit on the number of lots that can be attributed to the same provider, even when offers can be placed for more or all lots (art. 141 par. 5 of the law), along with the possibility to grant contracts by combining more lots and granting them to the same provider, if, upon applying the granting criterion, this would be more advantageous to the contracting authority than granting the respective lots separately to several providers (art. 148 par. 1 of the law).

[14] According to art. 160 of the norms, the subsequent nomination of subcontractors that were not mentioned in the initial offer does not account for a substantial modification if the following conditions are simultaneously met: a) the inclusion of a new subcontractor does not have an impact on the fulfilment of qualification/selection criteria, or on the application of the granting criterion reported upon the evaluation of offers; b) the inclusion of a new subcontractor does not alter the price of the contract between the contracting authority and the contractor; c) the inclusion of a new subcontractor is strictly necessary for the fulfilment of the public procurement contract; d) by including a new subcontractor, the general nature of the public procurement contract is unaltered, i.e. the objective of the contract, as well as the main indicators denoting the results of that contract, remain unchanged.

Then, by comparatively examining the simplified procedure[15] and other procedures applicable for larger values of the purchase, we notice that in the case of applying the simplified procedure, the economic agent can invoke the support of a third party for a maximum of 50% of the demand established in the light of art. 113 par. 11 lett. c) of Law no. 98/2016, so that, implicitly, it should possess its own experience in the amount of 50%. On the other hand, in the case of the other procedures, for meeting eligibility criteria it is unlimitedly accepted to have the support of a third party. This difference in "treatment" may be explained through the fact that smaller-value procedures are not subjected to European directives, which has allowed for this differentiated legislative approach that does not, however, meet the needs of SMEs. Therefore, it cannot go unnoticed that the standpoint of the Romanian lawmaker does not provide SMEs without their own similar experience with a chance to participate in public procurement procedures, albeit there may be a commitment on the part of the supporting third party to be held accountable along with the winning candidate for the execution of the public procurement contract. This commitment can be fully exploited in the case of contracts that imply granting procedures with an estimated value situated above European thresholds.

Significant alterations have also been made in the case of the criteria used[16] for deciding on the most advantageous offer from an economic standpoint, namely: the lowest price; the lowest cost; the best quality-price ratio; the best quality-cost ratio.

Without a doubt, the "lowest price" criterion is a comfortable and accessible one, but it does not constitute a guarantee of quality procurement, as it has become evident chiefly in the case of European-funded projects. This

[15] From the corroborated interpretation of the paragraphs of art. 7 of Law no. 98/2016, it becomes apparent that below the thresholds of 132.519 lei (for products and services) and 441.730 lei (for works), one resorts to direct procurement; above these thresholds, but below the limits of 23.227.215 lei for public procurement / framework agreements on works, 600.129 lei for public procurement / framework agreements on goods and services, and 3.334.050 lei for public procurement / framework agreements on services referring to social services or other specific services, stipulated by appendix no. 2, the simplified procurement procedure is used.

[16] Art. 198 of E.G.O. no. 34/2006 provides for two granting criteria in the case of public procurement contracts: either the most economically advantageous offer, or, solely, the lowest price.

is one of the reasons why this criterion cannot be used by contracting authorities in the case of contracts focusing on intellectual services (for instance, design, audit and consultancy services), and which involve high-complexity activities, as well as of public procurement contracts dealing with works or services pertaining to projects of trans-European transport infrastructure and county roads (art. 187 par. 8 of Law no. 98/2016). In the case of the other types of contracts, it is not forbidden to use the "lowest price" criterion, so it is for the contracting authority to decide the extent to which the criterion invoked meets the needs of the latter so as to achieve quality procurement (in other words, whether the effectiveness of the investment depends solely on cost).

We also deem relevant the provision pertaining to the introduction of the European Single Procurement Document (ESPD)[17], whose effect if the simplification of the process of taking part in public procurement procedures is that in this way one avoids the presentation by the applicants/providers of a significant number of certificates or other legal documents germane to selection and eligibility criteria. The Single Procurement Document consists of a statement on honour produced by the economic agent, with regard to fulfilment of eligibility and selection criteria, while only the winning candidate is obliged to submit all the original documents required, which implicitly leads to a reduction of the applications' evaluation period.

The standard form also provides relevant information on the entities on whose capacities the economic agent relies on (third party, subcontractor), so that the verification of information can be conducted simultaneously with that of the main economic agent, and in the same conditions (art. 193 par. 2 and 3 of Law no. 98/2016).

Another novelty element is the possibility, when one aims to purchase products/services/works with a high degree of technical, financial or contractual complexity, or from areas marked by rapid technological progress, to carry out consultations on the market prior to initiating the procedure. This dialogue is to follow the principle of transparency, by means of SEAP. The consultation notice published on SEAP has to include, among

[17] See, Implementing Regulation (EU) 2016/7 of the Commission of 5 January 2016 on the establishment of the standard form for the European Single Procurement Document, published in Official Journal no. L3/06.01.2016.

the mandatory details, those referring to the objective requirements and technical and/or contractual constraints which characterise the needs of the contracting authority germane to that particular consultation; the deadline by which the proposals of interested parties are submitted, as part of the consultation process; the deadline by which the consultation process is active etc. (art. 18 par. 1 and 2 of the norms).

One last aspect we wish to underline is that most problems related to the old public procurement legislation emerged in the implementation of European-funded projects. To overcome such obstacles as the ones encountered in the 2007-2013 programming period, the new legislation provides that it is the task of the contracting authority to set its own contracting strategy for each purchase, in which it would estimate the time frame for preparing procurement documents and prepare the entire lifecycle of the procurement contract. It would also anticipate decisions germane to the type of contract envisaged to be chosen and the means of implementing it, the payment mechanisms within the contract, allocation of risks, risk management measures, penalties for failing to comply with or for wrongful implementation of contractual obligations etc. Doubtlessly, a correct strategy enables contracting authorities to comply with the activity calendar graph.

Conclusions. It is obvious that the new legislative package succeeds in rendering the public procurement system generally more flexible, by creating a relatively favourable framework for the more effective use of public funds. The provisions referring, amongst others, to the division of the contract onto lots, setting shorter terms, higher thresholds, instruments meant to simplify and increase the efficiency of the selection process of economic agents (for example, the European Single Procurement Document), or to enhance communication between the contracting authorities and the private environment (through the transparent and equidistant consultation of the market, prior to the initiation of the granting procedure) are meant to foster acquisitions from both European funds and the state budget, as well as to ensure a more active participation of SMEs in granting procedures.

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