

Chapter 1

1. INTRODUCTION

The present study aims to explain and elucidate the multilayered field of public procurement contract execution by describing and analyzing the main challenges that occur during this “obscure”¹ phase of public procurement. This chapter introduces the research topic and the outline of its scope.

1.1. The general context

Public procurement has a multidisciplinary character, transcending all sectors of economy and society². Public procurement, the process by which public authorities purchase work, goods or services, makes up a substantial part of the economies of the European Union Member States. It involves over 250,000 contracting authorities across Europe and accounts for more than 14% of EU’s GDP (roughly around €2 trillion per year)³. Its importance within the economies of the Member States varies, but the significance is always considerable. This transforms the public procurement strategies and actions into a potentially strong instrument for governments to achieve economic, social, and environmental goals. But all these instruments depend substantially on the manner the public procurement system is managed, conducted and monitored.

Gradually, public procurement has become a significant area of EU regulation. The basis of the European procurement regulation and the EU’s interest in this subject

¹ “Obscure” is defined in Cambridge Dictionary as meaning both unknown and difficult to understand. I consider this phase of a public procurement contract as being obscure in the sense that it is the least regulated, has the lowest level of transparency from the entire procurement cycle, has a low level of monitoring and control (mainly control upon the legality of the process without quality considerations), is almost left out from analyses at a doctrinal level.

² For an analysis of public procurement, from a legal and economic perspective see S. Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Volume 1, Third Edition, Thomson Reuters, London, 2014, A. Semple, *A Practical Guide to Public Procurement*, Oxford University Press, 2015, C. Bovis, *Law of EU Public Procurement*, Oxford University Press, 2015, G. Piga, *Public Procurement’s Place in the World. The Challenge Towards Sustainability and Innovation*, Pöschel & Schmidt, 2014, A. Sanchez-Graells, *Public Procurement and the EU Competition Rules*, Second Edition, Hart Publishing, 2015, N. Khan, *Public Procurement Fundamentals. Lessons from and for the Field*, Emerald Publishing, Bingley, 2018.

³ https://ec.europa.eu/growth/single-market/public-procurement_en, last accessed 09.04.2021

lies mainly within the concept of internal market. The Treaty on the Functioning of the European Union (TFEU) establishes the basic framework for public procurement rules in the EU, even though the term “public contract” is nowhere to be found in the text. The most relevant aspect from a public procurement perspective is the regime on the free movement of goods and services, by removing the formal and informal barriers to intra-EU trade. The free movement rules prohibit the existence of discriminatory practices in public procurement within the EU, such as ‘buy national’ policies⁴. But these rules with a prohibitive character proved to be insufficient to reach the goal of an open market and to eliminate the protection offered by Member States to domestic suppliers. For this reason, coordinating directives⁵, which harmonize the procurement regulation of the Member States were enacted.

The evolution of EU public procurement law has been swift and expansive. Although European directives on public procurement have been in force since the 1970s⁶, transparency and fairness in the procedures for public contracts was strictly limited, with non-domestic enterprises almost completely excluded from national markets⁷. Between 1988 and 1993, a series of new directives were adopted defining the scope of public procurement and regulating the procedures according to which the purchasing entities may procure works, supplies and services. The aim of the regulation was to lay down a framework that would provide for fairness and openness in the European procurement market. The purposes of the provisions were: firstly, to achieve increased competition between European enterprises, secondly to improve the efficiency and competitiveness of European enterprises in global markets, and thirdly to reduce public-sector purchasing costs.

Another generation (the 4th) of public procurement directives was enacted in 2004. The procurement legislation was again consolidated providing for an “obvious

⁴ The main objective of the European public procurement is contained in the Treaty: opening up of the national procurement markets in order to provide for equal opportunity to submit offers and win contracts to bidders from other Member States.

⁵ According to Trybus, a Directive determines the results that must be achieved by a particular piece of regulation but leaves the choice of form and methods to the Member States. See M. Trybus, “Improving the Efficiency of Public Procurement Systems in the Context of the European Union Enlargement Process”, *Public Contract Law Journal*, vol. 35, No.3, 2006, p. 412.

⁶ 1971 for works and 1977 for supplies.

⁷ The Single Market Review, Volume 2: Dismantling of Barriers. Public Procurement, Office for Official Publications of the European Communities, 1996, p. 2, available online at <http://aei.pitt.edu/85778/1/V.2.III.pdf>, last accessed 20.04.2020. Two studies were relevant for the changes brought to the legislation Commission of the European Communities., *Basic Findings*, Vol. 5, Part. B: *The Cost of Non-Europe in Public Sector Procurement*, Official Publications of the European Communities, Luxembourg, 1988 and Cecchini Report, 1992: *The European Challenge, The Benefits of a Single Market*, Wildwood House, 1988.

simplification”⁸ and modernization⁹ of the European regulation in this field. A major innovation introduced by the 2004 Directive allowed Member States to pursue their own policies (social and environmental) through the regulation of public procurement¹⁰. In Recital 5 of 2004/18 Directive a reference is made for the first time in a procurement directive to the concept of value for money. The Recital provides for the right of the contracting authority to introduce green considerations whilst ensuring the possibility of obtaining best value for money. This innovation has raised the question if it is justifiable to consider the concept of value for money as a new “horizontal” objective of the procurement regulation. According to Arrowsmith and Kunzlik, the reference to value for money in Recital 5 does not indicate that this concept is a new objective of the Directive¹¹. In an article published in 2012, Arrowsmith considers that the Member States may adopt domestic rules to establish value for money, but the main purpose of the EU rules “would be to ensure that public bodies choose the best supplier to develop the internal market”¹². Comba assesses in an intriguing fashion that the procurement regulation may admit for the first time new objectives other than the classical achieving of the internal market with reference to concept of value for money. After an in-depth analysis of the concept of value for money in public procurement, Comba concludes in the same line

⁸ Y. Allain, “The New European Directives on Public Procurement: Change or Continuity?”, *Public Contract Law Journal*, vol. 35, No.3, 2006, p. 522.

⁹ The use of electronic means of communication, the use of central purchasing bodies, taking into account of environmental and social consideration, the mechanism of framework agreements are just few of the modernized rules provided by Directive 2004/18.

¹⁰ This right is expressly stated in Recital 1 of Directive 2004/18. Reference to the principle of freedom of establishment and freedom to provide services as provided by the Treaty is made in Recital 2.

¹¹ S. Arrowsmith, P. Kunzlik, *Social and Environmental Policies in EU Procurement Law - New Directives and New Directions*, Cambridge: Cambridge University Press, 2009, pp. 34-35. See also D. Davenport, *Review of Social and Environmental Policies in EC Procurement Law – New Directives and New Directions*, ed. Sue Arrowsmith and Peter Kunzlik, *Public Procurement Law Review*, 5, 2011, pp. 175-178.

¹² S. Arrowsmith, “The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies”, in C. Barnard, M. Gehring and I. Solanke eds., *The Cambridge Yearbook of European Legal Studies*, Volume 14, Hart Publishing, London, 2012. p. 24. In the same cited source, Arrowsmith criticizes the competition-oriented public procurement approach taken by A. Sanchez-Graells in *Public Procurement and the EU Competition Rules*, Oxford: Hart Publishing, 2011. Responding to Arrowsmith’s criticism, Sanchez-Graells writes in the second edition of his study that “It seems very clear that EU public procurement rules (...) are concerned with economic efficiency”. See A. Sanchez-Graells, *Public Procurement and the EU Competition Rules*, Oxford: Hart Publishing, 2015, p. XV.

of argument and points out that efficiency in public spending is a matter of national public administration¹³.

Following a reform process proposed by the Commission in 2011, the new rules for public procurements were finally published in 2014¹⁴.

Within the EU, national procurement rules have been coordinated by these EU public procurement directives. The vehicle of harmonization has been entrusted to carry the progress of public procurement regulation¹⁵. The European legislator chose to regulate in the Directives only those contracts whose monetary value exceeds a certain amount¹⁶. The European regulation does not aim to control and thrust a common regulatory regime on EU Member States in the field of public procurement. It allows the Member States to remain free in regulating a number of issues, adjusting substantive and procedural rules to their national procedures, as long as these rules are not in conflict with the provisions of the Directives and the ones from the Treaty. The EU aims to introduce “a discipline of regulation” in order to ensure that the undertakings from across the Internal Market have the opportunity to compete for public contracts, by ensuring equal treatment and by abolishing any scope for discriminatory purchasing through enhanced levels of transparency and accountability¹⁷. At the heart of the EU’s efforts to achieve an internal market in public procurement lies a prohibition on discrimination. The principle of non-discrimination prohibits practices on discriminating against

¹³ See M. Comba, “Variation in the Scope of the New EU public Procurement Directives of 2014: Efficiency in Public Spending and a Major Role on the Approximation of Laws, in F. Lichere, R. Caranta, S. Treumer (Eds.), *Modernizing Public Procurement. The New Directive*, Copenhagen: DJOF Publishing, 2014, pp. 35-36, 47.

¹⁴ Directive 2014/23/EU on concession contracts, Directive 2014/24/EU on public sector procurement, and Directive 2014/25/EU on procurements in the utilities sectors. Bovis argues that the new directive on public sector procurement has met three principal objectives: simplification, modernization and flexibility. See C. Bovis, “The priorities of EU public procurement regulation”, ERA Forum 21, 2020, pp. 283-297. The research will focus on the “classical” Directive on public procurement, namely 2014/24 Directive.

¹⁵ C. Bovis, „Public Procurement and the Internal Market of the Twenty-first Century: Economic Exercise versus Policy Choice”, *European Union Law for the Twenty-First Century*, Volume 2, *Rethinking the New Legal Order*, ed. Takis Tridimas and Paolisa Nebbia, London: Hart Publishing, 2004, pp. 291–310.

¹⁶ It is considered that the thresholds set by the Directive are sufficiently high to attract economic operators from other Member States. However, the actual impact of the Public Procurement Directive is much greater than the bellow thresholds procurement contracts. Furthermore, the ones falling outside the scope of the Directive, which are to be governed by domestic rules only, still have to respect the principles established by EU law.

¹⁷ C. Bovis, *EU Public Procurement Law*, Cheltenham: Edward Elgar Publishing, 2012, p. 2

suppliers/service providers because of their nationality. The procurement directive builds on the ban on discrimination on grounds of nationality and develops it further into a principle of equal treatment of tenderers¹⁸.

From the wording of the Directive, it is clear that it primarily focuses on the award phase of the public procurement contract¹⁹. Contract implementation traditionally belongs to the procedural autonomy of the Member States²⁰ and the legal framework and traditions differ heavily among them. Most legal systems differentiate clearly between public and private law and assign public procurement contracts to one of the two categories²¹. In general, in common law jurisdiction, there is no formal division between public and private contracts. The public procurement contract is considered a civil law contract and does not have an independent status, falling under the scope of private law²². There are also countries that consider public procurement contracts as administrative contracts that are governed by public law. This is the case of France, Belgium, Spain, Finland, Portugal. In other Member

¹⁸ See *Beetjes Case*, Case 31/87, ECLI:EU:C:1988:422: “all bidders must be treated equally”. In order to prevent discrimination, transparency is considered another general principle of EU public procurement law (The CJEU has interpreted that the free movement provisions themselves imply an obligation of transparency. See, for instance, *Teleaustria*, Case C-324/98 *Telaustria v Telekom Austria and Herold Business Data*, ECLI:EU:C:2000:669. K.-M. Halonen, R. Caranta, A. Sanchez-Graells, in “Transparency in EU Procurements: an Introduction”, in K.-M. Halonen, R. Caranta, A. Sanchez-Graells (Eds.), *Transparency in EU Procurements*, Cheltenham: Edward Elgar Publishing, 2019, pp. 1-8. See the transparency principle as a corollary of the general principle of non-discrimination. In order to achieve efficient procurement keeping competition fair is a key concern. As Sanchez-Graells points out, Directive 2014/24 stresses the relevance of competition considerations across the board. (A. Sanchez-Graells, *Public Procurement and the EU Competition Rules*, Oxford: Hart Publishing, 2015, p. XV). The author goes beyond his assessment and considers that is likely for EU public procurement rules to develop a further pro-competitive orientation. For a source that argues that the competition law continues to regulate the execution of the public procurement contract, and that the infringement of EC competition norms may well establish the illegality of the contracting authority's action, see M. A. Alexopoulou, “EC Competition Rules in Public Procurement Cases: A Ground for Judicial Review?”, The University of Oxford – Centre for Competition Law and Policy Working Paper, CCLP (L) 24.

¹⁹ In the same fashion with the WTO Government Procurement Agreement and the UNICTRAL Model Law on Public Procurement.

²⁰ Contract law was considered to be at the core of the domestic legal systems. However, in recent years, it was clear that the EU law interacted more with the national contract laws of the Member States. In this line see EU Contract Law, Report number: JURI_3_1, February 2009.

²¹ M. Trybus, *op. cit.*, p. 416.

²² In the UK, Germany, and the Nordic countries. Even in those countries where the public contract is subject to ordinary private law, there “are frequently some modifications in the way the law of contract is applied to government entities” (S. Arrowsmith, J. Linarelli, D. Wallace Jr., *Regulating Public Procurement. National and International Perspectives*, Hague: Kluwer Law International, 2000, p. 14).

States, such as Austria, Denmark, Estonia, Poland, Sweden, and Italy, there is no specific set of rules for all public procurement contracts. In these states, the public contracts are governed by the general principles of contract law, also being subject to certain principles drawn from administrative law.

We may ask ourselves: where does Romania belong in this bigger picture? EGO 34/2006 was the first public procurement regulation that included an express mention related to the legal nature of the public procurement contract. However, the contract was deemed as administrative according to the doctrine even before EGO 34/2006²³. With several amendments brought to procurement legislation after 2006 the legislature has changed the legal nature of the public procurement contract from an administrative to a commercial one. The strangest situation occurred after 2010²⁴ when, according to the legislation, the discussed contract received a mixed character: an administrative contract for the pre-contractual phase and a commercial one for the execution phase of the contract.

Considering that there are discrepancies in national law and practice concerning the framing of the contracts and their performance, it is an understatement to claim that the Treaty freedoms and principles which underlay procurement regulation would be frustrated, if the directives ceased to apply at the moment a contract was awarded²⁵. It is clear that non-discrimination, equal treatment, transparency and competition concerns may very well spread over the performance phase of the contract²⁶. As the EU Directive has not explicitly regulated the events occurring after the conclusion on the contract, it was considered that the European legislation on public procurement did not affect the contract performance phase. However, the CJEU has largely extended the applicable scope of the procurement directives. The *Pressetext* decision has legitimized control over whether operations are in

²³ For a study that considers the contract as administrative, see D.C. Dragoș, D. Buda, “Considerații teoretice privind noul cadru juridic al încheierii contractelor de achiziție publică”, *Revista Transilvană de Științe Administrative*, nr. 1(7)/2002, pp. 201-221.

²⁴ EGO 34/2006 was amended by EGO 76/2010 and the Law No.278/2010 (published in the Official Gazette of Romania No.898 from 31.12.2010).

²⁵ A. Semple, *A Practical Guide to Public Procurement*, Oxford: Oxford University Press, 2015, p. 119. When the execution of the contract differs substantially from the conditions set forth in the award, the whole equilibrium of the bid rankings, set in compliance with competition and nondiscrimination principles, is undermined (Gabriella M. Racca, Roberto Cavallo Perin, and Gian Luigi Albano, “Competition in the Execution Phase of Public Procurement”, *Public Contract Law Journal*, vol. 41, No.11, Fall 2011, p. 91).

²⁶ Specifically, the contracting authority may bring changes to the contract during its performance such as: the modifying of the scope of the public contract (the change would have attracted other economic operators), and the allowing for time extensions (denying the opportunity of other economic operators to participate in a new tender).