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Faculty of Law

DOCTORAL THESIS SUMMARY

Public Procurement Contract Execution

Scientific Coordinator: **PhD Candidate:**

Prof. Dr. Dacian Cosmin Dragoș **Daniela Cîmpean**

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Demystifying the complex field of public procurement contract execution has been the central purpose of this research. In the present thesis the main challenges that occur during this phase[1] of the public procurement process have been identified and analyzed. The research for this study started after the adoption of the 2014/24 Directive in order to examine the major innovation brought to the procurement legislation by the emergence of more detailed rules concerning the performance stage of a public procurement contract. The objective of the thesis is to provide a comprehensive analysis of the transposition of the rules related to contract performance from 2014/24 Directive into the Romanian legal framework. My study also analyzes the available remedies for breaches in the rules regarding the performance phase of a public contract[2].

Most of the new EU provisions give a vast discretionary power to the Member States and leave a lot of room for interpretation. The duty of the national legislator is to anchor the European regulation on public procurement contract performance to the national legal context and to create a framework that is clear and comprehensible[3]. Otherwise, the regulation may lead to large variety of interpretations and legal uncertainty.

Directive 2014/24/EU provides for simpler and more efficient public procurement rules, while respecting the principles of transparency and competition between suppliers. It renders contracting authorities with more flexibility and opportunities to make choices to negotiate with economic operators both at awarding

[1] In the introduction I called this phase "obscure". Even after spending several years studying this area of research, I consider the term fair for this phase of the procurement process.

[2] Law No. 101/2016 on remedies and appeals concerning the award of public procurement contracts, the sector contracts, works concession contracts and service concession contracts, and on the establishment and functioning of the Nation Council of Appeals Settlement published in the Official Gazette No.393, 23.05.2016.

[3] One of the problems with Romanian procurement system is the overregulation. With the intention of clarifying certain aspects transposed from the Directive, confusing tertiary legislation was developed. The same problems were also obvious under the previous legislation on public procurement, namely EGO 34/2006. See I. M. Doroftei, V. Dimulescu, "Romanian public procurement in the construction sector. Corruption risks and particularistic links", Alina Mungiu-Pippidi ed., Anti-Corruption Policies Revisited, ANTICORRP, 2015

stage and at the execution stage (renegotiation), it aims at reducing contracting authorities' administrative burden and promoting innovative solutions.

This has led to the following main research question: Has the Romanian lawmaker managed to develop a simplified, stable and predictable legislative framework, oriented to the principles of public procurement concerning the performance phase of a public procurement contract?[4]

The analyses of the performance phase of a public procurement contract under Romanian legislation raised different sub-questions and the first one was whether the concept of the administrative contract is suitable to define the public procurement contract. The starting point in assessing the scope of the application of the public procurement regime is the notion of public contract. The Directive defines the concept, but important indications about the interpretation of the definition have been given by the CJEU. The Court places emphasis on the aspect that the public contract is a EU concept that must be interpreted in a functional way throughout the legal systems of EU Member States. As it has been extensively discussed in the second chapter of this research, the meaning of the concept of the public contract has been configured at European level. According to Bovis, the determining factor of its nature is not what and how is described as public contract in national laws, nor is the legal regime (public or private) that governs its terms and conditions, nor are the intentions of the parties[5].

Within the EU, there are various theories related to the public/private nature of a public procurement contract. There is a debate about the existence of a third autonomous model regarding the legal nature of the contract[6]; however, the primary dualism between the French and the British model cannot be denied. Generally speaking, in common law jurisdiction, the public procurement contract does not have

[4] This was one of the major objectives set by Romania in the 2015's comprehensive National Strategy for Public Procurement. The strategy is available at http://anap.gov.ro/web/strategia-nationala-in-domeniul-achizitiilor-publice/, last accessed 15.05.2020.

[5] C. Bovis, "Public Procurement in the EU: Jurisprudence and Conceptual Directions", Common Market Law Review, No. 49, 2012, p. 263. See also I. Baciu, D. Dragoș, "Horizontal In-House Transactions vs. Vertical In-House Transactions and Public-Public Cooperation: Annotation of the Judgment of the Court (Fifth Chamber) of 8 May 2014 in Case C-15/13, Technische Universität Hamburg-Harburg and Hochschul-Informations-System GmbH v Datenlotsen Informationssysteme GmbH", European Procurement & Public Private Partnership Law Review, vol. 10, No. 4, 2015, p. 255.

[6] J. B. Auby, "Comparative Approaches to the Rise of the Contract in Public Sphere", Public Law, I. 2007, pp. 40-57. M. Fromont considers in *Droit administratif des Etats europeens* that there is no third model, but rather an evolution of the original French model.

an independent status and is considered as a civil law contract[7]. There is another category of jurisdictions that recognize the special nature of "contrats publique" and consider them as a distinct category, as administrative contracts[8]. The case of France is particularly illuminating when referring to administrative contracts, because the concept has a French origin.

Romania follows the French conception on the public procurement contract. The national procurement legislation qualifies the contract as an administrative one. Unfortunately, at a national level, the legal nature of the public procurement contract has been representing the topic of an ongoing controversy. The legislator continuously altered the competence of the courts to solve the litigation initiated against the acts/measures taken by the contracting authority, from the contentious administrative courts to the ordinary ones and this has led to a non-consistent qualification of the procurement contract: administrative or civil/commercial[9]. EGO 34/2006[10] was the first legislative act to expressly qualify the procurement contract as an administrative one[11]. But with the continuous amendments brought to this piece of legislation, the legislator pended between an administrative and a commercial nature of the contract. The strangest situation occurred in 2010, when from the provisions of EGO 34/2006, the discussed contract ended up in having a mixed character: administrative for the pre-contractual phase and commercial for the execution phase. In my view, there are strong arguments for the consideration of such a contract as an administrative one, subject to a legal regime under public law. This is the exact position of the national legislator since 2013, when by means of EGO no. 77/2012 the public procurement contract was re-qualified as administrative. From the current

[7] There is no formal divide between public and private contracts. In USA, England, Wales there are specific statutory rules that govern public procurement contracts, but there are different stardard terms elaborated by the government. For an investigation about government contracts and their regulation, see A.C. L. Davis, Accountability, *A Public Law Analysis of Government by Contract*, Oxford: Oxford University Press, 2001.

[8] This category includes France, Spain, Portugal, Romania. A third category of jurisdictions may be considered by referring to the countries that do not have a specific set of rules for public procurement contracts. The said agreements are governed by the general principles of contract law but are also subject to certain principles from administrative law. This category includes Italy, Austria, Estonia, Sweden.

[9] As detailed in chapter 2, the national courts ruled in a contradictory manner on this topic.

[10] Government Emergency Ordinance no. 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts, Published in the Official Gazette No.418, 15.05.2006.

[11] Nevertheless, the doctrine considered the contract as being administrative even before that moment. 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.

definition of the discussed contract, as found in Law no. 98/2016, it is clear that the legislator decided to keep the legal provisions according to which the public procurement contract is an administrative contract.

Nevertheless, with the amendments brought to the Remedies Legislation in 2018,[12] by means of which the competence to solve the litigations regarding the performance phase of a public procurement contract was again shifted from the divisions for administrative and fiscal contentious to the civil ordinary courts, the question upon another change of the legal nature of the public procurement contract was raised again. Was the intention of the legislator to consider again the public procurement contract as a civil one?

For the arguments that have been presented in the second chapter of the thesis and then extensively discussed in the part of thesis that deals with the solving of legal disputes regarding the performance phase of the public procurement contract, I shall conclude that the decision of the national legislator to move the jurisdiction from administrative to civil courts does not coincide to changing the legal nature of the contract.

Considering the present Romanian law system, I join the doctrine that considers that the public procurement contract can only be qualified as an administrative one. The CJEU has stated on countless occasions that the public procurement contract must respect the European legal framework irrespective of the legal regime: public or private that governs its term under national legislation[13]. With the special provisions included in the new Directives from 2014 on contract amendments and the possibilities foreseen for contracting authority to unilaterally terminate the public procurement contract the appropriateness to consider, under national legislation the contract as administrative becomes even more evident.

However, if we look more accurately at this problem we realise that the entire debate is applicable only for the execution phase of a public procurement contract. According to Comba, it is an undisputable fact that within the EU the award phase of

[12] Law 101/2016 was amended by Law 212/2018 published in the Official Gazette nr. 658 (30.07.2018).
[13] C-264/03, ECLI:EU:C:2005:62.

public procurements contracts is governed by public law, which stems from the public procurement EU directives[14].

The existence of a public procurement contract brings as to a central characteristic of the said contract, namely the make-up of the parties. Defining the meaning of "contracting authority" becomes crucial. As the EU directive does provide for a material definition of the concept we had to search through the guidance offered by the CJEU in its case law. The interpretation of the Court has been again in a broad and functional way in order to assure that the objectives of the EU procurement regulation – as to assure a level playfield for public contracts within the internal market – may reach a full materialization. The national legislator tried to include a comprehensive definition of the term, but as it has pointed out by referring to the national jurisprudence, the current definition causes serious interpretation problems.

In the same chapter, a special type of contract, namely the framework agreement (as a specialized technique used in public procurement) has been analyzed. The key question was whether this more complex contractual model is able or not to provide a better continuity between what is promised at the award stage and what is actually performed at the execution phase.

There are several broad definitions for the concept, but all have two common aspects: there is a master agreement concluded with one or more suppliers following a full and open competition process and a second stage procurement process that leads to the conclusion of the actual public procurement contract. There are many variations of framework agreements as they may involve one or more contracting authorities, single or multiple suppliers and predetermine all the conditions for the subsequent contracts or only part of them.

There is one obvious question that rises out of this technique: why a contracting authority should resort to it, keeping in mind that framework agreements require two steps for the award of the contract. The main argument for using framework agreements is to achieve cost savings in procurement by generating

[14] M. Comba, "Contract Execution in Europe: Different Legal Models with a Common Core", European Procurement & Public Private Partnership Law Review, Volume 8, Issue 4 (2013), pp. 302 – 308.

economies of scale, as well as in the process of procuring by reducing the administrative burden of issuing multiple tenders[15].

A framework agreement may prove to be quite useful when several deliveries or works are expected during a given period of time, but specific quantities and dates cannot be exactly anticipated. This shall provide for the contracting authority more flexibility around the goods or services contracted under the framework agreement, both in terms of volume and also the detail of the relevant goods and services. At the second stage, when the need arises the contracting authority does not have to go through the entire procurement process and may award the contract directly (in case the terms of the framework agreement are complete) or by a mini-competition between the economic operators that are part of the framework. Either way, this shall reduce the timescales and complexity of awarding public procurement contracts.

As I have underscored, this technique is not suitable for any type of purchase. In order to make a real use of the framework agreements the contracting authority must analyze a series of variables in order to check whether it is appropriate for its needs. The contracting authority must find a balance between the benefits of setting up a framework agreement, which will bring economies of scale and reduce administrative burden and the generated effects in shall have on the market due to reduced competition for a certain period of time.

Another sub-question that was answered within the following chapter relates to the contractual incompleteness, since it is impossible to foresee every possible event that might arise during the execution of the contract[16]. The legislation gives contracting authority greater flexibility in negotiating and amending the contract during its term. Certain questions have been addressed, i.e in what circumstances the contracting authority is allowed to modify the contract, which are the conditions that have to be fulfilled in order for the amendment to be legal, when is an amendment considered as being substantial.

Modifying an existing contract is an efficient way of resolving unforeseen circumstances that have appeared during the performance phase of the contract. For contracts outside the public procurement rules, the parties enjoy the freedom of

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[15] https://ec.europa.eu/regional_policy/sources/good_practices/GP_fiche_16.pdf, last accessed 21.01.2021.

[16] S. Saussier, J. Tirole, "Strengthening the Efficiency of Public Procurement", Notes du Conseil D'analyse Economique, Volume 22, Issue 3, 2015, p. 1.

modifying them as they seem fit as long as they manage to reach an agreement regarding the said amendment. In public procurement contracts, the parties have to settle with less efficiency and effectiveness, in exchange for competition and transparency[17].

For the first time, a EU Directive on public procurements regulates explicitly the contract performance, breaking the taboo of shifting the boundaries of EU competence beyond the award or the conclusion of the contract, even if, as explained in first part of the third chapter, the CJEU had already crossed the bridge between award and performance of public contracts[18]. Both Semple, and Andrecka emphasized that the 2014 directive seeks to reflect the evolution of CJEU case law and to implement this in legislation[19].

The general rule is that the parties of a public procurement contract, the contracting authority and economic operator are not allowed to agree upon modifying an existing contract. The alteration of an existing contract by an agreement concluded between the contracting authority and the economic operator represents a lost possibility for other economic operators to compete for what may be a new opportunity. Such an agreement to amend the contract will be an infringement of the principles of transparency and equal treatment. The procurement rules aim to prevent such a behavior. While modifications to an existing contract may be necessary, the Directive explicitly regulates the circumstances that can be considered as safe harbors when the amendments are permitted and there is no need to go through a new procurement procedure. However, the European legislator had to pay special attention to drawing up these provisions. As Graels pointed out increased flexibility may also increase the risk of competitive distortions derived from the choices made by the public buyer[20].

As for the Romanian transposition of the said rules, we can conclude that the transposition of the Directive concerning the possibility to amend an existing contract

[17] R. Dominguez Olivera, "Modification of Public Contracts. Transposition and Interpretation of the new EU Directives", EPPL, No. 1/2015, p. 35.

[18] M. E. Comba, "Principles of EU Law Relevant to the Performance of Public Contracts", in M. Trybus, R. Caranta, G. Edelstam (Eds.), *EU Public Contracts*, Bruxelles: Bruylant, 2014, p. 332.

[19] A. Semple, M. Andrecka, "Classification, Conflicts of Interest and Change of Contractor: A Critical Look at the Public Sector Procurement Directive", European Procurement & Public Private Partnership Law Review, 10(3), 2015, p. 186.

[20] A. Sanchez-Graells, "Competitive Neutrality in Public Procurement and Competition Policy: an Ongoing Challenge Analyzed in View of the Proposed New Directive", 5th International Public Procurement Conference, August 2012, IPPA Proceedings, Part 8-10, p. 3484.

is significantly stricter than the Directive itself. There is one question that was raised from this approach of the Romanian legislator: In this particular case, does "stricter" mean "better"? I definitely understand that this topic of contract amendments represents a potential area for conflict with the rules intended to prevent corruption. Intending to prevent corruption, the legislation was designed in such a way as to restrict the discretion of the procuring entities, hoping that in this way it will limit the opportunities for abuse. How did the legislator proceed? It started to re-use the tertiary legislation. And now the regulatory environment starts to look again similar to the procurement framework before the change in 2016: with huge number of tertiary legislations[21] and many amendments. Again, by over-regulating, the legislator tries to take away any flexibility from the procurement officer and actually transforms his job into a mechanical application of rules. The final objective of any procurement system is to make sure that the entire procurement process (and this includes the execution phase) is carried out efficiently and value for money is reached. This requires that the process is carried out without unnecessary or disproportionate delay or waste of resources for the procuring entity, and also without unreasonable costs for suppliers[22]. As Faustino emphasized, by solely focusing on the amount of discretion that is available to procurement officers, procurement regulation risks neglecting ways to prevent the abuse of the discretionary powers.

The contracting authority is solely in the position to determine the nature of the modification and the situation in which it can be made, without organizing a new award procedure under article 221 of Law 98/2016. The responsibility for taking a decision to amend the contract remains with the contracting authority which must perform an analyses and evaluation process that requires the whole set of information/documents fully describing the situation to be taken into account.

But unfortunately, Romanian procurement officers are afraid to take decisions based on principles and somehow prefer to use the "CTRL+F" mechanism and find an explicit provision in the legislation applicable in their specific case. The truth is that 50 years of dictatorship (1949-1989) cannot be erased by simply pressing

[21] As we have already mentioned, in some cases the tertiary legislation (Instructions issued by NAAP) brings different point of view, creating even more confusion. See Guidance 1/2018, 1/2019, 1/2021.

[22] S. Arrowsmith, "Understanding the Purpose of the EU's Procurement Directives: the Limited Role of the EU Regime and Some Proposals for Reform", in *The Cost of Different Goals of Public Procurement*, Konkurrensverket Swedish Competition Authority, 2012, p. 61.

the *delete* button [23] . According to an interesting study on democracy, semi-authoritarian practices, widespread corruption and the lack of transparency and accountability are the major problems that have to be solved in post-Communist era in Romania[24]. It must be pointed out that the implementing of the rules regarding the amendment of the public procurement contract has been further compounded by the "witch-hunt" established by the control bodies that has led the contracting authorities to a lack of assumption of responsibility[25].

We have to acknowledge the fact that it is a big step forward to finally have provisions related to the execution phase of a public procurement contract included in the procurement legal framework. However, the myriad of different cases to be considered under the new regime will probably lead to some further debate on the correct interpretation of these provisions[26].

Moving further to the concerns raised by subcontracting, several sub-questions were answered: how to differentiate the subcontractor from a supplier or a third party on whose capacity the contractor relies on, if it is the strictness imposed by the national legislator regarding the transparency around subcontracting going to offer better results in the performance of the contract and whether the direct payment mechanism as seen by the national regulator shall have the desired effect of protecting subcontractors against bad faith contractors?

The Procurement Directives have not paid great attention to the institution of subcontracting. In 2014, with the Public Sector Directive more extensive provisions on subcontracting have been included. The rules are incorporated in article 71. The most part of article 71 includes non-mandatory provisions that have a rather clarificatory nature. It was left to the Member States to choose between creating rigid rules in regard to subcontracting or allowing contracting authority flexibility in deciding if a tight control of subcontracting is required in a particular procurement procedure.

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[23] R. Bako, *The Internet and Corruption- Romania, Global Information Society Watch*, available online at https://www.giswatch.org/en/country-report/transparency-and-accountability-online/romania, last accessed 24.02.2021.

[24] P. Gross, P., V. Tismaneanu, "The End of Postcommunism in Romania," Journal of Democracy 16(2), 2005, p. 146.

[25] G. Alcea (Stanila), "Achizițiile Publice – De la claritatea principiilor la 'negura' reglementarii, in E.-M. Dobrota, D.-V. Parvu (Eds.), *Achiziții publice. Idei noi, practici vechi*, București: Editura Eniversitară, 2020, p. 23.

[26] L. Klee, *International Construction Contract Law*, Hoboken: Wiley Blackwell, 2015, p. 180.

The national legislator had to make a choice between a normative simplification versus excessive bureaucratization. It decided to respect the long tradition of overregulating [27] and expanding quite a lot the scope of monitoring obligations for contracting authorities. Thus, I can understand the intention of the legislator to put a stop to subcontracting as a "legal" loophole for corrupt practices. The doctrine has underlined that the regulatory burden affecting subcontracting in public procurement contract execution is set in the need to prevent favoritism, corruption and poor-performance[28].

Considering the importance of subcontracting in public procurement, which profitably involves a greater number of businesses – mostly local ones – in the execution phase of public contracts, the legislator made an attempt to regulate the mechanism in a comprehensively manner to better assure proper performance of procurements. The new regulations provide contracting authorities with the necessary tools to verify whether the proposed subcontractors are properly involved and also to protect them by using the direct payment mechanism. The question is whether the direct payment mechanism as seen by the national regulator shall have the desired effect of protecting subcontractors against bad faith contractors[29]?

Practitioners and lawmakers have identified a stringent need to regulate the issue concerning failure to make timely payment to subcontractors in public procurement contracts and to create a system of guarantees of payment of amounts owed to subcontractors. In order to avoid all these issues, a version of direct payments

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[27] Overregulating is considered one of the main causes that sustain the growth of "shadow" economy in Romania. For more upon this topic see L. Maftei, "An Introduction to the Underground Economy of Romania", CES Working Papers, ISSN 2067-7693, Alexandru Ioan Cuza University of Iași, Centre for European Studies, Iași, Vol. 6, Iss. 1, 2014, pp. 110-116. The same negative aspects of overregulating are presented in the banking system: G. Morosan, L. E. Scurtu, "Regulation of the Romanian Banking System. Effects on the Market Economy", Ecoforum Journal, North America, Vol. 8, No. 1, 2019.

[28] See L. Moretti, P. Valbonesi, "Subcontracting in Public Procurement: an Empirical Investigation, "Marco Fanno" Working Papers, Dipartimento di Scienze Economiche "Marco Fanno", No. 154, 2012, p. 2, available on-line at https://econpapers.repec.org/paper/padwpaper/0154.htm, last accessed 20.01.2021.

[29] For the works contract "Transilvania Highway" regarding lot 3 Chețani-Câmpia Turzii, the Association Pro Infrastructura requested (on October 2020) the National Company for Road Infrastructure Administration to introduce as contracting authority the possibility of direct payment to subcontractors, because the main contractor, Straco has not made the payment. The subcontractor dealing with structures has already left the construction site and the only subcontractor still present is the one handling embankments. This subcontractor is going to stop the works due to lack of money for salaries and taxes. Therefore, the construction site will be completely deserted and the subcontractors on the edge of bankruptcy. More details are available at https://cursdeguvernare.ro/noi-probleme-pe-autostrada-transilvania-constructorul-lotului-chetani-campia-turzii-cvasi-inexistent-in-santier.html, last accessed 29.11.2020.

to subcontractors was encouraged, but not imposed by 2014/24/EU Directive. The possibility of the subcontractor to be paid directly by the contracting authority represents another innovation introduced in the Directive to the subcontracting regime. The target of Directive 2014/24/EU is not to ensure payments to subcontractors in general, the real goal is to ensure payments to subcontractors on-time and in full[30].

The decision to include the procedure of direct payment in our legislation can be seen as a step forward in strengthening the position of subcontractors involved in the execution of public procurement contracts, but the provision also has interpretative issues. The Romanian legislator has made frequent use of the technique of translating the Directive in the implementation process. However, for the direct payment mechanism it actually had to draft the regulation, as the Directive left a lot of space to the Member State in choosing the appropriate implementation form. From this point on, we need to deal with the interpretative problems of a provision that has been drafted carelessly, as if it wished to shed darkness on the terms to which the contracting authority will be bound to with the subcontractor[31].

Despite the various inquiries of this research, it became clear that a part of the thesis has to be granted to discussing the duty of the contracting authority to drive maximum value from every contract that they have awarded. This can only be achieved by providing an effective contract management in order for the contracting authority to stay in control over the activity of the supplier across the entire contract lifecycle. There are many components of this process that are discussed within the fifth chapter: provision of the good performance guarantee, order for the commencement of work, surrender of the possession of the site, the possibility to allow for price adjustments, time extensions, other amendments to the contract, the aspects related to contract termination, the issuance of a findings report. The last section of the chapter discusses the external oversight over the performance of the contract.

An effective and efficient procurement process is vital. Unfortunately many contracting authorities give a significant importance to the awarding phase of a public

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[30] E. Pallo, "Withholding Payments to Main Contractors – an Attempt by Estonia to Protect Subcontractors in Public Works Contracts", Procurement Law Journal UrT, Vol. 1/2019, p. 32.

[31] A. C. Perera, "Direct Action and Direct Payments in Public Works Subcontracting", Gomez-Acebo&Pombo (Eds.), *Analyses*, March 2018, p. 3, available online at https://www.ga-p.com/wp-content/uploads/2018/07/direct-action-and-direct-payments-in-public-works-subcontracting.pdf, Last accessed 20.10.2019.

procurement contract, but deal in a superficial way with the following stages of the procurement process – the execution of the contract and its finalization. In many cases, this ends with a failure to properly achieve the objective of the procurement procedure. This failure may have the form of additional costs, acceptance of goods/works/services that have a lower quality than the one initially set in the contract, major delays or even failure to finalize the works/supplies or services due to early termination of the contract.

In works contracts the point at which a contractor begins the execution of the responsibilities of the contract is dependent on the duty of the contracting authority on providing the required permits and surrendering the possession of the site. Several instances have been provided, which show the incapacity of the contracting authorities in performing these duties that have led to serious cost escalations and sometimes even the termination of the contract. During the implementation of the contract, a monitoring of the quality of the performance is aimed at identifying problems in the implementation of the contract. Modifications of the procurement contract may concern a variety of aspects, including, for instance, time period for performance, quality and quantity, technical aspects, and contract price. The possibility to perform price adjustments has been extensively discussed.

A contract performance review must be carried out by measuring actual performance on the project against pre-tender expectations and known benchmarks and performance indicators[32]. A comparison of the performance of the goods, works and services provided by the main contractor or its subcontractors against the criteria specified in the tender documentation/contract is a vital part of the procurement process. It is essential to check the performance levels reached by the contractor during the execution of the contract. All these information shall be used in drafting a findings report that shall be issued at the end of the contractual relationship and shall be published in SEAP for all contracting authorities to be aware of the way the contractor/subcontractors have fulfilled their duties under the contract.

When the report is issued on the completion of the contract, being a proof of the satisfactory execution of the contract, it raises no further debates. Basically, it represents a recommendation about the performance of the contract. But things complicate when the said report includes negative references. The existence of such a

[32] A. Griffith, P. Watson, "Post-Contract Review", in *Construction Management*, London: Palgrave, 2004, p. 500, p. 500.

negative report has a major effect on tenderers as this may lead to their exclusion from subsequent awarding procedures[33].

The last section of the chapter was dedicated to the institutional oversight of the execution phase of the public procurement contract. Unfortunately, administrative control systems in the area of public procurement are redundant, with partial effects and almost exclusively focus on the legality of the process, leaving aside its quality, such as ensuring that expenditure is efficient by encouraging competition and transparency[34]. We have to recognize the main objective of this oversight as being the prevention and discovery of corrupt practices, but the mechanism brings a much wider range of benefits, such as increased accountability and transparency, enhanced trust in government contracting, and cost savings.

Unfortunately, this final phase of a public procurement process – the implementation of the contract – where the performance of the winning bidder should coincide with what was promised at the tendering phase is usually less controlled. If a monitoring activity was performed only in one phase, the selection would most likely only displace corruption rather than reduce it[35]. A measuring and monitoring system for the execution phase of the contract is essential. The lack of available data concerning the execution phase of a public procurement contract [36] is a major problem[37]. The contracting authorities were not required to publish in SEAP[38] the

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[33] This provision shall encourage the economic operators in honoring their contractual commitments. For more details on the use of reputation in the public contract, see S. Saussier, J. Tirole, *op.cit.*, pp. 1-12.

[34] V. S. Badescu, Instrumente juridice de luptă împotriva corupţiei şi fraudei din achiziţiile publice din România, in Public Procurement. Legal framework, procedures and appeal in the European context of accessing structural funds, E. L. Catana eds., C.H Beck Publishing, Bucharest, 2018, p.124.

[35] M. Fazekas, E. David-Barett, Corruption Risks in UK Public Procurement, Government Transparency Institute, Budapest, 2015, p. 9.

[36] The benefits of open data are, but not limited to transparency, governmental efficiency and effectiveness, societal and economic benefits. See F. Welle Donker, B. van Loenen, A. Bregt, "Open Data and Beyond", International Journal of Geo-Information, 5, 2016.

[37] For the purpose of this thesis, I have registered requests to receive the procurement files at the Cluj-Napoca Municipality, at three major universities from Cluj-Napoca and at all major villages (communes) within Cluj County. Only one University has taken the time to get in touch with me and accepted an interview with a procurement specialist from the institution (they did not provide any documents). As for the others, they did not even bother to send an answer to my petition. It seems that the only real option is to go to court and request the information. The competitors, as business operators do not have the time or money to resort to such a procedure in order to get in-sights upon the changes agreed by the contracting authority with the winning bidder. However, in may be argued that even when other economic operators, possible competitors find out about the renegotiation of the contract, it is very likely for them not to take any actions as they stand to gain very little while risking getting on the wrong side.

amendments brought to awarded public procurement contracts[39]. The new guidance issued by NAPP in 2021 will finally put an end to this situation. The said guidance includes rules related to the requirement to subject the contractual amendments to formal rules of registration in the internal records of the contracting authority and also to publish all contractual amendments in SEAP[40]. At least this information shall provide the required data for non-governmental organizations, researchers and citizens to perform analyses upon the performance phase of a public procurement contract.

By performing a "real" monitoring activity of the performance phase of a public procurement contract, the contracting authority together with the economic operator can tackle any problems that may appear during this phase as soon as this happens. Generally speaking, the last solution should be termination of the contract The contracting authority together with the economic operator should examine alternative ways of solving the issues that have risen between them. However, as Recital 112 specifies, "*Contracting authorities are sometimes faced with circumstances that require the early termination of public contracts in order to comply with obligations under Union law in the field of public procurement*". It is clear that there are situations in which the termination of the contract is the only solution and we need to treat it carefully.

This is why the sixth chapter deals with the least desired situation of terminating a public procurement contract early. The Procurement Directive sets, for the first time rules on termination of procurement contracts. The procurement legislation foresees the possibility for the contracting authorities to early terminate a public procurement contract.

The Directive leaves the room open to Member States to set at a national level the details for contract termination and this may lead to different interpretations of

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[38] Electronic System for Public Procurement, an e-procurement platform that works as a portal for all institutions to purchase works, goods or services.

[39] Such a duty was finally introduced by means of EGO 114/2020 that modified Law 98/2016 and included an express provision requiring the contracting authorities to publish all the subsequent amendments, so that the final length and value of the contract at the moment it is finalized or terminated to be known.

[40] Guidance 1/2021. However, as discussed within this thesis the Guidance falls short of their expectations to create a predictable framework on contractual amendments.

article 73[41]. However, the Directive clearly states that the right of the contracting authority to terminate a public contract must exist at least under the circumstances set by the European legislation. It is obvious that the intention of the EU legislator was to set some grounds that may be taken by the Member States as examples and not to set in a limitative manner the circumstances that allow the contracting authority to early terminate a contract.

While the Directive's provision on contract termination leaves a great deal up to the Member States, Romania took the easy way out, used the "copy-paste" mechanism, not including any special rules concerning the conditions and possible consequences of unilateral termination of the public contract.

From the drafting of the second and third circumstance (the bidder was at the moment on the contract award in one of the situations that would have determined its exclusion from the procedure and the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under European legislation and this has been declared by a judgment of the Court of Justice of the European Union), it seems that these cases represent situations that disregard the legal provisions for concluding a valid contract, leading to the nullity of the contract. The Romanian legislator deemed these three cases as unilateral termination without further details, which means that the general rules of unilateral termination became applicable. Law 98/2016 points out that all these specific cases of unilateral termination of a public procurement contract shall be without prejudice to the common law rules related to contract termination and the ones related to absolute nullity of the contract.

There is an uncompromising need for a coherent interpretation of the conditions of the termination of a public procurement contract, on the conditions regarding the applicability of a notice period, and on the consequences of the termination. This requires some guidance for practitioners, regardless of referring to contracting authorities, economic operators, legal councilors or courts of law in order to mitigate the risks related to misinterpretations and unlawful termination[42].

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[41] See K. M. Halonen, "Termination of a Public Contract. Lifting the Veil on art. 73 of 2014/24 Directive", Public Procurement Law Review, No. 4, June 2017, pp. 187-199. The article discusses how the provision was implemented in the Nordic countries: Finland, Denmark, Norway and Sweden.

[42] An Administrative Procedure Code would be really useful in providing a general framework for contract termination of administrative contracts. A project for a Code of Administrative Procedure was

A significant part of the chapter was dedicated to the concept of *force majeur* in public procurement contracts. The procurement legislation does not provide for any derogation from the ordinary rules in this field. As a consequence, a case-by-case analysis shall be performed in order to assess the fulfillment of the conditions set by Article 1351 and following from the Civil Code, supported by the legal nature of the contract as an administrative one[43]. Special attention must be given to the contractual provisions.

A final analysis of the research concerns the remedies and the "forums of review"[44] available for protection for the execution phase of the public procurement contracts. The specific enforcement mechanisms upon which the public procurement legislation relies on are provided by the Remedies Directives[45]. As a main rule the creation of remedies and procedural provisions concerning breaches of the regulation is left to the national legislator according to the principle of national autonomy. However, the European Commission realized that in order to ensure a fast and efficient enforcement of the European public procurement rules at national level, there was the need to take some measures at European level. The Remedies Directives represent an essential piece in the public procurement landscape and a unique example in EU law of giving full effect to EU rights at national level[46].

The enforcement standard which national law has to meet is set only partly by the public procurement Remedies Directive, since many aspects of enforcement remain either untouched by the Directive, or are not exhaustively regulated[47]. The discretion afforded to the Member States is not an empty legal space but rather an

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actually created in 2012, but unfortunately it has never been actualized. The issues around the effects of considering a contract as an administrative one were pointed out in Article 157 of the said project.

[43] See L. Farca, D. C. Dragos, "Achizitiile publice-viteza: un sport la care suntem campioni!", in O. Dimitriu (Ed.), *Probleme și soluții legale privind criza COVID-19*, București: C.H. Beck, 2020, p. 470.

[44] The term is used by OECD, in SIGMA Paper 41, Public Procurement Review and Remedies System in the European Union, 2007, p. 22.

[45] Directives 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended through Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

[46] Report from the Commission to the European Parliament and the Council- On the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC as modified by Directive 2007/66/EC, concerning Review Procedures in the Area of Public Procurement, Brussels, 2017 –final, p. 2.

[47] H. Schbesta, "Community Law Requirements for Remedies in the Field of Public Procurement: Damages, EPPPL", No. 1, 2010, p. 24.

area heavily concerned with legal tests in balancing equally significant interests and policies[48].

For the implementation of the "old" Remedies Directives, the Romanian legislator decided not to adjust the existing regulation on remedies[49], but to adopt a new distinct law as part of the Romanian legislative package on public procurement[50]. This was done by Law no. 101/2016 on remedies and means of appeal in the award of public procurement contracts, utilities contracts and concession contracts and on the organization and operation of the National Council for Solving Complaints. It is the first time that we actually have a distinct regulation that covers the available remedies in the area of public procurement.

One year after the enforcement of the new regulation, several subsequent problems were identified, some not regulated at all and some that arose from the actual enforcement of the legal norms. In order to solve these inconsistencies, two emergency ordinances were issued by the Romanian Government: EGO 107/2017[51] and EGO 45/2018[52]. An amendment related to the competent court to solve complaints related to the execution of a public procurement contract was introduced by means of Law 212/2018[53]. In 2020 several new amendments were brought by means of EGO 23/2020[54] and EGO 114/2020.

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[48] S. Bogojevici, X. Groussot, J. Hettne, "Looking Ahead: A New age of Proportionality?", in S. Bogojevici, X. Groussot, J. Hettne (eds.), *Discretion in EU Public Procurement Law*, Oxford: Hart Publishing, 2019 p. 275.

[49] GEO 34/2006.

[50] Law No. 98/2016 on public procurement, Law No. 99/2016 on sectorial/utilities procurement, Law No. 101/2016 on remedies and appeals concerning the awarding of public procurement contracts, sectorial contracts and concessions and for the organization and functioning of the National Council for Solving Complaints and Law No. 100/2016 on concessions of services and works .

[51] Emergency Ordinance No. 107/2017 for the amendment and supplementation of some normative acts with impact in the field of public procurement, which was published in the Official Gazette of Romania, Part I, no. 1022 of 22.12.2017. The ordinance aims to bring further clarifications to the remedies procedures In 2017, three emergency ordinances were issued in the field of public procurement: No. 98/2017, no. 104/2017 and no. 107/2017. For an in-depth analysis of the modification brought to the public procurement legislation through the said ordinances, see I. Alexe, D-M. Sandru, "Remarks Concerning Amendments Brought in 2017 in Romanian Legislation in the Field of Public Procurement", Juridical Current, Vol. 72, No. 1, 2018, pp. 123-142.

[52] Government Emergency Ordinance no. 45/2018 for amending and supplementing some normative acts having an impact on the public procurement system was published in the Official Gazette of Romania, Part I, No. 459 of 04.06.2018.

[53] Published in the Official Gazette nr. 658 of 30.07.2018. Law 2012/2018 brings amendments to Law 554/2004 on administrative proceedings. For a research upon the main modification brought to the contentious administrative act, see U. Liviu, "Main Amendment to Law 554/2004 on Administrative

As presented above, from the moment it entered into force in 2016, the national legislation suffered several amendments. Most of these amendments were brought by means of emergency ordinances[55]. The government tried to justify emergency on the need to take urgent measures to improve and make the public procurement system more flexible, because of the risk of the reduction of the allocated fund (including European funds), with the most serious consequence of delaying the implementation of major investment projects with social and economic impact at national or local level[56], on the need to bring clarity and correlate the national legislation with the European regulation on remedies[57].

As I have argued in the seventh chapter, there are several issues that raise serious questions regarding not only their effectiveness but also their constitutionality. Some of them have been rectified, others still request the attention of the Romanian legislator[58]. Unfortunately, the track record for aligning the domestic legislation with the European regulation, with the EU acquis and the specification of the national legal system is patchy and has in most cases been applied by means of emergency ordinances instead of regular laws. Unfortunately, the lack of effective remedies can contribute to the continued deterrence of economic operators from participating in Romanian award procedures, with the number of single tenders being 40,62%[59]. The last part of the chapter is dedicated to arbitration as a dispute solving mechanism in public procurement. Regardless of the competent court, the duration of court

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Litigations Brought by Law 212/2018", Romanian Case Law Review/ Revista Romana de Jurisprudenta, 2019, Issue 2, pp. 260-268.

[54] The said GEO has been declared unconstitutional in its full by means of Decision 221/2020 of the Constitutional Court of 2nd of July 2020, published in the Oficial Gazette no. 594/2020.

[55] GEO 107/2017 published in the Oficial Gazette no. 1022/2017, GEO 45/2018 published in the Oficial Gazette no. 459/2018, GEO 23/2020 published in the Oficial Gazette no. 106/2020, GEO 114/2020 published in the Oficial Gazette no. 614/2020. There was an amendment issued in 2018 by means of Law 212/2018.

[56]Explanatory Memorandum of GEO 107/2017. The same justification is used for GEO 45/2018.

[57] Explanatory Memorandum of GEO 23/2020.

[58] The legislative body in Romania is the Parliament, the Government being the executive body. The Government should exert its legislative initiative and not overuse the right to resort to emergency ordinance.

[59] According to the Report of NAPP regarding "Indicators to monitor the efficiency of the procurement procedures completed by the closer of contracts in 2018", available at http://anap.gov.ro/web/indicatorii-de-monitorizare-a-eficientei-procedurilor-de-achizitie-publica-finalizate-prin-contract-in-anul-2018/, last accessed 15.09.2020. For more on the amendments brought to the remedies legislation by GEI 23/2020 see L. Farca, *Modificarea legii privind căile de atac în achizițiile publice: la limita dintre principiul transparenței și asigurarea unui remediu util și efectiv?*, published on Universuljuridic.ro, last accessed 03.02.2021.

proceedings in solving the disputes arising from the execution of public procurement contracts seriously affects the achievement of best value for money and any advantages for both parties involved are nullified. Fortunately, there is the possibility to use arbitration as a method of resolving public procurement contractual disputes in a prompt and professional manner.

The overview of the Romanian public procurement legislation on contract execution that I have provided, by taking into consideration the transposition of the directive 2014/24/EU in the national law, leads me to several insights. In the last chapter, the findings of the previous sections are once again emphasized together with some concluding remarks.

If we examined the National Strategy in Public Procurement,[60] the intention of the Government would be quite adequate. According to the said document, the strategy brings a new approach to public procurement, shifting the focus from procedure to process, from the contract value itself to the cost of the entire procurement cycle, from over-regulation to flexible legislation, backed by coherent and up-to-date guides, consolidated and validated by the National Agency for Public procurement.

All things considered, the only possible conclusion seems that actions and intentions do not always align[61].

[60] It is a document that proposes actions which define the policy of the Government on the reform of the national public procurement system during 2015-2020.

[61] Kruger J, Gilovich T., Actions, "Intentions, and Self-Assessment: The Road to Self-Enhancement Is Paved with Good Intentions. Personality and Social Psychology Bulletin", 30(3), 2004, 328-339.

Bibliography

G. Alcea (Stanila), "Achizițiile Publice – De la claritatea principiilor la 'negura' reglementarii, in E.-M. Dobrota, D.-V. Parvu (Eds.), *Achiziții publice. Idei noi, practici vechi*, București: Editura Eniversitară, 2020.

I. Alexe, D-M. Sandru, "Remarks Concerning Amendments Brought in 2017 in Romanian Legislation in the Field of Public Procurement", Juridical Current, Vol. 72, No. 1, 2018, pp. 123-142.

S. Arrowsmith, "Understanding the Purpose of the EU's Procurement Directives: the Limited Role of the EU Regime and Some Proposals for Reform", in *The Cost of Different Goals of Public Procurement*, Konkurrensverket Swedish Competition Authority, 2012.

J. B. Auby, "Comparative Approaches to the Rise of the Contract in Public Sphere", Public Law, I. 2007.

I. Baciu, D. Dragoș, "Horizontal In-House Transactions vs. Vertical In-House Transactions and Public-Public Cooperation: Annotation of the Judgment of the Court (Fifth Chamber) of 8 May 2014 in Case C-15/13, Technische Universität Hamburg-Harburg and Hochschul-Informations-System GmbH v Datenlotsen Informationssysteme GmbH", European Procurement & Public Private Partnership Law Review, vol. 10, No. 4, 2015.

R. Bako, *The Internet and Corruption- Romania, Global Information Society Watch*, available online at https://www.giswatch.org/en/country-report/transparency-and-accountability-online/romania, last accessed 24.02.2021.

V. S. Badescu, Instrumente juridice de luptă împotriva corupţiei şi fraudei din achiziţiile publice din România, in Public Procurement. Legal framework, procedures and appeal in the European context of accessing structural funds, E. L. Catana eds., C.H Beck Publishing, Bucharest, 2018.

S. Bogojevici, X. Groussot, J. Hettne, "Looking Ahead: A New age of Proportionality?", in S. Bogojevici, X. Groussot, J. Hettne (eds.), *Discretion in EU Public Procurement Law*, Oxford: Hart Publishing, 2019.

C. Bovis, "Public Procurement in the EU: Jurisprudence and Conceptual Directions", Common Market Law Review, No. 49, 2012.

M. Comba, “Contract Execution in Europe: Different Legal Models with a Common Core”, European Procurement & Public Private Partnership Law Review, Volume 8, Issue 4 (2013).

M. E. Comba, “Principles of EU Law Relevant to the Performance of Public Contracts”, in M. Trybus, R. Caranta, G. Edelstam (Eds.), *EU Public Contracts*, Bruxelles: Bruylant, 2014.

A.C. L. Davis, Accountability, *A Public Law Analysis of Government by Contract*, Oxford: Oxford University Press, 2001.

R. Dominguez Olivera, “Modification of Public Contracts. Transposition and Interpretation of the new EU Directives”, EPPL, No. 1/2015.

I. M. Doroftei, V. Dimulescu, “Romanian public procurement in the construction sector. Corruption risks and particularistic links”, Alina Mungiu-Pippidi ed., Anti-Corruption Policies Revisited, ANTICORRP, 2015

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.

L. Farca, D. C. Dragos, “Achizitiile publice-viteza: un sport la care suntem campioni!”, in O. Dimitriu (Ed.), *Probleme și soluții legale privind criza COVID-19*, București: C.H. Beck, 2020.

M. Fazekas, E. David-Barett, Corruption Risks in UK Public Procurement, Government Transparency Institute, Budapest, 2015.

P. Gross, P., V. Tismaneanu, “The End of Postcommunism in Romania,” Journal of Democracy 16(2), 2005.

A. Griffith, P. Watson, “Post-Contract Review”, in *Construction Management*, London: Palgrave, 2004.

K. M. Halonen, “Termination of a Public Contract. Lifting the Veil on art. 73 of 2014/24 Directive”, Public Procurement Law Review, No. 4, June 2017.

L. Klee, *International Construction Contract Law*, Hoboken: Wiley Blackwell, 2015.

Kruger J, Gilovich T., Actions, “Intentions, and Self-Assessment: The Road to Self-Enhancement Is Paved with Good Intentions. Personality and Social Psychology Bulletin”, 30(3), 2004, 328-339.

U. Liviu, “Main Amendment to Law 554/2004 on Administrative Litigations Brought by Law 212/2018”, Romanian Case Law Review/ Revista Romana de Jurisprudenta, 2019, Issue 2, pp. 260-268.

L. Maftei, “An Introduction to the Underground Economy of Romania”, CES Working Papers, ISSN 2067-7693, Alexandru Ioan Cuza University of Iași, Centre for European Studies, Iași, Vol. 6, Iss. 1, 2014, pp. 110-116.

G. Morosan, L. E. Scurtu, “Regulation of the Romanian Banking System. Effects on the Market Economy”, Ecoforum Journal, North America, Vol. 8, No. 1, 2019.

L. Moretti, P. Valbonesi, “Subcontracting in Public Procurement: an Empirical Investigation, “Marco Fanno” Working Papers, Dipartimento di Scienze Economiche "Marco Fanno", No. 154, 2012, available on-line at https://econpapers.repec.org/paper/padwpaper/0154.htm, last accessed 20.01.2021.

E. Pallo, “Withholding Payments to Main Contractors – an Attempt by Estonia to Protect Subcontractors in Public Works Contracts”, Procurement Law Journal UrT, Vol. 1/2019.

A. C. Perera, “Direct Action and Direct Payments in Public Works Subcontracting”, Gomez-Acebo&Pombo (Eds.), *Analyses*, March 2018, p. 3, available online at https://www.ga-p.com/wp-content/uploads/2018/07/direct-action-and-direct-payments-in-public-works-subcontracting.pdf,
Last accessed 20.10.2019.

A. Sanchez-Graells, “Competitive Neutrality in Public Procurement and Competition Policy: an Ongoing Challenge Analyzed in View of the Proposed New Directive”, 5th International Public Procurement Conference, August 2012, IPPA Proceedings, Part 8-10.

S. Saussier, J. Tirole, “Strengthening the Efficiency of Public Procurement”, Notes du Conseil D’analyse Economique, Volume 22, Issue 3, 2015.

H. Schbesta, “Community Law Requirements for Remedies in the Field of Public Procurement: Damages, EPPPL”, No. 1, 2010.

A. Semple, M. Andrecka, “Classification, Conflicts of Interest and Change of Contractor: A Critical Look at the Public Sector Procurement Directive”, European Procurement & Public Private Partnership Law Review, 10(3), 2015.

F. Welle Donker, B. van Loenen, A. Bregt, “Open Data and Beyond”, International Journal of Geo-Information, 5, 2016.

https://ec.europa.eu/regional_policy/sources/good_practices/GP_fiche_16.pdf, last accessed 21.01.2021.

Report from the Commission to the European Parliament and the Council- On the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC as modified by Directive 2007/66/EC, concerning Review Procedures in the Area of Public Procurement, Brussels, 2017 –final, p. 2.