| Chapter 6 |

EU Public Procurement Policy

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ABSTRACT

A single European market cannot rule out the participation of the State, through public procurement, among other private actors on the market. However, specific rules have been imposed regarding the State's actions, aiming to secure a free market and to prevent protectionism. The 2014 new set of European directives have updated this approach, setting transparency, equal treatment, and open competition as the main objectives of the public procurement procedures. The CEECs, based on their common history regarding centralized economies, require a special approach when it comes to the state's intervention on the market. Therefore, the current study aims to analyze a series of particularities regarding the transposition of the 2004 and 2014 European directives on public procurement in the CEECs. Also, specific recent essential events with a direct impact regarding public procurement will be examined, such as the COVID-19 pandemic or the implementation of the Recovery and Resilience Facility (RRF).

KEYWORDS

public procurement policy, EU public procurement agreements, arbitrability, price adjustment, emergency public procurement

1. The Evolution of Harmonized Public Procurement Regulations in the EU

The economic crisis that erupted in 2008 gave birth to the awareness in the European Union of the need for common policies in the economic fields, beyond the specific notions of seeking a single market. From the need for common budgetary rules—such as those adopted by the Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union, signed on March 2, 2012, by Member States' representatives—to the assumption by the European Central Bank of a key role in financial markets, there has been a tendency to centralize or harmonize measures that may have an impact on the market. The Europe 2020 strategy for smart, sustainable, and inclusive growth,[1] adopted by the European Commission in 2010, mentions public procurement among the areas that should have a central role in economic recovery.

1 Communication from the European Commission (EC), Europe 2020, A strategy for smart, sustainable and inclusive growth, COM (2010), 2020 final, Brussels, 3.3.2010.

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Subsequently, this area was detailed in a Commission Communication entitled 'Transforming public procurement so that it works in and for Europe'[2] which expressly established the 'strategic dimension of public procurement' in the European Union.

However, to reach this advanced stage, the construction of Europe has come a long way toward a greater 'centralization' of public procurement policies. A first step in this direction was taken from the first decade of existence of the European Economic Community, as the Commission adopted on November, 7, 1966, a directive[3] aimed at removing obstacles to the acquisition by public entities of products supplied by economic operators from other Member States—as was the case, for example, with the conditions relating to the national origin of goods acquired by a State. The second step in this direction followed shortly, but a generalization of the previous rules was achieved. Thus, on December 17, 1969, the Commission adopted a new directive[4] expressly prohibiting a wide range of forms of discrimination which a Member State might impose in a public procurement procedure regarding goods from other Member States. In a relatively short time, the prohibitions on discrimination on the grounds of origin in public procurement procedures are extended to the field of procurement of services. This time, however, we are no longer talking about a delegated regulatory act, but about a Council directive,[5] which requires the removal of restrictions at national level in the field of public works procurement.

The first European regulations in this field were aimed at removing the restrictions that Member States could have imposed to circumvent the principle of free movement of goods or services in the case of public procurement procedures. Basically, the way of regulating public procurement could be a non-tariff obstacle to the free movement of goods and services.[6] A new stage, however, opened in 1976, when a directive aimed at coordinating the procedures for assigning public procurement contracts[7] was adopted. This time it was no longer just a matter of ensuring that all economic actors in the Member States have access to public procurement procedures in other Member States, but the beginning of an effort to create a common market, an ideal example of which is the obligation to publish at the community level, notices on procedures

2 Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Making Public Procurement work in and for Europe, COM (2017) 572 final. Brussels, 16 October 2017.

3 Commission Directive 66/683/EEC of 7 November 1966 eliminating all differences between the treatment of national products and that of products which, under Arts. 9 and 10 of the Treaty, must be admitted for free movement, as regards laws, regulations or administrative provisions prohibiting the use of the said products and prescribing the use of national products or making such use subject to profitability, OJ 220, 30.11.1966.

4 Commission Directive 70/32/EEC of 17 December 1969 on provision of goods to the State, to local authorities and other official bodies, OJ L 13, 19.1.1970.

5 Council Directive 71/304/EEC concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, OJ L 185, 16.8.1971.

6 Commission of the European Communities, 1988.

7 Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ L 13, 15.1.1977.

for the assignment of significant contracts. This led to what was considered the first *public common market* in Europe, in which demand always comes from the state and its representatives.[8] Since 1992, the regulation has been diversified with the adoption of three separate regulations, each for a particular type of public procurement: procurement of services[9] and procurement of works,[10] both complemented by a set of common rules on public procurement, applicable to procurement of goods.[11]

Subsequently, in 2004, a directive was adopted which could represent the framework legislation in the field, referring to the procurement of works, goods, and services,[12] as well as a first directive on special categories of procurement, such as those in the energy, transportation, or postal services,[13] These directives proved a special relevance rather from the contracting authority perspective, a classical contracting authority or public service provider. The subsequent adoption of the 2004 set of directives represents an important step for CEECs: the need for transposition at national level for the first time after they have become subject to the obligation to transpose unitary EU law regarding public procurement. The way in which this transposition was made will be analyzed in the following, together with a more extensive analysis of the current set of regulations in the field, adopted in 2014.

2. CEECs and the Application of the 2004 and 2014 Directives regarding Public Procurement

Most CEECs joined the European Union in three successive waves: 2004 (Poland, Czech Republic, Hungary, Slovakia, Slovenia, Estonia, Lithuania, and Latvia), 2007 (Bulgaria and Romania) and 2013 (Croatia). In all these states two factors can be identified which have a relevant impact on the transposition of European legislation

8 Bovis, 2016, p. X.
9 Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209, 24.7.1992.
10 Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ L. 199, 9.8.1993.
11 Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ L 199, 9. 8.1993., Council Directive 89/665/EEC of 21 December 1989 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, OJ L 395, 30. 12. 1989, pp. 33–35 and Council Directive 92/13/EEC of 25 February 1992 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, OJ L76, 23. 3. 1992, pp. 14–20.
12 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30. 4. 2004, pp. 114–240.
13 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30. 4. 2004.

in the field of public procurement: i) the origin from the former communist bloc, based on an economy in which the state is the main economic actor, which attracted a rapid, often only partially consumed, process of transition to a market economy; and ii) accession to the European Union after the establishment of a stable framework for European policies, which had to be transposed in a limited timeframe.

Regarding the first constant, it must be emphasised that for the states of the former communist bloc, the simultaneous period of transition to a liberal democracy also involved a process of transformation from a centralized economy to an economy based on free market principles. In this process, most states started from an economic premise that could be considered simplistic: state intervention to generate demand in certain markets will also generate the viability of economic actors in those markets and can equally attract foreign economic actors outside the concerned countries. However, this model quickly proved non-functional. The first five years of the transition to a market economy brought about essential changes, but not in the expected sense: if centralized economies had previously generated an endemic shortage of goods, the entry of domestic goods or services into foreign markets, often more competitive than those of national origin, led to a lack of activity for many former state-owned enterprises and, implicitly, a lack of demand in the labor market. Such a situation has led to the need for state intervention, either through specific means of social security policies, which has generated inflation, or by trying to create demand for national economic actors and, implicitly, demand on the labor market.[14] It quickly became necessary to adapt to rules specific to market economies regarding the intervention of states in the economy, starting from the protection of economic relations between the state and private actors to the establishment of authorities with regulatory or supervisory powers in this field.[15] An ideal example in this sense is represented by the case of Romania. In an initial phase of regulation of public procurement procedures, Government Ordinance no. 14 of 1993 was adopted, a succinct act, comprising only 31 Arts., one-third of which were transitional rules or sanctions, while the responsibility for implementation fell to existing authorities—the Ministry of Finance and the Ministry of Public Works. However, the experience of the economic and financial crises of the 1990s, as well as the process of economic liberalization that led to restructuring, privatization or, in some cases, the disappearance of former economic actors in key sectors, led to the adoption of a new legislative framework. Thus, according to Government Ordinance no. 118 of August 31, 1999, and, subsequently, Government Ordinance no. 60 of April 25, 2001, public procurement procedures were much more detailed, being customized according to their subject matter and adding additional rules on mechanisms for challenging the results of public procedures.

Beyond the transition to a market economy, perhaps an even stronger impact on public procurement regulations has been generated by the constant determination among CEECs to join various international structures and, most importantly, the

14 Podkaminer, 2013, p. 11.
15 Vintrová, 2004, p. 521.

European Union. Thus, in just two years, ten of the former Member States of the communist bloc applied to join the community bloc.[16] Equally, the European structures understood the need to establish much clearer conditions on the reforms in the acceding states, the debate on which was initiated at the European Council in Madrid on December 15–16, 1995. On this occasion, the model to be applied to all CEECs was established: the signing of a pre-accession agreement setting out the path of reforms needed to align with European conditions, under the supervision of the European institutions and with the help of a package of financial aid provided by the Union. Perhaps, the most consistent condition for accession was the transposition of the *acquis communautaire*, consisting of over 20,000 regulations. The fact that these had to be transposed in a short period of time had an interesting effect on how they were transposed, especially in the case of directives. If previously the transposition of European rules in the Member States involved a complex process, which in many cases led to exemptions granted to certain states, in case of CEECs there was a 'non-critical implementation of policies related to the European Union'.[17] Of course, this approach was also reflected in the transposition of public procurement legislation. Similarly, from the perspective of the transposition of the European *acquis*, a constant has been observed between Member States, especially in regulatory areas related to the economy or state intervention in markets; the coexistence of new rules adopted in the accession process to different organizations, such as the European Union or the Council of Europe, or even imposed by other organizations in financing procedures, such as the World Bank or the International Monetary Fund, with old rules, adopted during socialist regimes, now obsolete.[18]

The case of European public procurement law is symbolic from this perspective. Thus, a large part of the states that have long been members of the European Union have gone through a complex process of transposing Directive 2004/18/EC. For example, France, Austria, Italy, or Portugal have adopted Public Procurement Codes, including complementary rules, not included in European provisions. In particular, France opted to transpose the provisions relating to appeal proceedings to the Code of Civil Procedure or the Administrative Justice Code. Differently, Austria has chosen to divide the regulations between the Code adopted at the federal level and a series of regulations at the level of the federal states. Other states, such as Germany or Sweden, have preferred to update existing legislation, subsequently continuing to amend national acts with the adoption of new European public procurement rules. In opposition to these models, the approach used by all ten of the CEECs that joined the European Union in 2004 and 2007 was the same: Directive 2004/18/EC was simply transposed into a national legal system, and the previous

16 Hungary (31 March 1994), Poland (5 April 1994), Romania (22 June 1995), Slovakia (27 June 1995), Latvia (13 October 1995), Estonia (24 November 1995), Lithuania (8 December 1995), Bulgaria (14 December 1995), the Czech Republic (17 January 1996) and Slovenia (10 June 1996).
17 Podkaminer, 2013, p. 11.
18 Toschkov, 2008, p. 382.

regulations has been repealed.[19] Such an approach describes, as we have shown above, the tendency to fully transpose European legislation, without a particular analysis at national level.

However, a varied situation at the level of CEECs is generated by the institutional framework established by them for the purpose of implementing the provisions on public procurement. Thus, European regulations establish certain tasks incumbent on the state in the process of assigning public procurement contracts, controlling compliance with their execution, or resolving disputes arising from legal relationships specific to public procurement contracts. In most states that joined the European Union before 2004, these tasks fall to institutions with other responsibilities, such as the ministries of finance or administration. However, in some countries, such as Belgium or France, specialized bodies have been set up to approve acts in the field of public procurement (Commission for Public Procurement, in Belgium), advising and monitoring the execution of public procurement contracts (Advisory Commission on Public Procurement, in France) or even control (Control Procurement Body, in Belgium). This model of organizing specialized public procurement institutions has been followed by most CEECs, with only a few states (Czech Republic, Estonia) retaining authority over institutions with broader powers, such as ministries. One example is Lithuania, where both an institution responsible for the centralized organization of public procurement (Central Project Management Authority) and a control body (Public Procurement Office) were established. Similarly, in other states, there are institutions whose main responsibility is monitoring and control (Public Procurement Authority, in Hungary; Procurement Monitoring Bureau, in Latvia; Office for Public Procurement, in Slovakia). In the case of Poland, the Public Procurement Office has an extensive set of tasks, from secondary regulation to the organization of procurement procedures or control of contract execution. In Romania, however, a mixed system was preferred: the National Authority for Regulating and Monitoring Public Procurement, with a general role and autonomous functioning, and the Unit for Coordinating and Verifying Public Procurement, which operates in the Ministry of Finance. However, starting 2015, both authorities were merged into the National Public Procurement Agency, by means of Government Emergency Ordinance No. 13 of May 20, 2015.[20] Interestingly, all these examples demonstrate a tendency of CEECs to create an autonomous system in the field of public procurement, even if the practice so far has not been uniform.

19 An exception is the case of Poland, where the pre-existing regulation, adopted in early 2004, has been significantly revised to transpose the new European regulations. The case was similar in Hungary: Act CXXIX of 2003 was adopted by the Hungarian Parliament on 22 December 2003 and entered into force on 1 May 2004. The act was comprehensively amended in 2006 due to the obligation to transpose the new EU public procurement directives. After the accession of Croatia, the Croatian Government also started the revision of the existing public procurement system and a new Public Procurement Act was adopted by the Croatian Parliament in July 2011.

20 Government Emergency Ordinance No. 13 of 20 May 2015 regarding the establishment, organization and functioning of the National Public Procurement Agency, Official Gazette No. 362 of 26 May 2015.

Ten years after the 2004 directives, a package of public procurement directives have been adopted, with the aim of replacing previous regulations in the field, one on the general framework of public procurement,[21] and one on special procurement, as is the case for gas, energy, transport or postal services.[22] To these was added a directive which undertook the unification of national legislation in the field of concession contracts.[23] The objective assumed by these normative acts, as it is described even in the preparatory documentation drafted by the European Commission,[24] was the simplification and flexibility of the previous regulatory regime. The whole process started with a consultation launched with the publication in January 2011 of the 'Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market'. Also, starting from the 'Europe 2020' strategy, mentioned above, the substantive regulations have assumed as objective, according to the preamble of Directive 2014/24/EU, 'a smart, ecological and inclusive growth', being an example for the transition of the European Union from the neo-liberal paradigm of the free market to that of a state that assumes an extensive number of social responsibilities.

Pertaining to the proposed simplification as an objective, the analysis of the text of the directives in fact reveals the existence of more detailed regulations. New criteria are thus emerging to encourage small and medium-sized enterprises to participate in public procurement procedures or conditions that protect competition. However, such an approach can be considered a 'simplification' if detailed European regulations limit the room for maneuver of states when transposing directives. As the doctrine has shown, such a result 'cannot be considered a problem in itself as long as greater legal certainty is created'[25] throughout the Union, the alternative being the creation of a lax system that would have allowed significant variations in Member States' regulations. Regarding the second objective, flexibility, the new regulation seems much better adapted. Thus, the procurement purposes are increased for which procedures based on negotiation or competitive dialogue can be organized, and in addition the 'innovation partnership' procedure is added. The risk associated with such regulations is, of course, the potential for discrimination by participants in procurement procedures by the authorities, as well as limiting transparency. Another aspect directly related to the flexibility of regulations is the greater openness to the adaptation of contracts during their execution, an aspect that will be addressed in the third part of this paper.

21 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, pp. 65–242.
22 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, pp. 243–374.
23 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, pp. 1–64.
24 See Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 final, Brussels, 20. December 2011, Explanatory Memorandum, Section 1.
25 Treumer, 2014, p. 11.

The extensive analysis of the current European legal framework and its implementation at national level has been the subject of an extensive set of exhaustive works.[26] Distinctly, however, we intend to discuss in this art. only a limited number of issues, which have generated interest especially from the perspective of recent events.

3. Various Approaches to Recent Cross-border Challenges

Even before the adoption of the new European legislative framework on public procurement, several recurring dilemmas were noted, with practice in different Member States varying. We will analyze only two cases: the possibility of using arbitration in disputes arising from public procurement contracts, as well as the possibility of adjusting prices in public procurement contracts in case of significant market fluctuations. Finally, we will discuss two other topical issues that required the formulation of responses from European Union bodies: the adaptation of public procurement procedures to emergencies, as was the case of the COVID-19 pandemic, and the first major program of pan-European investments—the Recovery and Resilience Facility.

3.1 Arbitrability of Public Procurement Agreements

Between the legal relations arising from public procurement contracts, dominated by rules specific to public law, and the arbitral tribunals, which form a private justice system, parallel to the public one, there seems to be an almost 'oxymoronic relationship'.[27] However, more and more states are beginning to show openness to the use of arbitration to resolve disputes in the field of public procurement, through an attempt to limit the public (or administrative) nature of these procedures.[28] The main reasons are easy to understand. First, public procurement procedures concern the provision of goods or services that the state needs with relative urgency, in which case the resolution of any disputes cannot wait for the completion of lengthy proceedings before the ordinary courts. Similarly, resolving such disputes requires a relatively high degree of specialization, which may encourage the parties to turn to arbitrators who have experience in public procurement, instead of ordinary courts, which are obliged to adjudicate various disputes. Also, an often-raised issue is that of confidentiality in relationships arising from public procurement contracts, confidentiality that can be better ensured through arbitration proceedings which are, by their nature, non-public.[29] Another significant advantage of using the arbitration procedure in public procurement disputes is the award of contracts to foreign entities, which can be settled before international arbitral tribunals, the practice of which is more easily accessible than that of national courts. Finally, public procurement contracts often

26 See, e.g., Caranta and Sanchez-Graeells, 2021; Calleja, 2015; Lichere, Caranta and Treumer, 2014.
27 Sandulli, 2013, p. 205.
28 Ilinca, 2015, p. 20.
29 Kyriaki, 2010.

require an understanding of the market and economic conditions, beyond the legal regime that governs such relationships, so that arbitrators in the private sector can show more flexibility.[30]

In the absence of express provisions at European level on the acceptance of arbitration as a means of resolving public procurement disputes, the option remained at the discretion of the Member States. In CEECs, arbitration legislation has evolved in the context of the transition to a market economy, in parallel with that of public procurement. Thus, they have in most cases been open to the encouragement of arbitral tribunals, even if the work of such tribunals has not become, at least so far, comparable to that of other Western European countries. Regarding the acceptance of the settlement of public procurement disputes in arbitral tribunals, regulations in the acceding states after 2004 have varied.

A first category, the most extensive, includes states where no express provisions on the arbitrability of public procurement can be identified. In most such cases, we are dealing with a fair transposition of the European public procurement directives, which, in turn, do not refer to arbitration as a means of resolving disputes. This is the case, for example, in Slovenia, where national legislation transposing European public procurement directives does not explicitly refer to how the directives are resolved, while the Civil Procedure Act,[31] which regulates arbitration, does not explicitly exclude its use in the case of public procurement disputes. A similar situation can be found in other countries, such as Bulgaria, the Czech Republic, or Slovakia, and even the last state to join the European Union, Croatia. In such cases, the doctrine applied the principle of dividing the legal relations regarding public procurement into the part of public law, related to administrative procedures, and the part of private law, related to the execution of the contract. Consequently, disputes concerning the performance of the contract may become arbitrable.[32]

The second category includes European states in which arbitration has been expressly used as a means of resolving public procurement disputes. An example in this sense is Romania, in which Law no. 101 of 2016, intended for the organization of the National Council for the Settlement of Appeals in the field of public procurement, expressly provides in Art. 57 that 'the parties may agree that disputes related to the interpretation, conclusion, execution, amendment and termination of contracts to be resolved by arbitration'. A similar situation is in Turkey, a state that has transposed European directives in the field of public procurement, given the pre-accession phase it is in. Interestingly, however, in this case the possibility of using arbitration in relation to public procurement is provided by the arbitration legislation.[33]

In several European countries, the clear distinction between the two stages of public procurement procedures has even led to special regulations regarding the

30 Șandru, 2014, p. 114.
31 Civil Procedure Act, Law no 134/2010, Republished in the Official Gazette, Pt. I, No. 247 of 10 April 2015.
32 Subev, 2015, p. 216.
33 Art. 2 of the International Arbitration Act No. 4686/2001, as updated on 30 December 2017.

competence to resolve disputes. For example, in the case of Hungary, according to Art. 145 Act no. CXLIII of 2015, non-compliance with the rules on awarding public procurement contracts can be challenged before a special state body, called the Public Procurement Arbitration Board, while disputes over the execution of public procurement contracts fall in the exclusive jurisdiction of ordinary civil courts.

A particular case is one in which a procedure similar to arbitration is accepted, even if it is not carried out before traditional arbitral tribunals. Thus, a new law on public procurement, adopted in Poland in 2019, provides the parties to a public procurement contract with the possibility to opt contractually for the settlement of disputes before the Court of Arbitration at the General Counsel to the Republic of Poland. It should be emphasized that this court has the sole jurisdiction to resolve such disputes, apart from those in the judiciary.

Arbitration in public procurement disputes is certainly ongoing, and is closely linked to the openness of arbitral tribunals to accept their jurisdiction over such cases. The practice in the coming years will certainly lead to firmer legal solutions, as is the case of the Romanian regulation, regarding the acceptance of arbitration, or that of Hungary, which recognizes the exclusive competence of ordinary civil courts.

3.2 Price Adjustment in Case of Market Variations

One of the elements that illustrates the flexibility of procurement procedures through Directive 2014/24/EU, compared to previous regulations (e.g., Directive 2004/18/EC), concerns the express regulation of the possibility of modifying public procurement contracts after the start of their execution. From its preamble, Directive 2014/24/EU states in principle that '[m]odifications of the contract resulting in a minor change in the value of the contract should always be possible up to a certain value, without the need for new procurement procedures'. Art. 72 of the directive implements the principle and stipulates how public contracts may be amended either where this possibility was expressly provided for in the contract or when, even if the possibility of modification was not provided for in the contract, the intervention of certain exceptional situations makes the performance of the contract dependent on such changes. The second case, in which the amendment of the contract is accepted even if this possibility was not expressly provided for in the initial contract, is regulated in detail and additional conditions are imposed. Perhaps the most important provision in terms of price adjustment is to limit variations to 50% of the original price. However, it is necessary to draw attention to the fact that a distinction must be made between price change clauses (conditioned by uncertain factors, such as possible market variations) and price indexation (conditioned by objective indices, such as the inflation rate).

The way in which European provisions have been transposed has led to complex approaches at Member State level, and implementation through secondary rules has created additional difficulties.[34] A good example is that of Romania, where Art. 221 of Law no. 98/2016 on public procurement largely reformulates Art. 72 of Directive

34 Treumer, 2014, p. 281.

2004/18/EC, while maintaining the same substantive conditions. However, the methodological norms for implementation, as is the case of those adopted by Government Decision no. 395/2016 and subsequently amended by Government Decision no. 419/2018, provide for the limitation of situations in which the price may be changed. Thus, it will be possible to affect the price without organizing a new procedure only in the first case provided by the European directive and by Law no. 98/2016, the one in which the parties had previously agreed to this possibility. Moreover, the price change is limited to the measure 'strictly necessary to cover the costs on the basis of which the contract price was based.' Moreover, by subsequent norms adopted by the National Agency for Public Procurement (NAPP), respectively Instruction no. 2/2018, public authorities were obliged to introduce in the award documentation models a unique price revision formula, based on factors such as labor costs, average monthly gross earnings, growth rate of metal products, growth rate costs for electricity, gas, heat, rising raw material prices for construction, etc. Much more recently, the Romanian Government adopted the Emergency Ordinance no. 15/2021[35] simplifying the procedures for adjusting prices in case of market changes, especially regarding construction materials for *infra*structure projects. Also, NAPP Instruction no. 1/2021 on amending the public procurement contract/sectoral procurement contract/framework agreement[36] details how the clauses of public procurement contracts can be modified.

3.3 Emergency Public Procurement Procedures: The COVID-19 experience

The crisis triggered by the onset of the COVID-19 pandemic in February–March 2020 involved significant state intervention in the markets, mainly for the purchase of sanitary materials, from masks and ventilators to vaccines. Such an intervention also involved forcing the limits of public procurement regulations. Although Directive 2014/24/EU expressly stated in para. (46) of its preamble that

> 'Contracting authorities should be allowed to shorten certain deadlines applicable to open and restricted procedures and to competitive procedures with negotiation where the deadlines in question would be impracticable because of a state of urgency which should be duly substantiated by the contracting authorities. It should be clarified that this need not be an extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority. (...)'.

This was strictly an objective repeated to a greater or lesser extent in the rules of the directive or in national rules. We will analyze below the European legislative framework that can be used in general in such situations, but also the reactions

35 At the moment this article was drafted, Emergency Ordinance No. 15/2021 was still in the approval circuit at the level of the Parliament, as it happens according to the Romanian Constitution in the case of all Government Emergency Ordinances, arousing numerous disputes.
36 NAPP Instruction No. 1/2021 on amending the public procurement contract/sectoral procurement contract/framework agreement, Official Gazette, Pt. I, No. 56 of 19 January 2021.

regarding the COVID-19 pandemic, both at the European level and at the level of a part of the CEECs.

European legislators have chosen two main types of response to emergencies, such as the COVID-19 pandemic. The first of these is represented by the shortening of the terms for receiving the requests to participate, in receiving the offers. Depending on the type of procedure used for the award of procurement contracts, Arts. 27 to 29 of Directive 2014/24/EU provide for the limitation of these time limits to a minimum of 10 for an open procedure and 15 days for a restricted procedure.

The second way of responding is the intervention of the European Commission through delegated regulatory instruments or instructions on the implementation of existing rules. This is the case, for example, with the instructions set by the Commission on April 1, 2020.[37] In doing so, the European Commission urges as much flexibility as possible in the application of public procurement procedures, making it clear that European provisions are sufficiently open. Instruments such as a negotiated procedure without prior publication or a direct award procedure, where that provider is the only one that can provide the materials or services requested by the state, are fully encouraged. Similarly, the association of states is supported to carry out procurement procedures for products that are difficult to purchase, the European executive being willing to contribute to such procedures itself. However, the Commission urges compliance with the case law of the CJEU,[38] pointing out that these procedures, which significantly affect the principle of transparency, should be used only to the extent necessary for extreme emergencies, and other procedures cannot be applied.

In addition, the Commission has initiated a new regulation, and the Parliament and the Council are currently adopting a new regulation[39] on joint actions at EU level in the field of health, which expressly regulates the possibility of joint procurement, involving several Member States, or the possibility of the Commission to purchase for the benefit of the Member States products necessary to combat events such as pandemics.

At the level of some Member States, the call for flexibility made by the European Commission has led to radical solutions. For example, in Hungary, where a state of emergency was established on March 11, 2020, Government Decree No. 40/2020 gave public authorities the authority to purchase products intended for protection against COVID-19 directly, without complying with European legislation, or dealing with the the field of public procurement. These rules applied only to goods from sources

37 Communication from the Commission—Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/C 108 I/01), OJ C 108I, 1.4.2020.

38 Judgment of the Court of 15 October 2009 Commission of the European Communities v. Federal Republic of Germany, Case C-275/08 ECLI:EU:C:2009:632; Order of the Court of 20 June 2013 Consiglio Nazionale degli Ingegneri v. Comune di Castelvecchio Subequo and Comune di Barisciano, Case C-352/12, ECLI:EU:C:2013:416.

39 Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme for the Union's action in the field of health ('EU4Health Programme') for the period 2021–2027, and repealing Regulation (EU) 282/2014, OJ L 107, 26.3.2021.

in Hungary. Poland adopted a similar measure, where on March 8, 2020, a set of amendments to the Law on Government Procurement entered into force, amending the exception from the application of the usual rules when procurement concerns essential goods or services for the fight against COVID-19. Moreover, the removal of the usual norms was applied to create strategic reserves by the Ministry of Health. Other states, such as Romania, have been more restrictive in enforcing the European Commission's instructions. Thus, by Emergency Ordinance no. 114/2020, Romania extended the possibility to apply the negotiation procedure without prior publication to a wider range of 'social services.'

Beyond these individual responses, the use of a regulation to unify procurement policies in medical emergencies clearly indicates the intention of European legislators to use a single practice at European level. It remains to be seen until the end of the COVID-19 pandemic and in the years to come to what extent such an objective can be achieved.

3.4 Public Procurement Regulatory Changes in the Context of the Recovery and Resilience Facility

In view of the effect of the COVID-19 pandemic on the economies of the EU Member States, on May 27, 2020, the European Commission proposed a plan on the formation of a European fund from which grants and loans could be granted to Member States.[40] Regarding the plan, the European Council accepted a set of conclusions on July 21, 2020. Although the initially proposed amount was €500 billion, the version subsequently approved in Parliament and the Council brought the total amount to slightly more than €700 billion in the form of the Recovery and Resilience Facility (hereinafter referred as to RRF). The aim of these grants and loans is to ensure reform in all Member States in all sectors of activity to prepare for the digital transition, the transition to a less polluting economy, and the transition to socially sustainable economies. Both public institutions and private actors can have access to the funds available under the National Recovery and Resilience Plans, as long as the proposed projects comply with the objectives set under the Facility. In the case of funds to be managed by public institutions, however, there is the problem of adapting public procurement procedures to such a funding inflow.

In this context, the Council adopted on November 25, 2020, a document entitled 'Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy',[41] seeking to indicate to the Commission, Parliament, and Member States the need to rethink public procurement policies and regulations in the context of the implementation of the Recovery and Resilience Mechanism. The main objectives that should be achieved, from the perspective of the Council,

40 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. The EU budget powering the recovery plan for Europe, COM (2020) 442 final.

41 Council Conclusions Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy (2020/C 412 I/01), OJ C 412I, 30.11.2020.

through a unitary regulation in the field of public procurement would be: to ensure the efficiency of public procurement to encourage recovery from the crisis and prevent future crises; to establish through public procurement procedures means to encourage sustainable development and investment; and to contribute, through public procurement, to a more resilient European economy. To achieve these objectives, the Council also proposes concrete measures, some of which are particularly noteworthy.

A first direction envisaged for the future development of public procurement mechanisms, in particular in the context of the RRF, concerns cooperation between Member States. Thus, the collaboration of states through the Network of First Instance Review Bodies is proposed, encouraging development of strategies and mechanisms to achieve cross-border and joint procurements. Nonetheless, the Commission should support the Member States to create a European network of best practices advisory hubs for sustainable and innovative procurement, as well as cooperate with the Member States in developing guidelines and criteria through a common methodology to support the public sector in sourcing through transparent, reliable, flexible, and diversified supply chains with the aim to strengthen the European economy and reduce strategic dependence on third countries.

The second direction is closely related to the objectives of RRF in the digital, environmental, and social areas. Thus, the European Council proposes that the public procurement regulations in the future include, as strategic criteria job creation, support for small and medium enterprises, as well as green and digital development. From an institutional perspective, the Commission needs to develop a sustainable procurement screening mechanism that considers green public procurement principles. Public procurement should also be made considering Regulation 2020/852.[42] As a result, climate-friendly and resource-efficient products and services must be given priority, and the Commission must establish criteria to determine this.

4. Conclusions

CEECs' public procurement policies and regulations are changing. Although accession to the European Union has necessitated the transposition of a single body of legislation, solutions have sometimes varied. However, a much greater diversity has been caused by specific legal challenges, such as the institutions responsible for enforcing public procurement provisions, alternative ways of resolving public procurement disputes, or price adjustment in case of market variations. European public procurement policy is still changing, under the pressure of two major factors: state involvement

42 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, pp. 13–43.

in the markets in the context of the COVID-19 pandemic, and the implementation of large public procurement projects based on the RRF.

CEECs have been tempted to take individual approaches to the COVID-19 pandemic, responding autonomously to the various challenges from adapting national rules to the need for emergency procurement. Although this flexibility has been tacitly accepted by the European Commission, the European Council has suggested that the implementation of the RRF seems to require a centralized approach at European level from a public procurement perspective. Such centralization could even prove to be an opportunity to update the regulatory framework in the coming years, perhaps even by choosing a normative instrument with direct applicability, such as regulations. Furthermore, CEE countries have proposed some of the most ambitious plans in relation to the RRF, a fact that would generate large public procurement procedures that will have to observe EU law provisions. Simplifying the existing procedures or even establishing exceptional provisions applicable in the context of the RRF would prove beneficial from this perspective.

Today we are witnessing a constant pressure on public sector budgets—especially on local government budgets for the procurement of goods and services. This trend is characteristic to all EU Member States. The continuing need for rational spending of public money and raising service standards for citizens is a necessity, due to a rapidly changing political and economic environment. Public procurement of goods and services must also generate positive social outcomes, especially in key areas such as health, education, environment, or the relationship with public authorities. Therefore, we consider that several changes are needed, such as:

1. Encouraging innovative procurement by leveraging creative solutions. Procurement professionals need to become smart and knowledgeable customers, open to new ideas, so they do not risk missing out opportunities that could lead to efficiency and improved outcomes for the communities of citizens they lead.

2. Establishing robust procurement monitoring systems to continuously assess whether suppliers and contracts are being managed efficiently, and whether collaboration with them is constantly being improved. Procurement recipients need to ensure that their procurement partners have the right skills and experience to deliver efficiently. For example, understanding the sector in which the services are procured can have a significant impact on the ability to procure the best offer.

3. An increasing use of digital technologies that will allow procurement beneficiaries to have a better ability to manage contracts and suppliers. Computers have a much greater ability to store and compare data so that the risk factors with suppliers of goods and services can be better assessed (for example, the performance of suppliers in their contractual relationships with other organizations), and this will not only provide historical data on supplier performance, but will also allow organizations to accurately establish supplier risk profiles and predict risk events.

The goal of any public policy is to provide a set of rules and procedures at the executive level of public administration, which ensures the achievement of goals and priorities agreed at the political level, and which allow the development of all

essential sectors of society. In the field of public procurement, the goal is to achieve efficient procurement, which means more than rational spending of public money. Efficient procurement means offering to the citizen a service or product of a superior quality, aiming to positively impact one's quality of life.

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