ANTI-FRAUD MEASURES IN PUBLIC PROCUREMENT IN THE EU SINGLE MARKET. LEGAL, INSTITUTIONAL AND TECHNICAL SOLUTIONS

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EXECUTIVE SUMMARY[1]

In 2014, a first report on corruption and anticorruption in the EU member states has been released. The horizontal topic is corruption in public procurement, a topic of a major importance from the public spending perspective in the member states and taking into account the adoption of the New Directive on Public Procurement that will change the legislation in this sector in the entire European Union. The importance of the sector is shown by the fact that 20% of the GDP at EU level is spent by institutions and public authorities, as well as other public entities through procedures that involve the procurement of goods, services and works[2]. The European Commission tried to evaluate the level of corruption in the procurement processes through research projects and concluded that in 8 EU countries the direct costs related to corruption taking into consideration only 5 activity sectors were in 2012 about 1.4 – 2.4 billion Euros[3]. The report includes recommendations for the member states – adapted to the needs and realities of each of them - and identifies good practices that may be generalized.

The EU is first of all a common market. Procurement is regulated mainly to ensure the transparent, correct and uniform spending of money. The market is open to all companies that fulfil the eligibility criteria and includes all the bids of the EU public entities. The legislation on public procurement also includes provisions relevant to anticorruption policies: transparency, detailed procedures checked by independent institutions, limits for the margin of discretion on amendments of the contract, administrative and criminal sanctions, and black-listing of companies.

The report also shows that although the infringement procedures do not refer to directly to individual corruption cases that should be dealt with at member state level, the vulnerabilities identified increase corruption risks. Out of 97 infringement procedures related to public procurement, almost a half refer to three EU countries[4]. The most affected sectors are the waste management, IT services, railways, health and energy[5].

A new debate on the national legislative framework is an opportunity to address the legislative and institutional deficiencies identified. Expert Forum has produced an inventory of Croatian good practices and advocates for introducing

1 References to the results of this research have been included in the report Romania between EU and Eurasia: public funds, rule of law and real economy, published by EFOR within the project Good governance community: think tank open to the public supported by SEE grants 2009 – 2014, within the NGO Fund in Romania.
2 *http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf*
3 Identifying and Reducing Corruption in Public Procurement in the EU – Development of a methodology to estimate the direct costs of corruption and other elements for an EU-evaluation mechanism in the area of anti-corruption', 30 June 2013, PricewaterhouseCoopers and ECORYS.
4 *http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf*
5 *http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf*

them in Romania. One of our objectives is to explore the practical ways through which the common market can become a reality that will allow companies to have real time access to the tenders published by the public entities in both countries in a standardized and easy to read manner.

The transparency of the tender documentation. Free access to public information is an essential tool for every corruption prevention policy, including one focused on public procurement: the public must have access to the procurement file. A clear legal provision must be included in the law that setting the rule of publicity and exhaustive list of exceptions (mainly commercial and classified data).

The transparency of the procurement contract. The practice of hiding contracts from the public by using pretexts such as *confidentiality clauses* that forbid the publication of the contracts must be eliminated. These clauses have been extensively used in Romania in the past 20 years to cover business that was paid by the taxpayer, but detrimental to the public interests. The courts have constantly decided in favour of the complainant that challenge the refusal to release information related to such procurement contracts for confidentiality reasons. These cases had a wide coverage in the media and some resulted in criminal files.

The registry of public procurement contracts. All public entities should keep files registers of public procurement contracts, including framework agreements. By using these registers journalists and civil society will be able to track procurements and better formulate their requests to contracting authorities.

The transparency of the contracts and bidding documentation would encourage cross-checks with the Registry of Commerce in order to identify real beneficiaries of the public procurement contracts that proved to be damaging for the state. The main criticism coming from companies regard the closure of the market and the channelling of high-price tenders to companies owned by politically affiliated persons – politicians, their friends and their sponsors. These all hamper fairness on the market and market transparency, the main purposes of the public procurement legislation.

Actually, the procedures directed to the firms that belong to the party members or friends suffocate the rest of the economic environment and contribute to the non-transparent financing of the electoral campaigns. Their employees of these companies and their families represent an electoral pool for the political forces that control that region or public entity. Expert Forum released a *Map of Clientelism* (*www.expertforum.ro*) that shows the direct correlation between the political affiliation of the mayors and he funds received by municipalities led by them from six national investments funds (2004-2011). If we add that in 2014 election for the EU Parliament, the Presidency and for vacant MP positions will be organized, the need for money becomes even more obvious.

Training public procurement experts that work in public institutions is an important step for the professionalization of public officials. Their training should be continuous and contain annual theoretical and practical seminaries. Where there are not enough human resources, a policy to centralize the procurement needs should be instated. Procurement could be done at a higher level by a centralized entity

with sufficient administrative capacity that would collect the funds from the smaller entities and would distribute the purchased products to them. In order to run such mechanism it is not enough to have it regulated in the public procurement law, but also in the public finance law so that transfers between public entities may be allowed.

The new directive gives priority to the most economically advantageous tender (MEAT) moving away from the lower price criterion. Previously public entities used the lowest price as selection criterion because it was the simplest way to solve the selection dilemma. However the purchased goods lacked quality and frequently led to higher maintenance costs during the product lifetime. By changing the paradigm and promoting the MEAT criterion, the European legislator transfers more accountability on the contracting authorities by encouraging them to purchase competitive products, but also requiring them to make additional efforts of defining the technical criteria that together with price must be taken into consideration in the selection process.

In Croatia, for the elimination of the **successive price increase** of the contract after it has been signed, the law includes the compulsory market analysis in order to determine the approximate price for the contract (where it cannot be easily estimated). For the more complex procurement procedures, a two steps mechanism may be used: firstly, the essential criteria to be taken into consideration are set; afterwards, the procurement procedure is organized starting from the already defined criteria.

Another problem occurring in Croatia is that **subcontractors** do not receive their money, although they have performed their tasks according to the contract. The contractors delay payments to subcontractors and use the funds received from the contracting authority for their own purposes, therefore generating cash-flow challenges for the subcontractors. The legislation now includes a provision stating that the subcontractors must be defined in the initial offers, with their roles and budget shares. After the satisfactory execution of their share of the contract the payment is done by the contracting authority directly to subcontractors without using the accounts of the main contractor.

Unfortunately the new directive does not address a problem frequently seen in practice: **the lack of oversight over the execution of contracts**. There are provisions on the pre-contracting and contracting stages that allow challenges to the procedure handled by independent institutions, but nothing is said about the execution phase. All responsibilities stay with the contracting authority that is supposed to verify the proper implementation of the contract. In countries where poor performance and corruption are serious challenges the assumption that public entities would undertake properly this obligation is somewhat naïve. Most of the times fraudulent procurements involve a two-sides deal between the public entity representatives and the contractor, so little incentive on the side of the contracting authority to properly exercise oversight.

Moreover, if the European funds are highly protected by the legislation that incriminate abuses, the national money are not covered by stand-alone **crimes** that would incriminate frauds in public procurement. This serious criminal safeguards against misuses of European

money might explain the low appetite for accessing such funds. National funds remain the main resource used in fraudulent deals. The New Romanian Criminal Code introduces crimes related more to the penalizing of cartels than to sanctioning frauds done by illegal deals between private persons and public entities. This is a setback for the prosecutors that have to invoke the *abuse of office* in order to investigate those who abuse the public budget through damaging procurement. The development of a case under these terms is clearly more difficult than if it would have been built on clear provisions on similar to those criminalizing frauds of European funds.

Sadly, the already reduced effectiveness of prosecuting for *abuse in office* related to public procurement is furthermore weakened by the new *law on delegation* that entered into force at the middle of March 2014. This legislation allows the delegation of responsibility from the mayors and presidents of the county councils to any public servant from that specific institution or subordinated entities (not just to vice mayors or vice-presidents for example). Elected officials will cease signing documents, therefore their legal responsibility will hardly be linked to anything their subordinates do, though the decisions will in fact stay at the highest level. The National Anticorruption Directorate – the main prosecution office competent for corruption – will no longer be competent to investigate such cases, as it only looks at high level corruption. Similarly, the National Integrity Agency – competent to review conflicts of interests, among others – will not be able to sanction wrong-doings in this area as formally, without the signature of the mayor, there is no conflict of interests as such when contracts are signed with companies he controls.

***

This paper has the purpose of analysing both Romanian and Croatian public procurement systems, with references to the new EU legislation and to provide solutions for some of the current issues that occur in Romania. We will describe by short some of the innovations of the Croatian law that can also be transferred to the Romanian framework. The strengths and weaknesses of the Croatian Act have been discussed during two workshops organized by Partnership for Social Development and Expert Forum in Bucharest (January and March 2014), where relevant local and international experts took part, in order to share the experience and exchange good practices regarding the mechanisms that need to be consolidated.

CHAPTER 1
THE OPPORTUNITIES OF THE NEW EUROPEAN DIRECTIVE ON PUBLIC PROCUREMENT

After a long process that lasted almost four years, the European Parliament approved a set of three new directives, as it follows:

- 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 Text with EEA relevance[6];
- 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 Text with EEA relevance[7];
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance[8].

The changes in the legislation aims to ensure a better quality and value for money, make the procedures more fluid and make the access easier for the SME companies that take part to bids, while including tougher conditions for subcontracting. The procurement procedures should become simpler and less bureaucratic, enabling better outputs from the process. In this context, electronic procurement is promoted as an essential mechanism in the simplification process. Moreover, the procurement documentation is unified, while new types of procedures and partnerships are promoted.

Please find below a synthetic description of the main modifications brought by the new directives to the European procurement system and their main advantages.

1. SIMPLIFICATION OF RULES AND EASIER ACCESS TO THE PROCEDURES[9]

- The deadlines are shortened up;
- The *Standardised European Single Procurement Document* is introduced, a system that reduces the bureaucracy through the fact that only the winner of the bid has to present documentation that proves the information provided when entering the competition (self-declarations); The effect of this measure is less administrative burden and shorter schedules. This will reduce the burden for the companies with up to 80%[10];

6 *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG*
7 *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG*
8 *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG*
9 *http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-01-overview_en.pdf*
10 *http://www.europarl.europa.eu/news/en/news-room/content/20140110IPR32386/html/New-EU-procurement-rules-to-ensure-better-quality-and-value-for-money*

- The division between two types of contracting authority: the central ones and the sub-central (regional and local). The second type will benefit for more flexible rules on thresholds, publicity and may set procedural deadlines by mutual agreement with the potential bidders;
- In order to become more innovative and environmental friendly, the new rules impose the more intensive use of electronic means. Electronic communication becomes mandatory and the e-procurement implementation is mandatory, with a deadline of 54 months from the date the directives enter into force. By September 2018, electronic submission of offers (e-submission) will become mandatory for all contracting authorities[11].

2. LOGIC CHANGES IN TAKING DECISIONS: ORIENTATION ON SOCIAL AND ENVIRONMENTAL PRIORITIES

- The contracting authorities will need to take into consideration the need of employment for the vulnerable and disadvantages groups; public authorities may reserve contract for workshops or companies that work with disadvantages groups, with the condition to provide 30% of the work force of that entity (currently 50%);
- The selection criteria of the winning bid must also include rules related to the use non –toxic and environmental practices and contracting authorities may ask for specific labelling that certifies certain environment or social characteristics;
- Innovation will be stimulated through the search of innovative services;
- One of the major changes is the selection of the "most economically advantageous tender" (MEAT) criteria for awarding contracts. Therefore, even risks of corruption may arise from this instrument, on a longer term, this type of decision puts more accent on the quality of the products and services, environmental aspects and the life-cycle costs of the procured service or good;
- The parts of the contract performed by subcontractors must be reported within the bidding process and the payments may be done directly to them and not through the contractor.

11 Read more about all the e-procurement standards here: *http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-04-computerisation_en.pdf*

3. THE INCREASED ACCESS OF THE SMES TO THE PROCUREMENT MARKET

- The contracting authorities are encouraged to awards contract to more SMEs rather than one major contract to big companies. Therefore, the big contract must be divided into smaller lots and the purchaser must publicly motivate the reason for which the contract has not been split if possible;
- The turnover asked to take part to the procedure will be reduced to maximum the double size of the estimated contract value. If a wider limit is required, the purchaser is oblige to explain the reason.

4. INCREASED RULES ON TRANSPARENCY AND INTEGRITY

- THE STATES will be obliged ti take more efficient step to prevent and fight conflicts of interests, first of all by providing a new, clearer definition[12];
- Bidders that use false information, distorting competition or acting in order to influence a decision may be excluded from the procedures. Also, companies that performed poorly in a previous contract may be subject to exclusion from a future bid, especially if the previous contract was terminated earlier than predicted. Bidder that provide abnormal low bids may be removed from the process;
- Measures will be taken to prevent and identify cases of contract modification after it is awarded without a new procedure (with the included exceptions).

12 The minimum definition is: "any situation where staff members of the contracting authority who are involved in the conduct of the procedure or may influence its outcome have, directly or indirectly, a financial, economic, political or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure". More details about transparency here: *http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-10-transparency_en.pdf*

5. CHANGES TO THE PROCEDURES AND REGIME OF THE TENDERS

- One of the significant innovation in this area is the *simplified regime*, directly connected to the distinction between priority (Part A) and no priority (Part B) services; the latter includes services more amenable to the cross-border competition and was subject to more flexible rules in the old directives. According to the new ones, the distinction is no longer in force, but specific rules are available for health, social and cultural services, as well as legal and hospitality services. The simplified regime refers to:
  1. it benefits from a much higher threshold of 750 000 €;
  2. rules implementing the corresponding national procedures no longer have to respect EU rules on technical specifications that apply to the current "B" ("non-priority") services;
  3. apart from the general EU principles, the only obligations that have to be respected are the ones relating to transparency and publicity, namely: ex ante (through prior information notice) and (existing) ex post (contract award notice) publicity.[13]
- The introduction of the *Competitive Procedure with Negotiation* that can be applied when certain legal or complexity related circumstances are justified or by the fact that the standard procedures/solutions are not satisfactory. The tenders are submitted, negotiated and afterwards offers are resubmitted in a final form.
- Another procedure is the *Innovation Partnership* that includes both the development of a service, product or works and its purchase according to certain conformity characteristic. Both solutions are oriented on partnerships and aim to solve a problem by dialogue and collaboration, having thus a higher change of find the most suitable solution for that contract
- The c*ompetitive dialogue* has been simplified and it is accessible under the same conditions as the competitive procedure with negotiation giving the contracting authority full choice.

13 European Commission, MEMO, Brussels, 15 January 2014, Revision of Public procurement Directives - Frequently Asked Questions, *http://europa.eu/rapid/press-release_MEMO-14-20_en.htm?locale=en*

CHAPTER 2

THE CROATIAN EXPERIENCE. LESSONS TO BE LEARNT FROM A COUNTRY ACCESSING THE EUROPEAN UNION

The Croatian public procurement system has undergone significant changes in the past 10 years, from the first law that entered into force in 1998 until the latest piece of legislation, OG 90/11[14], the Public Procurement Act that entered into force at 1st January 2012. Throughout the years, the legislation was continuously modified and adapted to the EU requirements. In 2005, EC public procurement directives No. 17/2004 and 18/2004 brought important changes to the law, including the transfer of right to use the negotiated procedure without publication, to contracting authorities without need for prior approval by Public Procurement Office, the removal of the right of the Government of Croatia to determine particular interest in public procurement, and adaptation of the procurement terminology with that of the EC[15].

The new wave of regulations was significantly determined by the accession of the Croatian Republic to the European Union that also involved the alignment to the EU *acquis*. Therefore, the Croatian authorities had to initiate a reform process that transformed the law into an example of good practice, putting in place a series of mechanisms that permitted the system to become more transparent and consolidated. New features have been included that permit both the bidders and the public officials to perform their job with clearer defined guidelines.

Still, even the legislation proved to be an announcer of the new European Directives that entered into force in 2014, the practical aspects, the training of the staff and the accommodation of the public with the procedures proved to be a difficult mission. Therefore, as any new system that is set-up, training the personnel, monitoring the implementation of the procedures and passing by the formalistic approach of the contracting authorities still remain tasks to be achieved on a long term. Other issues, identified by the state authorities are:

- Lack of standardization / catalogues of supplies;
- Slowness in implementation of other Strategies (for example Internet for all central state);
- Need for professionalization of procurement officers (the CPO and clients);
- Fluctuations of employees;
- Lack of modern IT infrastructure for the central procurement system;
- Inability for timely completion of procedures (within 50 days of the start of the procedure) due to repeated appeals;
- The legal status and financing of the CPO;
- Justification for the certain procurement categories[16];

14 *http://www.javnanabava.hr/userdocsimages/userfiles/file/ZAKONODAVSTVO%20RH/ENGLESKI/ZAKONI/Public%20Procurement%20Act-OG%2090-2011.pdf.* In 2012, the Croatian Parliament entered into force the Concessions Act (OG 125/08) *http://www.javnanabava.hr/userdocsimages/userfiles/file/ZAKONODAVSTVO%20RH/ENGLESKI/ZAKONI/Concessions%20Act%20OG%20143-12.pdf* and the Public Private Partnership Act (OG 129/08, 55/11) *http://www.javnanabava.hr/userdocsimages/userfiles/file/ZAKONODAVSTVO%20RH/ENGLESKI/ZAKONI/Act%20on%20PPPs%20OG_78_2012.pdf*

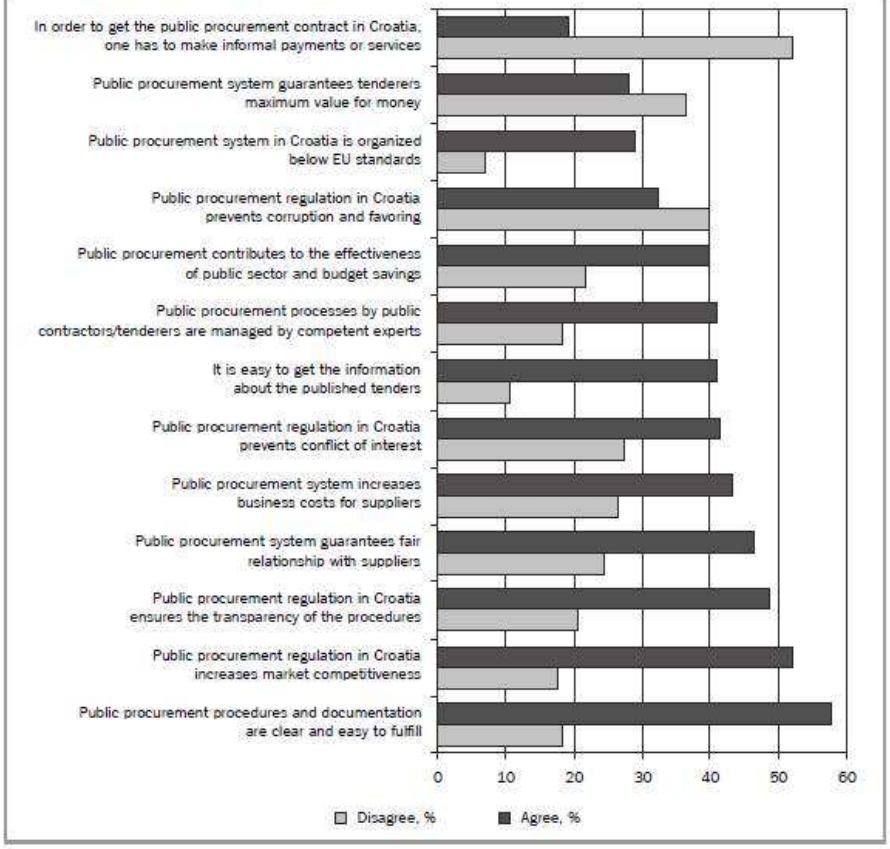
15 Ilaz Duli, Safet Hoxha and Mersad Mujovic, Reforms of public procurement in the Western Balkans, *http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-2.pdf*

- Implementation of Green Public Procurement;
- Corruption, clientelism, bribery;
- Dominance of the lowest price only award criteria;

Corruption and clientelism seems to remain significant issues, in an environment in which the public procurement value was about 9-16% of the GDP in the past 5 years. According to Flash Eurobarometer 374[17], released in 2013, 59% of the respondents consider that corruption is an issue for the business in Croatia, while 57% said the same about patronage and nepotism. Moreover, favouring friends and family members in public institutions was seen as a problem by 41% and clientelistic contracting related to party financing by 34%. The relation between politics and the business environment seems to be the most productive way to gain money, contracts and perform public services. About 42% of the respondents considered that corruption prevented their company from winning a tender, while 23% said that the tenders were tailored-made.

The following table shows the view of more than 300 companies about the Croatian public procurement system. Besides the fact that, in a paradoxical way, corruption is not seen as a major problem by the companies, the respondents consider the procedures save public funds, are transparent and properly implemented by the public servants. On the other side, the system increases business costs for suppliers and – the best value for money – is not guaranteed[18].

Figure 2 **Attitudes towards the System of Public Procurement Procedures and Regulations (n = 300)**



Note: Disagree – fully disagree and disagree; agree – fully agree and agree.

THE INSTITUTIONAL FRAMEWORK

According to the Law that entered into force in 2001, the institutional framework is composed of a Public Procurement Office, part of the Government of Croatia that has the role of monitoring the implementation of the legislation on public procurement and the Public Procurement Supervisory Commission that reviews the complaints related to the procurement procedures.

The Office has the following tasks:

- *establishes the overall procurement requirements for products and services of entities bound by the public procurement regime; plans the implementation of procurement procedures; conducts market research; manages the database of awarded contracts and framework agreements and submits statistical reports to the government; implements advanced technologies in the public procurement process; drafts tender documentation; controls the performance under the signed contracts and framework agreements; analyses the efficiency of the public procurement regime through continuous monitoring; and performs any other tasks as may fall within the scope of its competence*[19].

As a good practice, the Office publishes a strategy for every two years, including the priorities. For the current cycle, 2013-2015, the institution works on aspect such as improving electronic procurement and the regulations related the implementation of the best value of money criteria.

The Act on the State Commission for Supervision of Public Procurement Procedures[20] regulates the functioning of the Commission, an independent central body with the role of reviewing complaints, awarding concessions and selecting private partners for the PPPs.

Other institutions involved in the public procurement process are The Directorate for the Public Procurement System - Ministry of the Economy, State Commission for the Supervision of Public Procurement Procedures, State Office for the Central Public Procurement, Ministry of Financed and Agency for Public Private Partnership.

An OECD report published in 2011 noted on the development of the public procurement system:

- *Croatia's public procurement system has reached a high level of functionality*

16 Ivančica Franjković (Central Procurement Office Croatia), 9th Public Procurement Knowledge Exchange Platform, Skopje 28-31 May 2013, *Centralized Public Procurement in Croatia - Experiences and Challenges*

17 *Businesses' attitudes towards corruption in the EU*, http://ec.europa.eu/public_opinion/flash/fl_374_en.pdf

18 Jelena Budak and Edho Rajh, The Public Procurement System: *A Business Sector Perspective*, Zagreb, 2013

19 Jelena Madir, Luka Rimac, Croatia: reforms to meet the terms of the EU acquis *http://www.ebrd.com/downloads/research/law/lit113h.pdf*

20 *http://www.javnanabava.hr/userdocsimages/userfiles/file/ZAKONODAVSTVO%20RH/ENGLESKI/ZAKONI/Act%20on%20SC%20OG%2018-2013.pdf*

and compatibility with the procurement systems of EU Member States. Extensive resources have been invested in the elaboration of a legal framework transposing the EC Directives. The legal framework – PPA, CA, PPPA, and Act on the State Commission for the Supervision of the Public Procurement Procedure (PPRA) – has also been supplemented by the issuance of secondary legislation and the preparation of operational tools in the form of guidelines and website information. A number of training activities have been conducted to support capacity-building at operational level.[21]

THE LEGISLATIVE INNOVATION

The legislative framework that anticipates the European standards included in the new Directives, innovates in chapters related to the procurement plan, the register of public procurement and framework contracts, the awarding criteria, the development of a roaster of professional public procurement specialists. The changes also apply to the two main institutions that have a role in the legal development and control of the procurement system: Public Procurement Supervisory Commission and the Public Procurement Office.

The 2011 version of the law brought changes to the procedures of developing and publishing the **annual procurement plans**. The plan corresponds to the procurement that is programmed for the business financial year and is an instrument that allow to cast more transparency in the activity of the contracting authorities. According to the Act (art. 20), the plan includes

1. *the subject-matter of procurement;*
2. *the file reference number of procurement;*
3. *the estimated value of procurement, if available;*
4. *the type of the public procurement procedure, including the procedure for the award of public service contracts referred to in Annex II B to this Act;*
5. *whether the public procurement contract or the framework agreement;*
6. *the planned commencement of the procedure;*
7. *the planned duration of the public procurement contract or the framework agreement.*

The plan can be adapted to the ongoing modifications, but all the changes have to be published immediately on the website. The document must be published on the internet within 60 days from the adoption

21 Evaluation for 2011, Croatia, *www.sigmaweb.org/publications/48970754.pdf*

of the budget or the financial plan. Also, the central public procurement authority gathers information on all the plans and publishes the information for those authorities that are not able to upload it on their own website. The published procurement plan and all its changes must be available on the Internet at least until 30 June of the following year.

Another innovation is t**he use of e-forms**, for the public procurement procedures. We do not refer here only to the e-government instruments that allow both the private and public users to publish information on the official public procurement webpage, but rather to the use of predefined, non-editable .pdf files that do not allow the user to insert wrong data. This type of files is currently used to publish the bids in the European procedures[22]. Although it was a difficult process that included mentality and institutional changes – one of the main issues was training the public servants - , the system improved the procurement process.

Thirdly, the contracting authorities must prepare and publish a **register of public procurement and framework contracts**. The contracting authority or entity must maintain the register of public procurement contracts and framework agreements – except those published under public – private partnerships and concessions contracts - and update the information in the register at least every six months. The register must be published on the internet. The required information – specified in art 21(3) - must be available in the register for a period of at least three years of the date of the final execution of the contract concerned.

Also, the data related to the registries and the subsequent changes is centralized by the competent body and published on its website as a list of links. The same body will receive the updated data at a six months interval from the authorities that cannot publish by themselves and will upload the information on the website.

Important developments are related to **subcontractors**. In order to avoid bids from companies that act as simple intermediaries, without actually not implementing the contract, an obligation has been introduced for the economic operators that take part to the bids to state what part of the contract will be subcontracted. Moreover, all the subcontractors in the public contracts must be known. An additional safety mechanism that tackles the setbacks that can occur in the relation between the winner of a bid and its subcontractors is the direct payment to the subcontractor. Under these conditions, the winner of the contractors will not be able to block the payments towards the subcontractors or even commit frauds.

A sensitive area in the public procurement system is the occurrence of **conflicts of interests**, which represent one of the most important threats to the fair competitions and one of the main sources of frauds and clientelism. Taking into consideration that Croatia lacks a well consolidated system to fight against such integrity issues and did not prove a visible track-record[23], conflicts of interests represent a risk for the public procurement procedures.

Therefore, in order to better prevent conflicts of interest, the new Public

22 *http://simap.europa.eu/buyer/forms-standard/index_en.htm*
23 Consult examples here: *http://expertforum.ro/wp-content/uploads/2013/03/Conflicts-of-interest-and-incompatibilities-in-Eastern-Europe.-Romania-Croatia-Moldova.pdf*

Procurement Act included extended provisions on conflicts of interests. Article 13 sets the framework and defines conflicts of interests as the following relations between contracting authorities and the economic operators:

- If a representative of the contracting authority is at the same time performing managerial duties in the economic operator, or
- The representative of the contracting authority is an owner of business shares or other rights on the basis of which he/she participates in the management or in the capital of the economic operator with more than 0.5%

The contracting authorities are not allowed to enter into contracts with the above mentioned economic operators as tenderers or parts of a group of tenderers. Also, these entities are not allowed to act as subcontractors for other bidders. Still, if such bid is concluded, the contract will be cancelled and may attract penalties.

As mentioned above, one of the new mechanisms comprised in the law is **the training and appointment of specialists** (art. 24 and 178). Authorised representatives are responsible for the preparation and implementation of the procurement procedures and each contracting authority or entity must designate through internal procedures a person with valid certificate of a special training programme in the field of public procurement. The representatives do not have to be employees of that entity and can also work with other authorities.

The central institution responsible for the public procurement system is responsible for the preparation and implementation of training programmes and issues certificates for the specialists.

The law states that from the date of publication of the tender, the contracting authority or entity is obliged to make available all the documents and any possible additional documents without any limitation and in whole, to the Electronic Public Procurement Classifieds in electronic form. Moreover, the documentation is free of charge and no condition can be imposed for downloading the documentation.[24]

Another feature of the Croatian legislation is the high limit of **penalties**. The law stipulates penalties for most of the chapters that have a significantly effect of deterrence. Fines from HRK 50,000.00 (6500 Eur) to HRK 1,000,000.00 (130.000Eur) can be applied to legal persons or units of local and regional self-government if they procure supplies, works or services without a public procurement procedure, fail to respect the procedures related to conflict of interests, subdivide the value of the contracts and so on (see article 182).

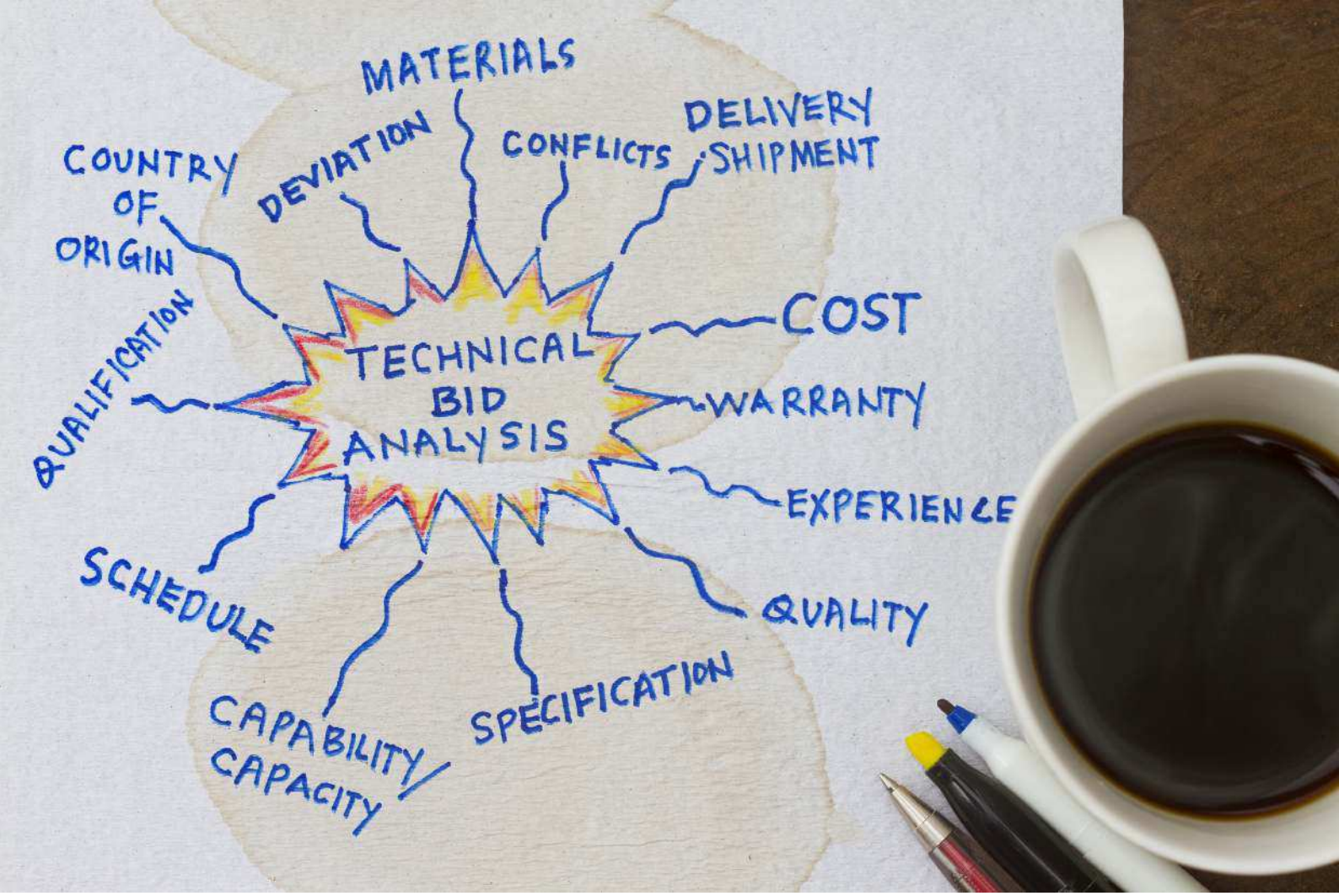
Even if the official procurement tenders are published on the governmental website[25], the portal does not provide with statistical information and

24 Public procurement system in the Republic of Croatia, *http://ec.europa.eu/enlargement/taiex/dyn/create_speech.jsp?speechID=24487&key=0570260d9cdbd3a797c041428626539e*
25 Electronic Public Procurement Classifieds of the Republic of Croatia https://eojn.nn.hr/Oglasnik/clanak/electronic-public-procurement-of-the-republic-of-croatia/0/81/
26 REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT EU ANTI-CORRUPTION REPORT, http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf

does not allow advanced searches. Therefore, alternative tools such as *www.integrityobservers.eu* represent a very useful instrument for promoting transparency and general access to an intelligent tool that allows advanced monitoring. The first anti-corruption European report[26], released at the beginning of 2014 marked the project as a good practice.

Public procurement electronic database – Croatia

In March 2013, a web portal and public procurement electronic database were launched by a local NGO as a result of an EU-funded project. The database consolidates information related to the implementation of public procurement procedures and companies involved in public procurement procedures, and is available free of charge to the public. The electronic database also contains information concerning assets and interests of public officials, in line with asset disclosure rules. Such aggregated data allow cross-checks to be carried out.



CHAPTER 3

THE ROMANIAN LEGISLATIVE AND INSTITUTIONAL FRAMEWORK. WHAT IS ALREADY WORKING AND WHAT NEEDS TO BE DONE

INSTITUTIONAL AND LEGAL FRAMEWORK

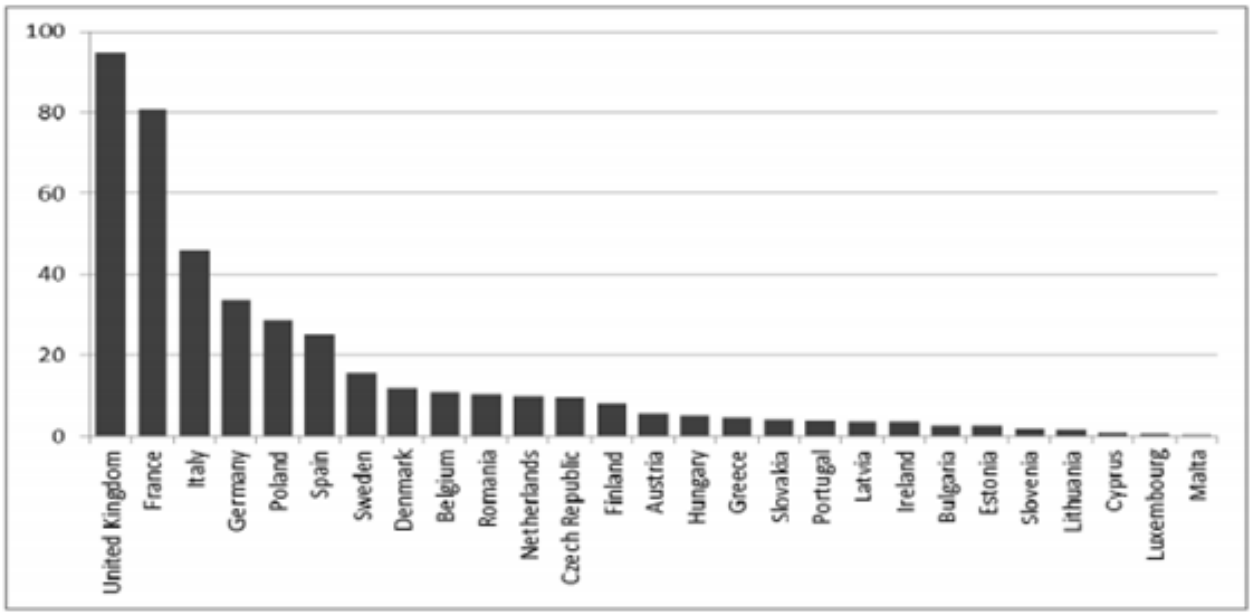
The Romanian public procurement system is based on the transposition of European Directives 18 and 19/2004 and works according to GEO 34/2006 and Government Decisions 925/2006. The following table illustrates the legislative and institutional framework in Romania:

INSTITUTION	LEGISLATION	ATTRIBUTION
National Public Procurement Regulating and Monitoring Authority (ANRMAP)	Setup by G.E.O. no. 74/2005 Works under G.D. no. 525/2007 and GEO 34/2006	ANRMAP is the main institution that develops and implements public procurement policy in Romania. It has regulatory, monitoring and control attributions and has the authority of verifying the compliance of the tender documentation with the rules of GEO 34/2006. ANRMAP is subordinated to the Prime Minister
Unit for Coordinating and Verifying Public Procurement (UCVAP)	GEO 30/2006 Government Decision no. 942/2006	UCVAP is subordinated to the Ministry of Public Finances (General Directorate) and has observance attributions over the implementation of public procurement procedures, performing ex-ante controls. The Unit works also with territorial branches and can apply fines for irregularities. UCVAP collaborates with ANRMAP, CNSC and SEAP
National Council for Solving Complaints (CNSC)	GEO 34/2006 Government Decision no. 1037/2011	CNSC is an administrative institution with remedy activity. The institution works with panels and provides resolutions for complaints related to public procurement
National Center for IT Management Society (CNMSI)	Law 329 /2009	The Center works under the Ministery of Communication and Information Society and is the administrator of the electronic procurement system (www.e-licitatie.ro)
Court of Accounts (CC)	Law 94/1992	The institution has the role of controlling the way the public funds are established, managed and spent. The Court published a yearly report on the expenses of public institutions and send intimations to prosecutors' offices regarding frauds

INSTITUTION	LEGISLATION	ATTRIBUTION
Competition Council (CC)	Law 21/1996	Competition Council is an autonomous administrative body aimed at protecting and stimulating competition in order to ensure a normal competitive environment, with a view towards the consumers' interests. Competition Council's role has two major dimensions: a corrective dimension – restoring and maintaining a normal competitive environment and a preventive dimension – monitoring markets and observing the behaviour of the actors participating in such markets.
Department for the Fight Against Fraud (DLAF)		The Fight Against Fraud Department – DLAF assures the protection of the European Union's financial interests in Romania. The Department has the competency for control of EU funds, being the national coordinator of the anti-fraud fight.

BACKGROUND

According to the official figures, the Romanian public procurement market represents a significant share of the GDP. In 2011, the services, goods and public works represented 24,6% of the GDP. The estimated total expenditure by general government and utilities on works, goods and services was between 29% and 33% between 2007 and 2011.



The estimated value of tenders published in TEB by member states in 2011 (billion Euro)[27]

Still, the main stakeholders, the participants to be bids do not see Romania as a system with all the integrity, transparency and simplified bureaucratic mechanisms put in place. A quota of 91% of the companies consider that corruption is widespread and 64% consider that the environment is characterized by nepotism and clientelism[28]. Moreover 38% consider that funding political parties in exchange of contracts or influence is a reality and 42% that family or friends are favoured in public institutions. Bribery and the use of connections is often the easiest way to obtain certain public services according to the opinion of 82% of the respondents.

A percentage of 90% of the companies interviewed by the Institute for Public Policy stated that the political regime sets the rhythm for the public procurement in Romania.[29] The **political factor** has put significant pressures on the procurement system through multiple means of influence: frequent legislative modifications, pressure of the local politicians over the central authorities and political leaders to change the legislation or influence over the contracting procedures.

Regarding the first mechanism, Emergency Government Ordinance 34/2006 has been continuously modified, in some cases through other similar ordinances[30]. The European Commission has triggered a red flag regarding the use of this type of ordinances – a method that

27 PUBLIC PROCUREMENT INDICATORS 2011, Brussels, 5 December 2012, *http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/public-procurement-indicators-2011_en.pdf*
28 *http://ec.europa.eu/public_opinion/flash/fl_374_en.pdf,* See more about clientelism in Romania in EFOR's annual report 2013, Political clientelism, *http://expertforum.ro/en/files/2013/02/rap-englishPB19.pdf*
29 *I*nstitute for Public Policy, Transparency, fairness and competitiveness of public procurement in Romania, Case study central contracting authorities, *www.ipp.ro/protfiles.php?IDfile=151*
30 OUG 34 was modified more than 8 time between 2006 and 2010, in some cases with significant amendments

practically overlaps the normal pathway of a law, through the Parliament – that are considered to be an abuse.

An aspect that triggered pressures from the mayors was a series of decisions from the National Integrity Agency that declared tens of local elected officials incompatible, as they were in the same time mayors or vice-mayors and simultaneously administrator for a trading company, member of the administration council, censor or held other leading or execution positions. Still, the most ardent issue was related to the position of representative in the general assemblies of the local public companies. Practically, this double capacity would have permitted them in the same time to make decisions and execute them, with funds involved in the process. This caused a movement of discontent and determined some of the mayors to ask their political leaders or MPs to change the law.

Recently, Law 215/2001 on local administration has been amended so that the mayors can delegate attributions to the vice mayors, the secretary or the public servants, as well as to the heads of the local institutions and service, according to their competences. A similar amendment has been adopted for the president of the county council. This decision may have been caused by the high number of arrests and criminal files opened by the National Anticorruption Directorate (DNA) against heads of county councils and municipalities for criminal activity. Statistically speaking, most if this indictments are related to public procurement, clientelistic contracting or abuse of power. The decision of the Parliament will decrease the responsibility of the officials and will transfer it to the subordinates, even if they may still be involved in frauds with public funding. The impact will be directly visible in the procurement procedures.

Apart from the politicized environment, there are significant issues related to the professional and expertise level of the public servants, the fairness of the competitions, frauds related to both national and European funds and excessive bureaucracy, doubled by the lack of unity in decisions. EFOR and PSD have already underlined in the previous report a series of irregularities that can be found on all sides of the procedures: at the contracting authorities, at the bidders and at the level of the regulating and control entities[31]. A report published by Deloitte shows extensively the issues with the legislative and institutional framework in Romania, including inapplicable system of prevention on **conflicts of interest**, instable legislation or excessive bureaucracy[32].

Moreover, although DNA estimated a sum of 36 mil. Euro related to frauds with European funds, the European Commission noted that the efforts to fight this problems are not strong enough[33].

Steps have been taken by ANI in order to prevent conflicts of interest, by developing a system that can detect such anomalies. PREVENT will gather

31 Assessing the efficiency, integrity, and transparency of the Romanian public procurement system, *http://expertforum.ro/en/assessing-the-efficiency-integrity-and-transparency-of-the-romanian-public-procurement-system/*

32 European Commission, Directorate General Regional Policy, Assessment of the Public Procurement System in Romania. Final Report

33 h*ttp://ec.europa.eu/cvm/docs/com_2013_47_en.pdf*

information from multiple sources (such as the municipalities, involved institutions etc) and will send an alert if certain person is in a potential conflict of interest. The alert will also be sent to the head of the institution, who is obligated to send a report over the decision that has been taken. If no decision is taken to prevent the occurrence of the conflict of interest, criminal and administrative procedures may be initiated. Still, the main issue is that the system will only be functional for the European funding. In order to prevent conflicts of interests, which represent a systemic issue within the public administration, the program must be extended to the national funds, which are less protected both by the legislation and the monitoring capacities of the relevant institutions, even though the percentage that is being spent is much higher[34].

Conflicts of interests became a higher stake for all the political parties when Law 144/2007 entered into force. On the administrative side, in 2010 the law was contested at the Constitutional Court and the attributions of ANI have been reduced. On the other hand, in December 2013, the Parliament tried to reduce the definition of 'public servant' from the Criminal Code; indirectly, these categories would have not been charged for conflicts of interests according to the criminal definition.

Although the general legislation in Romania on conflicts of interests is a solid one, the definition included in GEO 34 can be a vulnerability in the system, as persons that are part of the development of the specifications for a certain procurement can also be bidders as companies if their involvement does not distort the competition[35].

If we talk about transparency and integrity in the public procurement procedures, there is a series of vulnerabilities that has to be covered by a new, improved public procurement system. First of all, **the electronic procurement portal**, *www.e-licitatie.ro* needs significant upgrades, due to the fact that is absolute (even though it was one of the best practices in Europe at the beginning of 2000s) and is difficult to be navigated. Even though upgrades have been performed, the system must be brought to the latest technological updates and must provide better search and monitoring opportunities for the users. Up to 95% responders to the IPP study consider that the system is difficult to access, seldom blocks and the information is difficult to be accessed. The uploading system is difficult and if the bidder needs to upload a significant number of documents, the chances to take part in a procurement process may decrease[36]. Moreover, practically every entry and almost every other activity must be validated by the *captch*a code and the secured documents for each procedures are difficult to be accessed.

34 For example, in 2013 the statics show that 23,470,966,902.04 RON have been spent from EU funds and 51,080,098,123.67 RON out of national funds

35 Art 67: The natural or legal person who participated in the preparation of the tender documentation has the right, as economic operator, to be tenderer, associate tenderer or subcontractor, but only if his involvement in drafting the tender documentation is not likely to distort competition.

36 IPP, quoted document

On the other hand, institutions do not promote transparency on their websites either. Although contracting authorities should publish their contracts and tenders on the websites, for most institutions, the sections are either partial, they do not comply with the legislation or they do not exist. Moreover, the annual procurement programs are subject to the same issue, as they cannot be found on the websites.

Taking into consideration the official data about procedures, less than a half of the procedures are done through the electronic system. For example, in 2012 a number of 34,545 procedures out of 61,848 were processed on-line. If we take into consideration the sums, 138,802,879,794.11 RON out of 183,316,142,991.77 RON[37] have been passed through off-line procedures. We consider that the number is low and therefore, efforts should be made to increase the capacity of the system and the number of the authorities using it.

Taking into consideration the new European priorities related to e-procurement and transparency, more steps should be taken to enhance the access of the public to procurement procedures. Therefore, all the contracts and their annexes should be published and accessible to the public. The logic of the centralized public procurement website should be changed, in order to make participants to the tenders easier, including a more performing data entry system that will help prevent fraud or errors, statistical data and more accessible interface for both users and the general public.

If we speak of vulnerabilities, one of the recurrent issues is **the type of criteria used for the procurement**. As the official statistics show the largest part of the procurement is made through the 'lowest price' procedure. This type of criteria determines multiple setbacks to the implementation of the contract. First of all, the quality of the service, goods or works may be compromised because of the low quality or due to the lack of capacity of implementation of the bidder. Secondly, the competition may be affected due to dumping prices practiced by some of the participants to the tender process. The new directive imposes 'most economically advantageous tender" (MEAT) as the prefer criteria, due to advantages that include: higher quality, better balance between the price and the technical offer, better possibilities of shaping a contract. Still, this instrument

37 CNMSI 2012 report, *http://www.cnmsi.ro/Files/4ab627ee-96ef-4e37-91da-223fddbec1b9.pdf*

can also bring a higher degree of irregularities, if the calculation formula is not well put in place and correctly applied.

Another issue that needs to be more specific in the new framework is related to the rules for **subcontracting**. The Romanian legislation only established that a bidder can include in the tender proposal the possibility of subcontracting some of the parts of the contract. Moreover, the company has to provide information about the potential subcontractors. Still, as we mentioned before, the Croatian legislation and the new Directives mention that the subcontractors must be mentioned during the procedure, the specific parts they will be implemented must be detailed. Apart from this, the payment will be made directly to the company by the contracting authority and not through the main contractor. These decision will make the market more competitive and the tenders fairer, taking into consideration that currently there are companies that only manage the contract, with very little involvement in the implementation of the project and secondly, block or delay without justification the payment towards the subcontractor.

One of the issues of the current system that is directly related to corruption is the lack of a **management and performance evaluation**. One major flaw of the current legislation that is not properly covered even by the European directive is the lack of perspective over the entire project implementation cycle, including programming, procurement procedures, management and evaluation / audit. Many controls of the Court of Accounts have uncovered a large number of deficiencies within the functioning of the public institutions that implement the contracts with irregularities and even committing frauds. Although the Court of Account and UCVAP perform different types of audit, there are no institutions that perform proper performance evaluation. Therefore, more attention should be placed over the implementation of the contract, in order to verify if the funds are spent on the right services, goods or works, from the qualitative point of view.

Currently there is no institution that **holds centralized information about the implementation of the contracts** and therefore, there is no monitoring mechanism for the public use. Even if the outputs may be reached and the procedures are respected, there is a need for audit oriented on the outcomes, impact and sustainability of the implemented contract/project. According to the legislation, the contracting authority must produce documents that contain information about the fulfilment of the contract and prejudices if there is the case. The entity must deliver three copies of which should be sent to ANRMAP[38]. On the other hand, the legislation specifies that a bidder can be eliminated from the procedure for awarding the public contract if "in the last two years has not fulfilled or has fulfilled improperly its contractual obligations, for reasons attributable to the tenderer in question, which caused or is likely to cause serious damages to its beneficiaries" (art 181, c1). Still, there are no means to consult the centralized information about competitors that have failed to comply with the rules.

Another issue related to the consistency of the system is the **training of the**

38 Art 971, Government Decision 925/2006

procurement specialists. As official figures show, trainings for public procurement, investments and concessions are not a priority in the Romanian public administration. In 2010, the options of the public servants showed that just 3.83% are interested in this topic in the central administration, while 6% are oriented on this subject in the local administration[39]. In 2013, a number of 364 servants were proposed for courses on SEAP and 843 for public procurement[40] reported to more than 3000 municipalities and some hundreds agencies and decentralized entities.

Currently, ANRMAP is working on a National Strategy for Training on Public Procurement. According to the Strategy, ANRMAP becomes the main supplier of training on public procurement. The document will be implemented between 2014 and 2020 and it has brought public critic from the National Association for Public Procurement, as it does not emphasize the implementation of a liberal profession of public procurement specialists, it monopolizes the training market, while ANRMAP is not by mission just a supplier of training and is mainly oriented on theory and not practice[41].

Under these circumstances, we consider that the specialization of public servant on public procurement is essential, by creating a dedicated occupation that is periodically recertified. The responsibility for the coordination of professional development belongs to ANRMAP, but without exclusive competences on training (therefore, the services can be outsourced). This high impact decision is more important taking into consideration the transposition of the new Directives.

39 Ministry of Administration and Interior, The National Agency of Public Servants, Report on the training of public servants in 2010, Bucharest, 2010, *http://www.anfp.gov.ro/DocumenteEditor/Upload/download/rapoarte%20control/Raport%20Formare%20Profesionala%20FINAL_iulie.doc*

40 The National Agency of Public Servants, Report on the training of public servants in 2013, *http://www.anfp.gov.ro/DocumenteEditor/Upload/2013/Formare/2013_Raport%20formare-per%20prof%20fp.pdf*

41 *http://freedomhouse.ro/ISEC/index.php/stiri/item/346-specialistii-%C3%AEn-achizitii-cer-evitarea-unui-monopol-al-anrmap-%C3%AEn-formarea-profesionala*

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