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MANDATORY CLAUSES IN THE PUBLIC PROCUREMENT CONTRACT

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ABSTRACT

The article aims to show the crucial role of the European Union public procurement Directives and European Court of Justice case law in all the dimensions of the contract clauses in the field of classic sectors. We have addressed the contract clauses through the lens of European Union and Romanian public procurement law. First, we emphasized that the secondary European Union law emanates from the core regimes of the TFEU and pass by the European institutions in a set of detailed procurement Directives which after all must be transpose by the Member States. Second, we followed the relevant Directive's provisions which limits or allows the contracting authority to choose different public procurement contract clauses. Third, we discussed the crucial contribution of the case law of the European Court of Justice to European Union public procurement law. Even if, the public procurement Directive for the classic sector, does not provide detailed rules for the contracts, it establishes some limits and obligations. We have highlighted these last elements in the article through the lens of the Romanian new laws.

Keywords: *internal market, administrative contracts, public interest, contract modification and termination.*

1. Introduction

The public authorities, like any other legal entity, enter into contracts[2] in order to procure goods, services and works of public interest. The public procurement contract in Romanian law system is established as administrative contract which is signed among a public authority and third parties with the scope of solving, or for better accomplishment of, the public needs. The contract is for the achievement of public interest objectives and is governed by the public law provisions which draw imbalanced position of the contracted parties. Originating from the public interest the public authorities have exorbitant clauses privilege under the Romanian law.

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[2] In the article the concept contract denotes the contracts and the framework agreements concluded under the public procurement rules.

Within the paper we will emphasis the EU law on public procurement and Romanian national procurement law which transpose it. As with any public rule inevitably a number of questions are addressed once the Directives are enacted, implemented and clarified through European Court of Justice. These includes: how should the public authorities use the procurement procedures under the EU Directives; which are the attractive tenders to bidders and the cost effectiveness; how should select the final tender; to what extent the procedure was transparent and lawful; what flexibility gives the new regulations to the public authority in establishing the contract clauses; how do we avoid to over-engineering the contracts; which are the contract management instruments and mechanisms?

The public procurement process is extensively affected by EU law. At the question „to who you should conclude the contract", in the European Union idea of public procurement, the answer might be „to a provider from another Member State", and this makes the procedure relevant for the internal market. But, our aim is to answer only to those questions aroused from the Romanian public law system, mainly about the clauses of the public contract. Moreover, the hypothesis which lead us in this research was that under the EU Directives, and subsequently the national rules, there are some limits and clauses which must be in the public procurement contracts. For this reason, the entire research was done with references to the case law of the European Court of Justice which clearly stated the necessity that you should have a clause in the contract if you want to have a modification or unilateral termination of it. Furthermore, in the Romanian procurement system the National Agency for Public Procurement searches to establish framework contracts and to restrict, to some extent, the public authorities' discretionary power to decide on mandatory and specific clauses, and this drives us in this research.

2. The new, but old laws on Public Procurement

As any Member State of the European Union, Romania has to implement and transpose the European public procurement Directives. Currently, the Public Procurement Directives are 2014/23/EU [10], 2014/24/EU [4], 2014/25/EU [11] and 2009/81/EC [12]. The first relates to the concession contracts, the second relates to the goods, services and works (known as the Directive of the classic sectors), the third shapes the award of contracts of entities of water, energy, transport and postal services sectors (called the special sector Directive) and the last one is on defence and security procurement. The public procurement remedies Directives are 89/665/EEC [13] and 92/13/EEC [14] as they were thoroughly amended by the Directive 2007/66/EC [15] and by the above mentioned ones. The standardization of procurement and contract matters within the European Union have aimed to harmonize the legal systems of public procurement and to amplifying the Treaty regimes on the free movement of

goods and free movement of services through a rule with, at least, direct effect [1]. All Directives dedicate a substantial part of their provisions to their types of entities that have to follow them and the types of procedures and contracts to which they apply to.

Treaty on the Functioning of the European Union (TFEU) does not include any explicit provisions relating to public procurement. It establishes a number of fundamental principles that underpin all the secondary EU rules. The most relevant in terms of public procurement are the following: prohibition against discrimination on grounds of nationality; free movement of goods; freedom to provide services; freedom of establishment. In addition to, some more are emerged from the case law of the Court of Justice of the European Union (CJEU) such as: equality of treatment; transparency; mutual recognition; proportionality. All the principles will apply independently of the Directives even if the Directives do not apply.

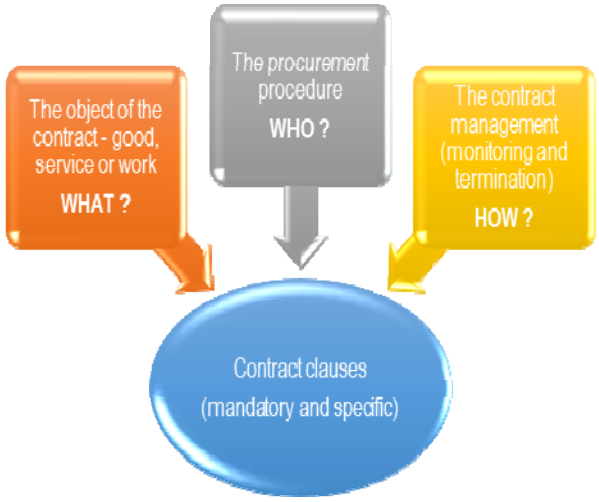
The secondary EU legislation on public procurement of goods, services and works is created based on the art. 53 (2), 62, and 114 TFEU as Directive. The EU Directive created a model law agreed at EU level which settled out the basic objectives, mechanisms and instruments necessary to be transposed in the Member States law system for a better functioning of the internal market. Until the 18 April 2016, the Members States were free to choose the method of transposition as long as it is fully compliant with the EU Directive.

Romania, along with other states, such as: Poland, Belgium, Finland, Czech Republic, Estonia and Spain[3], at 18 April 2016, did not fully transpose the EU Directives. The Parliament approved on 10 May 2016 (entered into force on 26 May 2016) four new laws regulating the public procurement framework in Romania and transposing the EU Directives. The new laws are more and less a copy of the Directives and they were modified and completed on December 2017. A Directive is binding the Member States to its objective but not to the means, a lot of discretion is given in how to apply it [1]. An efficient transposition law formulates implementing provisions best suited to the national context. Considerable analysis has to be done and it should not be transposed literally.

More than any other public sector issue the public contract supports the influence of the EU law to varying degrees, depending on the 'phase' the contract is in. The public procurement contract's strategy can be divided into three phases: (1) the definition of a need for a good, service or work, (2) the procurement procedure leading to the award of the contract, and finally (3) the contract management. Our interest for this paper is at the intersection of these phases, meaning the contract clauses, the binding rules of the contract parties.

[3] National transposition measures communicated by the Member States concerning: 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 available at http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32014L0024 retrieved on December 7, 2017.

Figure 1. The contract within the procurement process



As Medeiros [2] stated within the framework of a global assessment of the Directives, it is possible to identify, two main objectives, namely: (a) the flexibilisation and simplification of the procurement procedures at the European level; (b) the reinforcement of the instrumental use of public contracts to pursue secondary policies, especially in the areas of environmental policies, social policies and the promotion of jobs and innovation. Also, it is possible to unveil a wide set of secondary objectives: to facilitate procedural access to small and medium enterprises; an increased openness of procedures to foreign operators; the reinforcement of electronic public procurement mechanisms and tools; the prevention of corruption and the reinforcement of the guarantees of impartiality; the professionalization of the contracting activity of the contracting authorities; to clear interpretation doubts as to the interpretation of the defining concepts within the subjective ambit of the public procurement regime through the incorporation of the judicial contributions of the Court of Justice of the European Union.

3. The public procurement contract clauses

As we stated before nowadays a public procurement contract can be develop only under the provisions of European Union Directives and Member States national rules. The new laws support economic growth and deficit reduction by making the process faster, less costly and more effective for small and medium enterprises. Many constraints have been removed and the Member States have the flexibility to design their light touch rules. The contracting authority are bind by the principle of transparency in choosing contract clauses which were not clearly identified in the procedure documents. Even more, the public authority shall not provide for modifications or options something that could alter the overall nature of the contract or the framework agreement - art. 72(c)(ii) Directive 2014/24/EU.

Figure 2. Public procurement contract: rules and clauses

<table>
<tr><td colspan="4">European Union</td></tr>
<tr><td colspan="2">Treaty on Functioning of EU, consolidated version, Official Journal of the European Union C 326 of October 26, 2012 [3]</td><td colspan="2">Directive 2014/24 of the European Parliament and of the Council, of 26 February 2014, on public procurement and repealing Directive 2004/18/EC, Official Journal of the European Union L 94/65 of March 28, 2014 [4]

Court of Justice of the European Union - jurisprudence on public procurement [5]</td></tr>
<tr><td colspan="4">Romania</td></tr>
<tr><td colspan="2">Constitution of Romania as amended and supplemented, republished in the Official Journal of Romania no. 767 of October 31, 2003 [6]

Law no. 98/2016 on public procurement, Official Journal of Romania no. 390 of May 23, 2016 [7]</td><td colspan="2">Law no. 101/2016 on remedies and appeals concerning the award of public procurement contracts, sectorial contracts and of works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints, Official Journal of Romania no. 393 of May 23, 2016 [8]

Law no. 554/2004 on the contentious administrative, Official Journal of Romania no. 1154 of December 7, 2014 [9]</td></tr>
<tr><td colspan="4">Public Procurement Contract</td></tr>
<tr><td colspan="2">General and Mandatory Clauses</td><td colspan="2">Specific Clauses</td></tr>
<tr><td>The scope and parties of the contract</td><td>The subject matter and the value of the contract</td><td>Transport, delivery and other life-cycle conditions</td><td>Communication between/among the parties</td></tr>
<tr><td>Rights and obligations of the parties</td><td>Subcontracting and withdraw conditions</td><td>Force majeure</td><td>Payment(s) and indexation</td></tr>
<tr><td>Conflict of interest</td><td>Quality and performance requirements</td><td>Contract monitoring</td><td>Contract modification and termination</td></tr>
</table>

We have grouped the contract clauses based on the required steps to be followed when a modification of them might be necessary. Besides this, the Law no. 98/2016 in

article 221 (11) states that the overall nature of contract means the main objectives pursued by the contracting authority in making the initial procurement, the main subject matter of the contract and the main rights and obligations of the contract, including the main quality and performance requirements.

As an innovation of the Directive is the contract management, concretely the modification of the contracts, which essentially codifies the *C-454/06 pressetext Nachtrichtenagentur and Republik Osterreich Bund* judgement[4]. The Regions of Committee was the one which reacted and in its Opinion concluded *„the current directives include procedural rules for carrying out procurement. They do not include provisions on the modification of contracts during their term, and nor should the new directives, as these provisions impose an unnecessary administrative burden on contracting authorities and reduce flexibility. If the Commission wants to provide information on case law in this area, an interpretative communication would be a better solution"*[5]. The intervention of European Parliament over the art. 72 of the Directive 2014/24/EU established objective modification of contract during their performance, but in specific cases.[2] By any circumstance, the contract clauses must not be written so as to restrict or distort competition among economic operators within the European Union internal market. Contracts covered by the Directive[6] must be established for pecuniary interest (money or money's worth), in writing, among at least two parties[7] – the contracting authorities and the economic operator.

The significant improvements brought by the Directive 2014/24/EU and Romanian Law no. 98/2016 provisions about the contracts modifications with references at the CJEU and the recitals of the Directive are underlined in the following analysis. We have grouped under six categories the modifications, and by each category we identified the European and national provisions, the legal requirements and limits in short explanations and the case law of CJEU and recitals of the Directive for better understanding. We will not do any reference to the Romanian courts' jurisprudence because it is not considered source of law, and it binds to the execution only participating parties.

1. Modification of the monetary value

Legal provisions:

• Directive 2014/24/EU, art. 72 (1): „Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases: (a) where the modifications, irrespective of

[4] Case 454/06 pressetext Nachtrichtenagentur and Republik Osterreich Bund http://curia.europa.eu/juris/document/document.jsf?text=&docid=69189&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=651775 retrieved on December 11, 2017.

[5] Opinion of the Committee for Regions, p. 75.

[6] Directive 2014/24/EU, art. 2(5) „public contracts – means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services".

[7] The parties are understand as they were defined by the Directives and the Laws no. 98 and 99 of 2016.

their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement";

- Law no. 98/16, art. 221(1)(a) – the same content as the one from the Directive.

Explanations on the legal requirements and limits:

- This modification must accomplish one or more conditions:

(a) it has to ensure the principle of transparency and entails the risk of unequal treatment by being provided in all the initial documents.

(b) it has to be clear, precise and unequivocal and not as a general clause – for all possible changes.

(c) it has to specify the scope and nature of possible modifications or options as well as the conditions under which they may be used.

(d) does not alter the overall nature of the contract.

- The monetary value of the modifications done under this provision does not support a limit. But, an increase of the original value of the contract due to the modifications should not alter the overall nature of the contract.

Case law and/or recitals:

- *C-454/06 pressetext Nachtrichtenagentur and Republik Osterreich Bund* established the meaning of the material character of a modification:

- paragraph 34: „In order to ensure transparency of procedures and equal treatment of tenderers, amendments to provisions of a public contract during the currency of the contract constitute a new award of a contract ... when they are materially different in character from the original contract and, therefore, are such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract".

- paragraph 35: „An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted".

- paragraph 36: „Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered".

- paragraph 37: „An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract".

- paragraph 76: „As is apparent …, in determining whether the conclusion of such a clause constitutes a new award of contract, the relevant criterion is whether that clause must be regarded as being a material amendment to the initial contract".

• In C-160/08 *Commission and Germany*[8], the CJ applied the principles established in C-454/06 *pressetext Nachrichtenagentur* with regard to the extension of a services contract. It decided that the extension to the contract was a material change constituting a new contract award. The contract was extended to cover a significantly increased geographical area, and the contract value was increased by more than 15%.

- paragraph 99: „In that regard, it must be observed that an amendment to the initial contract may be regarded as being material and, therefore, as constituting the new award of a contract for the purposes of Directive …, inter alia, when it extends the scope of the contract considerably to encompass services not initially covered (see, to that effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 36)".

- paragraph 100: "In this instance, it is apparent from the information in the documents before the Court that the value of the contract relating to the operation of the ambulance station at Bad Bevensen amounts to EUR 673 719,92, which is considerably higher than the thresholds set under Article 7 of Directive …"

2. Modification for foreseeable works, services or goods with high inconvenience for contracting authority

Legal provisions:

• Directive 2014/24/EU, art. 72 (1): „Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases: (b) for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor: (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority. However, any increase in price shall not exceed 50 % of the value of the original contract. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive";

• Law no. 98/16, art. 221(1)(b): „when the following conditions are met cumulatively: (i) it becomes necessary to purchase from the original contractor additional products, services or works that were not included in the original contract but which have become strictly necessary to meet it; (ii) change of contractor is impossible; (iii) any increase in the contract price representing the value of the additional products/services/works will not exceed 50% of the value of the original contract;"

[8] Case 160/08 Commission and Germany available at *http://curia.europa.eu/juris/document/document.jsf?text=&docid=84478&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=664592* retrieved on December 9, 2017.

• Law no. 98/16, art. 221(6): „Contracting authorities amending a public procurement contract or framework agreement in the cases provided in paragraph (1) lit. b) … have the obligation to publish a notice in this respect in the Official Journal of the European Union and at national level, in compliance with the standard form established by the European Commission under the provisions of Art. 51 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014."

• Law no. 98/16, art. 221(9): „In the situation stipulated in paragraph (8), if several successive modifications are made, the amount of the changes shall be determined on the basis of the cumulative net value of the successive changes."

• Law no. 98/16, art. 221(10): „For calculating the price mentioned in par. (1) lit. (b) (iii), (c) (iii) and f) Use the updated price of the public procurement/framework agreement, which is the reference value when the public procurement contract includes an indexing clause".

Explanations on the legal requirements and limits:

• This legal provision is a cumulative one for additional works, services or goods and any increase in costs should not exceed 50% of the value of the original contract (where more than one modification is made, the 50% limit applies each time). If the contract includes an indexation clause, based on the above legal provision, the updated cost shall be the reference value. Moreover, „significant inconvenience" and „substantial duplication of costs" must be strictly interpreted.

• The principle of transparency institutes for the contracting authorities the obligation to publish a modification notice. For the European Commission's procurements a standard modification notice was established, but is not valid for the Romanian system.

Case law and/or recitals:

• Recital 108 of the Directive 2014/24/EU clarifies this provision:

„Contracting authorities may be faced with situations where additional works, supplies or services become necessary; in such cases a modification of the initial contract without a new procurement procedure may be justified, in particular where the additional deliveries are intended either as a partial replacements or as the extension of existing services, supplies or installations where a change of supplier would oblige the contracting authority to acquire material, works or services having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance".

• In the Opinion of Advocate General Trstenjak delivered on 15 November 2007[9], *Case C-404/06 Quelle AG and Bundesverband der Verbraucherzentralen und Verbraucherverbände* the significant inconvenience were clarified as follows*:*

[9] Opinion of Advocate General Trstenjak delivered on 15 November 2007, Case C-404/06 Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62006CC0404 retrieved on December 10, 2017.

- paragraph 47: „Clarification is also required as to whether the claim for payment of compensation for use causes the consumer '*significant inconvenience*' within the meaning of the third subparagraph of Article 3(3) of Directive 1999/44. In that regard, I agree with the Austrian Government's view that paying compensation for use entails 'significant inconvenience' within the meaning of the Directive. The term 'significant inconvenience' covers not only practical obstacles to replacing goods but also inconvenience in general, and financial 'inconvenience' is an additional inconvenience which, to my mind, can be even more significant than the practical obstacles facing the consumer where the goods are replaced."

3. Modification because of unforeseeable events

Legal provisions:

• Directive 2014/24/EU Article 72 (1)(c): „where all of the following conditions are fulfilled: (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee; (ii) the modification does not alter the overall nature of the contract; (iii) any increase in price is not higher than 50 % of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;"

• Law no. 98/16, art. 221 (1)(c), (6), (9) and (10) – the same content as the one from the Directive.

Explanations on the legal requirements and limits:

• This legal provision is a cumulative one, also, and even if the circumstances for modification could not have been foreseen by a diligent contracting authority they must be proven.

• Furthermore, on the grounds of substantiality and alteration of the nature of contract, the risk that a new contract will be required is very high. It is better to incorporate carefully negotiated and tailor-made *force majeure* clauses to reduce the risks associated with such events.

• Likewise, the rules of maximum 50 % of the original value or reference value and the one on transparency principle are maintained as above.

Case law and/or recitals:

• Recital 109 of the Directive 2014/24/EU clarifies this provision:

"The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value".

• In Case 11/70 *Internationale Handelsgesellschaft mbH and Einfuhr- und Vorratsstelle für Getreide und Futtermittel*[10] the Court established the meaning of *force majeure* as not been limited to absolute impossibility:

- paragraph 23 The concept of *force majeure* adopted by the agricultural regulations takes into account the particular nature of the relationships in public law between traders and the national administration, as well as the objectives of those regulations. It follows from those objectives as well as from the positive provisions of the regulations in question that the concept of *force majeure* is not limited to absolute impossibility but must be understood in the sense of unusual circumstances, outside the control of the importer or exporter, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice. This concept implies a sufficient flexibility regarding not only the nature of the occurrence relied upon but also the care which the exporter should have exercised in order to meet it and the extent of the sacrifices which he should have accepted to that end.

• Case 284/82 *Acciaierie e Ferriere Busseni SpA and Commission of the European Communities*[11] continues the above mentioned ideas about the concept *force majeure:*

- paragraph 8: „It must be stated that the period for bringing an action must be strictly observed and cannot be extended save on grounds of distance as provided in the second paragraph of Article 39 of the Statute of the Court of Justice of the ECSC. Nevertheless the third paragraph thereof provides that no right shall be prejudiced in consequence of the expiry of a time-limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure*".

- paragraph 11: „It is apparent from the established case-law of the Court that apart from special cases in specific areas in which it is used, the concept of *force majeure* essentially covers unusual circumstances which make it impossible for the relevant action to be carried out. Even though it does not presuppose absolute impossibility it nevertheless requires abnormal difficulties, independent of the will of the person concerned and apparently inevitable even if all due care is taken".

• In the Romanian new Civil Code art. 1351 (2)[12] *force majeure* is defined "as any external, unpredictable, absolutely invincible and inevitable event". Also, in the next paragraph of the same regulation the Romanian legislator gives the meaning of *the forcible case* as" an event that could be predicted or prevented by the person who have been called on to respond if the event have not been occurred".

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[10] Case 11/70 Internationale Handelsgesellschaft mbH and Einfuhr- und Vorratsstelle für Getreide und Futtermittel available at *http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61970CJ0011&from=RO* retrieved on December 10, 2017.

[11] Case 284/82 Acciaierie e Ferriere Busseni SpA and Commission of the European Communities available at http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61982CJ0284 retrieved on 12 December, 2017.

[12] Law no. 287/2009 on Civil Code republished in Romanian Official Journal no. 505 of July 15, 2011.

4. Modification for the replacement of the contractor

Legal provisions:

• Directive 2014/24/EU Article 72 (1)(d): „where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either: (i) an unequivocal review clause or option in conformity with point (a); (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or (iii) in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Article 71;"

• Law no. 98/16, art. 221 (1)(d) – the same content as the one from the Directive.

Explanations on the legal requirements and limits:

• As a general rule, the replacement of a contractual partner constitutes a substantial modification of the contract. Nonetheless, the Directive establish three specific situations for this modification:

- the contract has a unequivocal review clause or option that:

(a) is clear, precise and unequivocal; and

(b) sets out the scope, the nature and the conditions under which the replacement may be used e.g. „step-in" rights exercised by a funder.

- the legal identity of the contractor supports a structural change, but in fact the contractor remains the same.

- the contracting authority itself assumes the main contractor's obligations towards its subcontractors.

Case law and/or recitals:

• Recital 110 of the Directive 2014/24/EU clarifies this provision:

„In line with the principles of equal treatment and transparency, the successful tenderer should not, for instance where a contract is terminated because of deficiencies in the performance, be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract should be able, in particular where the contract has been awarded to more than one undertaking, to undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that tenderer".

• The above situation occurred in the C-454/06 *pressetext Nachrichtenagentur* case, where the contract was transferred on the same terms to a new legal entity, which was a company within the same group as the original contractor.

- paragraph 40: „As a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question, unless that substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting".

- paragraph 41: „According to the order for reference, APA-OTS is established as a limited liability company and therefore has separate legal personality from APA, the initial contractor.

- paragraph 42: „It is also common ground that, since the OTS services were transferred from APA to APA-OTS in 2000, the contracting authority makes payment for those services directly to APA-OTS, and no longer to APA."

- paragraph 43: „However, some of the specific characteristics of the transfer of the activity in question permit the conclusion that such amendments, made in a situation such as that at issue in the main proceedings, do not constitute a change to an essential term of the contract".

- paragraph 44: „According to the information in the case-file, APA-OTS is a wholly-owned subsidiary of APA, APA has the power to instruct APA-OTS in the conduct and management of its business and the two companies are bound by a contract under which profit and loss are transferred to and assumed by APA. The case-file also shows that a person authorised to represent APA assured the contracting authority that, following the transfer of the OTS services, APA was jointly and severally liable with APA-OTS and that there would be no change in the overall performance experienced".

- paragraph 45: „Such an arrangement is, in essence, an internal reorganisation of the contractual partner, which does not modify in any fundamental manner the terms of the initial contract".

- paragraph 47: „If the shares in APA-OTS were transferred to a third party during the currency of the contract at issue in the main proceedings, this would no longer be an internal reorganisation of the initial contractual partner, but an actual change of contractual partner, which would, as a rule, be an amendment to an essential term of the contract. Such an occurrence would be liable to constitute a new award of contract within the meaning of Directive ..."

5. Modification where the value is below 10% for service and goods, and 15% for works

Legal provisions:

• Directive 2014/24/EU art. 72 (2): „Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, contracts may equally be modified without a new procurement procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values: (i) the thresholds set out in Article 4; and

(ii) 10% of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts. However, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications".

• Law no. 98/16, art. 221 (1)(f), (9) and (10) – the same content as the one from the Directive.

Explanations on the legal requirements and limits:

• This provision permits the modification of a contract where the financial value of the modification is low and the modification does not alter the overall nature of the contract.

• The financial value of the modification must satisfy both financial conditions, which means that it must be:

(a) below the relevant EU financial threshold for the contract in question, and

(b) less than 10% of the initial contract value of a services/supplies contract or less than 15% of the initial contract value of a works contract.

• This provision does not apply to the value of each modification, but to the cumulative value of all modifications. When the contract includes an indexation clause, for the purpose of calculating the price, the updated price, increased according to the indexation clause, will be the reference value.

Case law and/or recitals:

• The Directive generally reiterates the rules laid down in the C-454/06 *pressetext Nachrichtenagentur* case, and it states that contracts may be modified where the modifications are not substantial.

- paragraph 34: „In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive … when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98 Commission of the European Communities and French Republic[13], paragraphs 44 and 46)".

[13] Case 337/98 Commission of the European Communities and French Republic available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=45714&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=762346 retrieved on December 10, 2017. Paragraph 44: „Accordingly, it must be considered whether the negotiations opened after 22 September 1995 were substantially different in character from those already conducted and were, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, so that the application of the provisions of Directive 93/38 might be justified", and paragraph 46: „It follows that, in the present case, it is for the Commission to adduce all such evidence as is necessary to prove that fresh negotiations were commenced after 22 September 1995 and were such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, which would justify the application of the provisions of Directive 93/98".

6. Any other modification will be allowed if it is not substantial

Legal provisions:

• Directive 2014/24/EU art. 72 (1)(e): „where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4".

• Directive 2014/24/EU art. 72 (4): "A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

(b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(c) the modification extends the scope of the contract or framework agreement considerably;

(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1".

• Law no. 98/16, art. 221 (1)(e) and (7) – the same content as the one from the Directive.

Explanations on the legal requirements and limits:

• Therefore, in addition to the modifications permitted specifically to the contract described above, all other modifications that are not substantial are also permitted, regardless of their value. When the needs of a contracting authority can no longer be satisfied and substantial modifications to the contract are highly needed, the only option is to terminate the contract and to do a new procurement procedure.

• In order to consider a modification as being substantial few conditions must be reached:

- the new conditions would have allowed the admission of other candidates, the acceptance of another tender, or would have brought additional participants to the initial procurement procedure.

- the modification changes the economic balance (e.g. price or risks of incurring penalty payments) of the contract in favour of the contractor in a manner which was not provided for in the initial contract. If the modification is in favour of the contracting authority, than it will not be substantial.

- the modification extends the scope of the contract considerably to encompass quantitatively or qualitatively goods, works or services which were not covered by the initial contract.

- when a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided in the category no. 4.

Case law and/or recitals:

- Recital 107 of the Directive clarifies this definition:

„A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure."

- In C-91/08 *Wall AG and La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs - und Service (FES) GmbH*[14] the CJEU applied the principles established in C-454/06 *pressetext Nachrichtenagentur* to a service concession contract that was subject only to Treaty principles. CJEU decided that a change of sub-contractor could, in exceptional cases, constitute an amendment to one of the essential provisions of a concession contract. This exception could be made when the nature of the contract meant that the use of a particular sub-contractor was a decisive factor in the award of the contract.

- paragraph 37: „In order to ensure transparency of procedures and equal treatment of tenderers, substantial amendments to essential provisions of a service concession contract could in certain cases require the award of a new concession contract, if they are materially different in character from the original contract and are therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, by analogy with public contracts, Case C-337/98 Commission v France, paragraphs 44 and 46, and Case C-454/06 pressetext Nachrichtenagentur, paragraph 34)".

- paragraph 38: „An amendment to a service concession contract during its currency may be regarded as substantial if it introduces conditions which, if they had been part of the original award procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of an offer other than that originally accepted (see, by analogy, pressetext Nachrichtenagentur, paragraph 35)".

[14] Case 91/08 Wall AG and La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs - und Service (FES) GmbH available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=80959&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=654779 retrieved on December 10, 2017.

- paragraph 39 „A change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain".

• In addition C-454/06 *pressetext Nachrichtenagentur* helps us to understand the circumstances to replace a contractor:

- paragraph 39: „By its first question, the Bundesvergabeamt is referring to the transfer to APA-OTS in 2000 of the OTS services hitherto provided by APA. It asks, essentially, whether a change in the contractual partner, in circumstances such as those at issue in the main proceedings, is a new award of contract..."

- paragraph 40: „As a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question, unless that substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting."

• What constitutes a „considerable extension" of a contract was deliberated by the CJEU in *Case C-160/08, Commission and Germany*, which concerned a contract for ambulance services. The CJEU emphasised that the value of the extension was considerably higher than the threshold value for a services contract.

- paragraph 42: „The extension of the subject-matter of the proceedings therefore lies in the fact that a breach of the principle of non-discrimination and the requirement of transparency, which stem from freedom of establishment and freedom to provide services, is now also being alleged in connection with the award of mixed ambulance services where the transport character predominates. In this respect the present action must be declared inadmissible".

- paragraph 69: "Lastly, the argument of the possibility, often provided for under the law of the *Länder*, of appointing ambulance service personnel as administrative enforcement officers cannot be accepted because it is clear from the Court's case-law that the extension of the exception allowed by Articles 45 EC and 55 EC to an entire profession is not possible when the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole."

- paragraph 134: „It is clear from the documents submitted by the German Government and from its observations that in 2004 the public contract was extended to include the provision of public ambulance services in the area of the Bevensen ambulance station, which accounts for around one quarter of the total area of the administrative district. Furthermore, the Federal Republic of Germany acknowledges that the value of the contract for the entire administrative district of Uelzen amounts to around EUR 4 450 000 per year and that the value of the ambulance services to be provided in the area of operation of Bevensen ambulance station amounts to at least EUR 670 000 per year."

- paragraph 135: „The contractual amendments negotiated between the Administrative District of Uelzen and the DRK in 2004 have therefore meant that the contract for the provision of ambulance services has been extended to an additional area in the administrative district, as a result of which the total area of operation increased by around 25% and the total value of the contract rose by at least 15%. The amendments to the contract negotiated in 2004 are therefore to be regarded as material, with the result that this process is to be seen as a new award of public ambulance contracts in the entire administrative district which was subject to Directive 92/50. This assessment is not affected by the – undocumented – information provided by the Federal Republic of Germany regarding the takeover of the ambulance service operated by another service provider."

In addition to the modification situations stated above, the public procurement contract, as any other administrative contract, may enclose a contracting authority withdraw clause. This clause gives the possibility to the contracting authority to renounce to the contract before the termination of it. But, the Directive 2014/24/EU in art. 73 establishes conditions under which it can terminate a contract, such as:

(a) the contract has been subject to a substantial modification, which would have required a new procurement procedure;

(b) the contractor has, at the time of contract award, been in one of the exclusion situations and should not be accepted to the procurement procedure;

(c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and this Directive that has been declared by the Court of Justice of the European Union.

As a general rule modification and termination of contract would be legally allowed only if it was expressly mentioned in the procurement documents. Based on this assumption, the mandatory, within the above mentioned conditions, and the specific clauses can be modified if all possible participants could find out about it since the beginning of the public procurement process. The new laws on the modification of contracts during their implementation keep a pro-competitive orientation and set a framework that, when is properly applied, can minimise internal market distortions. However, when it comes to the issue of contractual extensions and the award of additional works Directive 2014/24/EU lightens the enactment.

4. Conclusions

European Union laws on public procurement have a fundamental internal market dimension through the competition regime of the goods and services established. Even if the free movement of goods and services started since 1960, on procurement the last three generations of Directives (2004, 2007, 2009 and 2014) could enact them. However, the European legislator thought on economic operators when passed them they impacted more contracting authorities.

Within this article we did not aim to provide an exhaustive comparison of all issues dealt by the public procurement Directives and Romanian law, or to give a

full account of all their provisions; rather, we highlighted some important contract clauses as key topics in public procurement procedure. We did an analysis of the necessity to include in the contract some clauses which could help the contracting authority in the management of it, and to which the interested parties should refer to if they decide to start a career in public procurement. Public procurement is a strategic tool for public sector authorities and consequently for the public interest. Therefore, is in the public sector interest and the wider public to ensure the right leadership and technical expertise to deal with the public procurements process.

The package of the Directives on public procurement have thereabouts similar provisions on the contract clauses, moreover we used the case law from all of the EU provisions in the field. The Directives provided to contracting authorities the possibility to run procurements faster, with less red tape, and more focused on getting the right tenderer. Even so, the lack of legal technicity in procurement could be fatal for the entire process and a new procedure it might be necessary to commence.

Beyond our hypothesis we managed to demonstrate the necessity to distinguish between mandatory and specific clauses, even if in the article we did not revise the contract's specific clauses because we considered that they should be established by the contracting authority, based on their needs and on the public interest which they represents. We also consider auspicious the decision of the European legislator to do not include restrictive provisions about them. But this does not mean the contracting authorities are legally free to establish clauses about any aspect of goods, services and works. For example, they have to subside any procurement decision to the principle of non-discrimination on ground of nationality, the principle of equal treatment of tenderers and the obligation of transparency (see, to that effect, C-454/06 pressetext Nachrichtenagentur, paraghraph 32; Case C-275/98 Unitron Scandinavia[15], paragraph 31; Case C-324/98 Telaustria and Telefonadress[16], paragraphs 60 and 61; and Case C-496/99 P Commission v CAS Succhi di Frutta[17], paragraphs 108 and 109). Moreover, for a sustainable environment certain limits are established e.g. whether or not to take environmental considerations into account for choosing the economically most advantageous tender overall and include it as specific clause in the contract was addressed by the CJEU in the Case

[15] Case C-275/98 Unitron Scandinavia A/S, 3-S A/S, Danske Svineproducenters serviceselskab, and Ministeriet for Fødevarer, Landbrug og Fiskeri vailable at http://curia.europa.eu/juris/document/document.jsf?text=&docid=44849&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=665566 retrieved on December 15, 2017.

[16] Case C-324/98 Telaustria Verlags GmbH, Telefonadress GmbH and Telekom Austria AG, formerly Post & Telekom Austria AG, joined party: Herold Business Data AG available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=45859&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=665823 retrieved on December 15, 2017.

[17] Case C-496/99 P Commission of the European Communities and CAS Succhi di Frutta SpA, established in Castagnaro (Italy), appeal against the judgment of the Court of First Instance of the European Communities (Second Chamber) in Joined Cases T-191/96 and T-106/97 CAS Succhi di Frutta v Commission [1999] ECR II-3181 available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49126&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=666172 retrieved on December 15, 2017.

513/99 Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab, and Helsingin kaupunki, HKL-Bussiliikenne, paragraphs 27, 59 and 62-69[18].

The purpose of the EU procurement rules reflects the best mix quality and effectiveness which could be achieved through competition. As it concerns the contract management and more on the specific clause we will review them in a further article which will present in detail the monitoring system which any contracting authority should develop it order to reach public procurement performance.

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[18] Case 513/99 Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab, and Helsingin kaupunki, HKL-Bussiliikenne available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid= 47670 &pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=635202 retrieved on December 7, 2017.

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