

**REMARKS CONCERNING AMENDMENTS  
BROUGHT IN 2017 TO ROMANIAN LEGISLATION  
IN THE FIELD OF PROCUREMENT**

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**ABSTRACT:** *In 2016 Romania transposed in its national legislation the directives contained in the EU legislative package, through which was realized a reform in the field of public procurement at the level of the European Union, whereas in 2017 several tertiary regulations for their enforcement were adopted. Approximately one year and a half following the enforcement of the new norms and procedures, several subsequent problems from their content had been identified, in addition to the problems that arose from their application.*

*In order to solve these issues, the Romanian Government adopted, in December 2017, three Emergency Ordinances (no. 98/2017, no.104/2017 and no. 107/2017), thus modifying substantially the primary legislation in the field of public procurement, practically rewriting the regulation of the public-private partnership and establishing new rules aiming at the ex-ante control for the award of public procurement contracts/framework agreements, as well as for the award of sectoral contracts and for the award of public works concession contracts and public services concession contracts.*

*In this study we will try to analyse the modifications, both a topicality and an important subject, emphasizing the deficiencies and finding possible steps forward.*

**KEYWORDS:** *public procurement; sectoral public procurement; concession contracts; remedies; appeals concerning the award of public procurement contracts; ex-ante control; public-private partnership; Emergency Ordinances; Romania.*

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## **1. INTRODUCTION**

A century after the Great Union of 1918, and 11 years after the accession to the European Union bringing along an inherent immersion in its values, it may be stated that the Romanian legislative system is consolidated and harmonized with the European one, and the fluctuations aiming at its norms are also in accordance with the European trend, especially in the fields whose regulation is in the area of responsibility of the European

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Union's authorities<sup>1</sup>. Such a field, bearing a great deal of importance from its power to transform society and its functioning mechanisms, but also from the efficient use of public funds, from ensuring a transparent process and open markets economies with free competition, in the entire European Union, is the field of public procurement.

Successive reforms took place constantly both at the European and at the national level<sup>2</sup>, precisely in order to adapt the regulation of the field to the evolution of the factors which bear a decisive influence upon it, as well as to adjust it to the relevant case-law of the Court of Justice of the European Union<sup>3</sup>. It is necessary to underline, for those who are not familiar to the European decision-making and regulation mechanisms, that Romania, like the other Member States, is integral part to those mechanisms and their functioning, as well as by its citizens, through public consultations<sup>4</sup>, and institutionally.

The latter of these major reforms took place in 2014, after 10 years of enforcement, monitoring and evaluation of the former legislation in the field of public procurement. It would have been desirable for this reform to bring along a simplification of legislation, in order to debureaucratize and to simplify procedures<sup>5</sup>, but also in order to increase the understanding and the application of the norms. Unfortunately, this was not fully realised, therefore the European Parliament and the Council adopted a *legislative package* containing three new Directives, 2014/23/EU<sup>6</sup> (concessions), 2014/24/EU<sup>7</sup> (classic), 2014/25/EU<sup>8</sup> (sectorial), subsequently completed by a new directive on electronic invoicing in public procurement<sup>9</sup>, while establishing that Directive 2007/66/EC<sup>10</sup>, respectively the Remedies Directives, remain applicable.

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<sup>2</sup> For an analysis of the context leading to the reform in the area of Public Procurement, please refer to: (Kunzlik, 2013); for a further analysis of the reforms in this field, please refer to: (Alexe, 2017).

<sup>3</sup> Regarding the importance of the European Court of Justice jurisprudence on the matter, please refer to (Bovis & H, 2006). For an up-to-date case law of the Court of Justice of the European Union, with bibliographical suggestions and comments, please refer to the website of Prof. *Albert Sánchez Graells*: (Anon., fără an); for in-depth analyses, please refer to: (Arrowsmith, 2014).

<sup>4</sup> For some details, please refer to: *Mihai Șandru* (coord.), *Poziție comună referitoare la "Cartea Verde privind modernizarea politicii UE în domeniul achizițiilor publice Către o piață europeană a achizițiilor publice mai performantă"* (proiect cercetare CSDE în Seria Consultări Europene: „Modernizarea pieței europene a achizițiilor publice” (CSDE-SCE-22) – februarie – aprilie 2011), disponibil la (Anon., fără an); (Alexe, 2015). For an analysis concerning the EU competences after the adoption of the Lisbon Treaty, please refer to: (Lazăr, 2010).

<sup>5</sup> For the necessity to simplify legislation through directives, please refer to (Șandru, 2015).

<sup>6</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p.1.

<sup>7</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p.65.

<sup>8</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p.243.

<sup>9</sup> Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement, OJ L 133, 6.5.2014, p.1.

<sup>10</sup> Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20.12.2007, p.31.

Romania adopted, in 2016, three laws and three Government Decisions, through which it transposed the new directives, within a reasonable period of time<sup>11</sup>, as well as a fourth law transposing the Remedies Directives. Also, in the same year, 2016, the Parliament adopted a law<sup>12</sup> which institutes a new mechanism for the prevention of the conflict of interest in the award of public procurement contracts, which offered to the National Integrity Agency the legal basis to constitute an integrated computer-based system for the prevention and the identification of any potential conflict of interest, called the Prevention System. Also, given the necessity to regulate another field, strongly linked to the one of public procurement, a special law was adopted in 2016, establishing the norms aiming at the public-private partnership<sup>13</sup>, especially to emphasize the distinction between the regime of the concessions and the one of the public-private partnership. Last, but not least, between 2015-2016 has been established the legal framework and the organizational regulations for the competent authorities to coordinate, in a sustained and efficient manner, the field of public procurement<sup>14</sup>.

The extent of the correctness of the transposition or enforcement of the European directives in the field of public procurement has been debated in the public sphere, in the doctrine and in the professional environment, even during the debates that took place in the Romanian Parliament, throughout the procedure for the adoption of the aforementioned laws. Even more so, more than one year after their enforcement, arose the necessity to correlate certain texts, as well as to regulate, nuance or abrogate other, in order to ensure on one hand that the transposition process of the European legislation reflects closely the regulatory intention of the European lawmaker, while on the other hand to ensure that the public procurement procedures are coherent, flexible and avoid doubt and contradiction in their interpretation.

We think that, at the national level, there was a certain amount of preoccupation regarding the reparation of the errors and of the deficiencies linked to the transposition, interpretation and enforcement of the legislation. Besides, the preoccupation of the competent authorities, at the European scale included, to professionalize the field of public procurement, is of great actuality<sup>15</sup>. This trend is of topicality for encouraging large-scale investments in infrastructure, inclusively by an *ex ante* control<sup>16</sup>, or to use

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<sup>11</sup> The two-year deadline given to European Union's Member States for transposing the directives, was overdue in 18 April 2016, but all the six normative acts were adopted by the end of 2016

<sup>12</sup> Law no.184/2016, on instituting a conflict of interest prevention mechanism in the award of public procurement contracts, was published in the Official Journal of Romania, Part I, no. 831 of 20 October 2016..

<sup>13</sup> Law no. 233/2016, on public-private partnership, was published in the Official Journal of Romania, Part I, no. 954 of 25 November 2016.

<sup>14</sup> We hereby make reference to the Government Emergency Ordinance no. 13/2015 on the creation, organization and functioning of the National Agency for Public Procurement, published in the Official Journal of Romania, Part I, no. 954 of 25 November 2016, amended in 2016 by the Law no. 98/2016 on public procurement, as well as to Government Decision 634/2015 on the organization and functioning of the National Agency for Public Procurement, published in the Official Journal of Romania, Part I, no. 645 of 25 August 2015, amended in 2016 by the Government Decision no. 774/2016.

<sup>15</sup> C(2017) 6654 final - Commission Recommendation (EU) 2017/1805 of 3 October 2017 on the professionalisation of public procurement — Building an architecture for the professionalisation of public procurement; the text is available at (Anon., fără an).

<sup>16</sup> COM(2017) 573 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Helping investment through a

public funds in a strategic, efficient and sustainable<sup>17</sup> way, in order to lead to the realisation of the goals for which the normative acts have been adopted, and to stimulate fair competition on the Single Market, as well as to ensure quality services for all citizens from the European Union.

We should also underline that, in December 2017, the Government chose to modify and to complete, through three Government Emergency Ordinances<sup>18</sup>, all of the aforementioned national normative acts of superior level, aiming at the field of public procurement, the organisation and the functioning of the National Agency for Public Procurement included, and the realisation of the *ex-ante* or *ex-post* control, respectively the public-private partnership. To what concerns the chosen mean of regulation, the Government Emergency Ordinance, as well as the main modifications adduced by the three normative acts will make subject of our critical opinions in the following sections.

## 2. PUBLIC PROCUREMENT

Romania adopted, in 2016, two national transposition measures of Directive 2014/24/EU: the Law no. 98/2016 on public procurement<sup>19</sup> and the Government Decision no. 395/2016<sup>20</sup>. At the same time, through the Government Emergency Ordinance no. 107/2017<sup>21</sup>, substantial modifications have been brought to Law no. 98/2016 – 101/2016, as well as to the Government Emergency Ordinance no. 13/2015, adopting transitional measures regarding the ongoing awarding procedures at the enforcement date of the normative act, the applicable law regarding the contestations, conditions and procedure, lawsuits and requests before the National Council for Solving Complaints or, according to circumstances, the courts of law, respectively regarding price adjustment/revision of concluded contracts or subsequent contracts.

We hereby underline that, in the case in which the Government of Romania uses the institution of delegation of legislative powers provided in the art. 115(4) from the Romanian Constitution and adopts Government Emergency Ordinances, the conditions stated in the aforementioned text need to be met. Those refer both to the existence of extraordinary circumstances, whose regulation cannot be delayed, as well as to the obligation of the Government to provide the rationale of the emergency in its content. Analysing the Government Emergency Ordinance no. 107/2017, we may observe that the issuer of the act declares, without proper motivation – constitutionally speaking - the

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voluntary *ex-ante* assessment of the procurement aspects for large infrastructure projects; the text is available at (Anon., fără an).

<sup>17</sup> COM(2017) 572 final - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Making Public Procurement work in and for Europe; the text is available at (Anon., fără an).

<sup>18</sup> Government Emergency Ordinances no. 98/2017, no.104/2017 and no.107/2017.

<sup>19</sup> Law no.98/2016 on public procurement, published in the Official Journal of Romania, Part I, no. 390, of 23 mai 2016.

<sup>20</sup> Government Decision no. 395/2016 on the approval of the Methodological Standards of the provisions on the award of a public procurement contract/framework agreement, published in the Official Journal of Romania, Part I, no.423 of 6 June 2016.

<sup>21</sup> Government Emergency Ordinance no.107/2017 for amending and completing certain normative acts with effect in the field of public procurement, published in the Official Journal of Romania, Part I, no. 1022, 22 December 2017.

emergency of the regulation, trying to justify its necessity by showing its own lack of administrative capacity or by referring to the necessity of correlating previously adopted legislative measures, another reason invoked being the lengthiness of the regular adoption process of a law. Also, it is mentioned that the laws modified through this normative act have been adopted by the Parliament through an emergency procedure during which a new series of provisions were introduced, requiring immediate correlation. We stress that such a justification is not in accordance with the constitutional text, even though it corresponds to a certain extent to the general public interest, given that the appeal to the institution of the legislative delegation, by adopting Government Emergency Ordinances without duly fulfilling the constitutional requirements<sup>22</sup> practically makes its scope forlorn. Grounding the necessity of a Government Emergency Ordinance on the fact that the Parliament had previously adopted the laws through the emergency procedure that the Government itself has requested has multiple pernicious effects, including the avoidance of the public consultation process<sup>23</sup>, jeopardizing transparency in decision-making processes, and having *in extenso* an effect on the equilibrium and separation of powers. It is all the more difficult to understand the resort to such a solution, given that the Parliament was in legislative session at the adoption date of the Government Emergency Ordinance, and that the Government was backed up by a consistent parliamentary majority.

The main modifications brought by the discussed normative act to the Law no. 98/2016 are underlined in the presentation and the explanatory statement<sup>24</sup> of the bill for its approval. In a comparative analysis of the two documents, the initial and the amended text, we enhance that both of them concern the correlation of the norms, notions' explanation, a more reliable transposition of the provisions of the directive<sup>25</sup>, as well as the abrogation of some texts. We will not analyse in detail the 41 points contained in the text of art. 1 of the Government Emergency Ordinance, through which the discussed law was amended, given their impressive number, but also because they have been argued and detailed for each article, in the rationale.

However, we chose to emphasize the taxonomy of the modifications, but we will also provide some concrete examples:

a) the clarification of the concepts and procedures and their simplification: art.4 (1) c), art.4(3), art.19, art.28(1) and (2), art.33, art. 53, art.68, art.109 (3), art.111 (1) and (4), art.113 (4)<sup>1</sup> – newly introduced, art.114, art.131 (1) a), art.153 (1) .a), art.160 (1) and (2), art.175 (2) a), art.176 (1), art.187 (8) b), art.193 (2) and (3), art.200 (1), art.212 (1) b),

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<sup>22</sup> For example, in the preamble of the normative act it is specified that "The aspects... are constitutive of emergency situations", although we already proved that the constitutional text imposes the obligation to justify the emergency of extraordinary circumstances, not of emergency situations.

<sup>23</sup> In this specific case, there were public debates ever since May 2017, several months prior to the adoption of the Government Emergency Ordinance, but this fact can only reinforce the opinions regarding the non-existence of an extraordinary circumstance, constitutionally speaking, and invoked its own lack of administrative competence in order to avoid the parliamentary debate. For further details, please refer to, **Irina Alexe**, *op.cit.*, supra 2, pp.22-23.

<sup>24</sup> The document is available at (Anon., fără an).

<sup>25</sup> For the critic on the transposition of the directives through Government Emergency Ordinances please refer to (Alexe & Banu, 2016); the study's conclusions underline that in all Member States is preferable the transposition of the directive through a law, debated and assumed in the Parliament and not through Government Emergency Ordinances, like in the case of the aforementioned normative act.

art.213 (2), art.214 (2) and (3), art.215 (2) b) and art.224 (1) i). As an example, we refer to the fact that the procedures that can apply to the award of individual lots under the provisions of art. 19 of the law are expressly provided for, respectively the simplified procedure/direct procurement.

Also, any reference regarding subcontractors and third parties was eliminated in order to avoid confusion, but also because they are not part of the category of participants in the award procedure. Another example aiming at ensuring clarity of the norms regulating the clarification of the contracting authority's obligations in the case of the award of public procurement contracts/framework agreements concerning social services and other specific services provided for in *annex* no.2 of the law. Also, to what concerns these contracts, it is clarified that exclusively the best quality-price ratio, or the best quality-cost ratio will be used as eligibility criteria, taking into account the quality and sustainability criteria of the social services. Also, deadlines for inquiries and their answer on clarifications on the documentation of the public procurement have been clearly established, existing nonetheless serious doubts regarding the applicability of this new mechanism which, in spite of increasing the amount of rigour for economic operators, will generate new ground for contestation due to the fact that often a unique response does not suffice, thus generating several exchanges. A last example concerns the clarification of the fact that framework agreements can be also awarded through a simplified procedure.

b) a more accurate, exact and complete<sup>26</sup> transposition of the provisions of the directive<sup>27</sup>, respectively of the Commission Implementing Regulation 2016/7/EU<sup>28</sup>: art.4 (1) c), art.4 (3), art.6 (3) b), art.7 (1) b<sup>1</sup> – newly introduced, art.28 (1) and (2), art.55 (1), art.104 (1), a) and c),<sup>29</sup> art.167 (4) – abrogated, art.176 (1), art.182 (2), art.193 (2) and (3), art.200 (1), art.210 (1), art.215 (3) – (6) and (5<sup>1</sup>) – newly introduced and art.221 (1), d) iii). We make reference, for example, to the clarifications of the concepts of admissible, inadmissible and non-compliant offers, as well as inadequate requests to participate, respectively the concept of public organism, integrating the explanations included in consideration no.10 of the Directive's preamble, or the concept of association created by one/several contracting authorities. Another example aims at the complete transposition of the provisions concerning the threshold provided for in art. 4 of the directive and ensures a greater flexibility of the procedures in the case of local contracting authorities provided for in art. 23 of Law of local public administration, no. 215/2001, and to those subordinated to them. In this manner, if the threshold is below 929.089 RON, these authorities will undergo a simplified procedure. Another example concerns the regulation of the necessity to amend the European Single Procurement Document by third party (parties), as well as by subcontractors, in order to ensure the concordance with the

<sup>26</sup> On the methodological aspects of the directive with regards to its transposition, its enforcement, its application, its implementation, as well as on the extent of the correctness of the transposition, please refer to (Banu, fără an).

<sup>27</sup> We appreciate that, in most of the cases, in order to have an accurate understanding of the concepts it is necessary to analyse the legislative act of the European Union in close correlation with the text of the preamble of the respective norm.

<sup>28</sup> Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document, available at (Anon., fără an)

<sup>29</sup> For the interpretation and the application of art. 104 (1) c), please refer to Cluj Court of Appeal, third chamber of administrative and tax disputes, decision no. 324/2017, available at (Anon., fără an)

regulations. The last example we would like to emphasize aims at ensuring the concordance with the provisions of the regulation, in such a manner that the contracting authority requests to the bidder/candidate to precise the identification data of the proposed subcontractors, only if they are known at the time of the tender or of the request to participate.

c) the correlation of the texts of the normative act, between each other as well as with the newly introduced ones: art.6 (3) b), art.7 (1) b<sup>1</sup> – newly introduced, art.7 (1), art.109 (3), art.113 (4<sup>1</sup>) – newly introduced, art.131 (1) a), art.153 (1) a), art.161, art.182 (2), art.182 (5) – abrogated and art.207 (1) b). For example, the provisions of art.7 (1) are correlated with the texts of art.7 (2) and of art.113 (1) of the law, clarifying the conditions and the means of implementation of the simplified procedure. Another example concerns the regulation, through art.131, of the last stage of e-tendering as part of a simplified procedure. We would also like to take note of the correlation realized between art. 207(1) b), providing the exclusion criteria, and the text of art.172 (1), establishing the criteria concerning the capacity.

d) correlating the text of the Law no. 98/2016 with the one of the Law no.99/2016<sup>30</sup>: art.19, art.68<sup>31</sup>, art.111 (1) and (4), art.113 (4<sup>1</sup>) – newly introduced, art.175 (2) a), art.193 (2) and (3), art.213 (2), art.214 (2) and (3), art.215 (2) b) and art.224 (1) i). A first example concerns the text of art.19, clarifying the exception in which the contracting authority may apply the simplified procedure or direct procurement, for individual lots, when the conditions imposed by the law are cumulatively fulfilled; the new text is correlated with art.24 of Law no. 99/2016. Another example concerns the correlation between the newly introduced text of art.113 (4<sup>1</sup>) – through which, for the contracting authority was provided the right to decide upon the organization of a final stage of a certain e-tendering in the case of a one-stage simplified procedure, on the condition that this be mentioned in the simplified notice and in the tender documents – with the newly introduced text for art.126 (4<sup>1</sup>) from Law no. 99/2016, while a last example concerns the text of art.231 (2), establishing the five-day term for the contracting authority to publish the cancellation notice of the award procedure, while the unitary approach is modified accordingly to the text of art.226 (2) of Law no.99/2016.

e) the abrogation of the norms generating confusions or enforcement difficulties or that contravened either to the directive, or to the jurisprudence of the High Court of Cassation and Justice of Romania<sup>32</sup> : art.113 (2) and (3), art.167 (4)<sup>33</sup>, art.182 (5) and

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<sup>30</sup> Law no. 99/2016 on sectoral public procurement, published in the Official Journal of Romania, Part I, no. 391 of 23 May 2016.

<sup>31</sup> In this respect, please refer to, for example: Bucharest Municipal Court, second chamber of administrative and tax disputes, available at (Anon., fără an).

<sup>32</sup> In the explanatory statement previously mentioned in *supra* 24, in order to justify the abrogation of art.225 from the Law no.98/2016, it is mentioned the "decision of the High Court of Cassation and Justice" no.3402/2014 in the case file 21001/3/2012."

<sup>33</sup> For an interpretation of this article, please refer to eight chamber of administrative and tax disputes, decision no. 1500/2017, available at [rolii.ro](http://rolii.ro) (Anon., fără an). In other situations the courts enforced the provisions without referring to the interpretations Cluj court of Appeal, third chamber of administrative and tax disputes decision no. 3434/2017 available at: (Anon., fără an). In another lawsuit, ruled by the Court of Appeal of Craiova, was invoked an exception of unconstitutionality [Secția de Contencios Administrativ și Fiscal, Decizia nr. 1326/2017, available at [rolii.ro](http://rolii.ro) (Anon., fără an)], the instance admitting the request, and the legislative solution was criticized in relation with the directive's transposition.

art.225. For example, we refer to the abrogated text of art.113 (2) which, contrary to the spirit of the law, had an adverse effect on the possibility of SMEs to participate in simplified procedures, respectively to the abrogated text of art.167 (4), which restricted the participation in the award procedure for bidders subjected to some judicial investigation procedures for felony, but who have not yet been subject to a definitive sentencing; the text we make reference to was contravening both the norms of the directive and the constitutional provisions, with regards to the presumption of innocence.

We already mentioned that, to what concerns the modifications made to the law on public procurement in 2017, through the analysed normative act, are applicable transitional measures provided for in art. VI-VIII of the Government Emergency Ordinance, regarding the ongoing attribution procedures at the date of enforcement of the normative act, the applicable law regulating the appeal conditions and procedure, the trials and requests in discussion before the National Council for Solving Complaints or, if necessary, before the courts of law, respectively the conditions regarding concluded or subsequent contracts' price adjustment/revision.

It is obvious that, in spite of the fact that the Government Emergency Ordinance does not expressly include any mention of this kind and does not establish a deadline, the Government should have already prepared the Government Decision draft project for amending the Methodological Standards for the enforcement of the provisions concerning the award of a public procurement contract/framework agreement of Law no. 98/2016 on law on public procurement, approved by Government Decision no. 395/2016, in order to ensure that the provisions are in accordance with the primary legislation, even more so that the amendments to the primary legislations have been adopted through a Government Emergency Ordinance, in force at its publication date in the Official Journal of Romania. However, by consulting the website<sup>34</sup> of the National Agency for Public Procurement<sup>35</sup> we failed to identify any document concerning a project with such a regulatory purpose.

### 3. SECTORAL PUBLIC PROCUREMENT

The Directive 2014/25/EU providing specific norms on procurement by entities operating in the water, energy, transport and postal services sectors, constitutes, as we underlined, the second most important act from the legislative package on public procurement, its provisions being transposed in Romania by the Law no. 99/2016 and by the Government Decision no. 394/2016<sup>36</sup>.

For the same reasons, previously mentioned, for which the Law no. 98/2016 was amended, through the same Government Emergency Ordinance, according to its art. II amending and completing the Law no. 99/2016, thus being necessary a more accurate transposition of the provisions of Directive 2014/25/EU, as well the correlate of some texts on public procurement with those on sectoral public procurement. We will not repeat

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<sup>34</sup> The date at which the legislation was last updated, as well as the date at which the mentioned websites were last consulted is 2 January 2018.

<sup>35</sup> The official website of the National Agency for Public Procurement is (Anon., fără an).

<sup>36</sup> Government Decision no.394/2016 for the approval of the Methodological Standards of the provisions regarding the award of a sectoral public procurement contract/framework agreement of the Law no.99/2016 on sectoral public procurement, published in the Official Journal of Romania, Part I, no.422 of 6 June 2016.

here critical aspects earlier presented, which are also pertinent for the modification of this normative act on sectoral public procurement.

The 51 amendments made to Law no. 99/2016 have already been argued and detailed for each article, in the rationale, and their typology is similar to those of the amendments made to the law on public procurement. Given that within the analysis of the amendments on Law no. 98/2016 we exemplified in greater detail the categories of amendments, and given that those are for the most part also applicable to the Law no. 99/2016, we will hereby mention only one example for each of the typologies of amendments brought to the law on sectoral public procurement, emphasized as follows:

a) the clarification of the concepts and procedures and their simplification: art.3 (1) e) r), bb), jj) and ccc), art.4 (1) a), art.5 (2), art.6 (2), art.12 (1), art.17 a), art.24, art.66, art.80 (2) a), art.82 (1<sup>1</sup>) - newly introduced, art.117 (1) a) and d), art.127, art.173, art.197 (2), art.199, art.201, art.219 (1) b), art.226 (2), art.227 (2) and (3), art.228 (3) - (6) and (5<sup>1</sup>) – newly introduced, art.245 (2) introductory part and g). The given example is the text of art.188 (2) a), according to which it is clarified the fact that, in the case of a procedure underwent for the conclusion of a framework agreement, the condition regarding the modicum of the annual revenue is reported to the estimated value of the biggest subsequent contract, when the maximum anticipated value of the subsequent contracts' which are yet to be simultaneously executed is unknown.

b) a more accurate, exact and complete transposition of the provisions of the directive, respectively of the Commission Implementing Regulation 2016/7/EU: art.3 (1) e), bb) and jj), art.4 (1) a), art.5 (2), art.6 (2), art.7 (3), art.12 (1), art.17 a), art.38, art.67 (2), art.68 (1), art.80 (2) a), art.195 (1), art.202 (2) and (3), art.228 (3) - (6) and (5<sup>1</sup>) – newly introduced, art.240 (1) c). The given example refers to the text of art.80 (2) a), ensuring an accurate transposition of the text of the directive and eliminating the contradiction of terms between an invitation to the competitive tendering/confirmation of interest and the procurement notice.

c) the correlation of the texts of the normative act, between each other as well as with the newly introduced ones: art.12 (1), (2<sup>1</sup>) – newly introduced and (5) – newly introduced, art.17 a), art.82 (1), art.82 (1<sup>1</sup>) - newly introduced, art.95 (4), art.126 (11) b), art.126 (4<sup>1</sup>) – newly introduced, art.127, art.173, art.188 (2) a), art.189 (1), art.196 (2) and (5) – abrogated, art.209 (10), art.228 (3) - (6) and (5<sup>1</sup>) – newly introduced. The given example refers precisely to the latter invoked texts, concerning art. 228, in which due to the amendments brought to (3)-(6), was necessary the introduction of a new paragraph, (5<sup>1</sup>), in order to explain the situations in which the tender needs to be considered inappropriate.

d) correlating the text of the Law no.99/2016 with the one of the Law no.98/2016: art.24, art.51 d), art.68, art.82 (1), art.124 (1) and (4), art.126 (4<sup>1</sup>), art.189 (1), art.202 (2) and (3), art.226 (2), art.227 (2) and (3), art.228 (2) b) and art.245 (2) introductory part and g), as well as art.245 (2) m). Another example not mentioned previously in the analysis of the correlation of the text of the Law no. 98/2016 with the one of the Law no.99/2016 concerns the text of art.245 (2) m), newly introduced, establishing a new convention for infringement of the provision of art.2 from the law on sectoral public procurement, in order to have a sentencing regime similar to the one instituted through the law on public procurement.

e) the abrogation of the norms generating confusions or enforcement difficulties or that contravened to the directive: art.4 (1) d), art.6 (3), art.126 (12) and (13), art.196 (5)

and art.246. The given example refers to the text of the art.196 (5), concerning the fact that „in the case in which the third party/ies is/are through untransferable resources, the commitment ensures to the contracting authority the fulfillment of the assumed obligations if particular difficulties appeared during the performance of the contract”.

These norms do not have a correspondent in the directive and thus the text became obsolete to what concerns the amendments operated in the text of art.196 (2),the unmodified text of the art.198 from the law.

We hereby reiterate the fact that in this case as well, the transitional measures included in art. VI-VIII of the Government Emergency Ordinance no. 109/2017 are applicable. We would like to point out that some amendments of the Methodological Standards for the enforcement of the provisions concerning the award of a sectoral public procurement contract/framework agreement of the Law no. 99/2016 concerning sectoral public procurement, adopted through Government Decision no. 394/2016 are necessary, but we yet failed to identify any draft of a project concerning such a regulatory purpose.

#### 4. CONCESSIONS

Along with the classic and the sectoral directives and in complementarity with the two of them, in the 2016 legislative package aiming to reform the European field of public procurement was promoted and adopted the first directive exclusively aiming at the award of concession contracts: Directive 2014/23/EU. Romania transposed the European Act through the Law no.100/2014 on public works concessions and services concessions<sup>37</sup>, and for the enforcement of some provisions of this law methodological standards were adopted through Government Decision no. 867/2016<sup>38</sup>.

The four amendments brought by Government Emergency Ordinance no. 107/2017 to Law no.100/2016, provided for in its art. III, aim, on the one hand, to the coherence of the text, like the one proposed in art.2 (1) d), methodological and procedural clarifications, necessary in order to correlate inclusively with norms contained in Law no.98/2016 and no.99/2016, like those included in art.70.(8), making a clear reference to the condition through which the interested economic operator has the right to ask for clarifications or additional information regarding the tender documents, and on the other hand the elimination of discriminatory treatment of the sentencing regime. Hence, through amendments brought to art.111 (2), is aimed the implementation of a similar sentencing regime for the authorities which undergo activities in the three analysed fields: public procurement, sectoral and concessions, while through the text of the newly introduced art.112<sup>1</sup> has been regulated that, through a derogation from the concession's general penalties regime, the sanction of a fine will be prescribed 36 months after the time when it was committed.

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<sup>37</sup> Law no.100/2016 on concession of works and concession of services, published in the Official Journal of Romania, Part I, no.392 of 23 May 2016.

<sup>38</sup> Government Decision no.867/2016 for the approval of the Methodological Standards of enforcement concerning the award of concession of works and concession of services of the Law no. 100/2016 on concession of works and concession of services, published in the Official Journal of Romania, Part I, no.985 of 7 December 2016.

## 5. REMEDIES, CONTESTATION MEANS AND ORGANIZING MEASURES

None of the Remedies Directives aiming at being a part of to make part of the adopted legislative package from 2014 are novelty, but the National Strategy on Public Procurement<sup>39</sup> provided the adoption of a distinct normative act regarding the right of appeal in the field of public procurement and in the field of concessions, through the transposition of the Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, of Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as well as Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC, with regard to improving the effectiveness of review procedures concerning the award of public contracts.

Thus, in 2016, the same legislative package with the three laws transposing the new European legislation has been adopted by the Parliament and the Law no. 101/2016<sup>40</sup> regulating the remedies and the judicial contestation in the field of award of public procurement contracts, of sectoral contracts and of concession of public works contracts, and established norms regarding the organization and the functioning of the National Council for Solving Complaints. This normative act was also modified and amended through Government Emergency Ordinance no. 107/2017, closely linked with the other three laws from the national legislative package and in order to repair the deficiencies observed throughout the enforcement<sup>41</sup>.

The rationale and explanation of the amendments and additions brought to the 2016 text, provided for in the 18 points included in the art. IV of the Government Emergency Ordinance, are also detailed in the rationale accompanying the normative act, and their typology is similar to the one of the modifications of the other two laws on public procurement. We will present some concrete examples, emphasized as follows:

a) the clarification of the concepts and procedures and their simplification, as well as the establishment of specific deadlines: art.4(1), art.4 (4), art.8 (2) a), art.24 (1), art.29, art.36 (1), art.50 (2) and (3), art.52 (1), art.53 (7) – newly introduced, art.56 (1) a) and art.61 (2). A first example lies in the text of art. 4 (1), which clarifies the fact that the injured party may use at the same time the administrative-judicial way, addressing a

<sup>39</sup> Government Decision no.901/2015 on the approval of the National Strategy in the field of public procurement was published in the Official Journal of Romania, Part I, no. 881 of 25 November 2015.

<sup>40</sup> Law no.101/2016 on remedies and appeals concerning the award of public procurement contracts, sectoral contracts and of works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints, published in the Official Journal of Romania, Part I, no.393 of 23 May 2016.

<sup>41</sup> The necessity of the amendment arose from the jurisprudence, even if a (relatively) short period of time passed, because there were different interpretations of the provisions of the law. For example, the Bucharest Court of Appeal solutioned a negative competence conflict between the National Council for Solving Complaints and the Bucharest Municipal Court (where the National Council for Solving Complaints was considered competent). Please refer to Bucharest Court of Appeal, eight chamber of administrative and tax disputes, judgement no.3105/2017, available at [rolii.ro](http://rolii.ro) (Anon., fără an). The contrar solution was ruled by the Iasi Court of Appeal, chamber of administrative and tax disputes, judgement no.145/2017, available at [rolii.ro](http://rolii.ro) (Anon., fără an).

complaint to the National Council for Solving Complaints (CNSC), as well as the ordinary judiciary way, by referring to the court of law. We would like to emphasize a different example, regarding the mentioning of a precise deadline, in the text of art. 4 (4) , establishing the deadline to be respected by the court of law the ruling through which are connected the complaints presented to the National Council for Solving Complaints with the ones presented to the court of law.

b) a more accurate, exact and complete transposition of the provisions of the directives: art.3 (1) a) and art.3 (3) – newly introduced. The modifications entailed by art. 3 redefine the role of the contracting authority and introduce in the national legislation the concept of interested candidate/bidder, provided for in the art. 2a from Directive 66/2007/EC, a very important notion for the clarification of the procedural framework.

c) the correlation of the texts of the normative act, between each other as well as with the newly introduced ones d: art.4 (1), art.4 (2) – abrogated, art.33 (2), art.49 (2), art.53 (7) – newly introduced, art.58 (2) f) – newly introduced and art.61 (2). We take the opportunity to underline in this context the regulation *per se*, in art. art. 53 (7) – newly introduced, but also the correlation with the law in its entirety, of the fact that dispute settlement regarding reparation for prejudices caused from the award procedure, as well as regarding the ones regarding the performance, cancellation, nullity, termination, rescission or withdrawal, does not necessarily entail any preliminary procedure. We do consider notwithstanding that, in order to be clearer, it would have been preferable to expressly mention the procedure and the deadlines regulated in art. 7 and 11 of the Law on Administrative Court Proceedings, no.554/2004, do not apply in the litigations mentioned by art. 53 (1) from Law no. 101/2016.

d) the correlation of the text of the law with the complementary legislation or with the constitutional provisions: art.29, art.31(2) and (3), art.49 (2), art.58 (2) f) – newly introduced and art.61 (2). Thus, in order to ensure the free access to justice, the amended text of art. 29, correlated with the existing text of art.3 (1) f), provides that the decisions of the National Council for Solving Complaints can be appealed before the competent court not only by the involved parties, but by any injured party, as the law provides,.

e) the abrogation of the norms generating confusions or enforcement difficulties or that contravened either to the directive or to the constitutional provisions: art.4 (2) and art.29 (2). The text of art.4 (2) was abrogated in order to make correlation with the amended text of art.4 (1), previously exemplified at a). In the last paragraph, we also mentioned the text of art art.29, by whose modification was ensured the free and effective access to justice, so the limitations provided in art.29 (2) were to be abrogated given that they were restraining, contrary to the constitutional provisions, the right of a third party to participate in the procedure.

Especially in the case of the procedure aiming at Law no. 101/2016<sup>42</sup>, we observe that it has to a greater extent a procedural and technical one, of unequivocally establishing the deadline, this nature resulting from the very procedural specificities of the amended act.

A great relevance for the analysis of the amendments lies in the transitional norms provided for in art. VI-VIII from Government Emergency Ordinance no.107/2017, especially those included in art. VII, regarding the conditions and procedures for ruling on

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<sup>42</sup> For a thoughtful analysis of the obstacles prior to the amendment, brought by the Law no. 101/2016, please refer to (Irimia, 2017).

the complaints, lawsuits and the requests presented to the National Council for Solving Complaints or before the courts of law. What is to criticize nonetheless is the text of art. VIII of the Government Emergency Ordinance which, despite having the role of facilitating the adaptation of the contracts to eventual situations lacking predictability, affecting the principle of legal security, by developing contradictions with the transitional provisions of the amended laws, providing for the conclusion, amendment, interpretation, effects, performance and termination of public procurement contracts obey to the rules in force at the time of the signing of the respective contracts.

## 6. EX-ANTE AND EX-POST CONTROLS

A fifth normative act amended and completed by the Government Emergency Ordinance no.107/2017 through its art. V, is the Government Emergency Ordinance no.13/2015 on the creation, organization and functioning of the National Agency for Public Procurement, which has attributions both in the fields of *ex-ante* and *ex-post* control.

Before analysing the amendments introduced through the Government Emergency Ordinance no.107/2017, we point out<sup>43</sup> the existence, ever since 2016, of the Law no.184/2016, partially in force since 2016 and partially in force since 20 June 2017, adopted in order to implement, in the case of an e-tendering system, an *ex-ante* control mechanism, which does neither lengthen nor complicate the public procurement procedures in place, but allows the verification of potential conflicts of interest, points them out in order to be removed, implicitly allowing the continuation of the procedures.

Besides, in December 2017, one week prior to the adoption of the analysed Government Emergency Ordinance, another normative act was adopted - the Government Emergency Ordinance no.98/2017, regarding the *ex-ante* function of the award process of sectoral public procurement contracts/framework agreements and concession contracts on public works and public services<sup>44</sup>.

The three amendments and additions to the Government Emergency Ordinance no.13/2015 by the Government Emergency Ordinance no.107/2017 aim at the correlation of the organizational and operational act of the agency with the attributions it gained in 2016, both with regards to *ex-post* and *ex-ante* control, as well the correlations of the attributions emanating from the Law no.184/2016 and the Government Emergency Ordinance no.98/2017. Thus, the text of art.3 d) is amended so that, in order to accomplish its objectives, the Agency has among its attributions the *ex-post* control of the way in which the contracting authorities award the contracts provided for in Law no.98/2016 - 100/2016, while the text of art.3 is completed by d<sup>1</sup>), according to which the agency has among its attributions the *ex-ante* control of the way in which the contracting authorities award the public procurement contracts/framework agreements provided for both by the three laws and their amendments. Also, by the amendment made to art.5 by introducing a new paragraph, 1<sup>1</sup>), at the level of the agency's operational structure was created a

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<sup>43</sup> *Supra* 12.

<sup>44</sup> Government Emergency Ordinance no. 98/2017 on the *ex-ante* control of the award process of public procurement contracts/framework agreements, of the sectoral public procurement contracts/framework agreements, and of works concessions and service concessions was published in the Official Journal of Romania, part I, no.1004 of 18 December 2017.

”decision-making committee, composed by at least of the *ex-ante* control functions, regulations, methodological coordination and *ex-post* control representatives, nominated by an internal order of the President of the National Agency for Public Procurement”

For the organisation and functioning of the agency is also relevant the text of art. IX from the Government Emergency Ordinance no.107/2017, instituting a 30-day term since the publication of the Government Emergency Ordinance, during which the normative act for the amendment and addition of the Government Decision on the organization and functioning of the agency<sup>45</sup> can be presented to the Government for approval, but we failed to identify any document concerning a project with such a regulatory purpose by consulting the official website of the National Agency for Public Procurement.

Concerning the Government Emergency Ordinance no. 98/2017, we do not deny the necessity of the adoption of such a normative act whose elaboration was already stipulated in the National Strategy on Public Procurement, or that specific deadlines in order to complete some activities were already established, nor will we repeat the previous critics concerning the regulation of such a field by Government Emergency Ordinances. However, we point out that in this case as well, the emergency was solely invoked, without a proper motivation in accordance with the constitutional text, while all the arguments given in the preamble of the normative act do nothing more but to confirm the authority’s error, being proof of the absence of a genuine administrative capacity. Moreover, the Legislative Council points out the emphasized aspects in its opinion<sup>46</sup> with regard to the project of the aforementioned normative act, invoking inclusively the jurisprudence of the Constitutional Court of Romania, while the opinion<sup>47</sup> regarding the draft project which became the Government Emergency Ordinance no.107/2017 points out the necessity of normative simplification and of the correlation between the two projects.

We can easily observe, from the very title of the normative act, that the regulatory purpose of the Government Emergency Ordinance no.98/2017 interferes with all five laws/Government Emergency Ordinance concerning the field of public procurement, amended and completed through the Government Emergency Ordinance no.107/2017, and we consider that they could have been merged for a better understanding of the texts and procedures.

The Government Emergency Ordinance no.98/2017 is structured in five chapters, as follows:

I – General provisions regulating the subject-matter, the scope, the definitions and the deadlines, the competent authority and the field of application;

II - The *ex-ante* control regulates the selection methodology (the control is exercised selectively, based on a methodology), the control initiation, the exercise of the control on tender documents, the participation/simplified participation/competition notice, the

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<sup>45</sup> Government Decision no. 634/2015 on the organisation and functioning of the National Agency for Public Procurement, subsequently amended.

<sup>46</sup> Opinion no.1099/13.12.2017 of the Romanian Legislative Council, concerning the draft of the Government Emergency Ordinance no. 98/2017 on the *ex-ante* control of the award process of public procurement contracts/framework agreements, of the sectoral public procurement contracts/framework agreements, and of works concessions and service concessions available at: disponibil at: (Anon., fără an)

<sup>47</sup> Opinion no.1103/14.12.2017 of the Romanian Legislative Council, concerning the draft for amending and completing normative acts with effect in the field of public procurement, available at: (Anon., fără an)

*erratum* notice and the request for clarification/additional information, the control of bids/applications and of the award of the public contract, the assent of the National Agency for Public Procurement, the conciliation procedure, the *ex-ante* control of the negotiation procedures without prior publication of a contract notice and *ex-ante* control of the amendments of the contract;

III – Other provisions concern the assents issued by the National Agency for Public Procurement and their link to the binding character of the issued decisions and of the measures disposed by the Council/the competent court concerning the award procedures according to the provisions of the Law no. 101/2016, the collaboration of the National Agency for Public Procurement with other control bodies with attributions in the field of public procurement, respectively the obligations of the agency;

IV – Contraventions and sanctions – are identified the facts and established the limits of the sanctions for trespassing the legal provisions and are indicated the official examiners as well as the procedural norms and the exemptions from the general infringement regime. With regards to the extinction delay of the sanction or of the fine, the norms are not fully correlated with those provided in the 2016 laws in as far as there are two different extinction delays: a 12-month one, for certain offences, and a 36-month one (similarly to the other laws), for other offences.

V – Transitional and final provisions, according to which a 30-day term since the publication of the Government Emergency Ordinance is instituted, for the elaboration of the methodological standards of enforcement, that are approved by a Government Decision<sup>48</sup>. There are also included provisions according to which the award procedures and the contractual amendments initiated after 15 March 2018 are subjected to the *ex-ante* control, date at which the Government Emergency Ordinance will be enforced, with the exception of the provisions of the art. 24 (3), instituting necessary measures to the adoption of the e-tendering system in order to implement the necessary amendments and of transitional and final provision provided for in art. 28-30, coming into force at its publication date in the Official Journal of Romania, Part I.

## 7. METHODOLOGICAL COUNSELLING

An important attribution of the National Agency for Public Procurement, hereby analysed, is the methodological counselling of the contracting authorities in the award process of public procurement contracts and concession contracts, as an operational support in correctly applying the legislation in this field. We already observed that the 2017 amendments and additions to both normative acts regarding the organisation and functioning of the National Agency for Public Procurement are not making any direct reference to the methodological counselling. Given that it is not a newly introduced attribution in legislation in 2017, at first sight it would not count as an objective of our analysis, however the rationale behind the choice of discussing this subject dwells with the fact that the norms from Government Emergency Ordinance no.13/2015<sup>49</sup>, respectively those from Government Decision no.774/2016 amending and completing the

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<sup>48</sup> Such a Government Decision project was impossible to identify on the official website.

<sup>49</sup> Please refer to the texts of art.2 and art.3 c) and f) of the Government Emergency Ordinance no.13/2015, subsequently amended.

Government Decision no.634/2015 on the organisation and functioning of the National Agency for Public Procurement<sup>50</sup>, which regulates this aspects, were enforced by an internal order of the President of the National Agency for Public Procurement issued in 2017<sup>51</sup>.

Thus, the Order no.121/2017 designates the department of the National Agency for Public Procurement<sup>52</sup> which, in applying the superior provisions establishing the methodological counselling, interprets the legislation in this field for the authorities/contracting authorities and/or the legal bodies not bearing the quality of contracting authority, which have the obligation to enforce the legislative provisions from the regulatory fields of the Laws no.98/2016 – 101/2016. Also, it is established the working mechanism to ensure a unified framework for enforcement of the public procurement norms, and are identified the means of interpretation, which can be issued either on demand or *ex officio* and which, for the sake of accessibility, may be published on the agency's<sup>53</sup> website or, for the sake of interactivity, through an online instrument<sup>54</sup>.

Also, through this order there a clear distinction is made between the attribution of methodological counselling and another important attribution of the National Agency for Public Procurement, the one of ensuring a unified interpretation in the field, for which it bears the right of legislative initiative<sup>55</sup>.

## 8. PUBLIC-PRIVATE PARTNERSHIP

Closely relating to the field of public procurement, the Romanian Government adopted a new Government Emergency Ordinance, no.104/2017<sup>56</sup> in December 2017, amending and completing the Law no.233/2016 on public-private partnership<sup>57</sup>. We consider that the constitutional provisions have not been fulfilled either in the case of this Government Emergency Ordinance, but we refrain from reiterating the already presented critics for the Government Emergency Ordinance no.107/2017, which remain applicable. We must nevertheless underline that, from the majority of the motives invoked in the preamble, but especially in the presentation and in the explanatory statement of the normative act<sup>58</sup>, results the lack of administrative capacity of both the Parliament and the Government regarding the adoption of normative acts and in respecting the due deadlines and obligations.

<sup>50</sup> Please refer to the texts of art.3 (1) f) and alino.(3) b) of the Government Decision no. 774/2016 amending and completing Government Decision no. 634/2015 on the organization and functioning of the National Agency for Public Procurement, subsequently amended.

<sup>51</sup> The order no.121/2017 concerning the grant of methodological counselling was published in the Official Journal of Romania, Part I, no.339 of 26 May 2017.

<sup>52</sup> Directorate General for reglementation, methodological coordination and operational support (DGRCMSO).

<sup>53</sup> The publication of the interpretations can be found in the section "case-law repository/FAQs" on the website of the National Agency for Public Procurement, (Anon., fără an).

<sup>54</sup> For the interactivity, (Anon., fără an).

<sup>55</sup> Please refer to the texts of art.3 b) of the Government Emergency Ordinance no.13/2015, as well as art.3 (1) b) and (3) l) from Government Decision no. 634/2015.

<sup>56</sup> Government Emergency Ordinance no.104/2017 amending and completing the Law no.233/2016 on public-private partnership, published in the Official Journal of Romania, Part I, no.1037 of 28 December 2017.

<sup>57</sup> Law no. 233/2016 on public-private partnership was published in the Official Journal of Romania, Part I, no.954 of 25 November 2016.

<sup>58</sup> The document is available at: (Anon., fără an).

The Law no.233/2016, in force since 25 December 2016, provided a 90-days deadline for the elaboration of the methodological standards<sup>59</sup>, yet the elaboration is still pending at the time of the writing of this article, one year since the enforcement of the law. The apparently hilarious reason, very pertinent at an in-depth analysis, can also be found in the presentation and in the explanatory statement of the Government Emergency Ordinance no.104/2017: the law adopted in 2016 was practically inapplicable, because it was not correlated either with the national legislation regulating the field of public procurement or with the European legislation in this field. In these circumstances, the Government preferred not to apply the Law no.233/2016, or to elaborate methodological standards before applying fundamental amendments.

Thus, through the Government Emergency Ordinance no.104/2017, 36 of the 46 articles of the law were substantially amended and completed, while four new articles were introduced in the original text. The remarks lead to the conclusion that, approximately fourth fifths of the articles of the law being amended and completed, the law was practically re-drafted, changing its initial philosophy, and so the amending act should have been *per se* distinctive, abrogating the Law no.233/2016.

Analysing the content of the Government Emergency Ordinance no. 104/2017, we may observe that necessary clarifications are made through the proposed amendments in order to delimitate or to correlate the public-private partnership with the public procurement and especially with the concessions. We will not analyse in greater detail the entirety of the amendments because, as we underlined, it is not the reason for which we tackle this normative act in a study dedicated to the field of public procurement.

One of the amendments to this law is the definition of the public-private partnership as "having as object the production of a good, or, if appropriate, the emergency repair works and/or the extension of a good or of goods which will make part of the patrimony of the public partner, destined to provide a public service and/or to operate a public service, according to this law"<sup>60</sup>.

We underline nonetheless that the most important amendments concern procedural aspects, like the necessary steps towards the conclusion of a public-private partnership contract or the direct identification of each of the authorities responsible for the approval of the projects of the central public administration, respectively of local public administration, as well as those concerning the definition of the terms, especially of the public partnership, the substantiation study, necessary in regulating relevant aspects for the accomplishment of the project, for the protection of the public interest and of the public partnership, respectively the clarifications concerning the payment and analysis mechanisms, or the content of the contract, termination and performance of the contracts, regulation of the department financing the projects and the award of the public and private contributions during the investment, the obligations of the parties, the implementation of guarantees, the norms concerning the alienation, the private partner's actions unfair burden-sharing, respectively the foreclosure.

The Government Emergency Ordinance introduced in the text of the law, through three of its four new amendments<sup>61</sup> a sentencing regime for the non-compliance with the

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<sup>59</sup> Please refer to art.45 and 46 of the Law no. 233/2016.

<sup>60</sup> Please refer to art.2 of the Law no. 233/2016, subsequently amended.

<sup>61</sup> Please refer to art.43<sup>1</sup> - 43<sup>3</sup> of the Law no. 233/2016, subsequently amended.

provisions of the law, in which the procedure and the deadlines for the application of the sanctions are correlated with those from the public procurement legislation, while the official examiners will be nominated through an internal order of the Minister of Public Finance. According to the provision of art. II from the Government Emergency Ordinance, the three articles implementing the sentencing regime were to come into force 60 days after the publication, *ergo* on the 26 February 2016. Also, the enforcement of the art. III provides a new deadline for the elaboration of the methodological standards, set at 60 days following the publication of the Government Emergency Ordinance.

## 9. CONCLUSIONS

The field of public procurement<sup>62</sup> is of utmost importance both in the European Union and in Romania, and an efficient use of public funds, as well as the transparency of decision-making processes and the elimination of corruption and of excessive bureaucracy, have the role to ensure quality public services and foster development, not only of the infrastructure, but of the state itself, based on the European principles and values.

Considering all previous remarks, we may observe the vastness of the public procurement field, as well as its complexity and the importance of knowing it and applying it correctly. Both the European and the national legislation, are in a constant process of analysis, evaluation and amendment in order to be as adapted as possible to market demands. In order to succeed, we consider that it is necessary to professionalize the involved parties.

Analysing the very technical, complex and vast field of public procurement we may conclude that, more than one year following the application of the initial norms and the identification of the legislative loopholes or of the difficulties in understanding, interpreting and having a unified application of the law, the modifications entailed in 2017 were necessary and represent a progress and aim to ensure a unified and coherent normative framework, especially that at least one of the three analysed Government Emergency Ordinances<sup>63</sup> has been elaborated with a major contribution from specialists, after a genuine consultation of all of the involved parties.

The choice of a regulation formula implying the adoption, in a two-week period, of three Government Emergency Ordinances that amended prior legislation substantially remains notwithstanding reprehensible, since we estimate that, the constitutional conditions for their adoption were not fulfilled. Here lies the question whether the end justifies the means, to which solely the jurisprudence of the Constitutional Court of Romania will answer, on the three specific aforementioned cases.

The amendments and the additions brought in 2017 to the field of public procurement are a step forward, but several additional steps are required given that the Government needs to adopt at least five other normative acts in order to apply the new legislation. We will continue to observe both eventual legislative amendments, and especially the

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<sup>62</sup> From this point on, the reference to the field of public procurement includes, in our understanding, the field of public-private partnership.

<sup>63</sup> We refer to the Government Emergency Ordinance no. 107/2017 amending and completing normative acts with an effect in the field of public procurement.

European and national jurisprudence in this field, in order to find out if the 2017 normative acts will achieve the goal for which they were adopted.

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