

**THE REFORM OF THE EUROPEAN LEGISLATION IN THE
FIELD OF PUBLIC PROCUREMENT AND ITS RECENT
TRANSPOSITION IN THE ROMANIAN LAW**

Irina Alexe, PhD*

ABSTRACT: *The recently adopted legislative package, aiming to reform the public procurement field within the European Union, required its transposition in each member state. In 2016, the competent authorities adopted, at the primary level, several legislative acts in order to regulate the field, while at the secondary level other legislative acts were issued in order to enforce the aforementioned primary legislation. Almost one year after enforcement, several questions arose concerning the correctness of the transposition, as well as its clarity and the extent of its sufficiency in both quality and number of the respective norms; meanwhile, solutions are searched for in order to remedy the deficiencies.*

KEYWORDS: *public procurement; the reform of the legislative framework; transposition of the European Directives; national legislation*

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1. SHORT INTRODUCTION

In the negotiation phase preceding the accession of Romania to the European Union, as well as after this moment, whose 10th anniversary is celebrated this year, the competent authorities of the Romanian state, as well as its citizens, made significant efforts that lead to a profound transformation of the society and of its subsequent operating mechanisms.

*Associate Researcher, "Acad. Andrei Rădulescu" Legal Research Institute of Romanian Academy, ROMANIA.

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The transformation worked both for assuming the values on which the European Union¹ is standing, and for the fulfilment of the political and economic criteria leading to the application of the *acquis*. Hence, it functioned for the increase of the necessary capacity in order to adopt the *acquis* and, last but not least, for the existence of some judiciary and administrative structures allowing the adoption and application of the *acquis*. One of the fields targeted by this sound transformative process regards the public procurement.

At the level of the European Union, the regulation of the processes underwent in the field of public procurement started in the 1970s, at first throughout the Directives regarding the public procurement, which targeted the coordination of the procedures. The most important of these are Council Directive 71/305/EEC² concerning the co-ordination of procedures for the award of public works contracts, respectively Council Directive 77/62/EEC³ regarding coordinating procedures for the award of public supply contracts. These acts were followed by other coordination Directives, for instance Council Directive 89/665/EEC⁴ 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, subsequently amended and supplemented. The first significant reform of the field took place in 2004⁵, throughout Directive 2007/17/EC⁶, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as well as throughout Directive 2004/18/EC⁷, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, subsequently supplemented, in 2007, by Directive 2007/66/EC⁸, with regard to improving the effectiveness of review procedures concerning the award of public contracts

¹ 2nd Article, TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." The entire version of the article can be found at <http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A12012M%2FTXT>.

² Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, JO L 185, 16.8.1971, p.5.

³ Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, JO L 13, 15.1.1971, p.1.

⁴ Council Directive 89/665/EEC of 21 December 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, JO L 395, 30.12.1989, p.33.

⁵ Regarding the importance of the 2004 reform, please refer to (Arrowsmith, 2004); on the same page, including the application of the principles of law in the EU and the importance of the jurisprudence in the European Court of Justice, please refer to (Bovis, 2006).

⁶ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, JO L 134, 30.04.2004, p.1.

⁷ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, JO L 134, 30.04.2004, p.114.

⁸ 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, JO L 335, 20.12.2007, p.31.

The year 2014 represented nevertheless a crucial moment in the continuous reform of the European legislative framework in the field of public procurement⁹. Thus, by virtue of a communication from the European Commission, entitled Europe 2020 – A European strategy for smart, sustainable and inclusive growth¹⁰, according to whom „Public procurement policy must ensure the most efficient use of public funds and procurement markets must be kept open EU-wide”¹¹, the European Commission published in January 2011 a Green Paper on the modernization of EU public procurement policy – Towards a more efficient European Procurement Market¹² and launched simultaneously the public consultation regarding the existing legislation in the field of public procurement and made a questioning regarding the eventual necessary amendments in order to achieve the proposed goal. This was also made in order to fulfil the needs for simplifying and making flexible the procedures and the strategic use of public procurement in order to promote other policy objectives, improving access of SMEs to public contracts and combating favouritism, corruption and conflicts of interest.”¹³. After following consultations, in 2010-2011 the European Commission realized an impact and efficiency assessment of the EU legislation in the field of public procurement and concluded that „Directives 2004/17/EC and 2004/18/EC have helped to establish a culture of transparency and outcome-driven procurement, generating savings and improvements in the quality of procurement outcomes that far exceed the costs, for public purchasers and suppliers, of running those procedures. The evaluation has also found that differences in implementation and application of the Directives have led to different outcomes in different Member States”.¹⁴

Hence, following the aforementioned assessment, the competent authorities of the European Union regulated the vast domain of public procurement by the mean of a *legislative package* including three new Directives, 2014/23/EU¹⁵ (concessions), 2014/24/EU¹⁶ (classic), 2014/25/EU¹⁷ (sectorial), subsequently amended by a new directive regarding electronic invoicing in public procurement¹⁸, and established that Directive 2007/66/EC¹⁹, respectively the Remedies-Directives remain applicable, being aware that an attractive and sustainable economic environment can be maintained just by ensuring an open, transparent and correct competition in each member state, the public funds being thus used in a fair way which will not unlawfully distort the free competition.

⁹For an analysis of the context which led to the adoption of the legislative package reforming in the array of public procurement, please refer to (Kunzlik, 2013).

¹⁰ COM(2010) 2020 final.

¹¹ *Idem*, p.30.

¹² COM(2011) 15.

¹³ COM(2011) 896 final 2011, p.4.

¹⁴ *Idem*.

¹⁵ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, JO L 94, 28.3.2014, p.1.

¹⁶ 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, JO L 94, 28.3.2014, p.65.

¹⁷ 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, JO L 94, 28.3.2014, p.243.

¹⁸ Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement Text with EEA relevance, JO L 133, 6.5.2014, p.1.

¹⁹ Please refer to *supra* 8.

It is necessary to underline that the year 2014 brought for the first time in the EU legislation a directive exclusively devoted to the concession and it must be pointed out that the new regulations took in account the jurisprudence issued by the Court of Justice of the European Union in this field, as well as the result of the evaluations²⁰ and consultations²¹ made with the citizens and the competent authorities of the member states, on which further details will be provided for within this article.

The main regulations at the level of the European Union will be presented in the following sections, the status of their transposition in the member states, as well as the status of the transposition in the Romanian legislation, analysing also the new normative act through which the *ex ante* mechanism of verification was instituted in order to prevent any conflicts of interest in awarding public procurement contracts.

Taking into consideration the vastness of the field and the myriad of normative acts issued at the primary, secondary and tertiary levels, we decided to include in this analysis solely the primary legislation (laws) and secondary legislation (Government Decisions) through whom the Directives were transposed in the Romanian law. The three new directives adopted in 2014, as well as the Remedies Directives, were transposed in Romania through four distinct laws and by three Government Decision, whose enforcement required the adoption of other acts, as orders, details or instructions. We also need to underline that, given the experience of the 10 year-period of application of the legal framework anterior to 2014, before transposing in the national legislation the directives adopted in 2004, based on the objectives included in the National Public Procurement Strategy²², both the quality and the transposition options of the current legal framework have been assessed.

We will terminate this analysis with few brief conclusions regarding the importance and the vastness of the field, putting forward a perspective on the normative simplification *versus* excessive bureaucratization debate. Also, given the long and complex transposition process of the European legislation in Romania, especially after the application of the respective norms for a period longer than one year, some specific aspects which arose in the meantime need to be nuanced or corrected. The analysis will focus as well on the draft law²³ initiated by the National Agency for Public Procurement, which is at the time of writing in the public consultation phase, aiming to remediate the aforementioned

²⁰ Please refer to the Commission Staff Working Paper „Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation”

²¹ For further details, please refer to, for example: 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), available at <http://iaduer.ro/?p=2097>; (Alexe, 2015).

²² Government Decision n.901/2015 on the approval of the National Public Procurement Strategy has been published in the Official Journal of Romania, Part I, n.881 of 25 November 2015.

²³ The National Public Procurement Strategy proposed initially to amend the normative acts throughout a Government Emergency Ordinance, whose text is available at http://anap.gov.ro/web/wp-content/uploads/2017/05/pOUG_modif_legi_rev2.pdf. For the critique on the transposition of the Directives throughout Government Emergency Ordinances please refer to (Banu & Alexe, 2016); the conclusions of the study emphasize the fact that the Member States is preferable the transposition of the Directives by the law, debated and endorsed in the Parliament and not throughout Government Emergency Ordinances or Government Ordinances, as in the case of the presented normative act.

deficiencies, including the extent of the correctness and the sufficiency of the transposition of the norms²⁴ regarding public procurement processes.

2. DIRECTIVE 2014/24/EU AND ITS TRANSPOSITION IN ROMANIA

The chosen principles and regulatory solutions, which served as a basis for the adoption of Directive 2014/24/EU regarding public procurement are included in the 138 considerations composing the preamble of the directive. In our opinion, the most important of those, included in the first consideration of the preamble, makes reference to the fact that „The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving wherefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition”.

Structured in five titles corresponding to the scope, definitions and general principles (I), rules on public contracts (II), particular procurement regimes (III), governance (IV), respectively delegated powers, implementing powers and final provisions (V), the directive establishes from the first article its subject-matter and its regulatory area, respectively the institution of some „rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4” (paragraph 1), defines public procurement as being „the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.” (paragraph 2) and specifies that the Directive „does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organized and financed, in compliance with the State aid rules, and what specific obligations they should be subject to”.

After defining the notions, establishing the thresholds amounts, respectively the revision of the thresholds²⁵, and after establishing the methods for calculating the estimated value of procurement, the following step establishes the exclusions from the scope of the Directive – contracts in the water, energy, transport and postal services sectors; specific exclusions in the field of electronic communications; public contracts awarded and design contests organized pursuant to international rules; Specific exclusions for service contracts, service contracts awarded on the basis of an exclusive right, Public contracts between entities within the public sector – as well as in special cases: subsidised contracts and research and development services, Procurement involving defence or

²⁴With regard to the terminology of the Directive with regard to the transposition, enforcement, performance or implementation, please refer to (Banu, 2016).

²⁵Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts, JO L 307/25.11.2015, p.5.

security aspects, then are detailed the general provisions aiming at the Principles of procurement, economic operators, reserved contracts, confidentiality, rules applicable to communications, nomenclatures²⁶ and conflicts of interest.

The norms applicable to public procurements contracts²⁷ refers to procedures, techniques and instruments for electronic and aggregated acquisitions, at the undergoing of the procedure – with its steps regarding the preparation, publication and transparency, the selection of the participants and the awarding of contracts -, respectively at the contract performance, and in the title regarding special public procurement regimes the Directive institutes distinct norms regarding special services and other specific services, as well as applicable norms to project contests.

In force since 17 April 2014, the Directive, applicable to all of the member states, should have been transposed in a 2-years term, until 18 April 2016, with the specific exceptions provided in its text²⁸, while the national measures of transposition should have been communicated to the European Commission. Analysing the national measures of transposition communicated by the 28 member states²⁹, it may be observed that some of them failed to respect the two year term, with one state (Luxemburg) which has not sent any transposition measure more than one year after the end of the established term. It may also be observed that the number of the proposed measure is not uniform, varying from 1, in the case of Greece, Croatia, Malta, Austria or Slovakia, to an impressive number of measures, 35 for Hungary, 15 for the Czech Republic or 11 for France.

Romania communicated two national measures for the transposition of the Directive, namely the Law n. 98/2016 on public procurement³⁰ and Government Decision n. 395/2016³¹. It may be thus observed that in the case of Romania the transposition was exceeded with one month in the case of the law, respectively with almost two months in the case of the Government Decision, but this aspect is not relevant in this analysis, inasmuch as no procedure has been initiated due to the exceeding of the term and the lack of transposing within the established term. We appreciate the fact that the competent Romanian authorities chose to transpose the directive throughout a law rather than throughout a Government Emergency Ordinance, even if the parliamentary procedure

²⁶ Commission Regulation (EC) No 213/2008 of 28 November 2007 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV.

²⁷ For defining the public procurement contracts, please refer to (Rațiu, 2017).

²⁸ According to art. 90 of the Directive, the Member States may postpone the application in some conditions until 18 April 2018, respectively 18 October 2018.

²⁹ The national measures of transposition communicated by the 28 Member States for Directive 2014/24/EU is available at <http://eur-lex.europa.eu/legal-content/RO/NIM/?uri=CELEX%3A32014L0024>.

³⁰ The Law n.98/2016 on public procurement, published in the Official Journal of Romania, Part I, n.390 of 23 May 2016; was subsequently amended by the Government Emergency Ordinance n.80/2016, approved and supplemented by the Law n. 80/2017.

³¹ Government Decision n. 395/2016 for the approval of the methodological standards regarding the award of public procurement contracts/framework agreements, published in the Official Journal of Romania, Part I, n. 423 of 6 June 2016.

took a great amount of time³² and even if during the debate procedure some texts suffered some changes.

Did the Romanian authorities consider a complete transposition of the Directive throughout the Law n. 98/2016? The response to this question is negative and can be found in the explanatory statement of the project, according to whom „this law regulates the public procurement in Romania in order to partially transpose Directive 2014/24/EU³³, while other provisions of the Directive will be transposed by the enforcement standard³⁴. In this case, we may speak about a complete transposition of some provision and in a partial transposition of others, and Romania chose to use the possibility offered by the Directive, that of applying some provisions starting with 18 April 2018³⁵.

Hence, the general provisions were regulated by the law (aiming at the subject-matter, the scope, the principles; the definitions; the contracting authorities; the field of application; the exceptions; mixed procurement; centralized public procurement and occasional joint public procurement involving public authorities from other member states), general rules of participation and principles of procurement (regarding economic operators, reserved contracts, confidentiality, rules applicable to conflict of interest, rules applicable to communications), rules on procedures (detailing procedures, as well as instruments and techniques on procurement procedures), conduct of procedure (detailing the preliminary market consultations, division of contracts into lots, rules on publication and transparency, elaboration of award documents, alternative offers, selection and participation criteria, contract award criteria, European Single Procurement Document, respectively the Online repository of certificates (e-Certis), Official lists of approved economic operators and certification by bodies established under public or private law, electronic catalogues, award of public contracts and conclusion of framework agreements, concluding the procedure for the award of a public contract, informing candidates/tenderers, the procurement dossier the report of the public contract award procedure), conditions for performance of contracts/ framework agreements (regarding the norms concerning subcontracting, respectively concerning the modification of the public procurement contract/ framework agreement), specific cases of termination of public

³² According to Draft Law n. 98/2016, the parliamentary procedure was initiated in 23.11.2015 and was finished on 12.05.2016, by the sending of the act to promulgation. The project is available at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=15472.

³³ Explanatory statement, pp.1-2; available at <http://www.cdep.ro/proiecte/2016/000/10/8/em18.pdf>.

^{34,35} For the correspondence of the norms transposed by the Law n.99/2016, according to whom „the present Law transposes the provisions of art. 3, art. 5, art. 7-21, art. 23, art. 24, art. 27, art. 29-36, art. 38, art. 40-43, art. 45, art. 47, art. 49, art. 50, art. 52, art. 53, art. 55, art. 57, art. 58, art. 63, art. 65-67, art. 70, art. 72-74, art. 76, art. 78, art. 81, art. 82, art. 84 of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, published in the Official Journal of the European Union, L, n. 94 of 28 March 2014, and partially art. 1 (1) and (2), art. 2 paragraph (1) pct. 1, 4-24, art. 4, art. 6 (3), art. 22 (1) the first and the fifth paragraph, (2), (3), (5), art. 23 (1) paragraph (1), art. 26 (1)-(4), (5) first paragraph,(6), art. 28(1)-(6), art. 37 (1) first and second paragraph, (2)-(4), art. 39 (1), (2) first paragraph, art. 44 (1), (2), art. 46 (1)-(3), art. 48 (1), art. 51 (1) first paragraph, (2) second paragraph, art. 54 (1) first paragraph, (2), art. 56 (1)-(3), art. 59 (1)-(6), art. 60 (1), (2) first and second paragraphs, (3), (4), art. 61 (1), (2), art. 62 (1), (2), art. 64 (1), (3)-(5) first paragraph, (7), art. 68 (1), (2), (3) first paragraph, art. 69 (1)-(4), art. 71 (1)-(4), (5) first, second and third paragraph, art. 75 (1), (2), (4), art. 77 (1)-(5), art. 79 (1), (2), (3) paragraph (1), art. 80(1), art. 83 (1), (2), (4)-(6), art. 85 (3), art. 86, art. 90 (1)-(5), art. 91 first paragraph of Directive 2014/24/EU, published in the Official Journal of the European Union, L, n. 94 of 28 March 2014”.

³⁵ Please refer to, in this case, art.240 line(2) from Law n.198/2016.

procurement contracts, contraventions and sanctions for non-compliance with the legal provisions³⁶, as well as transitory and final provisions.

Important to note that throughout the second national transposition act communicated to the European Commission, Government Decision n. 395/2016, solely the methodological standards for enforcement of the provisions concerning the award of public procurement contracts/ framework agreements from the Law n. 98/2016 have been adopted, and not the methodological standards in their entirety, as stipulated in the primary text³⁷.

In contradistinction to the text of the law, neither the content of the Decision nor in the content of the methodological standards is not stated clearly which are the transposed texts from the Directive. However, the text of the methodological standards details, apart the general provisions regarding the registration, renewal and recovery of the registration in the electronic public procurement system (SEAP), the planning and the preparation of the public procurement (the steps of the public procurement process, estimation of the value of the public procurement and the choice of the award of contracts, preliminary market research and the award documentation, with all of its particularities), the public procurement process (including norms regarding direct award of public procurement contracts, general rules of participation to the award procedure, rules applicable to the communications, rules of publication and transparency, the conduct of award of public contract – regarding absolute auctions, reserve auction, competitive negotiation, competitive dialogue, innovation partnerships, negotiated procedure without prior publication, PPIs through open design contest and simplified procedure -, social services and other specific services, instruments and techniques on procurement procedures³⁸ - framework agreement, the dynamic purchasing system or the electronic auction -, the bid and the accompanying documents, the evaluation committee and its conduct, the process of verification and evaluation, finalizing the contract award procedure, the procurement dossier), the performance of the public procurement contract/ framework agreement (with rules regarding subcontracting, ways for replacing the specialised personnel nominated for the creation of the contract, provisions regarding long-term contracts, modifications of the public procurement contract/framework agreement, finalizing the public procurement contract), as well as transitory and final provisions. In the annex are nominated the contract categories for whose award the electronic auction cannot be used.

³⁶It should be mentioned that in order to avoid sanctions, based on the provision of art. 4 from the methodological standards of enforcement of the provisions concerning the award of public procurement contract/framework agreement of the Law n. 98/2016 but also 2.2 from the National Public Procurement Strategy, ANAP elaborated an on-line application, *Ghidul achizițiilor publice (Public Procurement Guide)*, designed for the orientation and the support of those who are involved in public procurement for the establishment of a common practice set in order to ensure the integrity of the public procurement process <https://achizitiipublice.gov.ro/home>.

³⁷According to art. 233 of the Law n. 98/2016, „ANAP will elaborate methodological standards in order to enforce the provisions, which will be approved by a Government Decision in the 30 days following the publication in the Official Journal of Romania, Part I”.

³⁸For the analysis of the juridical nature of the public procurement contract and for its qualification as administrative contract, as well as the evolution of the concept please refer to (Vedinaș, 2017), (Amilhat, 2014), (Richer, 2010).

3. DIRECTIVE 2014/25/EU AND ITS TRANSPOSITION IN ROMANIA

Directive 2014/25/EU, establishing specific norms regarding procurement by entities operating in the water, energy, transport and postal services sectors is the second important act in the legislative package regarding public procurement. Its preamble includes an impressive number of considerations, 142, explaining the principles and the means of transposition which served as a basis for the adoption of the act.

Hence, it is mentioned that „In the light of the results of the Commission staff working paper of 27 June 2011 entitled ‘Evaluation Report — Impact and Effectiveness of EU Public Procurement Legislation’, it appears appropriate to maintain rules on procurement by entities operating in the water, energy, transport and postal services sectors, since national authorities continue to be able to influence the behaviour of those entities, including participation in their capital and representation in the entities’ administrative, managerial or supervisory bodies. Another reason to continue to regulate procurement in those sectors is the closed nature of the markets in which the entities in those sectors operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned”³⁹, and in order to ensure the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union (TFEU) and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In view of the nature of the sectors affected, the coordination of procurement procedures at the level of the Union should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility”⁴⁰.

Starting from these considerations, but also from the norms and basic principles included in the Directive 2014/24/EU applying also to the water, energy, transport and postal services sectors, Directive 2014/25/EU regulates specific characteristics of those sectors⁴¹.

Structured in five titles corresponding to the scope, definitions and general principles (I), rules on public contracts (II), particular procurement regimes (III), governance (IV), respectively delegated powers, implementing powers and final provisions (V), the Directive establishes in the text of art. 1 the subject-matter and the scope, according to whom „establishes rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15”, and „Procurement within the meaning of this Directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen

³⁹Consideration (1) from the Preamble of the Directive.

⁴⁰Consideration (2) from the Preamble of the Directive.

⁴¹According to consideration (6) from the Preamble of the Directive, „It is appropriate that the notion of procurement is as close as possible to that applied pursuant to Directive 2014/24/EU of the European Parliament of the Council, having due regard to the specificities of the sectors covered by this Directive”.

by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 8 to 14.”, concerning gas and heat, electricity, water, public passenger transport by railway, automated systems, tramway, trolley bus, bus or cable, airports and maritime or inland ports, postal services or other services consisting of the clearance, sorting, routing and delivery of postal items, extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels.

In regards to the material scope, there is an establishment of the thresholds⁴², of the exclusions for contracts and design contests. Also, special provisions for procurement involving defence and security aspects are offered. Hence are regulated the exclusions applicable to all contracting entities, as well as special exclusions for water and energy sectors, special relations regarding cooperation, affiliated undertakings and joint ventures, specific situations regarding research and development and contracts subject to special arrangements, respectively activities directly exposed to competition and procedural provisions relating thereto.

Concerning the rules applicable to contracts, the Directive established rules regarding the choice of procedures, techniques and instruments for electronic and aggregated procurement, conduct of the procedures (including preparation, publication and transparency, choice of participants and award of contracts, tenderers comprising products originating in third countries and relations with those countries) and contract performance.

Concerning the particular procurement regimes, the directive establishes distinct norms for social and other specific services, as well as rules governing design contests.

In force since 17 April 2014, the Directive, applicable to all of the member states, should have been transposed in a 2-years term, up to 18 April 2016, while the national measures of transposition should have been communicated to the European Commission. In spite of this term „Member States may postpone the application of Article 40(1) until 18 October 2018, except where use of electronic means is mandatory pursuant to Articles 52, 53, 54, Article 55(3), Article 71(2) or Article 73”⁴³.

Analysing the national measures of transposition communicated by the 28 member states⁴⁴, it may be observed that some of them failed to respect the two year term, with one state (Luxemburg) which has not sent any transposition measure more than one year after the end of the established term. It may also be observed that the number of the proposed measure is not uniform, varying from one measure, in the case of Denmark, Greece, Cyprus, Malta, Austria, Portugal and Slovenia, to a greater number of measures, 29 for Hungary, 11 for France, 9 for the Czech Republic.

In the case of this Directive Romania also communicated two national measures of transposition of the European act, more specifically the Law n. 99/2016 regarding sectoral public procurement⁴⁵ and Government Decision n. 394/2016⁴⁶. We are reiterating here

⁴² Please refer to Commission Delegated Regulation (EU) 2015/2171 of 24 November 2015 amending Directive 2014/25/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts, JO L 307/25.11.2015, p.7.

⁴³ According to art.106 par.(2) of Directive 2014/25/EU.

⁴⁴The national measures of transposition communicated by the 28 Member States for Directive 2014/25/EU is available at <http://eur-lex.europa.eu/legal-content/RO/NIM/?uri=CELEX:32014L0025>.

⁴⁵Law n. 99/2016 on sectoral procurement, published in the Official Journal of Romania, Part I, n. 391, of 23 May 2016.

⁴⁶Government Decision n. 394/2016 for the approval of the Methodological Standards of the provisions regarding the award of sectoral public procurement contracts/framework agreements from the Law n. 99/2016

anterior observations regarding the exceeding of the transposition term, as well as the appreciations regarding the way of transposition of the procedures and of the transposition acts⁴⁷ while adding that the four laws analysed within the study were part of the same legislative package of transposition of European acts, running through the same legislative parliamentary procedure.

According to the explanatory statement⁴⁸ of the draft project of the Law n. 99/2016, this transposes the compulsory provisions of the Directive⁴⁹, following to transpose other provision of the Directive throughout the enforcement standard. It may also be observed that in the case of this directive some provision were entirely transposed while others just partially transposed. It may thus be observed that the Romanian authorities valued the aforementioned text⁵⁰ of the Directive concerning the entry into force of some provision on 18 April 2018⁵¹.

The law of transposition establishes general provisions (regarding the subject-matter, scope and principles, definitions, contracting entities, relevant activities concerning gas and heat, electricity, water, transport services, ports and airports, postal services, extraction of oil and exploration for, or extraction of, coal or other solid fuels; scope; mixed procurement; exemptions; specific situations; general principles for awarding procedures (regarding economic operators; reserved contracts; confidentiality; rules for avoiding the conflicts of interest; rules applicable to communications), rules applicable to contracts (detailing the procedures, of the techniques and instruments for sectoral public procurement contracts), the preparation process of the award of public procurement contracts (detailing the preliminary market consultations, division of contracts into lots, rules of publication and transparency, the elaboration of award of public procurement contracts documentation, alternative tenderers, requirements for qualification and qualitative selection, European Single Procurement Document, respectively the Online repository of certificates (e-Certis), award criteria, electronic catalogues, publication and transparency, award of public contracts and conclusion of framework agreements, tenderers comprising products originating in third countries and relations with those countries, concluding the procedure for the award of a public contract, informing candidates/tenderers, the procurement dossier the report of the public contract award procedure, sectoral contract performance (with specific norms regarding subcontracting, to modifications of sectoral contract/framework agreement, respectively with regard to

concerning sectoral public procurement, published in the Official Journal of Romania, Part I, n. 422 of 6 June 2016.

⁴⁷According to Draft Law n. 98/2016, the parliamentary procedure has been initiated at 23.11.2015 and finished on 12.05.2016, by sending the act to promulgation. The project is available at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=15471.

⁴⁸Explanatory statement, p.9; available at <http://www.cdep.ro/proiecte/2016/000/10/7/em17.pdf>.

⁴⁹For the correspondence of the norms transposed by the Law n.99/2016, according to whom „the present Law transposes the provisions of art. 2, 5, 6, 8-16, 18-32, 36-39, 42, 44-49, 51, 52, 54, 56, 58-61, 63, 64, 66-69, 73-75, 78, 82, 87, 89-91, 93, 95, 98, 100 and 106 from the 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, published in the Official Journal of the European Union, L 94/243 of 28 March 2014 and partially of art. 1, 3, 4, 7, 17, 34, 35, 40, 50, 53, 55, 57, 62, 65, 70, 71, 72, 76, 77, 83, 84, 85, 88, 92, 94, 96, 97 and 99 from the Directive 2014/25/EU of the European Parliament and of the Council, published in the Official Journal of the European Union, L 94/243 of 28 March 2014”.

⁵⁰*Supra* 39.

⁵¹Please refer to the text of art.257 (2) from the Law n.99/2016.

specific cases of termination of sectoral public procurement contracts), contraventions and sanctions for non-compliance with the legal provisions, as well as transitory and final provisions

It should be reiterated that throughout the second national transposition act communicated to the European Commission, Government Decision n. 394/2016, similar to the case of public procurement, only the methodological standards for the enforcement regarding the award of the sectoral public procurement contract/framework agreement from the Law n. 99/2016 have been adopted, and not the methodological standards for the enforcement of the law in its entirety, as provided by the primary text⁵². Also, neither the content of the Government Decision nor the methodological standards do not stipulate expressly the text of the Directive which has been transposed.

The methodological standards establish the general provisions regarding the registration, renewal and recovery of the registration in the electronic public procurement system (SEAP), the planning and the preparation of the public procurement (the steps of the public procurement process, estimation of the value of the public procurement and the choice of the award of contracts, preliminary market research and the award documentation, with all of its particularities), the public procurement process (including norms regarding direct award of public procurement contracts, general rules of participation to the award procedure, rules applicable to the communications, rules of publication and transparency, the conduct of award of public contract – regarding absolute auctions, reserve auction, competitive negotiation, competitive dialogue, innovation partnerships, negotiated procedure without prior publication, PPIs through open design contest and simplified procedure -, social services and other specific services, instruments and techniques on sectoral procurement procedures - framework agreement, the dynamic purchasing system or the electronic auction -, the bid and the accompanying documents, the evaluation committee and its conduct, the process of verification and evaluation, finalizing the contract award procedure, the procurement dossier), the execution of the sectoral public procurement contract/ framework agreement (with rules regarding subcontracting, the modification or termination of the sectoral public procurement contract/framework agreement, termination of the public procurement contract), the existence of an exclusive right and activities directly exposed to competition, as well as transitory and final provisions. In the annex are nominated the contract categories for whose award the electronic auction cannot be used.

4. DIRECTIVE 2014/23/EU AND ITS TRANSPOSITION IN ROMANIA

We were recalling at the outset of this presentation that, together with the classic directive, respectively the sectoral directive and in complementarity with it, within the same legislative package has been promoted and adopted the first distinct directive on the award of concession contracts, the Directive 2014/23/EU, whose preamble describes in detail both the necessity and the opportunity of the chosen means of transposition, as well as the relation of this directive with the previous.

⁵²According to art.254 from Law n.99/2016, „ANAP will elaborate methodological norms of application of its stipulent, which will be approved by Government decision”.

Hence, according to the consideration (4) „the award of public works concessions is presently subject to the basic rules of Directive 2004/18/EC of the European Parliament and of the Council (4); while the award of services concessions with a cross-border interest is subject to the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the principles of free movement of goods, freedom of establishment and freedom to provide services, as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. There is a risk of legal uncertainty related to divergent interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of various Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union which has, nevertheless, only partially addressed certain aspects of the award of concession contracts. | A uniform application of the principles of the TFEU across all Member States and the elimination of discrepancies in the understanding of those principles, while consideration (81) states that „In order to ensure adequate judicial protection of candidates and tenderers in the concession award procedures, as well as to make effective the enforcement of this Directive and of the principles of the TFEU, Council Directive 89/665/EEC⁵³ and Council Directive 92/13/EEC⁵⁴ should also apply to services concessions and to works concessions awarded by both contracting authorities and contracting entities. Directives 89/665/EEC and 92/13/EEC should, therefore, be amended accordingly.

The doctrine points out that this act „completed the juridical perspective by including a definition of concession contracts, based on the notion of operating risk, explained beforehand in paragraphs (18) and (20) from the Preamble of the Directive 2014/23/EU.”(Monica Amalia , 2017)

Hence, the Directive establishes „rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, whose value is estimated to be not less than the threshold laid down in Article 8”⁵⁵ and establishes, in its five titles, the subject-matter, scope, principles and definitions (I), rules on the award of concessions, regarding general principles and procedural guarantees (II), rules on performance of concessions (III), amendments to Directive 89/665/EEC and 92/13/EEC (IV), as well as rules on delegated powers, implementing powers and final provisions (V).

Other than subject-matter, principles, definitions, scope or thresholds, in the first part of the Directive are regulated aspects regarding exclusions applicable to concessions awarded by contracting authorities and contracting entities, specific exclusions in the field of electronic communications, respectively specific exclusions in the field of water, concessions awarded to an affiliated undertaking, notification of information by contracting entities, exclusion of activities which are directly exposed to competition and

⁵³ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, JO L 395, 30.12.1989, p.33.

⁵⁴ Directive 92/13/EEC of 25 February 1992, coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

⁵⁵Please refer to Commission Delegated Regulation (EU) 2015/2172 of 24 November 2015 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts JO L 307/25.11.2015, p.9.

concessions between entities within the public sector. Also, the provisions regarding the duration of the concession are detailed, as well as social and other specific services and mixed contracts and research and development services.

The second title contains relevant provisions concerning to general principles regarding concession notices, form and manner of publication of notices, electronic availability of concession documents, Combating corruption and preventing conflicts of interest. Also, it contains important elaborations on procedural guarantees concerning technical and functional requirements, effective guarantees, selection and qualitative assessment of candidates, time limits for receipt of applications and tenderers for the concession, provision of information to candidates and tenderers and the award criteria.

Concerning the rules on performance on concessions, regulated within the third title, the norms are aiming at subcontracting, modification of contracts during their term, respectively termination of concessions. Also, in the content of the fourth title are presented, on a case-by-case reasoning, the amendments to the previous directives in this field.

This third Directive, in force since 17 April 2014, applicable to all of the member states, should have been transposed in a 2-years term, until 18 April 2016, with the specific exceptions provided in its text⁵⁶, while the national measures of transposition should have been communicated to the European Commission. Analysing the national measures of transposition communicated by the 28 member states it may be observed that some of them failed to respect the two-years term, with three states (Bulgaria, Luxemburg and Slovenia) which have not sent any transposition measures. It may also be observed that in this case of this Directive as well, the number of the proposed measure is not uniform, varying from 1, in the case of Denmark, Ireland, Greece, Cyprus, Malta, Poland or Romania, to a maximum of 20 measures, in the case of Hungary.

It was already stated that, as results from the national transposition measures communicated by member states concerning Directive 2014/23/EU, Romania communicated just one national transposition of the European act, the Law n. 100/2016 on the award of concession contracts⁵⁷. We emphasize that in order to apply the provision of this law a set of methodological standards has been adopted throughout Government Decision n. 867/2016⁵⁸.

According to the explanatory statement⁵⁹ of the draft project of the Law n. 99/2016, this transposition transposes the compulsory measures of the Directive⁶⁰, following to transpose other provision of the Directive throughout the enforcement standard. It may

⁵⁶The national measures of transposition communicated by the 28 Member States for Directive 2014/23/EU is available at <http://eur-lex.europa.eu/legal-content/RO/NIM/?uri=CELEX:32014L0023>.

⁵⁷ Law n.100/2016 on works and services concessions, published in Monitorul Oficial al României, Part I, n.392 of 23 May 2016.

⁵⁸ Government Decision n. 867/2016 for the approval of the Methodological Standards concerning the provisions regarding award of public works concession contracts and services concessions contracts, published in the Official Journal of Romania, , Part I, n.985 of 7 December 2016.

⁵⁹ Explanatory statement, p.9; available at <http://www.cdep.ro/proiecte/2016/000/20/0/em20.pdf>.

⁶⁰ For the correspondence of the norms transposed by the Law n.99/2016, according to whom „the present Law transposes the provisions of art. 3, 8, 11, 13-19, 22-26, 28, 31, 34-36, 38-40, 43, 44 și 54 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L, 94/1 of 28 March 2014, and partially the provisions of art. 1, 2, 4-7, 9, 10, 20, 21, 29, 30, 32, 33, 37, 41, 42 and 45 of Directive 2014/23/EU of the European Parliament and of the Council”.

also be observed that in the case of this directive some provision were entirely transposed while others just partially transposed.

The law regulated the general provisions (aiming at the subject-matter, general principles; the definitions; the scope, the contracting authorities; the exceptions; duration of the concession procedures for public works concession or services concession, rules on the award of mixed procurement contracts, as well as special situations), exclusions (applicable to public works concession or services concession awarded by contracting entities, applicable to public works concessions or services concession organized pursuant to international rules; applicable to public works concessions or services concession involving defence or security aspects; applicable to services concessions; Specific exclusions in the field of electronic communications, applicable to public works concessions and services concessions awarded by contracting entities for the pursuit of their activities in a third country; public works concessions or services concessions awarded to an affiliated undertaking; awarded to a joint venture or to a contracting entity forming part of a joint venture. The law transposed solely the provisions regarding activities directly exposed to competition; applicable to concessions between entities within the public sector; principles on concession award procedures (regarding economic operators; confidentiality; rules for avoiding the conflicts of interest; rules applicable to communications); rules on the award of concessions (detailing the general principles applicable to the concessions award procedures, of absolute auctions, competitive dialogue, publication and transparency, the elaboration of award of concessions contracts documentation, time limits for receipt of applications and tenders for public works concessions or services concessions, award criteria and concluding the procedure for the award of a public contract, informing candidates/tenderers, rules on performance of concessions (regarding subcontracting respectively modification of contracts during their term and termination of concessions), contraventions and sanctions for non-compliance with the legal provisions, as well as transitory and final provisions.

It may be observed that throughout the second national transposition act, Government Decision n. 867/2016, solely the methodological standards for enforcement of the provisions concerning the award of concessions from the Law n. 100/2016 have been approved, and not the methodological standards in their entirety, as stipulated in the primary text⁶¹. Apart from the general provision regarding the registration, renewal and recovery of the registration from the electronic public procurement system (SEAP), the planning and the preparation of the public procurement (the planning of public works concessions and services concessions, the substantiation for the award of concession contracts, and the award documentation), the principles of the concessions award procedure (including general rules of participation of the award procedures, rules of publication and transparency, rules on the award of concessions - absolute auctions, competitive dialogue, negotiation with no prior publication of the concession notice, simplified procedure, respectively social services and other services – the bid and its accompanying documents, the evaluation committee and its conduct, the process of verification and evaluation, finalizing the contract award procedure, finalizing the concessions dossier), the execution of the concession contract/ framework agreement

⁶¹ According to art. 115 of Law n. 100/2016 „ANAP will elaborate methodological standards in order to enforce the provisions, which will be approved by a Government Decision.”

(with rules regarding subcontracting, modifications of the concession contract/framework agreement, finalizing the concession contract), as well as transitory and final provisions. The three annexes include the preliminary risk analysis matrix of the project and the general risk assessment list for a public works concession project, key-components of the availability-based payment mechanism, as well as key-elements of such a mechanism.

5. THE REMEDIES DIRECTIVES AND THEIR TRANSPOSITION IN ROMANIA

Although the Remedies Directives are not new Directives, in order to make part from the legislative package adopted in 2014, the National Public Procurement Strategy⁶² stipulated the adoption of distinct normative act regarding remedies and procedures in the field of public procurement and concessions by transposing Directive 89/665/EC 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.

The introduction of such a provision was deemed necessary to be included in the strategy, since 10 years after the enforcement of the legislation on the matter it was found that the national public procurement system was confronted on the one hand with the lack of capacity and capability of the contracting authorities to organize coherent public procurement procedures, and on the other hand with a dense legislation, hard to interpret and use in the legal practice, characterized by frequent legislative changes, by a lack of transparency and investment efficiency, by numerous complaints and by the lack of sustainability of the projects⁶³.

In short, these directives are coordinating the review processes of the public procurement and concessions fields by establishing a set of common standards, in order to ensure effective and rapid remedies for the alleged violations of the legal provisions, establishing simultaneously specific norms for remedies for any person who suffered consequences of an act of the contracting authority. These remedies can be exercised prior to the signing of the contracts – pre-contractual remedies including interim measures, the mandatory standstill period in order to sign the contract, the suspension of the award procedure until the contentions solving -, and posterior to its signing – post-contractual remedies including interim measures, destined to declare a contract as voidable and to establish the granting of reparations.

The national transposition measures communicated by member states for these directives will not be treated here, given the fact that the existent information of Romania refer to measures prior to 2016, established by normative acts abrogated since the entry

⁶² *Supra* 22.

⁶³ The reasoning is included in the first paragraph of the explanatory statement of the Draft Law n.101/2016; available at <http://www.cdep.ro/proiecte/2016/000/10/9/em19.pdf>.

into force of the Law n. 101/2016⁶⁴, regulating remedies and their procedures, both in administrative jurisdiction or in the judiciary, in the field of award of public procurement contracts, of sectoral contracts and of concession contracts and established norms for the organization of the National Council for Solving Complaints. The law also applies to the requests made in order to obtain damages in order to repair prejudices caused within the award procedure, as well as concerning the performance, the cancellation, the resolution, the rescission or the breaking down of unilateral contracts. It should be underlined that the text of the law stipulates the transposition of the two directives⁶⁵.

The national legal framework applicable in this field will not be detailed in this analysis, but it necessary notwithstanding to reiterate that any member of the society has the right to raise a contention, the compulsoriness to prior notice the contracting authority, the administrative jurisdictional system for solving complaints, as well as aspects regarding the organization of the National Council for Solving Complaints.

6. DIRECTIVE 2014/55/EU

In 2014, at the level of the EU has been adopted a subsidiary act to the legislative package concerning the public procurement report, but without bearing its importance, the Directive 2014/55/EU on electronic invoicing in public procurement⁶⁶. This Directive needs to be mentioned here because this standardization process of the electronic invoicing was an effort made in order to promote electronic public procurement, regulated both in the Directive on public procurement and in the sectoral Directive, and according to its scope, this new „ Directive shall apply to electronic invoices issued as a result of the performance of contracts to which Directive 2009/81/EC, Directive 2014/23/EU, Directive 2014/24/EU or Directive 2014/25/EU applies”⁶⁷, the exemptions being presented within its first article.

Apart from detailing the scope, the directive includes definitions, norms regarding the establishment of a European standard in this field, and formal objections to the European standard but on maintenance and further development of the European standard, core

⁶⁴ Law n. 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, published in the Official Journal of Romania, Part I, n.393 of 23 May 2016.

⁶⁵According to the final text of the Law n. 99/2016 according to whom „, the present Law transposes the Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts published on Official Journal of the European Communities, OJ L 395, 30.12.1989, further amended and supplemented, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, published in the Official Journal of the European Communities, OJ L 76, 23.3.1992, further amended and supplemented”.

⁶⁶Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement, JO L 133/6.05.2014.

⁶⁷ Art. 1 (1) and Art. 1 (2) presents the exemptions according to whom, „This Directive shall not apply to electronic invoices issued as a result of the performance of contracts falling within the scope of Directive 2009/81/EC, where the procurement and performance of the contract are declared to be secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State, and provided that the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures”.

elements of an electronic invoice, receipt and processing of electronic invoices, elements related to data protection as well as other procedural elements, inclusively regarding the entry into force and to transpose the provisions of the Directive. The directive entered into force entered into force on 26 May 2014, and the term established for its transposition is 27 November 2018, national measures of transposition should be communicated to the European Commission in due course.

Analysing the national measures of transposition communicated by the 28 member states⁶⁸; it may be observed that only four states communicated such measures, and Romania is not amongst them.

7. LAW N. 184/2016

In close connection with the reform of the national framework on public procurement and establishing un new mechanism for the prevention of conflicts of interest in the award procedure of public procurement contracts, the Parliament of Romania adopted, in the year 2016, a new legislative act, the Law n. 184/2016⁶⁹, which constitutes within Romania's National Integrity Agency (ANI) an integrated computer system for the prevention and the identification of potential conflicts of interest, called the Prevent System.

As mentioned in the first article, the scope of the law is the „prevention of the conflict of interest in the public procurement award contracts by the establishment of an *ex ante* verification mechanism, from the perspective of the situations which may generate conflicts of interest in the procedures initiated throughout the electronic public procurement system, in order to avert them without affecting the undergoing procedures.”

The Law, applicable both to public procurement and to sectoral public procurement, provided by the Law 98/2016 and 99/2016, includes the description of the mechanism, the procedure regarding the integrity warning, as well as final and transitory provision making possible its application. Within the annex of the law is provided the mandatory form of integrity, in which some data will be automatically extracted/generated by the electronic public procurement system (SEAP), whilst others will be included separately.

Entered into force partially in 2016 and partially in 20 June 2017, the Law applies exclusively to public procurement procedures started after its entry into force, and the necessity of the system is motivated within the explanatory statement of the draft Law⁷⁰, including the observation that although the legislative framework is reformed by the integration of the European norms, the application of the procedures is affected by corruption and conflicts of interest, especially at the local level, and the implementation of this *ex ante* control mechanism will allow the verification of potential conflicts of interest without further prolongations or complications of the existing public procurement

⁶⁸ The national measures of transposition communicated by the 28 Member States for Directive 2014/55/EU is available at <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32014L0055>.

⁶⁹ Law n. 184/2016, on the Law no.184/2016, to establish a mechanism to prevent conflict of interests in public procurement contract awarding, has been published in the Official Journal of Romania, Part I, n.831 of 20 October 2016.

⁷⁰ The explanatory statement of the Draft Law n. 184/2016 is available at <http://www.cdep.ro/proiecte/2015/600/20/6/em806.pdf>.

procedures, by signalling and averting conflicts of interest and allowing implicitly to continue the public procurement procedure.

8. BRIEF CONCLUSIONS

Analysing the multitude of invoked norms, but also from the perspective of the objectives of the legislative reform aiming to the simplification⁷¹ and de-bureaucratization, some questions arise concerning the extent to which these objectives have been completed or, contrariwise, if this reform lead to an excessive bureaucratization of public procurement procedures.

All the data converge towards the conclusion that the European normative framework, structured and transposed in the national legislation provides the prerequisites for supple procedures, more flexible and more efficient than the previous. Being widely known that any legislative text is the result of a compromise and the fruit of the negotiations underwent during the adoption process, analysing the vastness of the procedures underwent for each of the analysed acts, it may be stated that the chosen texts are the best possible outcome in the given conditions.

It is impossible to assess whether Romania succeeded or not a correct and complete transposition process, in accordance with the European trend. The confirmation or invalidation may arise in time, with the application of the provisions and the exam provided by the eventual cases presented in the attention of the European Court of Justice.

What may be firmly stated is that the competent authorities are preoccupied to complete the established objectives in their entirety, the idea of a project aiming at the interrelation of the norms one year after the application of the national legislation in this field in order to remediate the deficiencies being a proof of their preoccupation. The project⁷², in public consultation process at the time of the writing, aims to realize a precise correlation of some texts, to nuance and to clarify some notions and concepts, in the spirit of the Directives, as for example the notion of public law body, contracting authority and entity, the concept of association, modalities for applying a simplified procedure, data on the subcontractors, the rights of the contracting authority, a better respect of the equality of treatment, modification of some aspects regarding the sanctions, as well as the shortening of some time limits.

All the modifications concur for ensuring an auspicious climate for public procurement, but we appreciate that a central element for the success of the reform initiated in this field is the professional preparation of the specialized human resources, in all the administrative layers involved in the preparation and performance of public procurement procedures.

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⁷²For further details please refer to *supra* 23.

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