The European Union and Romanian Jurisprudential Perspective on the Public Procurement Contract – Category of the Administrative Contract

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Abstract

A decision-making relevance for retaining the incidence of the special legislation applicable in the matter of public procurement presents the qualification of the contract as a public procurement contract, subsequent to the analysis of the legal features of the contract, but also of the qualities of the contracting parties. The legal features that particularise the public procurement contract represent autonomous notions, defined by EU law, with the exception of the element relating to the administrative character, not provided for by Directive 2014/24/EU, but mentioned by Romanian law. Also, the qualification of the public procurement contract is an autonomous qualification, in accordance with the provisions of EU law on public procurement, and the qualification of the contract in national law is not relevant from this perspective. Equally, the concepts of contracting authority and economic operators, tenderer are defined not only at the legislative level, but have been the subject of a rich ECJ jurisprudence, which must be taken into account and applied as such by the national judge. In terms of guaranteeing the most efficient use of public money, avoiding the non-application of special provisions in the field of public procurement, as well as consolidating theoretical knowledge in the matter, it is useful to approach the previously mentioned autonomous notions in the light of European and Romanian jurisprudence and doctrine.

Keywords: *public procurement, public procurement contract, contracting authority, economic operator.*

JEL Classification*:* K23, K33

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1. Introductory aspects

The dynamics of public procurement regulations at the European level since 1970 is a reflection of the importance of consolidating the European single

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market in this area of great topicality and interest, which represents an important percentage of the EU member states' GDP.

This article represents an extensive research of the legal institution of the public procurement contract in the current context of the provisions of the 5th generation of the community acquis on public procurement and the Romanian transposition law, with an emphasis on the practical values reflected in a rich judicial practice of the ECJ and Romanian, subject to analysis.

The issue dealt with concerns about the concept of public procurement contract, its legal features, the parts of the public procurement contract and the types of public procurement contracts.

2. The concept of public procurement contract

Public procurement contracts are defined by the provisions of art. 2 para. (1) point 5 of Directive 2014/24, as contracts for consideration, concluded in writing between one or more economic operators and one or more contracting authorities and whose object is the execution of works, the supply of products or services.

Pursuant to the provisions of art. 3 paragraph (1) letter l) from Romanian Law no. 98/2016, the public procurement contract represents the contract with onerous title, assimilated, according to the law, to the administrative act, concluded in writing between one or more economic operators and one or more contracting authorities, which has as its object the execution of works, the provision of products or the provision of services.

Comparatively analysing the two definitions, we notice that beyond the elements provided in Directive 2014/24, our national law adds to the fact that the public procurement contract is assimilated according to the law, the administrative act.

3. Legal features of the public procurement contract

As it follows from the legal definition of the public procurement contract itself, it is an administrative, synallagmatic, onerous, solemn, bilateral or multilateral contract.

The legal features that characterise the public procurement contract represent autonomous notions, defined by EU law,[2] with the exception of the element relating to the administrative character, not provided for by Directive 2014/24/EU, but mentioned by our national law. In this sense, the phrase public contract mentioned in art. 2 para. (1) point 5 of Directive 2014/24/EU is used to denote the fact that one of the contracting parties is the state or other contracting

[2] See Michael Steinicke, Peter Vesterdorf, *EU Public Procurement Law. Brussels Commentary*, Ed. C. H. Beck, Baden-Baden, Germany, 2018, p. 159.

authority, and not to refer to the category of public contracts known in the national law of some member states (France, Germany, Romania).[3]

In the jurisprudence of the CJEU, the autonomous qualification, in accordance with the provisions of EU law on public procurement, of the public procurement contract was highlighted, showing no relevance from this perspective the qualification of the contract in national law. In this sense, it was held, for example, that since Article 1 letter (a) of the directive on public procurement does not contain any express reference to the law of the member states to determine its meaning and scope, it is not necessary to determine what is the qualification of the respective contract in French law to judge whether this convention falls within the scope of the directive.[4]

3.1. It is an administrative contract

In article 2 of Romanian Law no. 554/2004 of the administrative litigation, which bears the marginal name: 'the meaning of some terms', the Romanian legislator assimilates to the administrative acts defined in art. 2 letter c) thesis I, the contracts concluded by the public authorities whose object is: the promotion of public property, the execution of works of public interest, the provision of public services.

The public procurement contract is an administrative contract in the light of the definition of the public procurement contract and the Romanian Administrative Litigation Law no. 554/2004. The provisions of article 8 paragraph (3) of Law no. 554/2004 are relevant, according to which, 'when settling the disputes provided for in paragraph (2), the rule according to which the principle of contractual freedom is subordinated to the principle of priority of the public interest is taken into account'.

Thus, the legal regime of the public procurement contract is a special one, predominantly of public law. The public law prerogatives available to the contracting authority consist in the fact that the contract is concluded for the performance of tasks of public interest, which puts the contracting authority in a privileged position with the possibility to impose some clauses in the contract, to control the way of execution and even termination of the contract.

Principles such as the equality of co-contractors and the balance of negotiations, which prevail in civil relations, are not found in administrative law, where the contract concluded by the public administration has certain special characteristics, imposed by the public interest that is the basis of its conclusion and execution, being considered a public contract.[5] These special characteristics

[3] See, Roberto Caranta, Albert Sanchez-Graells, *European Public Procurement. Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, UK, 2021, p. 5.
[4] ECJ judgment of January 18, 2017, *Jean Auroux*, C-220/05, ECLI:EU:C:2007:31, para. 40.
[5] Sentence no. 264/28.04.2023, pronounced by the Mureș Tribunal, Administrative and Fiscal Litigation Section in file no. 337/1371/2022.

of the administrative contract also make the public procurement contract special.

The contracting authority and the economic operator are not in a position of legal equality. In this sense, for example, the request by the contracting authority to extend the validity of the offers, as well as the participation guarantee with a delay of 161 days, does not mean that the operator may not comply with the request of the contracting authority within the established deadline, without the provisions of art. 124 final thesis of Romanian The Government Decision no. 395/2016, which provides for the rejection of the offer as unacceptable in such a situation.[6]

To be in the presence of an administrative contract, it is necessary that one of the contracting parties is a public authority,[7] in a position of legal superiority over its co-contractor, and that the contract seeks to satisfy a general interest.

Related to the requirement that one of the parties to the contract be a contracting authority, in judicial practice it has been highlighted that the mention in the preamble of the service contract of the legal provisions in the field of public procurement does not give the contract the value of a public procurement contract as long as none of the contracting parties is not a contracting authority within the meaning of art. 4 of Romanian Law no. 98/2016.[8]

Regarding the satisfaction of a general interest pursued by the conclusion of the public procurement contract, in judicial practice it has been held, for example, that street lighting constitutes a public service, under the responsibility of the territorial administrative authority, an aspect that leads to the qualification of the contract concluded by the administrative unit – territorial having as its object the purchase of products intended for street lighting as a contract subject to the procedural provisions of Romanian Law no. 101/2016.[9]

Unlike the administrative contract, in the hypothesis of the civil/ commercial contract, the contracting parties are in a position of legal equality, and the interest pursued through the expression of the agreement of the will of the parties is private, and not general, public.

In the same vein, reflecting the contrast with the civil contract, the public procurement contract represents an exception to the principle of autonomy of will. Thus, both the European legislator and the national legislator, in the name of the general interest, establish mandatory norms and not supplementary or recommendation norms regarding the agreement of wills[10] of contracting authorities

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[6] Civil decision no. 598/21.12.2023, pronounced by the Târgu Mureș Court of Appeal, Second Civil Section, for administrative and fiscal litigation, in file no. 344/43/2023.

[7] See Alexandra-Eszter Vasiu, „Serviciul public – contractul administrativ", in *Universul Juridic Magazine* no. 6/2021, p. 1.

[8] Civil judgment no. 38/12.04.2024, pronounced by the Bucharest Court of Appeal, Xth Section for administrative and fiscal litigation and for public procurement, in file no. 2110/2/2024.

[9] Civil judgment no. 114/16.11.2023, pronounced by the Bucharest Court of Appeal, Civil Section VI, in file no. 7030/2/2023.

[10] See Andrei Bogdan Murgu, Lăcrămioara-Ionale Cojocariu, „Opinii cu privire la autonomia de voință în materie contractuală în dreptul internațional privat român", in *Pandectele Române*, no.

and economic operators.

While in civil contracts, the parties have the possibility to define the obligation of confidentiality, in principle, indefinitely, when one of the parties is a contracting authority, the public purpose of ensuring the transparency of information becomes significant.[11]

3.2. It is a synallagmatic, onerous contract

The synallagmatic contract is that contract in which the obligations born are mutual and interdependent.

According to the jurisprudence of the CJEU, the public procurement contract is a contract by which each party undertakes to perform a service in exchange for a consideration.[12]

The synallagmatic character of the contract is, therefore, an essential characteristic of a public procurement contract.[13]

The synallagmatic character of a public procurement contract necessarily translates into the creation of coercive obligations from a legal point of view for each of the parties to the contract, the execution of which must be able to be invoked in court.[14]

The contract is onerous if each contracting party seeks to obtain an advantage in exchange for the assumed obligations.

Usually, by completing the public procurement contract, the economic operator seeks to obtain a price from the contracting authority in exchange for the assumed contractual obligations, and the contracting authority seeks the execution of works, the supply of products or the provision of services by the economic operator.

As highlighted in the practice of the CJEU, the consideration of the contracting authority must not necessarily consist in the payment of a sum of money, so that the performance can be repaid through other forms of consideration, such as the reimbursement of expenses incurred for the provision of the agreed service (see among others Judgment of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and others*, C 159/11, EU:C:2012:817, paragraph 29, Judgment of 13 June 2013, *Piepenbrock,* C. 386/11, the EU: C: 2013:385, paragraph 31, as well as Judgment of 18 October 2018, IBA Molecular Italy,

5/2021, p. 61.

[11] See Carri Ginter, Nele Parrest, Mari Ann Simovart, „Access to the content of public procurement contracts: the case for a general EU-law duty of disclosure", in *Public Procurement Law Review*, 2013, 4, p. 158.

[12] ECJ judgment of October 18, 2018, IBA Molecular Italy, C 606/17, EU:C:2018:843, para. 28.

[13] See, in this regard, the ECJ Decision of December 21, 2016, *Remondis,* C. 51/15, EU:C:2016:985, para. 43; ECJ judgment of 28 May 2020, *Informatikgesellschaft für Software Entwicklung*, C. 796/18, the EU: C:2020:395, para. 40; ECJ judgment of June 18, 2020, *Porin kaupunki*, C 328/19, the EU: C:2020:483, para. 47.

[14] ECJ judgment of March 25, 2010, *Helmut Müller*, C. 451/08, the EU: C:2010:168, para. 60–62.

C 606/17, EU:C:2018:843, paragraph 29).

It follows that a contract whereby a contracting authority is not legally bound to provide any performance in exchange for that which its co-contractor has undertaken to perform does not fall within the scope of the notion of 'contract for consideration' within the meaning of Article 2 paragraphs (1) point 5 of Directive 2014/24.[15]

Article 2 paragraphs (1) point 5 of Directive 2014/24 cannot constitute a legal basis for rejecting an offer to propose a price of 0 euros. Therefore, this provision does not allow the automatic removal of a tender submitted under a public procurement contract, such as a tender at the price of €0, whereby an operator proposes to provide the contracting authority with the works, goods or services that it wishes to purchase without asking for a consideration.

Under these conditions, since an offer at the price of 0 euros can be qualified as an abnormally low offer, within the meaning of article 69 of Directive 2014/24, when a contracting authority is faced with such an offer, it must follow the procedure provided in this provision, asking the bidder for explanations regarding the value of the bid. From the logic on which article 69 of Directive 2014/24 is based, it follows that an offer cannot be automatically rejected just because the proposed price is 0 euros.

Thus, from paragraph (1) of this article it emerges that, if an offer seems abnormally low, the contracting authorities request the offeror to explain the price or costs proposed in the offer, these explanations may, among others, concern the elements provided for in paragraph (2) of the mentioned article. The respective explanations thus contribute to the evaluation of the reliability of the offer and would allow them to demonstrate that, although the offeror proposes a price of 0 euros, the offer in question will not affect the correct execution of the contract.

In accordance with paragraph (3) of the same article, the contracting authority must evaluate the information provided in consultation with the tenderer and may not reject such a tender unless the evidence provided satisfactorily explains the low level of the proposed price or costs.

The evaluation of this information must, moreover, be carried out in compliance with the principles of equality and non-discrimination between tenderers, as well as transparency and proportionality, which are imposed on the contracting authority in accordance with Article 18(1) of Directive 2014/24.[16]

In Romanian judicial practice, it was held that, in the case of a public procurement contract, the economic operator is always the one who undertakes to perform works, supply products or render services in exchange for the price paid by the contracting authority. Or, according to the contract concluded between the parties, the authority, as the lessor, is the one that has undertaken to

[15] ECJ judgment of September 10, 2020, Case C 367/19, *Tax Fin Lex* d.o.o., ECLI:EU:C:2020:685, para. 25 and so on.
[16] Idem.

ensure the use of the rented space in exchange for the price that the lessee economic operator has committed to pay. Moreover, even in the situation where the object of the contract would have been the provision of building rental services by the economic operator to the contracting authority, such a contract is not a public procurement contract, being explicitly excluded from the scope of the objective application of Law no. 98/2016, according to art. 29 para. (1) of the Law.[17]

3.3. It is a solemn contract

The public procurement contract is concluded in written form, provided form *ad validitatem* – aspect resulting from the administrative nature of the public procurement contract.

The imperative to conclude the public procurement contract in written form also results from the legal provisions regulating free access to information of public interest. In this sense, the provisions of art. 111 of Law no. 544/2001 states that any contracting authority, as defined by law, has the obligation to make available to interested natural or legal persons, under the conditions provided by art. 7, public procurement contracts.[18] Also, in countries such as Finland, Latvia, Slovenia, concluded public procurement contracts are public.[19]

In Romanian judicial practice, it was highlighted that one of the conditions required by the special law on public procurement to be present in a public procurement contract is that that legal act was concluded in writing, a condition not fulfilled in the context in which the legal relations established between litigating parties are proven by tax invoices and the seminar registration and accommodation reservation forms, appropriated by the signature.[20]

3.4. It is a bilateral/multilateral contract

The public procurement contract can be bilateral, in the event that the agreement of will for the completion of the said contract is expressed by a single contracting authority and a single economic operator, or it can be multilateral, in the event that the public procurement contract is concluded between several contracting authorities and/or several economic operators.

The choice of a tender and therefore of an adjudicator is an element intrinsically linked to the regulation of public procurement contracts by this di-

[17] Civil judgment no. 125/17.11.2023, pronounced by the Bucharest Court of Appeal, X[th] Section for administrative and fiscal litigation and for public procurement, in file no. 7427/2/2023.

[18] See Dan Cimpoeru, *Achiziții publice. Concesiuni. Gestiunea serviciilor de utilități publice. Parteneriat public-privat. Remedii și căi de atac*,7[th] Edition, Ed. C. H. Beck, Bucharest, 2022, p. 65.

[19] See Carri Ginter, Nele Parrest, Mari Ann Simovart, *op. cit*., p. 156.

[20] Civil judgment no. 9/4.02.2022, pronounced by the Bucharest Court of Appeal, Civil Section VI, in file no. 456/2/2022.

rective. A system of agreements, through which a public entity intends to purchase goods on the market by concluding contracts, for the entire validity period of this system, with any economic operator who undertakes to supply the goods in question cannot be qualified as a public procurement contract. Predetermined conditions, without making any choice between the interested operators and allowing them to adhere to the said system for the entire duration of its validity.[21]

4. The parties to the public procurement contract

The parties to the public procurement contract have the capacity of contracting authority, respectively economic operators.

They have the capacity of contracting authority within the meaning of art. 4 of Romanian Law no. 98/2016:

a) central or local public authorities and institutions, as well as the structures from their composition that have been delegated to the capacity of credit orderers and that has established competences in the field of public procurement;

b) public law bodies;

c) the associations formed by one or more contracting authority from those provided for in letter a) or b).

By public law body within the meaning of art. 4 para. (1) letter b) from Romanian Law no. 98/2016 means any entities, other than the central or local public authorities or institutions, as well as the structures within them which, regardless of the form of constitution or organisation, cumulatively fulfil the following conditions:

a) are established to satisfy the needs of general interest, without a commercial or industrial character;

b) have legal personality;

c) are financed, in the majority, by entities from among those provided for in paragraph (1) letter a) from Romanian Law no. 98/2016 or by other bodies under public law or is subordinated, under the authority or under the coordination or control of an entity from those provided for in paragraph (1) letter a) from Romanian Law no. 98/2016 or of another body under public law or more than half of the members of the board of directors/management or supervisory body are appointed by an entity from those provided for in para. (1) letter a) from Romanian Law no. 98/2016 or by another public law body.

In assessing whether or not such a need in the general interest is present, the account must be taken of all the relevant legal and factual elements, such as the circumstances prevailing at the time when the body concerned was established and the conditions under which it exercises its activity.[22]

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[21] ECJ judgment of June 2, 2016, *Dr. Falk Pharma GmbH*, C-410/14, ECLI:EU:C:2016:399, para. 38 and 42.

[22] Charles Clarke, „The Meaning and Requirements of the Term 'Contracting Authority Under EU Public Procurement Law: A Critique of Developments from the ECJ Jurisprudence", in *European*

The fact that a need is of general interest does not necessarily imply that its satisfaction does not have a commercial or industrial character, being equally possible that the satisfaction of a need of general interest may or may not have a commercial or industrial character. The lack of commercial or industrial character of the need for interest can only be verified after the concrete analysis of all relevant factual and legal elements.[23]

It is considered that the needs of general interest have an industrial or commercial character, if the entity established, under the terms of the law, by a contracting authority cumulatively fulfils the following conditions:

a) operates under normal market conditions;

b) seeks to obtain a profit;

c) bears the losses resulting from the exercise of his activity.

In the jurisprudence of the CJEU, it was ruled that the following public law bodies can have the capacity of contracting authority:

— universities (Judgment of October 3, 2000, *University of Cambridge*, C-380/98[24]);

— public broadcasting organisations (Judgment of 13 December 2007, *Bayerischer Rundfunk and others*, C-337/06[25])

— entities that comply with the condition regarding the satisfaction of the general interest (C-470/99, *Universale-Bau*[26])

— commercial companies controlled by the state (C-283/00, Commission v. Spain[27]; C-373/00, *Adolf Truley*[28])

— national sports federations (C 155/19 and C 156/19, *Federazione Italiana Giuoco Calcio*[29])

— public health insurance companies (Judgment of June 11, 2009, C-300/07, *Hans&Christophorus Oymanns*[30]).

At the same time, in the Union jurisprudence it was ruled that a company whose material and functional connection with a contracting authority justifies the application of the in-house exception, in terms of its internal operations, falls under the directives on public procurement if it contracts with third parties for

Procurement & PPP Law Review no. 1|2012, p. 59.

[23] See Alin Mihai Laurentiu, Achim Sorin Răzoare, Ioana Romana Laurentiu, „Provocări privind noțiunea de interes general fără caracter comercial sau industrial, în contextul legislației achizițiilor publice", in *Revista română de drept al afacerilor*, no. 9/31 October 2011, pp. 71–84.

[24] ECJ judgment of October 3, 2000, *The Queen v. H.M. Treasury, ex parte The University of Cambridge,* C-380/98, ECLI:EU:C:2000:529.

[25] ECJ Judgment of 13 December 2007, *Bayerischer Rundfunk and others*, C-337/06, ECLI:EU:C:2007:786.

[26] ECJ judgment of 12 December 2002, *Universale-Bau*, C-470/99, ECLI:EU:C:2002:746.

[27] ECJ judgment of 16 October 2003, *Commission v. Spain*, C-283/00, ECLI: the EU: C:2003:544.

[28] ECJ judgment of 27 February 2003, *Adolf Truley*, C-373/00, ECLI: EU: C:2003:110.

[29] ECJ judgment of 3 February 2021, *Federazione Italiana Giuoco Calcio*, C-155/19 and C-156/19, ECLI: EU: C:2021:88.

[30] ECJ judgment of 11 June 2009, *Hans&Christophorus Oymanns*, C-300/07, ECLI: EU: C:2009:358.

works, goods or services in order to fulfil the tasks entrusted by the respective contracting authority. In any case, the respective company must be qualified as a body under public law when, having legal personality and being subject to the control of the contracting authority, it carries out an essential part of its activity with the aim of providing – without being subjected to the pressure of possible competitors and in other conditions other than those of the market – rolling stock to the respective contracting authority, so that the latter can provide the passenger and goods transport service it is tasked with.[31]

The contracting authority is not necessarily the direct beneficiary of the procurement. An example in this sense is represented by the purchase of catering services in schools, a situation in which the direct beneficiaries of the purchase are the students enrolled at the respective public education unit. In such cases, the contracting authority does not gain a direct benefit, but rather fulfils a legal obligation in the public interest.[32]

Also, the direct beneficiary of the public procurement contract can be another contracting authority. In this sense, the CJEU ruled that a contracting authority can act for itself and for others clearly designated contracting authorities that are not directly parties to a framework agreement, provided that the requirements of publicity and legal certainty and therefore of transparency to be respected.[33] For example, a central public authority can conclude the public procurement contract taking into account the expressly determined needs of the local authorities, with the aim of obtaining higher discounts. However, in practice, difficulties may arise when the contracting authorities who are beneficiaries of the public procurement contract, but who are not signatories of that contract, have not been consulted by the central public authority, so that the beneficiary public authorities conclude, themselves, a public procurement contract having the same object.[34]

The transfer by a contracting authority of its rights and obligations arising from a public procurement contract to a company – which carries out commercial activity and in which the contracting authority holds a majority stake – which does not have the capacity of a contracting authority does not mean that that contract ceases to or a public procurement contract, except in the case where, from the very beginning, the contracting authority acted on behalf of the respective enterprise.[35]

The economic operator is defined as any natural or legal person, under

[31] ECJ judgment of 2 June 2016, *Dr. Falk Pharma GmbH*, C 410/14, ECLI: EU: C:2016:399.
[32] See, Roberto. Caranta, Albert Sanchez-Graells, *op. cit.*, p. 7.
[33] ECJ judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust*, C 216/17, ECLI:EU:C:2018:1034.
[34] See Carina Risvig Hamer, M. Comba, *Centralising Public Procurement. The approach of EU member states*, Edward Elgar Publishing, the UK, 2021, p. 45.
[35] ECJ judgment of 15 January 1998, *Mannesmann Anlagenbau Austria AG and Others*, C-44/96, ECLI:EU:C:1998:4, para. 43 and 44.

public or private law, or group or association of such persons, including any temporary association formed between two or more of these entities that lawfully offer on the market the execution of works and/or a construction, the supply of products or the provision of services and which are established in EU member states, EEA third countries that have ratified the AAP agreement, other agreements by which the EU is obliged to grant free access to the market in the field of procurement public, third countries in the process of joining the EU; (art. 3 par. (1), letter jj) from Romanian Law no. 98/2016; Art. 2 para. (1) point 10 from Directive 2014/24).

According to the provisions of art. 3 paragraphs (1) letter g) from Romanian Law no. 98/2016, the bidder is any economic operator who has submitted an offer within an award procedure. In the light of CJEU jurisprudence[36], there must be no differentiated treatment depending on the legal form under which the bidders have chosen to operate. Union law opposes a national regulation that excludes the possibility of non-profit entities (e.g. foundations) to participate in a public procurement procedure.

In the sense of art. 3 paragraphs (1) letter g) from Romanian Law no. 98/2016, a candidate is any economic operator who submitted a request to participate in a restricted tender procedure, competitive negotiation, competitive dialogue or partnership for innovation or who was invited to participate in a negotiation procedure without prior publication.

The association of economic operators referred to in art. 3 letter j) from Romanian Law no. 98/2016 is devoid of legal personality, being obliged to comply with all the requirements established by the contracting authority for the bidders, benefiting from the advantage of fulfilling the qualification and selection criteria, by cumulation.[37]

In the event that the association agreement provides for the possibility of one of the members being the leader of the association, he will have the right to represent all the other members in the contractual relations with the contracting authority, with the mention that the responsibility for the way of fulfilling the contractual obligations falls in charge of all members of the association. As such, the association agreement engages the joint liability of all associates.[38]

Changing the position of leader of the association with another member within the association does not contravene Romanian Law no. 98/2016, such a change within the association not being likely to affect the rules/principles that were the basis for the declaration of the aforementioned association as the winning bidder.

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[36] ECJ judgment of June 11, 2020, Parsec Fondazione Parco delle Scienze e della Cultura, C-219/19, ECLI:EU:C:2020:470, para. 22 and 23.

[37] See Ecaterina-Milica Dobrota, Dumitru-Viorel Pârvu, *Achiziţii publice. Idei noi, practici vechi*, Ed. University, Bucharest, 2020, p. 59.

[38] Public procurement guide/ANAP case library: case 1084, the document is available online at https://achizitiipublice.gov.ro/questions/view/162, accessed on 11.05.2024.

In the event that one/more members of the association request the withdrawal from the association with which a public procurement contract was concluded, it is possible to continue the development of the contract in question by the remaining member/members of the association, provided that the contracting authority verifies if he/she has/have the capacity to carry out the public procurement contract under the same conditions as the association designated as the winner and signatory of the public procurement contract, following that the aspects related to the joint liability deriving from the association will be regulated between the associates.[39]

5. Types of public procurement contracts

Depending on the criterion of their object, public procurement contracts are classified into public procurement contracts for works, public procurement contracts for products and public procurement contracts for services, according to art. 3 paragraph (1) letters m), n) and o from Romanian Law no. 98/2016.

Public works procurement contract – the public procurement contract whose object is: either exclusively the execution, or both the design and the execution of works in connection with one of the activities provided in Annexe no. 1 of Romanian Law no. 98/2016 (mainly construction works); either exclusively the execution, or both the design and the execution of a work; or the realisation, by any means, of a work that corresponds to the requirements established by the contracting authority that exercises a decisive influence on the type or design of the work.

The public purchase contract for products – the public purchase contract whose object is the purchase of products by purchase, including payment in instalments, rental, leasing with or without a purchase option or by any other contractual means under which the contracting authority benefits from these products, regardless of whether or not he acquires ownership of them; the contract for the public purchase of products may include, as an accessory, work or location and installation operations;

The contract for the public procurement of services – the public procurement contract whose object is the provision of services, other than those that are the object of a contract for the public procurement of works according to letter m).

The division of public procurement contracts, according to their object, into public procurement contracts for products, works or services has legal relevance from several perspectives. First, Directive 2014/24/EU of the European Parliament and of the Council (art. 4), respectively Law no. 98/2016 (art. 7 para. 1) provide for different thresholds related to each type of public procurement contract previously mentioned, it being important to note that the threshold value is

[39] Idem.

higher in the case of works contracts than those regarding the purchase of products and services. Secondly, among the exceptions from the application of Directive 2014/24/EU, respectively from the application of Romanian Law no. 98/2016 the broadest are those concerning services, regarding which specific exceptions are provided. Third, a more relaxed special regime is provided for the award of social services and other specific services. Also, Directive 2014/24/EU regulates mixed procurement which refers to the awarding of those contracts containing two types of objects (works, services or products). The EU legislator decided that these contracts will be assigned according to the rules applicable to the genre to which the main object of the respective contract corresponds. The main object of the mixed contract is decisive and to differentiate the parts of the contract that are impossible to divide.[40]

6. Conclusions

In order to retain the incidence of national legislation transposing Directive 2014/24/EU of the European Parliament and of the Council, it is decisive to qualify the concluded contract as a public procurement contract. Both the qualification and the legal features of the public procurement contract, with the exception of the administrative nature of the public procurement contract, represent autonomous notions, defined by European Union law and CJEU jurisprudence.

Equally, a rich union and national jurisprudence develop aspects regarding the quality of contracting authority, which also includes public interest bodies, but also the quality of economic operator participating in the award procedure as a tenderer or candidate, without, however, exhausting the issue that can be caused by all these complex and defining concepts for the field of public procurement, in particular, for the field of administrative law, in general.

Bibliography

1. Bogdanowicz, Piotr, *Contract modifications in EU procurement law*, Edward Elgar Publishing, the UK, 2021.
2. Caranta, Roberto & Albert Sanchez-Graells, *European Public Procurement. Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, the UK, 2021.
3. Cimpoeru, Dan*, Achiziții publice. Concesiuni. Gestiunea serviciilor de utilități publice. Parteneriat public-privat. Remedii și căi de atac*,7th Edition, Ed. C. H. Beck, Bucharest, 2022.
4. Clarke, Charles, „The Meaning and Requirements of the Term 'Contracting Authority Under EU Public Procurement Law: A Critique of Developments from the ECJ Jurisprudence", in *European Procurement & PPP Law Review* no. 1/2012.
5. Dobrota, Ecaterina-Milica & Dumitru-Viorel Pârvu, *Achiziţii publice. Idei noi,*

[40] See Piotr Bogdanowicz, *Contract modifications in EU procurement law*, Edward Elgar Publishing, the UK, 2021, p. 17.

practici vechi, Ed. University, Bucharest, 2020.
6. Ginter, Carri, Nele Parrest & Mari Ann Simovart, „Access to the content of public procurement contracts: the case for a general EU-law duty of disclosure", in *Public Procurement Law Review*, 2013.
7. Hamer, Carina Risvig & M. Comba, *Centralising Public Procurement. The approach of EU member states*, Edward Elgar Publishing, the UK, 2021.
8. Laurentiu, Alin Mihai, Achim Sorin Răzoare & Ioana Romana Laurentiu, „Provocări privind noțiunea de interes general fără caracter comercial sau industrial, în contextul legislației achizițiilor publice", in *The Romanian Business Law Review*, no. 9/31 October 2011.
9. Murgu, Andrei Bogdan, Lăcrămioara-Ionale Cojocariu, „Opinii cu privire la autonomia de voință în materie contractuală în dreptul internațional privat român", in *Pandectele Române*, no. 5/2021.
10. Steinicke, Michael & Peter Vesterdorf, *EU Public Procurement Law. Brussels Commentary*, Ed. C. H. Beck, Baden-Baden, Germany, 2018.
11. Vasiu, Alexandra-Eszter, „Serviciul public – contractul administrativ", in *Universul Juridic Magazine* no. 6/2021.