

Participation of Temporary Associations in Public Procurement Award Procedures in European and Romanian Law. Implications of the CJEU Judgment of 13.03.2025 Pronounced in Case C-266/22

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Abstract

From a theoretical and applied perspective, it is relevant not only to regulate the issue of the participation of temporary associations in the procedures for awarding public procurement contracts at the legislative level and the evolution of these regulations, but also to reflect and analyze the concept of economic operator, including temporary associations in the case law of the CJEU, as well as in Romanian administrative and judicial practice. We note, by referring to the case law of the CJEU, that the national legislator cannot adopt, in the absence of an authorisation in this regard from the EU, legislative acts by which it excludes temporary associations from participation in the procedures for the award of public procurement contracts carried out on the territory of the respective Member State in the event that one of the members of the association is based in a third country that has not concluded an agreement on free access to the public procurement market with the EU. However, contracting authorities, as they do not infringe the EU's exclusive competence in matters of common commercial policy, could provide for such an exclusion in the tender documentation.

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1. Introductory aspects

Directive 2014/24/EU of the European Parliament and of the Council is a minimum harmonisation directive, which allows the national legislator to pro-

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vide for additional standards in the transposition legislation, beyond those provided for in the body of the directive on classic public procurement. Considering this possibility, the Romanian legislator, defining in the content of Article 3 paragraph (1) letter jj) of the Romanian Law on Public Procurement no. 98/2016, as amended by GEO no. 25/2021 the concept of economic operator, which also includes temporary associations, added to the provisions of Art. 2 paragraph (1) point 10 of the Directive 2014/24/EU an additional territoriality condition. Thus, the economic operator must be located in an EU Member State or in a third country that has concluded an agreement on free access to the public procurement market with the EU. The compatibility of this additional condition provided for by Romanian law was the subject of the compatibility analysis with EU law, an aspect reflected in the CJEU Judgment of 13.03.2023, delivered in case C-266/22, ECLI:EU:C:2025:178.

This article represents an extensive research of the legal institution of temporary associations participating in public procurement contract award procedures in the context of the recent case law of the CJEU, of Romanian administrative and judicial practice, of the provisions of the 5th generation of the community acquis on public procurement, as well as of the Romanian transposition law, subject to analysis.

The issues addressed concern the concept of temporary association, the advantages of the joint offer, the situation of the association in the event that one of the association members is based in a third country that has not concluded an agreement on free access to the public procurement market with the EU, the condition of maintaining the material and legal identity of the association throughout the award procedure as well as during the execution of the public procurement contract, the sanction of exclusion from the procedure of associations formed with the aim of distorting competition, as well as the association's recourse to subcontractors or third party supporters.

2. The Concept of Temporary Association. Advantages of Joint Bidding

Small and medium-sized enterprises constitute the dominant form of participation in economic life in all EU Member States, their promotion through the provisions of the Directive 2014/24/EU is in line with sustainable measures that facilitate secondary objectives of EU law in the field of public procurement.² These secondary objectives emphasize sustainable public procurement, which in-

² See Martin Trybus, Marta Andrecka, „Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU?”, *European Procurement & Public Private Partnership Law Review*, 3/2017, p. 224.

volves the purchase of goods, works and services that encourage innovation, respect the environment and combat climate change, while improving employment, public health and social conditions.³

In order to facilitate access of small and medium-sized enterprises to public procurement procedures and to open up competition as widely as possible, participation in public procurement procedures is also open to temporary associations, without legal personality, usually formed by two or more small or medium-sized enterprises.

In this regard, the economic operator is defined by the provisions of art. 2 para. (1) point 10 of the Directive 2014/24/EU as any natural or legal person, governed by public or private law, or group or association of such persons, including any temporary association formed between two or more of these entities which lawfully offers on the market the execution of works and/or construction, the supply of products or the provision of services.

The concept of ‘economic operator’ in Article 1(8) of the Directive 2004/18 was taken over, without any substantial amendment, in Article 2(1)(10) of the Directive 2014/24, recital 14 of the latter directive now expressly indicating that that concept should be interpreted ‘in a broad sense’ to include any persons and/or entities active on the market, ‘regardless of the legal form under which they have chosen to operate’.⁴ The Community legislature did not intend to limit the concept of ‘economic operator offering services on the market’ solely to operators with an enterprise organisation, nor to introduce specific conditions likely to establish an upstream limit on access to contract notices based on the legal form and internal organisation of economic operators.⁵

Not only contracting authorities have the opportunity to carry out public procurement jointly,⁶ but also several entities have the possibility to conclude an association agreement, without the temporary association thus established acquiring legal personality, with a view to submitting a joint tender in the framework of award procedures.

Although the requirement to adopt a specific legal form in order to submit

³ See Jörgen Hettne, „Sustainable Public Procurement and the Single Market – Is There a Conflict of Interest?“, in *European Procurement & Public Private Partnership Law Review* 1/2013, p. 31; Marta Andhov, *Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?*, in S. Bogojevic, X. Groussot, J. Hettne (eds.): *Discretion in EU Procurement Law* (Hart Publishing 2019), available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3794794.

⁴ CJEU judgment of 11 June 2020, *Parsec Fondazione Parco delle Scienze e della Cultura*, C-219/19, ECLI:EU:C:2020:470, para. 22.

⁵ CJEU judgment of 23 December 2009, *Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)*, C-305/08, ECLI:EU:C:2009:807, para. 35.

⁶ See Tünde Tátrai, „Joint public procurement“, *ERA Forum*, Volume 16 (2015), pp. 7–24, <https://doi.org/10.1007/s12027-015-0374-3>.

a tender or a request to participate cannot be imposed on the temporary association,⁷ such a condition may nevertheless be imposed in national legislation transposing the Directive 2014/24/EU on the association that submitted the winning tender, to the extent that such a requirement is justified by the particular circumstances of the public procurement contract in question.⁸

The temporary association is constituted by considering the advantage of fulfilling the qualification and selection criteria by the members of the association, by cumulation.⁹

In this regard, in the event of the submission of a joint bid by a temporary association, the fulfillment of the criteria regarding the technical and professional capacity, as well as that regarding the economic and financial situation, is demonstrated by taking into account the resources of all members of the respective temporary association, and the contracting authority requires that the members of the association be jointly and severally liable for the execution of the public procurement contract/framework agreement.¹⁰

According to Article 19(2) of the Directive 2014/24/EU, any conditions for the performance of a contract by such groups of economic operators, other than those imposed on individual participants, shall also be justified by objective reasons and shall comply with the principle of proportionality. When setting conditions which are not imposed on individual tenderers, contracting authorities must comply with the principle of proportionality and provide extensive reasons for the reasons which justified the restriction on associations.¹¹

However, EU law precludes a clause in tender specifications which, where several tenderers submit a joint tender, requires that the contribution of each of them to meeting the applicable requirements in terms of professional capacity must correspond proportionately to the share of the works which it will actually perform if it is awarded the contract in question.¹²

Conditions imposed on temporary associations but not on individual participants, which must be justified by objective reasons and proportionate, could include, for example, the requirement to appoint joint representatives or a lead partner for the procurement procedure or to request information on their status.

Where the association agreement provides for the possibility for one of

⁷ See Sue Arrowsmith, *The law of public and utilities procurement. Regulation in the EU and UK*, vol. II, third edition, Thomson Reuters, London, 2018, p. 79.

⁸ See Michael Steinicke, Peter Vesterdorf, *EU Public Procurement Law. Brussels Commentary*, Ed. C. H. BECK, Baden-Baden, Germany, 2018, p. 341.

⁹ See Ecaterina-Milica Dobrota, Dumitru-Viorel Pârvu, *Achiziții publice. Idei noi, practici vechi*, Ed. Universitară, Bucharest, 2020, p. 59.

¹⁰ See Marlena Boancă-Ivan, *Dreptul achizițiilor publice. Perspectivă unională și națională*, Ed. Universul Juridic, Bucharest, 2025, p. 220.

¹¹ See Roberto Caranta, Albert Sanchez-Graells, *European Public Procurement. Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, UK, 2021, p. 213.

¹² See CJEU judgment of 5 April 2017, Borta UAB, C-298/15, ECLI:EU:C:2017:266, para. 96.

the members to be the leader of the association, this member shall have the right to represent all the other members in contractual relations with the contracting authority, with the stipulation that the responsibility for the manner in which the contractual obligations are fulfilled lies with all members of the association. As such, the association agreement shall entail the joint and several liability of all the members.¹³

3. The Situation of the Association in the Event That One of the Members of the Association Is Based in a Third Country That Has Not Concluded an Agreement on Free Access to the Public Procurement Market with the EU

Given that competition and public procurement are interconnected concepts,¹⁴ and it is also in the interest of the contracting authority to ensure the widest possible participation in a procedure for the award of public procurement contracts,¹⁵ the question arises whether it is compatible with EU law for the national legislator or contracting authorities to restrict the participation of temporary associations in award procedures carried out in an EU Member State in the event that one of the members of the association is based in a third country that does not have a free access agreement to the public procurement market with the EU.

The Directive 2014/24/EU of the European Parliament and of the Council being a minimum harmonisation directive, the Romanian legislator has established additional standards to those provided for in the Directive regarding the definition of economic operators.

Thus, if the initial form of the Romanian Law on Public Procurement no. 98/2016 takes over as such in the provisions of art. 3 paragraph (1) letter jj), the provisions of art. 2 paragraph (1) point 10 of the Directive 2014/24/EU, through the amendments made to the Law no. 98/2016 by GEO no. 25/2021 an additional territoriality condition is imposed on economic operators.

In this regard, Article 3 paragraph (1) letter jj) of the Romanian Law on Public Procurement No. 98/2016, as amended by GEO no. 25/2021, defines the notion of “economic operator” as “any natural or legal person, governed by public or private law, or group or association of such persons, including any temporary association formed between two or more of these entities, which lawfully offers on the market the execution of works, the supply of products or the provision of services, and which is/are established in:

- (i) a Member State of the Union;

¹³ Case 1084 of June 10, 2020, ANAP Case Library, available at <https://achizitiipublice.gov.ro/questions/view/162>, accessed on 7.05.2025.

¹⁴ See Willem Janssen, Erik Olsson, „On Competition, Free Movement and Procurement”, in *European Procurement & Public Private Partnership Law Review* 1/2020, p. 2.

¹⁵ See Dumitru Ilie, *Elemente de drept al achizițiilor publice*, Ed. ASE, Bucharest, 2019, p. 24.

- (ii) a Member State of the European Economic Area (EEA);
- (iii) third countries which have ratified the [APA], to the extent that the public procurement contract awarded falls under Annexes 1, 2, 4 and 5, 6 and 7 to the Union's Appendix I to that agreement;
- (iv) third countries which are in the process of acceding to the Union;
- (v) third countries which do not fall under point (iii) but which are signatories to other international agreements by which the Union is obliged to grant access free access to the market in the field of public procurement".

This territoriality condition concerning economic operators provided for in Article 3(1) (jj) final sentence of the Romanian Law on Public Procurement No. 98/2016, as amended by GEO No. 25/2021, was subject to an analysis of compatibility with European Union law in Case C 266/22.

In the main proceedings, a temporary association that submitted a tender in the context of an award procedure initiated by a Romanian contracting authority was excluded from the procedure, the reason for the exclusion being that the leader of the association, CRRC Qingdao Sifang, did not fall within the scope of the notion of 'economic operator' within the meaning of Article 3(1) (jj) of the Law on Public Procurement, as amended by GEO No. 25/2021, given the fact that its registered office is located in China.

By its judgment of 13 March 2025, delivered in case C 266/22, the CJEU ruled that Article 3(1)(e) TFEU, which confers exclusive competence on the Union in matters of common commercial policy, read in conjunction with Article 2(1) TFEU, must be interpreted as precluding, in the absence of an act of the Union requiring or prohibiting access to procedures for the award of public contracts by economic operators from a third country which has not concluded with the Union an international agreement referred to in Article 25 of the 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, a contracting authority in a Member State from excluding an economic operator from such a third country on the basis of a legislative act which that Member State has adopted without having been empowered to do so by the Union, the fact that this legislative act entered into force after the publication of the tender notice is irrelevant in this regard.¹⁶

In order to rule in this regard, the CJEU took into account that the Union is obliged to comply, with regard to certain third countries, with international agreements, in particular the GPA, which guarantee reciprocal and equal access for economic operators in the Union to the public procurement markets of those third countries and for economic operators from the said third countries to the

¹⁶ CJEU judgment of 13 March 2025, *CRRC Qingdao Sifang Co. Ltd, Astra Vagoane Călători SA versus Autoritatea pentru Reformă Feroviară, Alstom Ferroviaria SpA*, C-266/22, ECLI:EU:C:2025:178, para. 67.

public procurement markets of the Union. Article 25 of the Directive 2014/24 reflects those international commitments of the Union by providing that, in so far as they fall within the scope of the GPA and other international agreements which impose obligations on the Union, contracting entities of the Member States must grant economic operators from third countries which are parties to such an agreement treatment no less favourable than that granted to economic operators from the Union (see, to that effect, judgment of 22 October 2024, *Kolin İnşaat Turizm Sanayi ve Ticaret*, C 652/22, EU:C:2024:910, paragraphs 41 and 42).¹⁷

To date, other third countries have not concluded such an international agreement with the Union. This includes the People's Republic of China.¹⁸

Only the Union is competent to adopt an act of general application concerning access, within its territory, to procedures for the award of public contracts for economic operators from a third country which has not concluded with the Union an international agreement guaranteeing equal and reciprocal access to public procurement markets, establishing either a system of guaranteed access to such procedures for those economic operators or a system which excludes them or which provides for an adjustment of the score resulting from the comparison of their tenders with those submitted by other economic operators.¹⁹

As regards economic operators from those third countries, it must be noted that, although EU law does not preclude those economic operators from being admitted, in the absence of exclusion measures adopted by the EU, to participate in a procedure for the award of a public contract governed by the Directive 2014/25, it does, however, preclude those economic operators from being able, when participating in such a procedure, to rely on that directive and thus to claim equal treatment for their tenders in relation to those submitted by tenderers from the Member States.²⁰

We note, in relation to the case law of the CJEU, that the national legislator cannot adopt legislative acts to exclude associations from participation in procedures for the award of public procurement contracts carried out on the territory of the respective Member State in the event that one of the members of the association is established in a third country that has not concluded an agreement on free access to the public procurement market with the EU.

However, the contracting authority, since it does not infringe the exclusive competence in matters of common commercial policy, we consider that it could provide for a requirement in the specifications imposing the condition of the location of the members of the temporary association on EU territory or could provide when establishing the award criterion of the best price-quality ratio/best

¹⁷ Ibid., para. 56.

¹⁸ Ibid., para. 57.

¹⁹ Ibid., para. 61.

²⁰ CJEU judgment of 22 October 2024, *Kolin İnşaat Turizm Sanayi ve Ticaret AŞ*, C-652/22, ECLI: EU:C:2024:910, para. 47.

cost-quality ratio a weighting related to the location on EU territory of all members of the temporary association.²¹

In Romanian case law, for example, with regard to territoriality requirements, the requirement that the potential economic operator interested in participating in the procedure must have a mobile workshop registered in Romania was considered restrictive, in breach of the principle of non-discrimination. Thus, the court considered that the territorial limitation of having a workshop registered in Romania implies that economic operators from another Member State would incur additional obligations and costs vis-à-vis economic operators from Romania, a circumstance that would discourage them from participating in the award procedure.²²

4. The Condition of Maintaining the Material and Legal Identity of the Association Throughout the Award Procedure, as Well as During the Execution of the Public Procurement Contract

It is possible that in the case of temporary associations, a member of the association may withdraw from the jointly initiated procedure. In practice, the question has been raised of the consequences that these changes in the material and/or legal identity of the economic operators produce from the perspective of the possibility of continuing the award procedure or the possibility of continuing the execution of the public procurement contract, in relation to the need to respect the principle of equal treatment.²³

In the case law of the CJEU, it has been ruled that, within a negotiated procedure, in the event of the dissolution of a pre-selected group as such, of which two economic operators were part, one of them may replace the respective group and continue the said procedure, without the principle of equal treatment being infringed, provided that it is established that this economic operator alone meets the requirements initially established by the contracting authority and that its continued participation in the said procedure does not entail a deterioration in the competitive situation of the other tenderers.²⁴

By observing the two conditions expressly highlighted above, a member of the temporary association may substitute the temporary association in order to continue participating in the respective award procedure.

²¹ See CJEU judgment of 13 March 2025, *CRRC Qingdao Sifang Co. Ltd, Astra Vagoane Călători SA versus Autoritatea pentru Reformă Feroviară, Alstom Ferroviaria SpA*, C-266/22, precit., para. 63.

²² Civil sentence no. 27/10.02.2025, pronounced by the Constanța Court of Appeal, administrative and fiscal litigation section in file no. 3715/2/2022.

²³ See Marlena Boancă-Ivan, *op. cit.*, p. 31.

²⁴ See, in this regard, Judgment of the CJEU of 24 May 2016, *MT Højgaard and Züblin*, C 396/14, EU:C:2016:347, paragraph 48 and the operative part.

And in the event that the temporary association is declared the winning bidder, a single member of the association may, by observing the same conditions, safely execute the public procurement contract.

In this regard, in Romanian administrative practice, it has been established that in the event that one/more members of the association request withdrawal from the association with which a public procurement contract was concluded, it is possible for the remaining member/members of the association to continue performing the contract in question, provided that the contracting authority verifies whether he/she has the capacity to perform the public procurement contract under the same conditions as the association designated as the winner and signatory of the public procurement contract, with the following that the aspects related to the joint liability arising from the association shall be regulated between the associates.²⁵

In the same vein, the CJEU case law has highlighted that in the event that insolvency proceedings have been opened against one of the members of an association, the other member of the association may continue the procedure alone if, first, the economic operator who wishes to continue the procedure satisfies all the requirements of the contracting authority alone, and, secondly, the continuation of the procedure by that economic operator is not likely to cause distortion of competition.²⁶

Even in the event that insolvency proceedings have been opened against one of the members of the association, it is possible for the initially constituted association to continue participating in the procedure if the capacity to perform the contract is not affected, Member States having the possibility in the national transposition legislation to provide for such an exception to the ground for exclusion provided for in art. 57 para. (4) letter b) of the Directive 2014/24/EU on the exclusion of economic operators undergoing insolvency proceedings.²⁷

5. The Sanction of Exclusion from the Procedure of Associations Formed with the Aim of Distorting Competition

When temporary associations participate in the award procedure, contracting authorities usually analyze the risk that such an association will affect the rules on ensuring undistorted competition.²⁸

In order to hold that temporary associations are established with a view to distorting competition, there must be no plausible alternative explanation for

²⁵ Case 1084 of June 10, 2020, ANAP Case Library, available at <https://achizitiipublice.gov.ro/questions/view/162>, accessed on 7.05.2025.

²⁶ Judgment of the CJEU of 24 May 2016, MT Højgaard A/S, C-396/14, ECLI:EU:C:2016:347, para. 46 and 48.

²⁷ See Roberto Caranta, Albert Sanchez-Graells, *op. cit.*, p. 611.

²⁸ See Michael Steinicke, Peter Vesterdorf, *op. cit.*, p. 337.

the conclusion of the association agreement, the exchange of sensitive information between the members of the association must be proven, as well as an abnormal bidding method.²⁹

Associations formed between economic operators who are not competitors, as well as associations formed by economic operators who are competitors, are not likely to violate the competition rules, in the latter case only if the following conditions are cumulatively met: no economic operator can individually meet the conditions set out in the specifications or in the framework contract; a subgroup of the members of the respective association cannot meet the conditions set out in the specifications or in the framework contract; the members of the association exchange only information strictly necessary at the time of drawing up the tender and during the execution of the contract; the members of the association compete under normal conditions in other situations.³⁰

If a member of the association meets all the qualification and selection criteria on his own, the question arises of the intention underlying his decision to participate in the award procedure within a temporary association and not as an individual tenderer. In this regard, judicial practice has ruled that the association agreement is anti-competitive to the extent that it was concluded with a view to territorial market sharing and not with a view to effective cooperation in the performance of a public procurement contract.³¹

In such a situation, where the association is established with a view to distorting competition, it becomes an incident of the ground for exclusion provided for in art. 57 par. (4) letter d) of the Directive 2014/24/EU, transposed by the provisions of art. 167 par. (1) letter d) of the Romanian Law on Public Procurement no. 98/2016.

6. Association's Use of Subcontractors or Third-Party Supporters

The temporary association, and not only the sole tenderer, may also resort to subcontracting, as it is not compatible with EU law to set a percentage up to which subcontracting is authorised either by the national legislator³² or by the contracting authority.³³

²⁹ See Michele Giannino, „Competition Law Enforcement and Public Contracts Procurement in Italy: The School Cleaning Services Case”, *European Procurement & Public Private Partnership Law Review* 1|2017, p. 40.

³⁰ See Competition Council, *Guide on compliance with competition rules in the event of participation in the form of an association*, p. 2, available online at <https://www.consiliulconcurenței.ro/uploads/docs/items/bucket11/id11008/ghid20042016.pdf>, accessed on 7.05.2025.

³¹ See Roberto Caranta, Albert Sanchez-Graells, *op. cit.*, p. 212 et seq.

³² Judgment of the CJEU of 26 September 2019, *Vitali SpA*, C-63/18, ECLI:EU:C:2019:787, para. 45.

³³ Judgment of the CJEU of 14 July 2016, *Wrocław – Miasto na prawach powiatu*, C-406/14, ECLI:EU:C:2016:562, para. 51.

The temporary association shall also have the right to rely on the support of a third party(ies) in meeting the criteria relating to economic and financial standing and/or technical and professional capacity, regardless of the nature of the legal relationship between the economic operator and the respective third party(ies).

Both the subcontractor and the supporting third party are required to complete the DUAЕ, and in the event of the occurrence of the grounds for exclusion in their case, the temporary association will have the possibility of replacing them at a certain date. Subsequently, in the event of the occurrence of a ground for exclusion and in the event of the newly designated subcontractor/supporting third party, the association may be excluded from the procedure.³⁴

Thus, in the case law of the CJEU, it has been held that EU law does not preclude national legislation under which the contracting authority has the possibility or even the obligation to exclude the economic operator that submitted the tender from participating in the public procurement procedure if the ground for exclusion provided for in this provision is found in respect of one of the subcontractors mentioned in the tender of that operator. On the other hand, EU law precludes national legislation which provides for the automatic nature of such exclusion.³⁵

The CJEU also highlighted in its case law that EU law precludes national legislation under which the contracting authority must automatically exclude a tenderer from a public procurement procedure when an auxiliary undertaking whose capacities it intends to use has provided an untrue declaration regarding the existence of criminal convictions which have acquired the force of *res judicata*, without being able to impose, or, at least, without being able to allow, in such a case, this tenderer to replace the entity in question.³⁶

7. Conclusions

We conclude, by referring to the case law of the CJEU, that the national legislator cannot adopt legislative acts by which to exclude from the procedures for the award of public procurement contracts carried out on the territory of the respective Member State associations in the event that one of the members of the association is established in a third country that has not concluded an agreement on free access to the public procurement market with the EU.

Considering the incidence of the principle of priority of European Union law, regulated in art. 148 paragraph (2) in conjunction with art. 20 paragraph (2)

³⁴ See Marlena Boancă-Ivan, *op. cit.*, p. 214 et seq.

³⁵ Judgment of the CJEU of 30 January 2020, *Tim SpA – Direzione e coordinamento Vivendi SA*, C 395/18, ECLI:EU:C:2020:58, para. 55.

³⁶ Judgment of the CJEU of 3 June 2021, *Rad Service Srl Unipersonale*, C 210/20, ECLI:EU:C:2021:445, para. 45.

of the Constitution of Romania, republished, the solutions adopted in Romanian administrative and judicial practice will not be able to reflect the exclusion from the award procedure, pursuant to art. 3 paragraph (1) letter jj) of the Romanian Law on Public Procurement no. 98/2016, as amended by GEO no. 25/2021, of temporary associations in the event that one of the members of the association is based in a third country that has not concluded an agreement on free access to the public procurement market with the EU.

However, since the contracting authorities do not infringe the exclusive competence in matters of common commercial policy, we consider that they could provide for a requirement in the specifications imposing the condition of the location of the members of the temporary association in the EU territory or in a third country that has concluded an agreement on free access to the public procurement market with the EU. In the same vein, we consider that the contracting authorities could provide when establishing the award criterion of the best price-quality ratio/best cost-quality ratio a lower weighting related to the location in the EU territory of all members of the temporary association.

Bibliography

1. Andhov, Marta (2019), *Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?*, in S. Bogojevic, X. Groussot, J. Hettne (eds.): *Discretion in EU Procurement Law*, Hart Publishing, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3794794.
2. Arrowsmith, Sue (2018), *The law of public and utilities procurement. Regulation in the EU and UK*, vol. II, third edition, Thomson Reuters, London.
3. Boancă-Ivan, Marlena (2025), *Dreptul achizițiilor publice. Perspectivă unională și națională*, Ed. Universul Juridic, Bucharest.
4. Caranta, Roberto & Albert Sanchez-Graells (2021), *European Public Procurement. Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, UK.
5. Competition Council, *Guide on compliance with competition rules in the event of participation in the form of an association*, available online at <https://www.consiliulconcurentei.ro/uploads/docs/items/bucket11/id11008/ghid20042016.pdf>, accessed on 7.05.2025.
6. Dobrota, Ecaterina-Milica & Dumitru-Viorel Pârvu (2020), *Achiziții publice. Idei noi, practici vechi*, Ed. Universitară, Bucharest.
7. Giannino, Michele (2017), „Competition Law Enforcement and Public Contracts Procurement in Italy: The School Cleaning Services Case”, *European Procurement & Public Private Partnership Law Review* 1.
8. Hettne, Jörgen (2013), „Sustainable Public Procurement and the Single Market – Is There a Conflict of Interest?”, in *European Procurement & Public Private Partnership Law Review*, 1.
9. Ilie, Dumitru (2019), *Elemente de drept al achizițiilor publice*, Ed. ASE,

Bucharest.

10. Janssen, Willem & Erik Olsson (2020), „On Competition, Free Movement and Procurement”, in *European Procurement & Public Private Partnership Law Review* 1.
11. Steinicke, Michael & Peter Vesterdorf (2018), *EU Public Procurement Law. Brussels Commentary*, Ed. C. H. BECK, Baden-Baden, Germany.
12. Tátrai, Tünde (2015), „Joint public procurement”, *ERA Forum*, Volume 16, pp. 7–24, <https://doi.org/10.1007/s12027-015-0374-3>.
13. Trybus, Martin & Marta Andrecka (2017), „Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU?”, *European Procurement & Public Private Partnership Law Review*, 3.