

PUBLIC PROCUREMENT PRINCIPLES GENERATED BY THE TREATY OF ROME

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Abstract: *In order to understand the principles of public procurement in Romania, it is necessary to analyze, on the one hand, the European directives that regulate the actual public procurement and, on the other hand, the context in which the European directives were adopted. Even with the directives in force, the more general provisions contained in the Treaty of the European Economic Community (EEC) in Rome, hereinafter referred to as the Treaty, are applied, as well as many more general principles of law that will guide the interpretation of these directives. The Treaty was adopted in Rome, in 1957 and became applicable from January 1, 1958. It is considered that the source of the principles of public procurement is the Treaty. Even if in Treaty contained no specific provisions regarding the field of public procurement, it reflects the principles and the general framework for the functioning of the single market, a market characterized through the prism of the fundamental freedoms established by the Treaty: the free movement of goods, services, capital and persons. As the field of public procurement is closely linked to the free movement of goods, this principle is promoted and implemented in the practice of this field based on the regulations, directives and decisions of the Community institutions. The role of the free movement of goods is to harmonize the relationships involved in the process of purchasing goods, but also to ensure the homogeneity, coherence and balance of this process.*

Keywords: principles, public procurement, European directives, treaties, fundamental freedoms, European Economic Community

1. Introduction

In an attempt to identify the legislative framework specific to the field of public procurement, it is essential to underline the fact that, at European level, this field of study “*belongs European Union law, which, first of all, must be understood from the point of view of the rules specific to this system of law*” [1]. The system of law [2] represents the whole of the legal norms in close correlation, reunited in interdependent parts and governed by the same principles. The European Community law takes into account the “*constitutive treaties of the European Communities, from legal practice*

and customs” [3], regulating the activity of the states of the European Union, hereinafter referred to as the EU. According to Article 1, letter a), Law number 590/2003 defines the treaty as the legal act which highlights a state, governmental or departmental agreement, and which aims at creating, modifying or extinguishing legal and other rights and obligations, subordinated to public international law [4]. The treaties establishing communities are at the top of the pyramid of legal norms, representing “*the agreement of the will of the Member States for the creation of communities*” [5].

Regarding the main provisions in the field of public procurement, the basic principles applicable to this system have been outlined by the treaty establishing the European Economic Community, as well as by the subsequent modification treaties.

Although the Treaty of Rome does not contain explicit rules regarding the awarding of public procurement contracts, *“it regulates the initial conditions applicable to this procedure”* [6]. Over time, the European Court of Justice has shown that this matter falls directly under European institutional law.

2. The Treaty of Rome

The “Treaty of Rome”, hereinafter referred to as the Treaty, is considered to be the source of the principles established by the EU directives in the field of public procurement in the EU. It was signed on March 25, 1957 by representatives of France, Germany, Belgium, Luxembourg, the Netherlands and Italy (the 6 founding states of the European Coal and Steel Community), thus establishing two communities: the “European Atomic Energy Community” and the “European Economic Community”. The treaty, known as the “Treaty establishing the European Economic Community” or “The Treaty of Rome”, entered into force on January 1, 1958 following the ratification of the Contracting Parties *“for an unlimited period”* [7] and comprises norms with constitutional value. Over the years, the Treaty has undergone many changes through subsequent treaties, of which we mention: “The Single European Act”, “The Treaty of Maastricht”, “The Treaty of Amsterdam”, “The Treaty of Nice” and “The Treaty of Lisbon”.

According to the provisions of Article 2 of the Treaty, the aim is to promote a harmonious development of economic activities, an accelerated growth of living standards, and economic cohesion between the Member States. The means of achieving these goals were: the establishment of a free

common market in commercial matters and the correlation of national laws. The concept of a common market highlights “a space without internal borders” [8] whose implementation implies both the foundation of a common commercial policy and the creation of a single system that eliminates the trade barriers between states. The concept of a single market is subject to a legal and economic regime which includes four fundamental freedoms that underlie its functioning.

In accordance with Article 3 of the Treaty, the Community had a series of measures to achieve the purpose set out in Article 2. These include:

- Eliminating all customs duties and restrictions on the quantity of imports and exports of products;
- Establishing a common commercial policy;
- Creating a system that ensures competition in both the internal and the external market;
- Adopting laws in various fields such as environment, cooperation for development, consumer protection, civil protection, energy;
- Adopting social policies to strengthen the link between state and society.

The provisions of this document refer to certain fundamental principles, the majority of which are the base for public procurement principles.

2.1. Free movement of goods

The free movement of goods is an important pillar for shaping the single market. European economic integration has materialized through the transposition of the measures taken by the European Economic Community, within the national legislation and policies of the Member States [9]. The first set of measures aims to prohibit import and export tariff barriers for Member States, in order to strengthen the customs union. The second set of measures regulates the elimination of quantitative restrictions on interstate commerce. It consists in establishing a non-

discriminatory competitive regime with a preventive character against the abuse of a dominant position. The Treaty of Rome lays down legal rules on competition, aimed at preventing the manifestation of economic disturbances that may unbalance the common market. Thus, it prohibits agreements between companies whose purpose or effect is to:

- limit and create impediments to competition within the common market;
- limit the production and marketing of goods;
- break down markets;
- create competitive disadvantages.

2.2. Free movement of persons

According to Article 39 of the Treaty of the European Economic Community, the free movement of persons implies *“the elimination of any discrimination on grounds of nationality between the workers of the Member States, as regards employment, remuneration and other working conditions”* [10]. Consequently, the legal norms regulate the rights: the acceptance of any job offer and the possibility of the citizens to remain and to carry out activities on the territory of a Member State in accordance with the provisions existing in the legislation of each EU Member State.

2.3. Free movement of services

In applying this principle, *“restrictions on the freedom to provide services within the Community with regard to nationals of Member States established in a State other than the beneficiary of services”* are prohibited [11]. The services concerned include artisan activities, provided by the liberal professions and those of industrial and commercial character.

2.4. Free movement of capital

The free movement of capital is provided for in Article 56 of the Treaty of the European Economic Community, as follows: *“any restrictions on the movement of capital between Member States as well*

as between Member States and third countries are prohibited” [12].

3. Public procurement principles

The principles of public procurement are regulated by the implementation of European directives in the field of public procurement at national level, namely: Law no. 98/2016 - *regarding public procurement*, Law no. 99/2016 - *regarding the sectoral acquisitions*, Law no. 100 / 2016- *regarding the concessions of works and the concessions of services*, and also of the GEO no. 114 / 2011- *regarding the award of certain public procurement contracts in the fields of defense and security*.

The legislator did not foresee in the national legislation a definition of the principles of public procurement, limiting only to the specification found in the methodological norms of application of the laws mentioned in the previous paragraph, namely the obligation of the contracting authority to take all necessary measures to avoid the situations that can generate a conflict of interests and *“restrict, hinder or distort competition”* [13]. In the absence of explicit definitions of the legislator, defining the principles of public procurement falls under the responsibility of the specialized doctrine and of the law which interprets and implements the legal provisions.

3.1. The non-discrimination principle

According to the specialized doctrine [14], the principle of non-discrimination involves ensuring the conditions necessary for the manifestation of real competition between economic operators, regardless of the form of property (public or private), nationality or type of person (legal or physical), so that they are granted not only the participation in a public procurement procedure, but also the conclusion of a contract with the contracting authority.

In order to apply this principle, the following rules must be observed:

- contracting authorities cannot discriminate economic operators using unjustified criteria or certain technical specifications that could create advantages for certain economic operators;
- the contracting authorities cannot establish qualification requirements that can favor the economic agents in the public procurement procedure;
- the contracting authorities cannot use practices to favor an economic operator by establishing discriminatory requirements in the specifications.

3.2. The principle of equal treatment

Equal treatment means that, during the awarding procedure, “*identical rules, requirements and criteria*” [15] are established and implemented for all economic agents, so that they are given equal opportunity to conclude a public procurement contract.

According to this principle:

- responding to the qualifications requests should be made known through the Electronic system of public procurement to all economic operators;
- the minutes of opening tenders shall be transmitted to all the tenderers participating in the procedure;
- the application of the selection and qualification criteria should be identical for all the bidders;
- the evaluation factors are established so as to allow a comparative and objective analysis and evaluation of the offers;
- all the bidders are sent the draft contract together with the award documentation.

3.3. The principle of mutual recognition

Mutual recognition refers to “*the acceptance of products, services, and works legally offered on the European Union market, and of the diplomas and certificates issued by the competent authorities of other states, as well as of the technical specifications conforming to national standards*” [16].

The respecting this principle implies:

- the acceptance of products, services and works that are legally offered on the EU market;
- the acceptance of diplomas, certificates and documents issued by the competent authorities at national or international level;
- the acceptance of technical specifications in accordance with national and international standards.

3.4. The principle of transparency

The principle of transparency refers to “*public communication of all information regarding the application of the award procedure*” [17].

The application of this principle implies:

- a clear and precise formulation of all the necessary information regarding the development of the chosen procurement procedure in the documents specific to the public procurement process;
- ensuring the publicity of the public procurement procedure through the Electronic Public Procurement System and the Official Journal of the European Union.

3.5. The principle of proportionality

The principle of proportionality is activated in order to ensure the association between the necessity of the contracting authority, the object of the public procurement contract and the requirements to be fulfilled. In order to comply with the principle of proportionality, both the minimum qualification and selection requirements (evoked by the contracting authority through the documentation of attribution of authority) and the documents justifying the fulfillment of such requirements must refer only to the elements that are strictly necessary to ensure the fulfillment of the public procurement contract in optimal and efficient conditions [18].

The principle of proportionality highlights the relationship between: the needs of the contracting authority, the object of the public procurement contract and the conditions that must be respected by the bidders in order to satisfy the needs of the contracting authority.

The application of this principle implies that:

- the measures implemented by the contracting authorities cannot violate the value limits of what is in accordance with and indispensable to the attainment of the objectives targeted through the award documentation;
- the choice between several appropriate measures is carried out in favor of the least coercive, and the effects caused cannot be disproportionate to the purpose pursued;
- fraud and corruption are reduced;
- the occurrence of mistakes during the process of public procurement is reduced;
- restrictive requirements by establishing some that are in accordance with the needs of the contracting authorities are eliminated.

3.6. The principle of responsibility

Applying the principle of responsibility leads the contracting authority towards the punctual determination of the duties and competences of the persons involved in the public procurement process, thus guaranteeing the objectivity, professionalism and independence of the decisions taken during this process. This principle highlights the obligation of the parties involved in the public procurement process to assume and be responsible for the consequences of the adopted measures and decisions.

3.7. The principle of managing public funds effectively

The principle of managing public funds effectively guarantees that the contracting authority, regardless of the award method used, will seek to reflect the economic advantages of the tenders in order to obtain the optimal ratio between quality and price. If necessary, other expected effects in the social field or in the field of environmental protection and promotion of sustainable development can be considered.

With the advent of the Order of the Minister of European Funds no. 1284/2016 [20], in order to carry out the competitive procedure, the private beneficiaries that use

European funds are obliged to respect four other principles of public procurement.

3.8. The principle of transparency

This principle implies the publication of all the information related to the competitive procedure in such a way that the interested economic operators can participate in this procedure. It has the same purpose as principle 3.4. from this article.

3.9. The principle of economics

Economics implies the possibility of minimizing the resources available to achieve the estimated results by using the competitive procedure without reducing quality.

3.10. The principle of efficiency

Efficiency implies the possibility of achieving an optimal ratio between the allocated resources and the expected results.

3.11. The principle of effectiveness

Effectiveness involves identifying the degree of achievement of the objectives or the relationship between the projected effect and the actual result of the respective activity.

4. Conclusions

Regarding the main regulations in the field of public procurement, the Treaty on the functioning of the European Union establishes the free movement of goods and services as fundamental legal norms of European trade, *“principles that are applicable including in the field of public procurement”* [6].

At the level of the European Union, the regulation of the procedure for awarding public procurement contracts was implemented for the first time through Directives no. 71/305 / EEC and no. 77/62 / EEC. Currently, public procurement falls under the legislative package formed by the Directive no. 2014/25 / EU, Directive no. 2014/24 / EU and Directive 2014/23 / EU. These directives develop the principles set out in the establishing and operating treaties of the European Union; thus, the preamble states that *“the award of procurement contracts by or on behalf of the authorities*

of the Member States must respect the free movement of goods, the freedom of establishment and the freedom to the provision of services, as well as the principles that derive from them, such as equality of treatment, non-discrimination, mutual recognition, proportionality and transparency” [21].

According to Art. 288, Para. (3) of the Treaty on the Functioning of the European Union, the directive is obligatory for the signatory states, offering the national authorities “an instrument of legal uniformity”, “of correlation of the legislative, regulatory and administrative provisions of the Member States” [19].

These legal acts have been transposed into national law through: Law no. 98/2016 - regarding public procurement, Law no. 99/2016 - regarding the sectoral acquisitions, Law no. 100 / 2016 - regarding the concessions of works and the concessions of services, and also of the GEO no. 114 / 2011- regarding the award of certain public procurement contracts in the fields of defense and security.

The application of procurement principles aims to:

- develop a market specific to public procurement;
- create a competitive market in the field of public procurement, in order to attract

all interested economic operators and all quality products, works and services;

- create a climate dominated by trust, fairness and impartiality between contracting authorities and economic operators;
- eliminate subjectivity from the public procurement process, reducing the possibility of influencing the decisions of the contracting authority;
- reduce corruption at the level of public officials and implicitly, the possibility of fraud;
- eliminate the preferential treatment between national, international and local economic operators;
- eliminate the trade barriers that still exist between the states of the European Union;
- eliminate restrictive technical requirements;
- encourage the use of standardized award documentation that will help the economic operators to better understand the needs formulated by the contracting authorities;
- facilitate public access to all existing information regarding the award of public procurement contracts;
- ensure flexibility and transparency in ex-ante supervision as well as the achievement of efficient and effective control by institutions with responsibilities in the field of public procurement.

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