

# TRANSPARENCY AND THE NEW PUBLIC PROCUREMENT SYSTEM IN ROMANIA

Adrian Ducu MATEI<sup>1</sup>

Motto: *The lack of transparency results in distrust and a deep sense of insecurity*  
(14<sup>th</sup> Dalai Lama).

**Abstract** *This paper emphasizes the fact that public investment in times of crisis can be an opportunity for economic rebalancing provided that certain principles and rules stipulated by legislation are observed and also if it is subject to adequate control. Following both the regulation and functional errors in national and international mechanisms, some legislative and institutional changes were made. These changes were carried out at European level through the adoption of new EU directives on public procurement at national level but also at national level through new legislation transposing European directives. Europe 2020 strategy for smart, sustainable and inclusive growth is about a vision of the social market economy competitive in Europe for a period of ten years, based on three interdependent and mutually reinforcing priorities: developing an economy based on knowledge and innovation; promoting a competitive economy, with low emissions of carbon dioxide and efficient in terms of resource usage; and promoting an economy with a high employment rate, ensuring social and territorial cohesion. Public procurement is an important element, as it is one of the market tools that can be used to achieve those objectives. Procurement markets and, in particular, major work projects are often considered a sensitive area where corruption scenarios are carried out either by manipulating the tender documentation in favour of bidders or by using intermediary companies to cover illegal activities.*

**Keywords:** *trust, economic crisis, corruption, economy.*

**JEL Classification:** H57, O10, P47

## Introduction

Economic research and literature show that nowadays the world faces three models of economy and society. They are also models of economic and social development, among which are the following: the American, the Asian and the European model.

It is important that economic models represent the pivot around which globalization formulas form.

These three models are options to choose the way for the next period; for this purpose, it is necessary to highlight some individual features.

Depending on the essential components, strategic elements, reaching peak values and standards on which civilization is built today, the American model organically includes growth and political freedom, but it excludes social cohesion. From this perspective, it represents the model that places accountability for how to manage subsistence towards the local and mostly the individual level. In these circumstances the state minimizes its efforts for prevention and personal failure. The model is structured on the logic of one's own risk.

The Asian model includes economic growth and social cohesion and excludes political freedom. It is the model that propelled China into the centre of Asian regional economy. In this model the predilection for dirigisme and interventionism can be found, as well for one-party state and authoritarianism. Is the model that is said to have a history obsessed by development issues and which does not consider extra economy management

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<sup>1</sup> **Ph.D. Econ.,** ducumatei@yahoo.com

very important. It is a sample of a classic non liberalism, an experiment done for the emerging markets without considering the values of individualism.

The European model includes economic growth, political freedom and social cohesion. It is the model that combines the principle of non-explosive critical mass and contradictory principles and values, such as efficiency and fairness. Of all known models, the European model relies on risk without regulating sacrifice. Welfare has not appeared by chance in Europe and did not take forms whose social adhesion has ever decreased. Europe has capitalized its humanistic culture alignments through its development model, the predisposition of European society to accept additional costs for public convenience. For Europe, poverty is a social issue and unemployment is a national problem. Redistribution is the most widely used lubricant in the interstices of European progress mechanisms. Getting economic growth and social cohesion constitute a matter of political freedom essence for Europe.

### **1. The general framework and the European integration model**

According to some researchers, the European Union is an advanced approximation of globalization and for this purpose it is necessary to understand the connection between globalization and integration. A first sense of this relationship is to consider the European integration process as the political response to the demands of globalization (Wallace, 1996); "European integration can be analysed as Western Europeans' special effort to ensure the management of globalization consequences. They invented a form of regional governance, where the promoted policies aimed at expanding the role of states and strengthen boundaries between them and the rest of the world".

Under these circumstances, establishing supranational institutions is the response to inadequate reactions of the states facing external challenges of globalization. The inefficiency of national solutions to the economic crises of the 70's is the main argument for accelerating the process of European integration in the mid 80's; it consisted of the appearance of the single market between states and then the Economic and Monetary Union (EMU).

Creating the Single Market (by the Single European Act in 1987) had as its starting point the belief that market liberalization is the most effective way to cope with competitive pressures across the Atlantic and East Asia.

Therefore, European integration is the way in which public authorities have recovered their ability to exercise autonomy when facing globalization.

The European integration process has enabled the apparition of institutions that sustain the integration of the European economy on the globalization path, a position consistent with the preference for globalization. This vision has both an internal dimension by spreading neoliberal policies in Europe and an external one as well, considering that internal trade liberalization cannot succeed without anchoring in global liberalization (Dent, 1997). In this respect the European records are contradictory.

On the one hand, the Single Market and EMU are liberalization examples facilitating a pro-globalization approach. Globalization, whose core element is international trade, is facilitated by trade and investment liberalization to the general benefit.

It is a process in which all parties win, as post-war economic history proves. It is a statement regarding the need to continue efforts, which can be found if we consider the vision per which "Europe has taken advantage of this process and will continue to do so, provided it maintains long-term competitiveness, its capacity to innovate and the values of its model economy". (Lamy, 1999).

On the other hand, European farmers support system offered by the common agricultural policy is incompatible with globalization.

If the two prior approaches analysed the European integration process as a result of the public authorities' actions, a third vision describes the relationship between formal integration (achieved by the Community states and authorities) and the informal one (through the actions of companies among European regions). Several authors consider that the increase of community policy competences are the result of the increasing interaction between companies (whether multinational or transnational corporations acting in accordance with the rules established at Community level). For others, states remain the central control agents for integration results; accelerating this process is the consequence of convergence of the Member States national interests (Moravcsih, 1999).

The foregoing viewpoints can lead to outlining the elements of a European globalization model, with the following important points:

1. acceptance of the liberalization principles, the argument of the Directorate - General for Trade of the European Commission being that liberalization is a useful and necessary factor to ensure a high degree of development;
2. increasing the transparency of Community institutions;
3. harmonization of (trade) globalization, with poverty reduction as the result of applying that model;
4. Protection of areas where there are certain considerations that go beyond the market logic, including:
  - a. agriculture and observing the European agricultural model, which is not only about ensuring food security but also population security and revitalization of some rural areas;
  - b. public health, where Europe rather applies the caution principle;
  - c. natural environment, considering the provisions of the Kyoto agreement and the like;
  - d. cultural diversity considered part of cultural uniformity

Europe 2020 Strategy for smart, sustainable and inclusive growth was adopted for the purposes of those above mentioned; it emphasizes the desire of a vision on the social competitive market economy, as applicability of the European model of integration, for the next decade; it is based on three interdependent and mutually reinforcing priorities: the development of an economy based on knowledge and innovation; promoting a competitive, low-carbon and efficient in terms of resource use; and promoting an economy with a high rate of employment, ensuring social and territorial cohesion.

Public procurement plays an important role in the Europe 2020 strategy as one of the market tools to be used to achieve these objectives.

More specifically, the Europe 2020 strategy is based on public procurement to:

- improve the framework conditions which allow companies to innovate, exploiting the full potential of demand oriented policies<sup>1</sup>,
- support the transition to an efficient economy in terms of resource use and low-carbon, e.g. by encouraging the wider use of green public procurement, and
- improve the business environment, especially for the innovative SMEs.

At the same time, the Europe 2020 strategy highlights that public procurement policy must ensure the most efficient use of public funds and procurement markets must be kept open throughout the EU.

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<sup>1</sup> This issue is addressed in the Commission Communication "Innovation Union" - SEC (2010) 1161, one of the iconic initiatives of the Europe 2020 strategy which addresses the strategic use of public procurement to promote research and innovation. It invites Member States to allocate a part of their procurement budgets for research and innovation and informs about the Commission's intention to provide guidance and support mechanisms for contracting authorities.

Getting the best results in efficient procurement procedures is particularly important in the context of the severe budget cuts and economic difficulties faced by many EU member states. When dealing with these challenges, a functioning and efficient public procurement European market which contributes to achieving these ambitious objectives is more necessary than ever.

Many interested parties have called for a review of the EU public procurement system to increase its effectiveness. Thus, the Commission announced by the Single Market Act 1 that it will conduct wide consultations to formulate legislative suggestions aimed at simplifying and modernizing EU law.

## **2. The European and national framework of public procurement**

Directive 2014/24 / EU of the European Parliament and Council as of 26 February 2014 on public procurement and repealing Directive 2004/18/EC reconsidered public procurement policy at European level.

Public procurement plays a key role within Europe 2020 strategy, presented in the Commission's Communication of 3 March 2010 entitled 'Europe 2020: A strategy for smart, sustainable and inclusive growth (hereinafter " Europe 2020 strategy for smart, sustainable and inclusive growth") as one of market tools to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. To this end, the rules on public procurement adopted by Directive 2004/17 / EC of the European Parliament and of the Council (4) and Directive 2004/18/ EC of the European Parliament and Council (5) should be reviewed and upgraded to increase the efficiency of public spending, facilitate the participation of small and medium enterprises (SMEs) in public procurement and enable procurers make better use of public procurement in support of common societal goals. However, it was necessary that certain basic notions and concepts to be clarified to ensure legal certainty and to incorporate certain aspects of the constant case law of the European Union Court of Justice in this area.

The United Nations Convention on the Rights of Persons with Disabilities (6) should be taken into account in implementing the new directive particularly in relation to choosing means of communication, technical specifications, award criteria and conditions for implementing a contract.

The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; however, this clarification should not extend the scope of this Directive in relation to the Directive 2004/18/EC. The Union public procurement regulations are not meant to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, goods or services for consideration through a public contract. It should be clarified that such procurement of works, goods or services should be subject to this Directive, whether implemented by purchase, lease or other contractual forms.

The notion of acquisition should be broadly interpreted as obtaining benefits from those works, goods or services, without necessarily involving a transfer of ownership to the contracting authorities. Furthermore, the mere financing of an activity, particularly through grants, often linked to the obligation to repay the amounts received if they are not used for the purpose for which they are intended, is not usually regulated by procurement rules.

The economic logic of reform in public procurement in Romania was promoted through the National Strategy; it fully reflects the economic logic of the Directives on public

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1 Communication from The Commission To The European Parliament, The Council, The Economic And Social Committee And The Committee Of The Regions: Towards a Single Market Act For a highly competitive social market economy 27 October 2010 - COM(2010) 608.

procurement at European level. This economic logic revolves around the idea that transparency generates competition, competition generates savings.

Impact studies conducted at European level - including the previously legislative package - and promoted by DG Internal Market demonstrate that this logic has been checked.

The econometric analysis carried out during the assessment reveals that a small but stable, transparent procurement process leads to tangible savings.

Specifically, according to *Evaluation Report - Impact and Effectiveness of EU Public Procurement Legislation (Part 1)*<sup>1</sup>, published by the European Commission in 2011 (SEC (2011) 853 final, the publication of a notice results in savings of 1.2% compared to the situations where there are no published notices or other information in connection with the contract that was to be awarded. According to analysis results, a contracting authority that publishes an invitation to tender and uses open procedure can expect savings of 3.8% of the final value of the contract, while when using the restricted procedure, it can expect smaller economies amounting to 2.5%.

The savings associated with a higher degree of competition are increased in services and works, resulting in a directly proportional relation between economies and competition in these sectors: the more the procedures mobilize competition, the more the degree of saving increases.

The European Commission estimated within the same impact study that in most transparent procurement procedures savings between 2.5-10% compared to the budget estimate can be achieved (in terms of establishing realistic budgets).

Thus, budget savings can reach a considerable value. Following the logic outcome of impact assessments conducted at European level, it is anticipated that the average value of trades on the public procurement market of approximately Euro 15,000 million annually for a period of 5 years if the savings would be only 5% become investment of the same amount. This may result in reducing unemployment and GDP growth.

In addition, in the national context, due to the paradigm shift in public procurement in Romania, including (but not limited to shifting focus from the acquisition approach in terms of "the lowest price" to "the lowest cost" or demand aggregation) it is expected to achieve these savings not only at the transaction level, but also in operating the goods/service/work purchased. Thus, it is expected that for Romania, given the current economic situation and the effective reality of public procurement, compared with other European countries, the impact of the measures included in the National Strategy on GDP is higher than in other EU countries.

Romania makes efforts in monitoring the institutional use of public money, conducting financial control over the formation, management and use of financial resources of the state and public sector, having by law a crucial role in tracking public money usage. Detailed reports on inspection activities are regularly published; it is an important source of information for those interested in checking public spending.

The National Public Procurement Strategy, approved by Government Decision no. 901/2015 on the ex-post control of public procurement contains some measures to be taken by the Court of Auditors to strengthen the role in controlling public procurement:

- strengthening the capacity of the Court of Auditors in controlling public procurement;
- ensuring adequate human resources;
- specialized training of personnel;
- providing specific tools (guides on how to control public procurement);
- harmonize procedures and methods used by the Court of Accounts and the Audit Authority in carrying out audits of public procurement, to ensure full consistency of

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<sup>1</sup> [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/er853\\_1\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/er853_1_en.pdf)

approaches and interpretations; establishing a coordination mechanism between the Court of Auditors and the Audit Authority;

- taking into account risk factors indicated by the governmental institutions, such as the National Agency for Public Procurement, National Integrity Agency and the Competition Council in developing the Court of Accounts methodology used to determine relevant risk areas and, therefore, help develop annual work program and the audit plan.

The public procurement process is monitored in order to implement the Strategy measures.

### 3. Vulnerable domains in terms of public procurement transparency in Romania

According to national assessments<sup>1</sup> for the 2009 - 2010 period, the rankings areas with the highest total value of contracts awarded are indicated, as shown in Annex. 1 Excerpt from "Top 50 largest contracts awarded through SEAP summed values, according to the CPV"; **construction works** are on the top position (with all the associated services: buildings finishing, building installations, etc.) with a total aggregate value of over Euro 7 billion, representing virtually 40% of the total public procurement carried out through the Electronic system of public procurement (SEAP) in those two years, followed by health purchases.

Considering the frequency codes of the Common Procurement Vocabulary (CPV) associated with procurement procedures carried out through SEAP, most are **pharmaceuticals** and **medical equipment**, followed on the 3rd place by **construction and public works**.

If we look closely at the practices of central and local authorities, we can easily notice that the data published on the websites or other means of communication are not presented in a way that contributes to the correct information of citizens (the final beneficiaries of the public investments made).

Authorities mainly formally observe the procedures required by law without a prior analysis and therefore data are often incomplete, or refer to disparate parts of the procurement process.

The contracting authorities poorly inform the population about the whole process of public procurement.

Information on all proceedings stages are not public, from the publication of the notice to selecting the winner of that contract, signing and reception of the work, goods or services.

According to the survey conducted by PwC EU Services and Ecorys<sup>2</sup> (2013) on procurement in 8 Member States and 5 sectors during 2010, there was awarding procedure defrauding for public procurement contracts in 48% of cases.

Among the frauds identified in this study were the following: illicit commissions, conflicts of interest and intentional mismanagement, which attracted direct costs up to Euro 2.2 billion.

The Association of Certified Fraud Examiners - The Institute of Internal Auditors, the American Institute of Certified Public Accountants and the Association of Certified Fraud

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<sup>1</sup>The study by the Public Policy Institute entitled "Transparency, Fairness and Competitiveness in Procurement Process in Romania" Case Study: central contracting authorities, published in 2012 <http://freedomhouse.ro/achizitii/la-zi/item/283-transparen%C5%A3%C4%83-corectitudine-%C5%9Fi-competitivitate-%C3%AEn-procesul-de-achizi%C5%A3ii-publice-din-rom%C3%A2nia>

<sup>2</sup> PwC EU Services and Ecorys (2013). Procurement: the costs we pay because of corruption. Identification and reducing corruption in public procurement in the European Union. [http://ec.europa.eu/anti\\_fraud/documents/antifraud-policy/research-and studies/pwc\\_olaf\\_study\\_ro.pdf](http://ec.europa.eu/anti_fraud/documents/antifraud-policy/research-and studies/pwc_olaf_study_ro.pdf)

Examiner, 2008<sup>1</sup> uses a specific taxonomy of fraud types, which was taken over by European Commission to issue other documents, including notes, practical guides for identifying fraud (see "information Note on fraud indicators for ERDF, ESF and CF"). Among the elements related to research and detection of fraud, specific elements regarding tender manipulation can be enumerated: complaints from bidders, poor controls and inadequate bidding procedures, indications of bids changes after reception, voiding bids for errors, qualified bidders being disqualified for suspicious or unclear reasons.

## Conclusions and suggestions

In conclusion, in order to improve the public procurement system in Romania, a closer monitoring is necessary for the control institutions to draft expert reports, guides, functional work procedures on monitoring procurement in terms of fraud identification, prevention and elimination, from assigning the contract, where there still are practices of tender manipulation, studies to identify the causes of the lack of confidence in the public procurement system, the real causes of the high and constant number of complaints in the past five years and identifying the best action to reduce them, supporting a transparent and competitive business environment.

We also suggest increasing the activity of gathering information on the Electronic System of Public Procurement and other sources to develop a database on public procurement necessary to compile statistics, summaries, reports on public procurement system so as to identify the risk factors needed to establish its control program.

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<sup>1</sup> The Institute of Internal Auditors, the American Institute of Certified Public Accountants and the Association of Certified Fraud Examiners (2008). Managing the Business Risk of Fraud - A practical Guide. <http://www.theiia.org/media/files/fraud-whitepaper/fraud%20paper.pdf>

## Annex 1

Excerpt from "Top 50 50 largest contracts awarded through SEAP summed values, according to the CPV"

	CPV Description	CPV CODE	Amount agreed Euro	Number of contracts
1	Complete or partly complete construction works and public works	452	7,772,006,468	12,109
2	Pharmaceuticals	336	719,837,955	51,846
3	Banking and investment services	661	719,659,054	225
4	Building installation works	453	703,434,766	2,925
5	Building completion works	454	570,189,316	2,931
6	Engineering	713	511,827,070	3,969
7	Repair and maintenance services of pumps, valves, taps, metal containers and machinery	505	487,415,231	1,120
8	Repair, maintenance and associated services related to aviation, railway, road and sea	502	475,096,674	434
9	Fuel	091	448,590,277	1,681
10	Construction works	450	422,293,931	827