Public Contracts

1. What is the relevant legislation regulating the award of public contracts?

The 2004 European legal framework on public procurement and concessions was reviewed by the representatives of the European Commission and the findings and conclusions of the review were comprised in a report called the Monti Report.[1] Pursuant to the Monti Report, the European Commission enacted a document entitled "Strategy 2020 a strategy for smart, sustainable and inclusive growth" (Europe 2020 Strategy) aiming to achieve a sustainable future: smart growth – developing an economy based on knowledge and innovation; sustainable growth – promoting a more resource efficient, greener and more competitive economy; inclusive growth – fostering a high-employment economy delivering social and territorial cohesion. These three priorities are mutually reinforcing and they offer a vision of Europe's social market economy for the 21st century. These priorities are put in place by seven flagships (i.e. "Innovation Union", "Youth on the move", "A digital agenda for Europe", "Resource efficient Europe", "An industrial policy for the globalisation era", "An agenda for new skills and jobs", "European platform against poverty) referring to the actions to be taken by the Member States for the transformation of Europe in the next decade.

All those priorities and flagships are implemented in the Directives adopted in the public procurement field in 2014:

- 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 (Directive 2014/24/EU);
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Directive 2014/25/EU);
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Directive 2014/23/EU).

1 Former President of the European Commission, Jose Manuel Barroso, sent to Professor Mario Monti a letter called "Mission letter from the President of the European Commission" on 20 October 2009, asking him to prepare a report containing options and recommendations for an initiative to relaunch the Single Market as a key strategic objective of the then new Commission.

In addition, there is a separate directive, Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, which regulates the award of certain contracts in the fields of defence and security (Defence Directive). The Defence Directive was transposed by the Government Emergency Ordinance No. 114/2011 on the award of certain contracts in the fields of defence and security (Defence Procurement Law), but no methodological norms were enacted to implement the said law so far.

The new legal framework on public procurement was transposed in Romania by enacting a legislative package, comprised of:

- Law No. 98/2016 on public procurement (Public Procurement Law) which transposes Directive 2014/24/EU;
- Law No. 99/2016 on utilities procurement (Utilities Procurement Law) which transposes Directive 2014/25/EU, and
- Law No. 100/2016 on works concessions and services concessions (Concessions Law) which transposes Directive 2014/23/EU.

The new legislative package on public procurement was completed by the adoption of Law No. 101/2016 on remedies and review procedures and the organisation and functioning of the National Council for Solving Complaints (Remedies Law) which transposes Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors that have been amended a number of times. In addition to the remedies available at national level, the European Commission may take legal action against a Member State in front of the Court of Justice of the European Union in relation to any alleged breach of EU legislation.

Furthermore, for the purposes of implementing the new legal framework on public procurement, the following national secondary enactments were adopted:

- Government Decision No. 395/2016 approving the Methodological Norms for the application of the provisions on the award of the public contract/framework-agreement as provided for by Law No. 98/2016 on public procurement (Norms for the application of the Public Procurement Law);
- Government Decision No. 394/2016 approving the Methodological Norms for the

application of the provisions on the award of the sectoral contract/framework-agreement as provided for by Law No. 99/2016 on sectoral procurement (Norms for the application of the Utilities Procurement Law);

- Government Decision No. 867/2016 approving the Methodological Norms for the application of the provisions on the award of the works concessions and services concessions (Norms for the application of the Concessions Law).

A separate piece of legislation was enacted to regulate the award and the performance of public-private partnerships contracts, namely the Government Emergency Ordinance No. 39/2018 on public-private partnership (Public-Private Partnership Law), but the norms for implementing the Public-Private Partnership Law have not been enacted so far.

2. What are the main novelties brought by the Public Procurement Law?

The reform of public procurement brought by the Public Procurement Law is quite significant, both in relation to the matters concerning the award procedures and in relation to the implementation stage of the public procurement contracts.

Amongst these novelties, for the first time in the European legal framework on public procurements, the market consultation was expressly regulated as a tool for contracting authorities to design a procurement process and to inform the economic operators of their future projects and requirements. The Norms for the application of the Public Procurement Law provide that market consultation will be applied in case of highly complex procurements or procurements in areas of advanced technology. Also, the Norms for the application of the Public Procurement Law regulate the market consultation mechanism. Another novelty is the full use of electronic means, as a rule, in the application of all the award procedures, including the negotiation stage which may also be carried out by electronic means. By exception, specific categories of contracts which cannot be awarded by electronic auction were expressly identified.

For the first time in the European framework on public procurements, the European Commission has implemented and managed an electronic system, called *e-Certis*, comprising information on certificates and other attestations that are most commonly requested by the contracting authorities, and which can facilitate the participation of small and medium-sized enterprises of the Member States in the award procedures.

For the same purpose of facilitating the participation of small and medium-sized enterprises of the Member States in the award procedures, the European framework on public procurement introduced the setting of official lists of economic operators to be

invited to take part in such procedures.

3. Which are the entities subject to public procurement legislation?

The contracting authorities which shall apply the provisions of the Public Procurement Law are the following:

- Public authorities or public institutions, acting at central or local level;
- Bodies governed by public law, meaning bodies having all of the following characteristics:
  - They are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
  - They have legal personality; and;
  - They are financed, for the most part, by public authorities or public institutions or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by public authorities or public institutions or by other bodies governed by public law;
- Any association formed of one or more of the abovementioned contracting authorities.

The contracting entities which shall apply the provisions of the Utilities Procurement Law are the following:

- Contracting authorities as defined by the Public Procurement Law;
- Public undertakings, meaning entities carrying out economic activities over which contracting authorities directly or indirectly exercise a dominant influence as a result of ownership, financial participations or specific rules provided for in the incorporation documents of the undertaking;
- Any legal subject, other than those referred to above, which performs one or more relevant activities in the public utilities sectors based on a special or exclusive right, granted by a competent authority, whenever it awards public contracts or concludes framework agreements for the performance of such activities;
- Any association comprising at least one of the contracting entities listed above.

The contracting entities which shall apply the provisions of the Concession Law are the following:

- Contracting authorities as defined the Public Procurement Law;

- Public undertakings which apply the Utilities Procurement Law;
- Any legal subject, other than those referred to above, which operates on the basis of exclusive or special rights granted in order to pursue any of the relevant activities.

The public partners which apply the Public-Private Partnership Law are the contracting authorities and contracting entities as defined by the Public Procurement Law and Utilities Procurement Law, respectively.

4. Which are the contracts regulated by the public procurement legislation?

The contracts regulated by the public procurement legislation include: works contracts, supply contracts and services contracts. The general rule is that all the contracting authorities/contracting entities as defined by the Public Procurement Law/Utilities Procurement Law shall apply the provisions of the public procurement legislation when awarding public procurement contracts the estimated values of which are equal to or greater than the thresholds set out therein.

Depending on the relevant thresholds and object, public procurement contracts may be:

- Public contracts entirely governed by the Public Procurement Law/Utilities Procurement Law;
- Public contracts only partially governed by the Public Procurement Law/Utilities Procurement Law, having a special procurement regime;
- Public contracts that can be awarded without following the procedural requirements set out by the Public Procurement Law/Utilities Procurement Law.

5. Are there special public procurement awarding procedures?

Depending on its specifics, a contract is awarded, by one of the following public procurement award procedures:

- The open procedure, where any interested economic operator may submit a tender;
- The restricted procedure, where any economic operator may submit applications, but only the candidates selected during the first stage may submit tenders;
- The competitive negotiation procedure, where the contracting authority/contracting entity carries out consultations with the shortlisted candidates and negotiates contractual clauses, including the price, with one or more of them;

- The competitive dialogue, where any operator has the right to submit applications, following which only candidates meeting the qualification and selection criteria have the right to participate in the dialogue stage and only the candidates left at the end of dialogue are entitled to submit final tenders;
- The innovation partnership, where the contracting authority carries out successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works;
- The negotiation without publication of a contract notice, where the contracting authority/contracting entity awards the public procurement contract without publishing a contract notice in SEAP-SICAP[2], exclusively in the special cases set forth by the relevant enactment;
- A contest of solutions, which is a special procedure whereby a plan or a project is acquired by competitive selection carried out by a jury, with or without a prize, and which is more often used in areas such as land development, town planning and landscaping, architecture or data processing;
- Own award procedure applicable when purchasing social services and other specific services which benefit from a special procurement regime;
- A simplified procedure, applicable where the values of the contract to be awarded are less than the thresholds which trigger the application of the regular procurement procedures, but equal to or greater than the threshold for the direct purchase.

The Public-Private Partnership Law sets forth that the procedures for the award of the public-private partnership contracts are the award procedures laid down by the Public Procurement Law and Utilities Procurement Law, respectively.

6. What are the novelties regarding the award procedures?

In order to implement the priority areas of the Europe 2020 Strategy, namely a smart, sustainable and inclusive growth related to the research and innovation field, a new award procedure was introduced, i.e. the "innovation partnership", used if the contracting authorities/contracting entities intend to purchase innovative works, services, products or processes, given that the solutions available on the market, at any given time, do not satisfy the contracting authority's/contracting entity's needs.

7. Must public procurement procedures be publicised?

In view of ensuring the necessary transparency in awarding public procurement

2 SEAP-SICAP is the national electronic system where the contract notices are published by the contracting authorities/contracting entities.

contracts, mandatory rules require that the tender notice, invitation to tender and award notice must be published. A prior information notice is also to be published where a contracting authority/contracting entity intends to apply for reducing the minimum period from contract notice until submission date. The contract notice, contract documents and answers to clarifications must be published in the SEAP-SICAP. As a novelty, the contracts are awarded by electronic means and the evaluation must be performed automatically through the electronic means employed.

8. Is participation in procedures for the awarding of procurement contracts more flexible than before?

The use of the European Single Procurement Document ("ESPD" or "DUAE", in Romanian) was introduced with a view to removing the administrative burden faced by economic operators submitting tenders/applications. Thus, the DUAE replaces the tenderer's/candidate's former declaration on own responsibility, and the ESPD template was approved by European Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document. Pursuant to the Norms for the application of the Public Procurement Law/ Norms for the application of the Utilities Procurement Law, the contracting authority/ contracting entity shall generate an electronic DUAE filled with the information required by the tenderers with respect to the qualification and selection criteria.

9. On which grounds can tenders be rejected?

All grounds for exclusion of an economic operator from the award procedures provided by Directive 2014/24/EU and Directive 2014/25/EU were regulated under the national legislation as being compulsory, noting that, even where in abstracto it falls within one of the exclusion cases, the tenderer/candidate is given the chance to demonstrate its reliability in concreto. A special emphasis was placed on the self-clearing actions which shall be scrutinised by the contracting authorities/contracting entities, on a case-by-case basis. Another novelty is the active role played by the Competition Council, as it will be requested by the contracting authorities/contracting entities to give its opinion prior to taking decisions to exclude economic operators on grounds of possible breaches of the competition rules. The Competition Council's involvement in preparing a guide to draw attention to the best practices in the economic operators' submission of a joint tender to the award procedures should also be noted.

A specific new ground for exclusion was introduced by a recent legislative amendment targeting economic operators organized as joint stock companies, whose share capital is represented by bearer shares and which fail to prove the identity of the actual holders

/ beneficiaries of the bearer shares.

The evaluation committee appointed by the head of the contracting authority/ contracting entity must verify:

- Whether the qualification and selection criteria have been met by each tender, and the required documents have been provided;
- Whether the ESPD is filled in accordance with the requirements of the contract documents;
- Whether the price stipulated in the financial proposal does not exceed the available funds for the respective public procurement contract;
- Whether the contracting authority/contracting entity cannot make available additional funds for the fulfilment of the respective public procurement contract where the offered price exceeds the estimated value communicated through the contract notice;
- Whether, although the contracting authority/contracting entity can make additional funds available for the fulfilment of the respective public procurement contract where the offered price exceeds the estimated value communicated through the contract notice, by accepting such an offer a material change of the contract would occur by exceeding the threshold of 10% of the price of the contract, in case of services and supply contracts, and 15% of the price of the contract, in case of works contracts;
- Whether the offered price is abnormally low, or the tender contains prices which are not the result of free competition or which cannot be properly justified;
- Whether the technical proposal is compliant with the technical specifications set forth in the contract documents and is correlated with the financial proposal.

Depending on the nature of non-compliance with the relevant legal provisions or with the contract documents, tenders may be rejected as irregular or unacceptable or unsuitable. If any of the non-compliance situations mentioned above is found to exist, the tender shall be rejected without applying the award criterion provided in the contract documents.

10. Which award procedures are applicable for contracts with an estimated value below the thresholds provided by the Public Procurement Law/Utilities Procurement Law?

A more flexible award procedure was set out for contracts having an estimated value below the thresholds provided by the Public Procurement Law/Utilities Procurement Law, but exceeding the thresholds which entitle the contracting authorities/contracting entities to carry out direct procurement. A simplified procedure was introduced, with

shorter periods for submitting and evaluating the tenders. Such simplified procedure can be conducted in one or several stages which may also involve a negotiation stage.

As regards direct procurements having an estimated value less than the RON equivalent of EUR 27,000 (for supplies and services) or EUR 90,000 (for works), the contracting authorities/contracting entities are encouraged to use electronic catalogues which display and organise information in a way that is common to all participating tenderers and can be electronically processed.

11. Do the social services benefit of a special regime of procurement?

The Public Procurement Law/Utilities Procurement Law comprises certain specific provisions applicable to the procurement of a special category of services, also referred to as "services to persons".

Specifically, for the public procurements having an estimated value equal to or greater than the threshold of the RON equivalent of EUR 750,000, and for the utilities procurements having an estimated value above the threshold of the RON equivalent of EUR 1,000,000, respectively, the contracting authorities/contracting entities are to make known their intention to purchase by means of a contract notice or by means of a prior information notice, which shall be published continuously, and to publish an award notice. As regards the applicable procedure, a recent amendment permits own award procedures as a specific manner of awarding the contracts, provided that the principles of the public procurement/utilities procurement are observed, regardless of whether the estimated value of the procurement is above or below the relevant threshold.

As regards the procurements having an estimated value less than the threshold of the RON equivalent of EUR 750,000, and for the utilities procurements having an estimated value less than the threshold of the RON equivalent of EUR 1,000,000, respectively, the contracting authorities/contracting entities shall apply their own simplified award procedures by observing the public procurement/utilities procurement principles.

12. Are the economic operators based in non-GPA signatory countries allowed to submit tenders under the same conditions as domestic operators?

Currently, the non-GPA signatory countries based economic operators are allowed by

law to participate in public procurement procedures and the contracting authorities/ contracting entities are required to observe the fundamental principles governing public procurement, such as equal treatment and non-discrimination.

However, the most recent intention of the Romanian national authorities is to amend the legislation to allow access to public procedures in Romania only to tenderers resident in the GPA signatory states or in states with which Romania has concluded bilateral agreements on public procurement. Such legislative change, if implemented, occurs in a pre-existing context at the level of the European Union which aims to ensure a level playing field in relation to economic operators established in the European Union, which are required to observe a set of uniform rules and regulations, and economic operators from non-EU countries, which should be required to observe similar rules and regulations.

13. What types of information on evaluation methodologies must be disclosed up-front? Which are the aspects that may be considered in evaluating a tender?

All the minimum qualification requirements, the documents to be provided by interested economic operators in demonstrating compliance with the qualification and selection criteria, the award criterion, the tender evaluation factors and their proportional weightings, as well as the calculation algorithm or the actual methodology used to score the advantages resulting from the technical and financial proposals provided by tenderers, must be included in the contract documents.

The contracting authority/contracting entity must ensure that the contract documents are made available to any interested economic operator. Technical specifications comprised in the contract documents (requirements, prescriptions, technical characteristics that allow each product, service or work to be objectively described in compliance with the requirements of the contracting authority) shall be defined in such a manner as to meet, to the extent possible, the requirements/standards of any potential user, including disabled persons. Technical specifications must afford equal access to participants, and must not result in unreasonable obstacles to the opening up of public procurement to competition.

The contracting authority/contracting entity must define technical specifications either by reference to national standards transposing European standards, European technical approvals, international standards or other technical reference systems established by the European standardisation bodies, or by specifying the requested performances and/or operational requirements. No tender may be rejected if the bidder proves, by whatever appropriate means, that its technical proposal meets in an equivalent manner

the requirements of the contracting authority/contracting entity. In order to prove compliance with the requested technical specifications, the contracting authority/ contracting entity must accept certificates issued by bodies acknowledged in any Member State.

Performances and functional requirements may also include environment-related characteristics. In this case, the contracting authority/contracting entity has the right to use, in full or in part, specifications defined by "eco-labels", European or (multi-) national. The contracting authority may not consider a technical proposal noncompliant merely because the tendered products or services do not bear the "eco-label" required, if the tenderer proves, by whatever appropriate means, that the tendered products/ services are compliant with the requested technical specifications.

The contract documents may not set out technical specifications referring to a specific make, source, production or a particular process or to a brand name or trade mark, a patent or a production license to the effect of favouring or disqualifying certain undertakings or products. Contract documents may set out special requirements for the fulfilment of the contract, seeking to obtain social effects or environmental protection effects, and to promote sustainable development.

14. What are the authority's disclosure obligations and the parties' right of access to information during public procurement awarding procedures? Are there any confidentiality obligations?

Tenders are deemed confidential by the Public Procurement Law/Utilities Procurement Law until the award procedure report is published by the contracting authority/ contracting entity in SEAP-SICAP. Access to the information available in a contract award procedure is open and transparent to all interested tenderers, except where the tenderer expressly states in the tender the information and documents considered confidential, including commercial secrets or elements of the tender, and attach evidence that the information is confidential. For instance, a tenderer is granted access to the entire contract documents, to the answers given by the contracting authority/ contracting entity to requests for clarification addressed by other tenderer, and to the public procurement file. The contracting authority/contracting entity must inform the interested participants on the decisions on the outcome of the procedure; the information must be communicated in writing, no later than three days from taking the decision. Each tenderer shall be informed in detail of the reasons for rejecting its tender. Contracting authorities/contracting entities must secure the protection of any information that the tenderers state and prove as being confidential, insofar as the disclosure of such information would objectively damage the legitimate interests of the

tenderers (especially with regard to commercial secrecy and intellectual property). The disclosure of such information may be made only with the prior written approval of the tenderer.

15. Which are the rules for amending a public procurement contract?

The concept of "substantial modification" of a contract is introduced as a benchmark for the amendment thereof, in the sense that only those modifications that are not substantial are allowed. Also, the cases and requirements that must be fulfilled in order to amend a public procurement contract without organising a new award procedure are expressly set out, including the cases where the replacement of the initial contractor is allowed. Another novelty is the possibility to increase the value of a public procurement contract up to a certain limit, without assessing whether such modification could be deemed substantial, provided that the cumulative net value of the successive modifications is below the thresholds which trigger the obligation to carry out regular award procedures.

Moreover, the concept of "review clauses" was introduced for the first time in order to avoid the need for a new tender by mentioning from the outset the events which may trigger changes in existing contracts

16. Which are the award criteria to be applied for the award of public procurement contracts?

Unlike the previous procurement legislation which regulated the "most economically advantageous tender" as a distinct award criterion alternative to the "lowest-price" award criterion, the Public Procurement Law regulates the "most economically advantageous tender" as a general concept which may be implemented using several award criteria, namely "the lowest price", "the lowest cost", "the best price-quality ratio", "the best cost-quality ratio".

A series of evaluation factors have been established to achieve an outcome of the procurement which is based on relevant quality criteria.

One of the amendments to the Public Procurement Law/Utilities Procurement Law clarified and set out that the "the lowest price" criterion is applicable exclusively upon awarding contracts with an estimated value lower than the thresholds which would require a regular award procedures, while "the lowest cost", "the best price-quality ratio" and "the best cost-quality ratio" criteria shall be applied to the award of contracts

of an estimated value equal to, or greater than such thresholds.

17. What are the novelties regarding subcontractors?

As a novelty in the field of public procurement, the national enactments introduce the possibility for the contracting authority/contracting entity to make direct payments to subcontractors for the corresponding part executed by such subcontractors.

The Norms for the application of the Public Procurement Law/Utilities Procurement Law regulate the payment method which will be used for the corresponding part executed by the subcontractors and clearly define the conditions for appointing a new subcontractor or replacing a subcontractor during the performance of a public procurement contract.

18. Does the Public Procurement Law/Utilities Procurement Law regulate the termination of public procurement contracts?

For the first time in the European legal framework in the public procurement sector, certain mandatory cases where a contracting authority/contracting entity may unilaterally terminate a public procurement contract were regulated and thus transposed into the Public Procurement Law/Sectoral Procurement Law, as follows:

- If a material change to the public procurement contract has occurred;
- If the contractor was, at the time of the award, in one of the cases that, if discovered at that time, would have triggered its exclusion from the award procedure;
- If a decision was enacted by the Court of Justice against the contractor in relation to a serious infringement of the obligations under the EU Treaties and EU legislation on public procurement.

19. What are the novelties brought by the Utilities Procurement Law?

The Utilities Procurement Law regulate the procurement by entities operating in the water, electricity, heat, gas, transport and postal services sectors, ports and airports, as well as in the exploitation of a geographical area.

The law defines the concept of "utilities procurement", as well as the concept of "contracting entity" and the categories of entities which are required to apply the Utilities Procurement Law by organising the relevant award procedures.

20. Which are the changes brought by the Concessions Law?

In addition to public procurement issues, the Concessions Law introduces a series of novelties with respect to the legal structuring of concession projects. For the first time in the concessions legislation, the operating risk has been defined by identifying its characteristics. The requirement that a concession contract always implies a significant transfer of the operating risk to the concessionaire was also clarified.

Also, for any contract exceeding five years, the duration of the concession is determined by taking into account the period necessary to recoup the investments made by the concessionaire, to recover the costs incurred with the operation of works or services, and to achieve a reasonable return on the invested capital.

In addition, with respect to the award procedures, the contracting entities shall apply, as a rule, the open tender procedure or the competitive dialogue procedure. As a novelty, a second stage consisting in the negotiation of admissible tenders may also be applied in an open tender procedure. By way of exception from the two procedures mentioned above, and in the cases expressly stipulated by the law, negotiation without prior contract notice may also apply.

As regards the award criteria, concession contracts are awarded based on the most cost-effective offer, assessed based on objective criteria to ensure effective competition.The objective criteria may relate to the degree to which certain risks are undertaken by the concessionaire, the level of the net present value of the payments made by the contracting authority, the level of user charges, the duration of the concession, and innovation.

21. Does the subject-matter of the Public-Private Partnership Law overlap with the Concessions Law?

The Public-Private Partnerships Law only applies to projects where the pre-feasibility study shows that most part of the income derived from the use of the asset(s) or operation of the public service envisaged by the project (i.e., the income from which the private partner will recover its investment and will generate profit) will come from payments made by the public partner or other public entities to the benefit of the public partner.

A public-private partnership agreement may take the form of a concession or public procurement/utilities procurement contract, depending on the risk allocation structure.

Unlike the projects described above, projects generating the most part of their income

from the fees paid by the end-users of the relevant assets or services are not to be considered public-private partnerships.

22. Which are the characteristics of the Public-Private Partnership mechanism?

The requirements for a mechanism of cooperation between the public and the private sector to qualify as a public-private partnership are the following:

- The cooperation between a public partner and a private partner for the implementation of a public project;
- The relatively lengthy duration of contract performance, allowing the private partner to recover its investment and to derive a reasonable profit;
- Financing the project mainly from private funds, including, if the case, from both private and public funds;
- The distribution of risks between the private partner and the public partner, depending on each contracting party's capacity to evaluate, manage and control a certain risk;
- The achievement of the purpose that the public partner and the private partner pursue in the implementation of the project.

It should be noted that in an attempt to render the financing of public-private partnership projects more flexible and attractive, by a recent legislative amendment the sovereign development and investment funds and the private pension funds were included in the category of potential financers of the public-private partnership contract, together with the natural or legal persons who provide the project company with the financial means necessary to fulfil the obligations undertaken pursuant to the public-private partnership contract.

23. Which are the stages of preparation of a project in Public-Private Partnership project?

The conclusion of a public-private partnership contract requires several stages:

- *Preparation of the pre-feasibility study*: the prefeasibility study is the basis of the decision to implement a public-private partnership project;
- *Public partner's preparation of the study serving as basis for the public-private partnership project decision*: the study substantiating the decision to implement the project as a public-private partnership will be prepared by the public partner;
- *Approval of the study serving as basis for the public-private partnership project decision,*

by the Government or the local deliberative authorities, as the case may be: if the Government (in the case of central projects) or the local deliberative authorities (in the case of local projects) agree to the conclusions of the study serving as basis for the public-private partnership project decision, the Romanian Government or the local deliberative authority, as appropriate, will issue a decision approving that the relevant public project is to be structured as a public-private partnership;

- *Commencement and conduct of the public-private partnership contract award procedure*: after the publication and entry into force of the Government Decision/decision of the local deliberative authorities approving the implementation of the public project as a public-private partnership, the public partner will prepare the tender documentation and will commence and conduct the public procedure for awarding the public-private partnership contract;
- *Selection of the winning tenderer and execution of the public-private partnership contract*: if a tender is declared as the winning tender as a result of the award procedure carried out by the public partner, the public partner and the private partner may execute and implement the public-private partnership contract;
- *Submission of a copy of the public-private partnership contract to the National Institute of Statistics*: the public partner shall submit a copy of the public-private partnership contract, within 30 days from the execution date, to the National Institute of Statistics; any amendment to the public-private partnership contract during the implementation thereof will require prior approval from the Government or the local deliberative authority that approved the conclusion of the contract.

24. Can the private partner be replaced during the performance of the Public-Private Partnership contract?

For the first time, the national legislation on public-private partnerships allows for the replacement of the private partner, should such private partner or the project company fail to fulfil their contractual obligations. The replacement can be made at the public partner's initiative or upon the financing entity's recommendation, in order to ensure the carrying on of the public-private partnership project. However, this is subject to the potential to replace the private partner having been mentioned in the award documentation and in the public-private partnership contract, in the form of a review clause.

25. Are there specific rules set forth by the Defence Procurement Law?

Defence Procurement Law applies to the award of contracts for the supply of military products and/or sensitive products, works, products and services directly related to

the said products, and works and services specifically intended for military purposes or sensitive works and services.

The scope of the Defence Procurement Law has been clarified by a recent legislative amendment that includes the supply of sensitive products/works/services on critical IT infrastructure of national interest, given the sensitivity of the information conveyed through it. However, the disclosure of information related to the critical IT infrastructure involved in the supply of any e-Government public services was considered contrary to the essential interests of State security and has been included in the list of exceptions to the application of the Defence Procurement Law. To define the legal framework applicable to contracts having as subject-matter the critical IT infrastructure of national interest, additions were made to the Defence Procurement Law setting out in detail the manner of their procurement by introducing the framework-agreement as an adequate means to procure the said infrastructure.

As regards the applicable award procedures, the Defence Procurement Law regulates the restricted procedure, the competitive dialogue, the competitive negotiation procedure and the request for tenders which is a simplified procedure.

As regards the award criteria, the contracts are awarded based on "the lowest price" or "the most cost-effective offer" criteria, assessed based on objective factors to ensure effective competition.

26. Which are the mechanisms enabling the challenge of an awarding procedure?

The disputes arising during the procedures for awarding a public procurement contract, utilities procurement contract, public-private partnership contract or a concession contract shall be settled by administrative and jurisdictional means, in front of the National Council for Solving Complaints (Council) or in court, pursuant to the Remedies Law.

The person considering itself harmed in its right or a legitimate interest by an act of a contracting authority or by the latter's failure to solve a claim within a certain period, can file a complaint with the Council or the court of law, requesting the annulment of the act, the issuance of an order compelling the contracting authority to issue an act or to adopt remedial measures, or recognition of the claimed right or legitimate interest. If complaints are filed with both the Council and the court, they shall be joined and resolved in court.

Considering the multitude of complaints and appeals that hindered and slowed

down the procurement award procedures, a requirement to set a preliminary bond as mandatory condition for resolving complaints filed with the Council was introduced by an amendment to the Remedies Law. The bond shall be returned upon request by a final decision after the settlement of the complaint or after termination of suspension of the award procedure and / or the contract.

Decisions of the Council may be challenged by appeal with the competent court of law, where no new claims may be added. The court decision in appeal is final. Where the applicant choses to file the complaint directly with the court, it has the obligation to pay a judicial stamp fee. The judgment of the tribunal ruling on the challenge on its merits is subject to final appeal.

In well-grounded cases and to prevent impending damage, both the Council and the court may order the suspension of the award procedure, with no obligation to set any deposit in addition to the bond/judicial stamp fee presented upon filing the complaint.

The Remedies Law provides for the right of any interested person to seek in court cancellation of the contract/addendum concluded in breach of the conditions required under the public procurement legislation, the utilities procurement legislation, the public-private partnership legislation or the concession contracts legislation. The cases in which the court may declare the nullity of the contract/addendum and order *restitutio in integrum* are expressly identified.

27. What were the major changes brought by the COVID-19 crisis in the field? Will these changes stick?

The state of emergency due to the COVID-19 crisis was instituted by Decree of the President of Romania No. 195/2020 for an initial period of 30 days, later extended by 30 days by Decree of the President of Romania No. 240/2020. Subsequently, a a state of alert has been instituted in Romania, and periodically extended to date.

Although it has generated a number of well-grounded criticisms regarding the terminology used and establishment of exceptions to the manner of purchasing medical products regulated by the Public Procurement Law, the above-mentioned presidential decrees granted certain categories of contracting authorities the right to resort to direct procurements of an estimated value above the relevant threshold requiring a regular award procedure, and without establishing a maximum value of the procurement. In this context, the European Commission issued guidelines on using the public procurement framework in the emergency situation related to the COVID-19 crisis, providing that a negotiation procedure without the publication of a prior procurement notice may generally apply in the situation of extreme urgency generated

by the COVID-19 crisis. Thus, the exceptions established by the above-mentioned decrees were not necessary, as a legal framework providing for such exceptions was already in place.

However, after the state of emergency ceased and the state of alert was declared, the legal framework on public procurement continued to be applied as before the COVID-19 crisis.

28. Outlook

Further to the adoption of the existing legislative framework on public procurement, utilities procurement, concessions, and public-private partnerships that repealed the entire former legislation, significant changes occurred and are further expected to occur to ensure compliance with the objectives of the new European directives and the priorities of Europe 2020 Strategy, namely to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds.

Although the reform brought by the existing legislative package, including the recent amendments was expected to simplify the award procedures by allowing more flexibility, in practice both contracting authorities/contracting entities and economic operators still face various difficulties in applying the new regulations.

As regards the complaint mechanism, even though a more effective process is ensured by the removal of the prior notification, which used to be required before filing a complaint, the mandatory condition to set up the preliminary bond when filing a complaint hampers the process to a certain extent.