



THE NATIONAL
AGENCY FOR
PUBLIC
PROCUREMENT

*Legal framework and
practice in awarding
in-house contracts in
Romania*

by

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International conference

**”Public procurement in EU Member States after
reform – implementation of Directive 2014/24/EU
and Directive 2014/25/EU, application in practice,
challenges for the future”**

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➤ **Following the agreement with the European Commission, the National Authority for Public Procurement (N.A.P.P.) was set up by the Romanian Government in May 2015 by merging:**

- **former U.C.V.A.P./C.V.A.P. - structures entitled to verifying the procedural aspects related to the award process of procurement contracts and**
- **A.N.R.M.A.P. (current N.A.P.P.) – institution with a fundamental role of conception, promoting and implementing public procurement policy**

under the authority of the Ministry of Public Finance, as the main institution to oversee the management of public investment and to ensure the quality of public spending.

➤ **The responsibilities of the newly created institution are: policy and law making, methodological counselling, operational support, ex-ante control, monitoring and supervision of the public procurement system.**



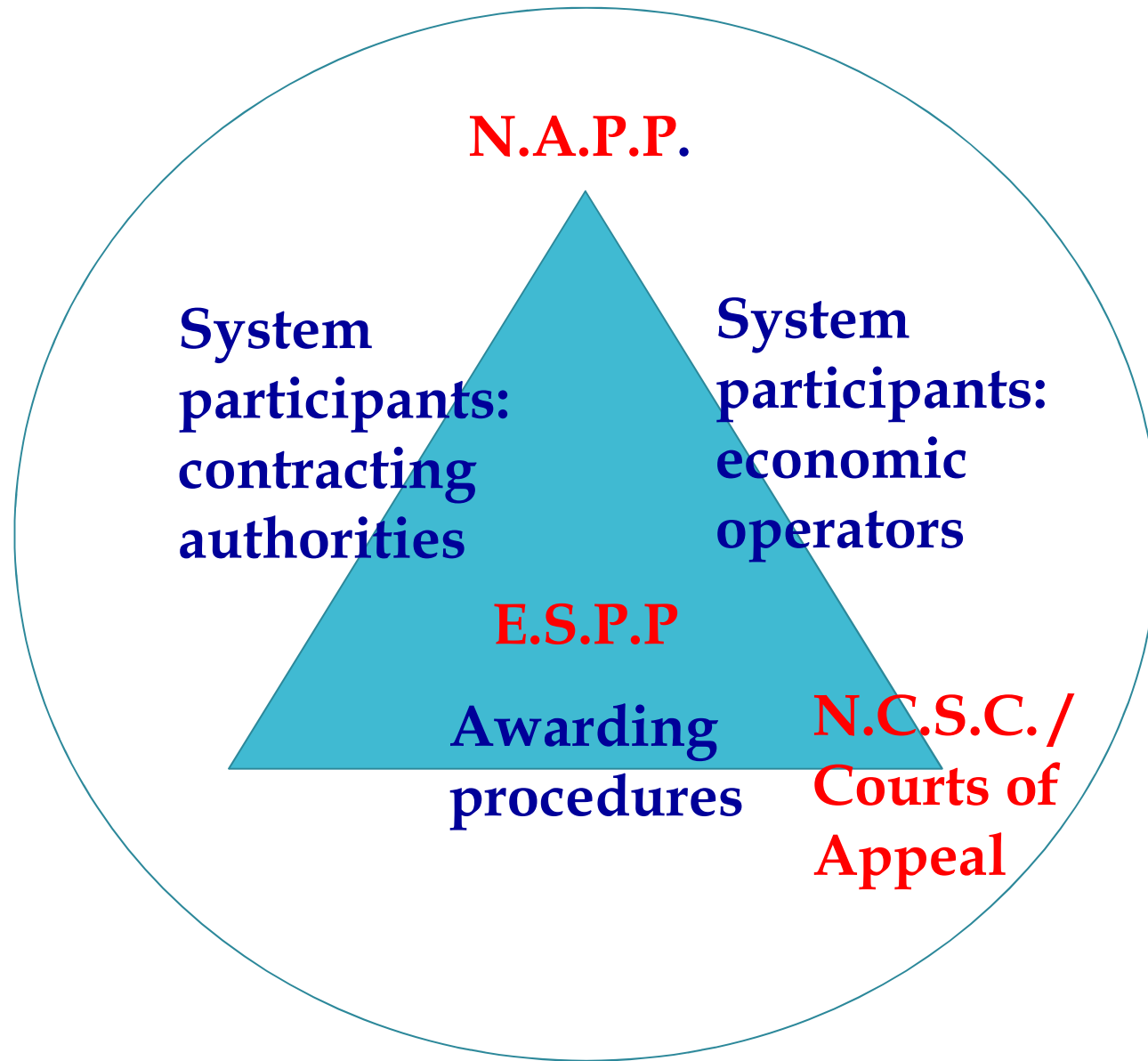
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Main objectives

- Ensuring a coherent and harmonized legal framework in the field of public procurement in line with the obligations derived from the application of the EU Directives
- Implementing a proper verification system to ensure the unitary application of the legal provisions and procedures by the contracting authorities
- Ensuring an efficient system of public procurement and supervising its functionality
- Ensuring a permanent communication channel with the structures within the European Commission, the correspondent public institutions from the Member States and with the national bodies of public interest



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Transposition of the new European Directives

Legislative framework, in force since May 26, 2016:

➤ **Primary legislation**

- ❖ **Law no. 98** for classic PP (transposing 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)
- ❖ **Law no. 99** for utility contracts (transposing 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)
- ❖ **Law no. 100** for concession contracts (transposing Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts)
- ❖ **Remedies' law no. 101**

! Unlike previous European Directives on public procurement that were transposed at the national level into a single law, these new Directives are transposed distinctively, each Directive having its own correspondent law

followed by

- **Secondary legislation (methodological norms),**
- **Tertiary legislation (orders/instructions issued for applying the secondary legislation) and**
- **Operational instruments/guidelines**



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With the transposition of the European Directives into national legislation, the rules of in-house contracts had also been transposed

Article 12 of Directive 2014/24 / EU - Article 31 of Law no. 98/2016

Article 28 of Directive 2014/25 / EU - Articles 47-50 of the Law no. 99/2016

Article 17 of Directive 2014/23 / EU - Article 36 of Law no. 100/2016



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In-house contracts may be awarded to legal entities governed by private law or public law which fulfill the conditions laid down by national law.

N.A.P.P., through its powers, can check whether the conditions for the award of in-house contracts are met as an exception to the application of the relevant legislation, both through methodological advice and ex-post control.



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Attention!

Even if the conditions for the award of in-house contracts can be met as an exception to the application of the relevant legislation, contracting authorities / entities are not / can not be required to rely strictly on this exception, being merely a facility granted to them.

Recital 31, par. 2, Directive 2014/24 / EU

Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. **The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules.** However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities



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In its current activities, N.A.P.P. has observed in the last months of the current year, by providing methodological advice to the contracting authorities / entities, an increase in the number of such cases, mainly reported in two situations as those covered by national legislation, namely:



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Situation 1

Where the relevant legislation does not apply to public procurement / framework agreements awarded by a contracting authority to a legal person governed by private or public law if the following conditions are met cumulatively:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person

Proof of meeting the conditions of paragraph a) and c) derive mainly from the Act of Establishment / Statute of the legal person under private or public law.

Percentage from lit. b) relate to all activities performed as mentioned in this letter, do not relate to the subject matter of each in-house contract.



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Situation 1

Examples

Hall Cities or County Councils set up entities with legal personality, private or public law, to carry out activities consisting of:

Public service provision for public and private domain management;

Landscape maintenance service provision;

Execution of works / provision of repair and maintenance services for streets, alleys, sidewalks, gutters, canals and bridges;

Construction work;

Execution of water-canal works;

Construction, modernization, maintenance, administration and exploitation of agro-food markets, bazaars, fairs and exhibitions;

Provision of security services.



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Situation 2

Where the relevant legislation does not apply to public procurement / framework agreements awarded by a controlled legal person that has the status of contracting authority under the following conditions:

- (a) the contracts are awarded to the contracting authority which controls it or to another legal person controlled by the same contracting authority;
- b) In the second situation from lit. (a) there shall be no direct participation in the capital of the legal person to whom the contract is attributed, with the exception of forms of participation of private capital which do not provide control or veto but whose existence is required by law in accordance with the Treaties, and which does not exert a decisive influence on the controlled legal person.

Proof of meeting the conditions of paragraph a) and b) derive mainly from the Act of Establishment / Statute of the legal person under private or public law.



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Situation 2

Examples

Awarding a contract for the provision of security and public order services by a City Street Administration to a Local Police General Directorate, both entities with legal personality, controlled by the City Hall of that city;

The assignment of a guard service contract by a General Directorate for Social Assistance and Child Protection to a Guard and Order Directorate, both entities with legal personality, controlled by a County Council.



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"Grey" areas of the Directives as regards the rules for awarding in-house contracts that generate questions:

Which legislation / rules should apply to the in-house contract that has been awarded to it, the legal person under private or public law?

Does the legal person under private law, which is not a contracting authority / entity, and to which an in-house contract has been awarded, becomes a contracting authority / entity?

Can a private legal or public law body controlled by a contracting authority / entity be required to sign strictly in-house contracts if the relevant conditions for awarding such a contract are met?

- How can such private or public law legal entities be monitored in an optimal, transparent and centralized manner, as well as compliance with the legislation in the matter of in-house contracts to them, without this creating a burden administrative burden on the authorities that control them?

The list remains open ...



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In view of the above-mentioned aspects, N.A.P.P. is concerned with the clarification and regulation of these gray areas.

Thus, at present N.A.P.P. is currently preparing a tertiary level regulatory document focusing on detailing how to apply rules on in-house contracts, which will also include **Case C-567/15 - LitSpecMet**.

Judgment of the Court (Fourth Chamber) of 5 October 2017

UAB „LitSpecMet“ vs. UAB Vilniaus lokomotyvų remonto depas

Reference for a preliminary ruling — Public works contracts, public supply contracts and public service contracts — Directive 2004/18/EC — Article 1(9) — Concept of contracting authority — Company wholly owned by a contracting authority — Transactions internal to the group



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Conclusions of A.G. Manuel Campos Sanchez-Bordona in case C-567/15 – LitSpecMet.

„79. In other words, the contracting authority can make use of proxy entities, within the limits already mentioned, by entrusting them with particular tasks which should, in principle, be subject to public procurement procedures but which are exempted. This exception is not, of itself, open to question, legally speaking, in the light of the case-law of the Court of Justice (and, now, Article 12(1) of Directive 2014/24). However, where such proxy entities do not have the resources needed to themselves carry out the tasks assigned by the contracting authority and are obliged to have recourse to third parties in order to do so, the reasons for relying on the in-house exemption disappear and what emerges is actually a hidden public (sub-)procurement where the contracting authority, through an intermediary (the proxy entity) obtains goods and services from third parties without being subject to the directives which should govern the award.”



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Conclusions of A.G. Manuel Campos Sanchez-Bordona in case C-567/15 – LitSpecMet.

„81. It seems to me that if the connection between LG and VLRD is such as to justify the application of the in-house exemption to transactions between them, then the external transactions that are essential to the performance of the tasks entrusted to VLRD by LG cannot avoid being caught by the procurement directives (provided they are in excess of the relevant value threshold). Otherwise, simply by reorganising the activities of LG through the establishment of VLRD, LG would be able to avoid the consequences that flow from its status as a contracting authority.”



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Judgment of the Court (Fourth Chamber) of 5 October 2017

„The second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011, must be interpreted as meaning that a company which, on the one hand, is wholly owned by a contracting authority whose activity consists of meeting needs in the general interest and which, on the other, carries out both transactions for that contracting authority and transactions on the competitive market must be classified as a ‘body governed by public law’ within the meaning of that provision, provided that the activities of that company are necessary for the contracting authority to exercise its own activity and, in order to meet needs in the general interest, that company is able to be guided by non-economic considerations, which it is for the referring court to ascertain.

The fact that the value of the internal transactions may in future represent less than 90% or an insignificant part of the overall turnover of the company is irrelevant in that regard.”

Thank you!

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