

Competition vs Urgency in times of Covid-19: the impact on public procurement

-Overview of Romanian Legislation -

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ABSTRACT

The year 2020 has been a real international challenge, as with the onset of the COVID-19 pandemic all countries around the world have made efforts to provide specific medical services, adequate medical equipment, and medical products to prevent the spread of the Covid-19 virus. Due to the high demand for products and services of the same kind in a short time, the state authorities had to purchase these products in the fastest way possible, through public procurement, taking into account the observance of the fundamental principles of public procurement, as well as its general purpose, namely best value for money.

This urgency in procurement gives us the opportunity to analyze the principle of free and unrestricted competition, as a principle believed to be highly violated due to the measures adopted by the authorities in order to create a more flexible and fast public procurement process. Thus, this article aims to (1) present the principle of free competition through the procurement legislation during the state of emergency, show (2) if competition in public procurement was affected by the urgency in times of Covid-19, so then to (3) set the level of competition in Romania before and after Covid-19, by conducting a study on the annual public procurement reports.

Keywords: Public Procurement, Competition, Covid-19

1. Introduction

Public procurement is one of the main tools in combating the Covid-19 pandemic, as the urgent need for similar goods and services is increasing. Faster and less formal public procurement requires special rules that challenge compliance with the basic principles of public procurement. The European Commission has taken measures to prevent the breach of the basic principles of public procurement by enacting the EU's *Joint Procurement Agreement for the Procurement of Medical Countermeasures*.

This article reflects on the principle of competition in the face of the Covid-19 pandemic, highlighting an extremely urgent public procurement with the increase for similar supplies, equipment, and services. Theoretically, the basic principles and rules of public procurement were highly violated during the Covid-19 crisis, as the adapted public procurement procedures – direct procurement and negotiated procedure without prior publication-, together with qualifying Covid-19 as *force majeure* led to faster procurement and non-existent competition. In practice, competition in public procurement during Covid-19 remains constantly, even increasing from 2019 in different procurement procedures. All these acknowledgments will be consolidated based on data provided by the Romanian Agency on Public Procurement.

2. Relevant Legislation on Public Procurement – an overview of European Law and Romanian Law -

European Union regulates public procurement mainly through Directive 2014/24/EU. In Romania, the core of the public procurement legislation is thus formed of Law no. 98/2016 on public procurement, Law no. 99/2016 on utility procurement, and Law no. 100/2016 on works concession contracts and services concession contracts. Law 98/2016 provides the fundamental principles governing the public procurement process, namely transparency, equal treatment, non-discrimination, proportionality, and accountability. Identifying the principle of competition as one of the fundamental principles of public procurement, both in the European Union and Romania, this article provides an overview of urgency in public procurement and its influence over competition principle. Public procurement rules have to be designed in a pro-competitive way, “so that they do not hinder, limit or distort competition”², and such restricting practices be avoided.

The principle of competition is consolidated in Article 18(1) of Directive 2014/24/EU that clearly indicated that “*the design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition*”³. This statement stresses the importance of the competition principle in the

² **Albert Sanchez-Graells** – *Public procurement and the EU competition rules*, 2nd edition, Hart Studies in Competition Law, Bloomsbury, 2015, p. 195

³ Article 18(1) of Directive 2014/24/EU: “*Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The design of the procurement*

public procurement process and provides an incremental step in the development of a pro-competitive orientation of the EU public procurement rules.⁴

In Romania, the main legislation regarding public procurement is Law no. 98/ 2016. The principle of competition is embedded in article 50 the text of which is identical to that of the Directive 2014/24/EU.⁵ Covid-19 pandemic required swift and smart solutions in dealing with an immense increase of demand for similar goods and services while certain supply chains were disrupted.⁶ Based on this necessity, the European Commission issued *The Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis* (the “Guidance”) and stated that in case of urgency, the general deadlines for the awarding procedures of contracts can be reduced, while also providing other solutions for combating Covid-19 pandemic.⁷ The European Commission claimed that contracting authorities can fall back on the EU public procurement framework because it also provides ways to accommodate severe emergencies such as the COVID-19 pandemic. This statement creates two sources of the interpretative difficulty. Firstly, the Guidance provides a formulation of *urgency in public procurement* that does not include a time-space classification, nor a clear definition of urgency and its applicability. An excessively formal interpretation of these elements could run the risk of distorting competition, as contracting authorities may benefit from these new deadlines to award non-related to Covid-19 pandemic contracts or after the pandemic is no longer considered *urgent (force majeure)*. Secondly, article 18(1) of Directive 2014/24/EU provides the necessity of a subjective element for distorting competition “*the intention of artificially narrowing competition*”. By interpreting the necessity of the subjective element, we need to address the following question: Does the Covid-19 pandemic distorts competition in public procurement, or the lack of competition is justifiable?

shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favoring or disadvantaging certain economic operators.”

⁴ **Albert Sanchez-Graells** – *A deformed principle of competition? – The subject drafting of Article 18(1) of Directive 2014/24*, Forthcoming in GS Olykke & A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules in 2014*, Cheltenham, Edward Elgar Publishing, 2016

⁵ Article 50 of Law no. 98/2016: “(1) Contracting authorities shall not design or structure procurements or elements thereof with the aim of exempting them from the application of the provisions of this Law or of artificially restricting competition.

(2) For the purposes of para. For the purposes of paragraph 1, an artificial restriction of competition shall be deemed to exist where the purchase or elements thereof are designed or structured with the aim of unduly favouring or disadvantaged certain economic operators.”

⁶ **Official Journal of the European Union** – *Communication from the Commission: Guidance from the European Commission on using the public procurement framework in the emergency situation related to the Covid-19 crisis*, 2020, Available at [EUR-Lex - 52020XC0401\(05\) - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/lexuris/ui.do?module=detail_browse&id=EURLEX-2020-040105&tableOfContents=1)

⁷ **OECD** – *Application of public procurement rules during the COVID-19 crisis from perspective of the European Union’s Procurement Directives and the Government Procurement Agreement*, 2020, Sigma, p. 7 – See <http://www.sigmaweb.org/publications/Public-procurement-COVID-19-crisis-SIGMA-April-2020.pdf>

The Romanian Public Procurement Law was amended in 2020 by Government Emergency Ordinance No. 23/2020⁸ to create a more flexible, faster, and better public procurement system. The lack of improvement in public procurement due to urgency would affect the use of allocated funds, including European funds, and lead to delays in the implementation of major projects with social and economic impact at a national or local level. Solutions proposed in public procurement by the European Commission were adopted by the Romanian Government with the implementation of the state of emergency by Presidential Decree no. 195/2020⁹. Several solutions were considered: a. contracting authorities can substantially reduce the deadlines to the accelerated open and restricted procedure; b. a negotiated procedure without publication can be envisaged if the emergency is justified and all the conditions from art. 32(2)(c) from Directive 2014/24/EU¹⁰ are fulfilled and c. contracting authorities should look at alternative solutions, to help public buyers to dispose of innovative solutions available on the market.

3. Competition vs. Urgency in public procurement

3.1 Competition principle vs. Covid-19 crisis as *force majeure*

The principle of competition is one of the basic principles of public procurement as it is necessary for achieving the best value for money. Covid-19 crisis demanded a faster procurement because of the necessity for similar goods and services in a short period of time, so the enforcement of competition law need to be adjusted to serve the greater public interest during this crisis. The outbreak of the Covid-19 pandemic represents an unforeseeable event (*force majeure*) that needs special provisions in order to make the procurement process faster and less formal.¹¹ United Nations Conference on Trade and Development recommends Governments take five actions to protect competition in the markets during the pandemic: (1) ensure equal conditions between companies for a level playing field that remains relevant even in crisis period; (2) adapt competitive procedures and deadlines to the extraordinary circumstances created by the pandemic; (3) closely monitor markets of essential products necessary to combat Covid-19 pandemic; (4) temporarily allow cooperation arrangement to ensure the supply and distribution of affordable products to all consumers to prevent a shortage of essential products; (5) enforce competition law against companies that take advantage of the crisis by creating

⁸ Government Ordinance no. 23/2020 on the modification and completion of some normative acts with an impact on the public procurement system is available at [Ordonanța de urgență nr. 23/2020 pentru modificarea și completarea unor acte normative cu impact asupra sistemului achizițiilor publice - Lege5.ro](https://www.lege5.ro/legislatie/act/ordonanta-de-urgenta-nr-23-2020-pentru-modificarea-si-completarea-unor-acte-normative-cu-impact-asupra-sistemului-achizitiilor-publice)

⁹ The Presidential Decree no. 195/2020 on the establishment of the state of emergency on the territory of Romania is available at [DECRET 195 16/03/2020 - Portal Legislativ \(just.ro\)](https://www.just.ro/legislatie/act/decret-195-16-03-2020)

¹⁰ **Art. 32(2)(c) from Directive 2014/24/EU** states that: “Contracting authorities may award public contracts by a negotiated procedure without publication ”insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority” – See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

¹¹ **F. Akoka, V. Lamy & A. Meynier-Pozzi-** *Crise sanitaire et contracts publics*, Jean Moulin, 2021

cartels or abusing their market power.¹² The buyer and the seller in a public procurement market would see *force majeure* from different angles. Firstly, the buyer may limit force majeure events to matters that are outside the seller's control, while the seller will negotiate as broad a list of force majeure events as possible, as force majeure favors the seller.¹³

In Romania, nor the Presidential Decree no. 195/2020, nor the Government Ordinances qualified Covid-19 pandemic as *force majeure*. The basic question that arose was whether the parties may rely on the Covid-19 crisis as a reason for the non-performance of the contracts. The European Commission in the *Guidance* stated that the raising of patients requiring medical treatment needs to be considered unforeseeable for any contracting authority, as the exact number for medical equipment, treatment, and medical services could not be foreseen and planned.¹⁴ The principle of competition is highly influenced by considering the Covid-19 pandemic a *force majeure*, as the relevant public body may provide the contractor with a time extension or contract termination. These solutions shall only be applied to public procurement contracts of goods and services needed to combat the Covid-19 pandemic; thus, general public procurement contracts will not benefit from this advantage.

The Guidance on using the public procurement framework in the emergency situation related to the Covid-19 crisis states that the pandemic "*has to be considered unforeseeable for any contracting authority*". However, the unforeseeability of the pandemic cannot be invoked ad hoc, as it must be unanticipated by the time the agreement is concluded. For all agreements concluded by the time the media started reporting the spread of Covid-19, force majeure would be very difficult to prove, and it must be analyzed case-by-case.¹⁵

In conclusion, when the contractor cannot submit their tender in time, if there is a problem regarding the financial revision of the contract or the extension of the term of the contract, all due to the Covid-19 crisis, *force majeure* may constitute the legal basis.¹⁶ Of course, all declared cases will be analyzed case by case to prevent bid-rigging practices.

¹² UNCTAD – *Defending competition in the markets during Covid-19*, 2020, Available at <https://unctad.org/news/defending-competition-markets-during-covid-19>

¹³ Vanessa L. Miller -*Force majeure tug-of-war: Competing interests of buyers and sellers negotiating force majeure protection in supply chain contracts*, 2020, Available at <https://www.foley.com/en/insights/publications/2020/07/force-majeure-competing-interests-buyers-sellers>

¹⁴ European Commission – *Guidance from the European Commission on using the public procurement framework in the emergency situation related to the Covid-19 crisis*, 2020, p. 4, Available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401\(05\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401(05)&from=EN)

¹⁵ <https://cms.law/en/int/expert-guides/cms-expert-guide-to-force-majeure/belgium>

¹⁶ F. Lichere, F. Akoka, V. Lamy & A. Meynier Pozzi – *Health Crisis and public contracts*, 2021, Available at http://www.ius-publicum.com/repository/uploads/08_06_2021_14_21_IUSPub_Report_Lichere_etal_Health_crisis_and_public_contracts.pdf

3.2 Competition principle vs. Direct procurement

Given the extreme circumstances in the current time, public procurement rules limit their applicability to give freedom to buyers to provide in a very short period of time the necessary goods and services. Direct procurement represents the main adjustment to public procurement during the Covid-19 crisis. The European Commission clearly stated this possibility in the *Guidance*: “public buyers may negotiate directly with potential contractor(s) and there are no publication requirements, no time limit, no minimum number of candidates to be consulted, or other procedural requirements. No procedural steps are regulated at EU level”.¹⁷ In practice, this means that the process of public procurement will be conducted without competing or advertising the requirements, for fulfilling the urgency and providing all the necessary goods.

As stated in *Commission v. Germany*¹⁸ to rely upon these derogations, the following criteria must be fulfilled cumulatively: a) exist an unforeseeable event, b) exist extreme urgency, and c) exists a causal link between unforeseeability and urgency. The negotiated procedure without prior publication limits competition on the basis that contracting authorities are given the possibility of direct approaches to a potential contractor(s), as well as awarding the contract to a specific supplier without any competition. Hereinafter, faster public procurement also provides contracting authorities the possibility of contacting potential contractors in and outside the EU by phone, e-mail, or in person or even demand for an increase in production or the renewal of production.¹⁹

Although direct procurement during Covid-19 seems to violate the basic principle of public procurement, Romanian Presidential Decree no. 195/2020²⁰ limits the applicability of direct procurement by considering only the period of the state of emergency and the pandemic as suitable for direct procurement, as well as clearly providing the object of direct procurement -materials, equipment, and services necessary to combat the pandemic. Even if these provisions narrow down competition, direct procurement made during the state of emergency comply with the rules established by the European Commission. It is believed that the basic message in public procurement during the pandemic was to procure the necessary goods and services in the fastest and best way possible, even if violating the basic rules of public procurement.²¹

¹⁷ **Albert Sanchez-Graells** -*European Commission’s Guidance on Extreme Emergency Procurement and Covid-19 -some thoughts and a word on the Dyson contract*, 2020, Available at <https://www.howtocrackanut.com/blog/2020/4/1/euroupean-commission-guidance-on-extreme-emergency-procurement-and-covid-19-some-thoughts>

¹⁸ C-318/94 *Commission v. Germany*, 1996, ECR I-1949 - <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0318&from=EN>

¹⁹ European Commission Guidance (n2) section 1.

²⁰ **The Presidential Decree 195/16 March 2020** – *Chapter II -The economic domain, Art. 8- Art. 12*, Available at <http://legislatie.just.ro/Public/DetaliiDocumentAfis/223831>

²¹ **Albert Sanchez-Graells** – *Procurement in the time of Covid-19*, 2020, p. 3 Available at <https://nilq.qub.ac.uk/index.php/nilq/article/view/531/421>

3.3 Protecting competition in public procurement

The European Union and its Member States are not unacquainted with unforeseeable events. On the contrary, the European Union issued *Joint Procurement Agreement for the Procurement of Medical Countermeasures*²² that seeks to *coordinate international responses to public health threats*.²³ As noted in the European Commission's *Explanatory Note on the Joint Procurement Mechanism*, the *Joint Procurement* "is not an international treaty, in the meaning of the Vienna Convention on the Law of Treaties", nor a pure legal act, but rather an agreement concluded between the Commission and the Member States.²⁴ Contrary to its *sui generis* nature, the *Joint Procurement* is governed by the EU Law and is under the jurisdiction of the Court of Justice of the European Union.²⁵

The Joint procurement aims to ensure more equitable access to the necessary medical goods while balancing prices for the participation of EU countries. Competition is thus protected by the *Joint procurement* provisions, as it states that all purchases "shall ensure that it follows public procurement law and competition law".²⁶ Moreover, article 27 states that "contracting parties awarding and signing specific contracts shall be fully responsible for ... c) evaluating the offers for specific contracts in case of reopening of competition". This agreement aims to streamline the market by allocating the goods and services needed to combat the Covid-19 pandemic while avoiding duplication of procurement procedures at a national level. Moreover, it aims to prevent unnecessary competition between buyers in times of crisis, as they might need different quantities of products at different times. Thus, the European Union is prioritizing the distribution and quantities of goods needed depending on the need of each MS through specific case-by-case analysis.²⁷

In reality, the JPA organizes procurement for the Member States at a regional level, facilitating competition in public procurement by managing the call for competition notices, the acceptance, and the evaluation of submitted bids.²⁸ The contracts are concluded at a reasonable price, to ensure compliance with the best value for money. Moreover, almost all Member States, including Romania, encounter problems in purchasing

²² **Joint Procurement of Medical Countermeasures** - Available at

https://ec.europa.eu/health/preparedness_response/joint_procurement_ga

²³ **Albert Sanchez-Graells** – *Procurement in the time of Covid-19*, 2020, p. 4, Available at

<https://nilq.qub.ac.uk/index.php/nilq/article/view/531/421>

²⁴ See Commission, "Explanatory Note on the Joint Procurement Mechanism", 2015, Available at

https://ec.europa.eu/health/sites/default/files/preparedness_response/docs/jpa_explanatory_en.pdf

²⁵ **E. Mcevoy and D. Ferri** – *The role of Joint Procurement Agreement (JPA) during the Covid-19 pandemic: assessing its usefulness and discussing its potential to support a European Health Union*, article published in *European Journal of Risk Regulation*, 2020, p. 6 Available at

<https://www.readcube.com/articles/10.2139/ssrn.3724639>

²⁶ See Article 27 and article 30 of the *Joint Procurement of Medical Countermeasures*, Available at

https://ec.europa.eu/health/sites/default/files/preparedness_response/docs/jpa_agreement_medicalcountermeasures_en.pdf

²⁷ **Albert Sanchez-Graells** – *op cit*, p. 6, Available at

<https://nilq.qub.ac.uk/index.php/nilq/article/view/531/421>

²⁸ **L. Folliot Lalliot & C. Yukins** -*Covid-19: Lessons learned in public procurement. Time for a new normal?*, 2020, Available at <https://ssrn.com/abstract=3835200>

medical supplies and services, as the possibility to provide medical products and equipment outside the formal public procurement procedures led to the payment of higher prices for poor quality products.²⁹ The principle of competition and the rule of ensuring the best value for money in public procurement was highly violated, so the JPA has been conceived as a method of improving transparency, competition, and buying power of the Member States.³⁰

Furthermore, many single-suppliers and small companies were locked out of the public market due to the Covid-19 crisis, resulting in the award of high-value contracts to single suppliers or a limited number of multinational companies.³¹ The *Joint Procurement* provides non-discriminatory centralized procurement actions that do not disturb competition, nor limit the impact on the budget of non-participating Member-States. Even if JPA seems to favor the public procurement for the Member States, it improves smaller State's buying power and provides a fair distribution of medical supplies during times of health emergencies such as the Covid-19 pandemic.³²

With the advent of the virus, cooperation relations between the Member States began to strengthen, being accepted the use of centralized cross-border procurement in the health sector. Seeking a competitive market in times of urgency, the *Joint Procurement* managed to facilitate its transparent and competitive nature by advertising calls for competitive notices on the Official Journal, providing information in the call for a competitive notice regarding the selection, evaluation criteria, and award procedure. Despite the urgency in procurement, the JPA managed to facilitate a balance between promoting competition in public procurement and securing reasonable cost and high-quality medical goods and services, by setting out the procedures used in awarding the contracts. The competitive procedures set out in the *Joint Procurement* support the observance of the basic principles of public procurement, in particular the principles of transparency and competition, as well as that of non-discrimination of the signatory States.³³

Although JPA represents a key element in the European competitive market during the Covid-19 crisis, difficulties may be encountered in individual countries regarding the competitive access to medical goods and services, because emergency measures could be used to carry out non-competitive practices. Romania, for example, uses direct procurement as the main procedure in awarding contracts related to the Covid-19 crisis

²⁹ **M. Lawrence Johnson, J. Belin, F. Dorandeu, and M. Guille** - *Strengthening the cost effectiveness of medical countermeasure development against rare biological threats: The Ebola outbreak*, *Pharmaceutical Medicine*, 2017, p. 423-426

³⁰ **S. Ponzio** - *Joint Procurement and Innovation in the new EU Directive and in some EU-funded projects*, *Ius Publicum Network Review*, 2014

³¹ **G. Albano and M. Sparro** - *Flexible strategies for centralized public procurement*, *Review of Economics and Institutions*, 2010, p. 61

³² **E. Mcevoy and D. Ferri** - *The role of Joint Procurement Agreement (JPA) during the Covid-19 pandemic: assessing its usefulness and discussing its potential to support a European Health Union*, article published in *European Journal of Risk Regulation*, 2020, p. 8, Available at <https://www.readcube.com/articles/10.2139%2Fssrn.3724639>

³³ *Ibidem*, p. 11

while competition is practically non-existent as most of the contracts are being awarded to the supplier that has the fastest possibility in delivering the necessary goods.

4. Competition vs. Urgency in Public Procurement – an overview over Romanian public procurement –

In the context of 2020, with the emergence of the Covid-19 health crisis, public institutions, in close cooperation with European institutions, had the mission of identifying and adopting measures to support society as a whole. In Romania, a state of emergency was established by two successive decrees of the President of Romania, between March 16 and May 14, 2020, after which a series of additional measures regulated by distinct normative acts were ordered. In applying the ordered measures, the National Agency for Public Procurement in Romania has adopted a series of legislative amendments to improve and flexibility the public procurement system, aimed at accelerating the award procedures, by simplifying and reducing the deadlines.

4.1 Average number of tenders received per type of procedure, depending on the type of contract

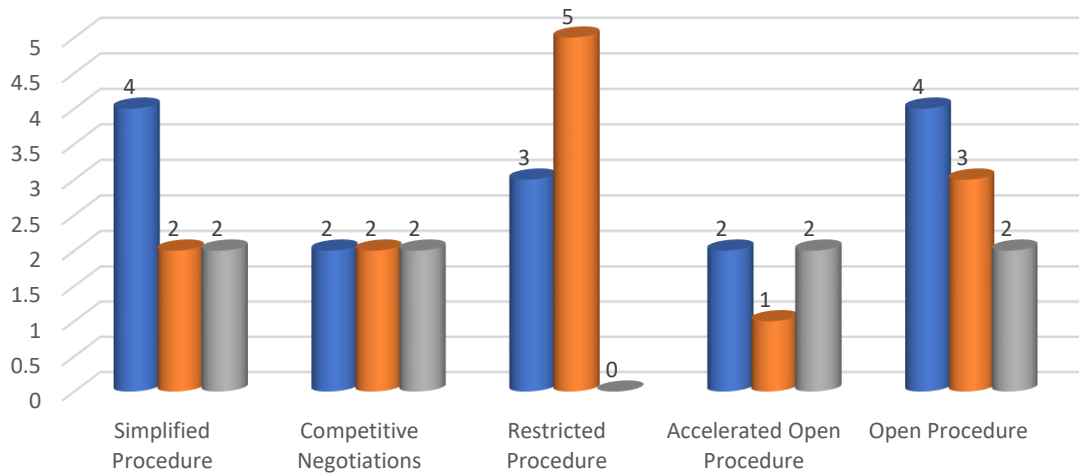
From the analysis of the data provided by the S.E.A.P operator³⁴, in 2020 the negotiation procedures without prior publication recorded a percentage of about 40% of the total number of procedures communicated in S.E.A.P. Compared to the previous year, the share negotiation procedures increase significantly, by about 30%, from 7,528 negotiations in 2019 to 10,694 in 2020. Depending on the justification for choosing the procedure of N.P.P.P., statistical data reflect that most cases were caused by situations of extreme urgency, in the proportion of 58.19%.

Competition between economic operators can lead to an improved efficiency production, lower prices, and rates at product development and new innovative services, which contributes, in essence, to economic growth. Being an essential trait part of the market economy, promoting competition in public procurement procedures is a purpose of the legislation itself in the field of procurement according to which contracting authorities/entities parties should apply an equal and non-discriminatory treatment, transparently and proportionally to all economic operators. A detailed statement of the average number of tenders received in the procedures of public procurement carried out during 2019, broken down by type of contract, is presented in the following figure³⁵:

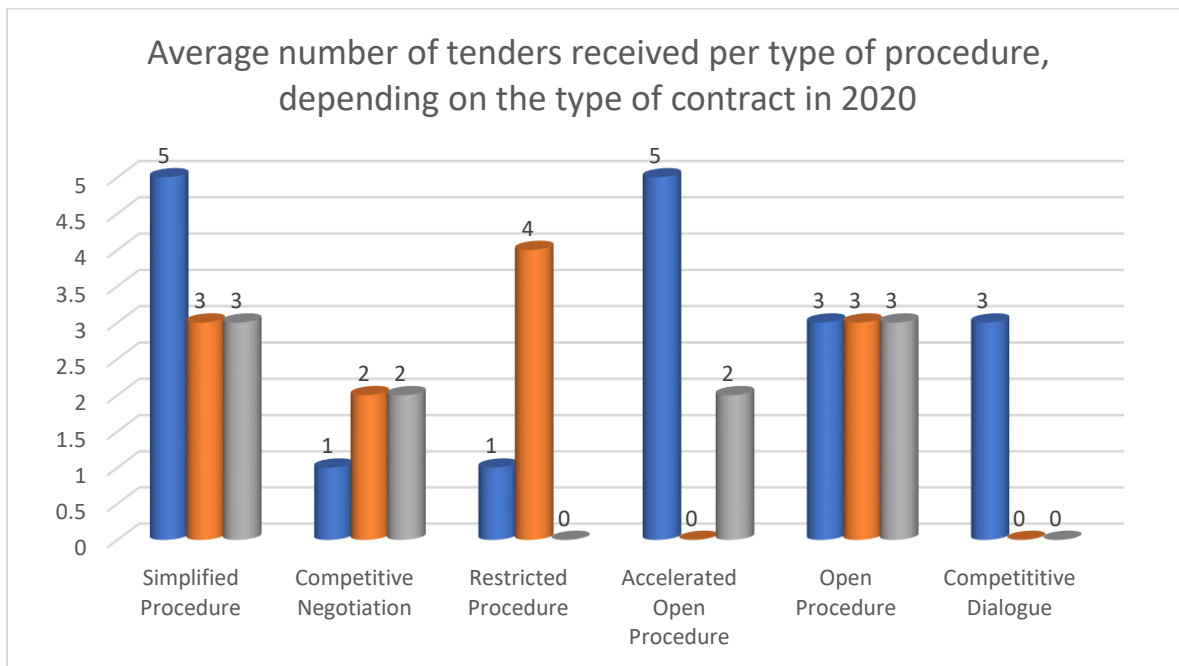
³⁴**National Agency o Public Procurement** – *Monitoring indicators of the efficiency on public procurement procedures concluded by contracts in 2020*, Available at http://anap.gov.ro/web/wp-content/uploads/2021/08/Indicatori-eficienta-SAP-Contracte_AN2020_varianta-site_10Aug2021_FINAL.pdf?fbclid=IwAR2YYL2hSPH1J9xDSbK5zPkktpyCIIJID-Yv6l8mSgA5pel1qiQj5h765PU

³⁵**National Agency o Public Procurement** – *Monitoring indicators of the efficiency on public procurement procedures concluded by contracts in 2019*, Available at http://anap.gov.ro/web/wp-content/uploads/2020/09/Raport_indicatii_de-monitorizare_-2019_varianta_finala_rev16iul_v2.pdf

Average number of tenders received per type of procedure, depending on the type of contract in 2019



The level of competition depending on the type of contract and the carried-out procedure fluctuates in 2020, statement based on the data provided by the electronic platform operator S.E.A.P. The figure below shows the values obtained from its calculation monitoring indicator:³⁶



³⁶ National Agency of Public Procurement – Monitoring indicators of the efficiency on public procurement procedures concluded by contracts in 2020

Open procedure and simplified procedures represent the most used public procurement procedures, through which are assigned almost 99% of all public procurement contracts. Analyzing the presented calculated values, there are no major differences recorded compared to the previous years. The exception is the accelerated open procedure, for which the average bid deposited is 5, which reveals a significant increase compared to the average of only 2 offers registered in 2019. As regards the restricted procedure, the average number of bids calculated for works contracts was determined by the 12 tenders received by the contracting authorities for the award of several 3 public procurement contracts.

In 2020, competition loses its intensity, the average number of offers decreasing from 4 (2019) to 3 for the awarding of supply contracts using an open procedure. At the same time, competition slightly increases for service contracts, registering an average number of 3 offers instead of 2. In the case of works contracts, the interest of economic operators remains constant, the average being 3 bids submitted. Competition increases in the case of works and services contracts awarded using the simplified procedure, as the number of average bids increases from 2 to 3. The supply public procurement contracts registered a decrease of bids from 4 to 3.

4.2. Average number of offers received by C.P.V. code category, depending on the type of contract

Competition in public procurement was also calculated according to the main category of the C.P.V.³⁷ code so that the level of competition can also be presented for certain economic sectors. Depending on the number of contracts concluded, the table below presents the values obtained by each category of C.P.V. code used in public procurement contracts, for which award notices were published in 2019.³⁸

Category C.P.V.		Average of offers received
Supply	Medical equipment, pharmaceuticals, and care products staff	6
	Food, beverages, tobacco, and related products	6
	Computer equipment and office accessories, except furniture and of software packages	4

³⁷ Common Procurement Vocabulary

³⁸ **National Agency of Public Procurement** – *Monitoring indicators of the efficiency on public procurement procedures concluded by contracts in 2019*

	Furniture (including office furniture), furniture accessories, appliances household appliances (excluding lighting) and cleaning products	4
	Transport equipment and auxiliary products to transport	3
Works	Construction works	2
Services	Architectural, construction, engineering, and inspection services	2
	Services for agriculture, forestry, horticulture, aquaculture and beekeeping	2

Depending on the number of contracts concluded we presented below the values obtained by each C.P.V. used in contracts public procurement in 2020. For collecting relevant information on the influence of competition during the Covid-19 crisis, we collected data for the same C.P.V codes, both in 2019 and in 2020.³⁹

Category C.P.V.		Average of offers received
Supply	Medical equipment, pharmaceuticals, and care products staff	9
	Food, beverages, tobacco, and related products	6
	Computer equipment and office accessories, except furniture and of software packages	3
	Furniture (including office furniture), furniture accessories, appliances household appliances (excluding lighting) and cleaning products	4
	Transport equipment and auxiliary products to transport	2
Works	Construction works	3

³⁹ **National Agency o Public Procurement** – *Monitoring indicators of the efficiency on public procurement procedures concluded by contracts in 2020*

Services	Architectural, construction, engineering, and inspection services	3
	Services for agriculture, forestry, horticulture, aquaculture and beekeeping	2

The analysis of statistical data reflects that for category C.P.V. (33) - Medical equipment, pharmaceuticals products, and personal care products – competition for supply contracts increased from 6 offers reported on average for 2019, to 9 offers in 2020. For works contracts (category C.P.V. (45) - Construction works) and for service contracts (categories C.P.V. (71) - Architectural services, of construction, engineering, and inspection (79) is recorded competition increasing by one percentage point from 2019.

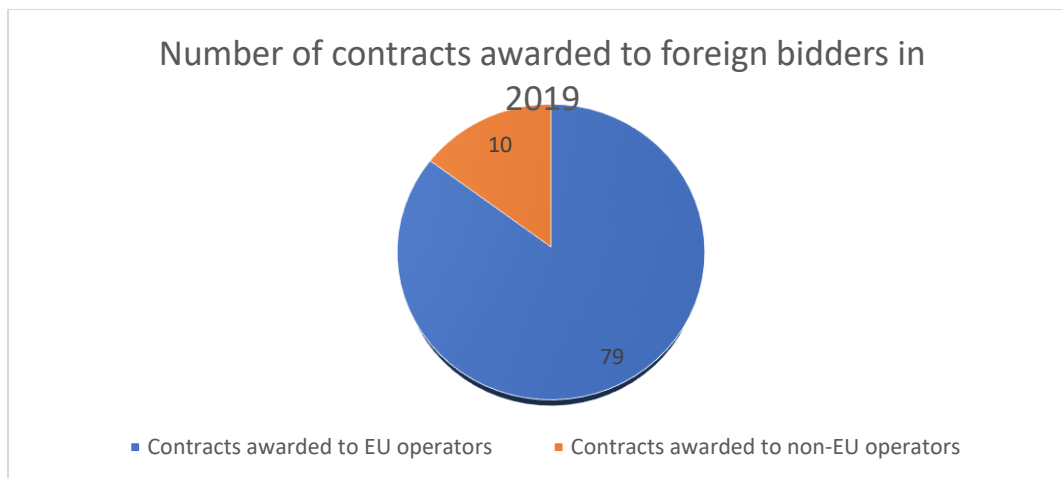
4.3 Opening/access - Award of contracts to tenderers in the EU / NON-EU market (excluding Romania) in the public procurement process in Romania

Public procurement law requires contracting authorities and entities observance of the principles in carrying out the procedures award for the conclusion of a contract for public procurement. Non-discrimination, equal treatment, mutual recognition, transparency, setting criteria, and taking responsibility are principles that make the public procurement market in Romania open and accessible to all categories of economic operators.

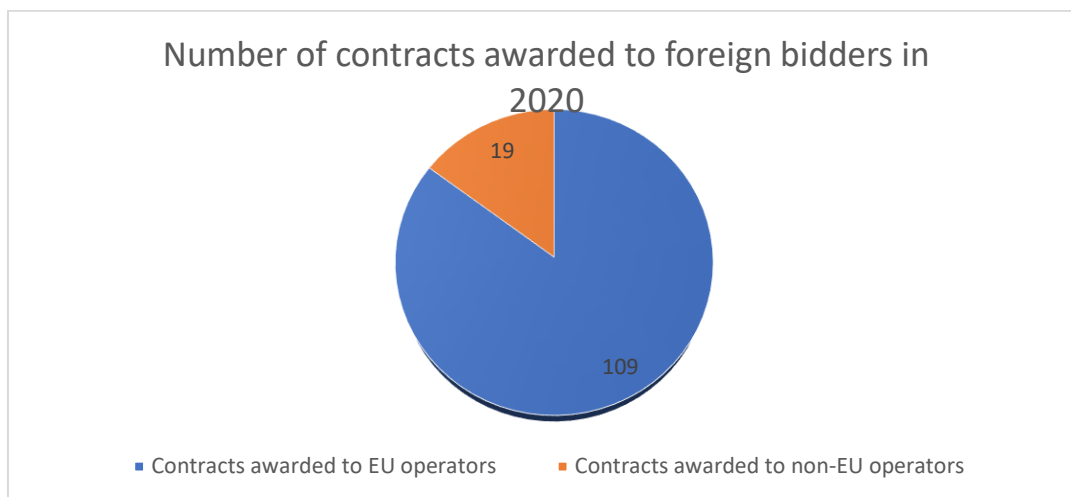
Through the technical facilities of electronic platform S.E.A.P., the announcements of initiation of public procurement procedures carried out by the authorities and entities contractors in Romania are disclosed both at the national level (exclusively published in the S.E.A.P.), as well as at the European level (optional or mandatory published in the Official Journal of the European Union, for those procedures exceeding certain value thresholds imposed by Legislation in force).

For 2019, the statistical data reveal that the Romanian contracting authorities have entrusted to foreign economic operators a number of 89 public procurement contracts. In the below figure are the public procurement contracts awarded to foreign economic operators, depending on the type of contract.⁴⁰

⁴⁰ **National Agency on Public Procurement** - *Annual activity report for 2019*, Available at <http://anap.gov.ro/web/wp-content/uploads/2021/02/Raport-activitate-ANAP-2019-final.pdf>



The number of U.E and non-U.E participants in Romanian auctions is still relatively low, despite the assurance of these openings. Thus, as in previous years (2018 and 2019) and year 2020, the 128 public procurement contracts attributed to foreign economic operators do not have exceeded 1% of the total number of assigned contracts.⁴¹



5. Conclusions

Competition, transparency, and openness in public procurement tender should achieve the best value for money. Exceptional circumstances such as the spread of a pandemic impose special measures for adapting public procurement to a faster and more demanding environment. Covid-19 pandemic had been qualified by the European Commission as *force majeure* and an event of extreme urgency that required prompt solutions for purchasing

⁴¹ National Agency on Public Procurement - Annual activity report for 2020, Available at <http://anap.gov.ro/web/wp-content/uploads/2021/01/Raport-activitate-ANAP-2020-final.pdf>

similar medical goods and services in a very short time while respecting the basic principles of public procurement and its main objective: to achieve the best value for money.

European Commission has truly encountered to protect the principle of competition in public procurement, as concluded contracts are fair distributing the necessary medical supplies. Moreover, the data provided by the Romanian National Agency on Public Procurement shows that competition was indeed influenced by the Covid-19 pandemic, but the differences of average bidders were not significant. These findings suggest that in reality, the adapted urgent public procurement complied with the principle of competition, as shown in the analyzed data, even if theoretically competition is, in most of the cases, non-existent - see direct procurement-.

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