THE IMPACT OF PUBLIC PROCUREMENT IN THE ABSORPTION PROCESS OF NON-REFUNDABLE EUROPEAN FUNDS ASSIGNED TO ROMANIA BETWEEN 2014-2020

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Abstract. *Public acquisitions have been a constant challenge in the application process for public funds, especially in the application for European non-reimbursable funds.*

The low rate of absorption relating to the programming period 2014-2020 is closely linked to the manner of processing public acquisitions in Romania, these engendering most of the delays in the application process of non-reimbursable funds projects.

Although Romanian primary legislation relating to public acquisitions is balanced by the community's acquis, secondary legislation shows inconsistencies and leaves room for interpretation, with many scantily regulated subjects.

Corroborated by the lack of clear descriptions of the roles relating to the National Authority for Public Procurement and to the Managing Authorities in regards to the verification of public acquisitions made by beneficiaries of European funds, this causes not only delays in the application process of the projects, but also financial corrections and a low rate of absorption.

Keywords: *European funds, public acquisitions, absorption rate, cohesion policy*

The absorption of European non-reimbursable funds has become a topical issue, fulfilment of the commitments with regards to their efficient usage and the terms negotiated with the European authorities proving the ability of the liable national authorities of using them efficiently and effectively.

The effective rate of absorption[1] (Ministry of European Funds, 2020) in Romania at the end of August 2020, in accordance with the latest data published by the Ministry of European Funds, is of 26,07% relating to the operational programmes funded by way of FEDR, FSE and FC and of 35,75% should we also take into account the programmes dedicated to the agricultural and fishing sector, funded by way of FEADR and FEPAM.

Considering the fact that the programming period is coming to an end, and the rate of absorption is at a notably low level, questions regarding the causes of this situation are justifiable, as well as a way of their settlement, if possible.

At a closer look one may identify an array of causes which led to the low rate of absorption, such as:

- The launch of the first calls for projects in 2016, two years after the start-up of the scheduling term;
- The lack of prediction in regards to the launch of calls for projects;

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[1] *NB: The effective rate of absorption represents the actual sums reimbursed by the European Commission in Romania.*

- The administrative and financial inability of the applicants, in particular of the public ones, of applying for several calls for open projects concurrently;
- The lack of financial resources of the public applicant of ensuring their own financial resources necessary in the dossier precursory to the submission of the infrastructure projects (e.g. feasibility studies, field studies, etc.);
- The poor cooperation between the Managing Authorities responsible for the administration of operation programmes regarding complementary projects with soft (human resources) and hard (infrastructure) component;
- The faulty functioning of the computer application Mysmis;
- The public procurement legislation.

The factors leading to the low level of the rate of absorption are multiple and need to be approached at length in order to detect the root cause.

This article aims, though, to carry out an analysis of the way in which the public procurement legislation, in the present case Law 98/2016 *relating to public acquisitions with subsequent amendments and additions* generates delays and hindrances in the absorption process of European non-reimbursable funds, applicable in the case of operational programmes, wherein the effective rate of absorption is but 26,07%.

In addition, we shall detail practical examples and points of view issued by the Managing Authorities relating to the operational programmes, as well as the ones issued by the National Agency for Public Procurement (NAPP).

Romanian public applicants and beneficiaries for, respectively of, European non-reimbursable funds comply, in regards to procurement, with Law 98/2016 *relating to public acquisitions with subsequent amendments and additions*, as well as Judgement no. 395/2016 *of the approval of methodological norms for the implementation of provisions in respect of the procurement procedure/ framework agreement in Law 98/2016 in respect of public procurement.*

In conformity with the previously mentioned legislation, value thresholds are defined, which establish the applicable type of procurement for the services, goods or works in view of procurement.

The aim of the present work is not that of an in extenso outlining of the procurement legislation but, for a better understanding of the problems engendered by it in the process of accessing European non-reimbursable funds, some relevant elements shall be set forth.

Thus, the Contracting Authority (authorities and local or central public institutions, as well as structures in their body, which act as authorising officers and are accountable for the public procurement domain, public law bodies or associations consisting of at least one of the two types of institutions or bodies previously mentioned (N.A.P.P., 2016)) is entitled to direct procurement of goods or services whose estimated value of procurement is below the value threshold of 135.060 lei, non-VAT and works whose value is less than 450.200 lei, non-VAT (N.A.P.P., 2016).

At first sight, this provident is justified, its target being to forestall the lack of transparency in the usage of public funds. Corroborated though with the late launches of calls for projects and the lack of predictability of the Managing Authorities in regards to launch data, the above provident engendered, in practice, major problems in the process of absorption of European funds, respectively:

- **Financial corrections applicable to beneficiaries of European non-reimbursable funding;**

For instance, in the year of 2018, 10 calls for projects targeting local public authorities were launched, financed by means of the Regional Operational Programme, with the aim of infrastructural development (road, educational, tourism, social, etc.) some of these having as mode of selection a *first come, first served* basis.

A time table of these launches of calls for projects had not been published at the start of the year, thereby local public authorities did not have the possibility of coming up with an annual plan of realistic public acquisitions, nor could they compile a realistic financial planning. Thus, contracting authorities procured services as calls for projects were being launched, with the risk of them being non-settled after having been agreed upon in the funding contract.

- **The impossibility of submitting projects in the given time frame due to the lack of compulsory dossiers requested by the financing authority;**

On the other hand, the lack of predictability in the launch of calls for projects brought about the inability of public local authorities to submit projects as a consequence of the setbacks in acquiring services necessary for the dossiers' development.

- **Lack of personnel training within contracting authorities regarding Law 98/2016**

The lack of specialised personnel in the domain of public acquisition within contracting authorities represents, also, one of the reasons of applying financial corrections and, by default, a low rate of absorption.

In this case, a proper example would be the manner of developing procurement contracts of design services, in the present case that of feasibility studies. If across the given services contracts there are clauses stipulating the cession of economic copyrights, in concordance with art. 17, alin. 5 of HG 395/2016, the value of the services in question does not cumulate with other similar services acquired throughout the year, even if the total value of all the acquired designing services during the given year crosses the value threshold relating to direct acquisition.

In several cases, contracting authorities omitted to include such clause within design services procurement contracts, Managing Authorities proceeding to cumulate all design services contracts within the annual plan of public acquisition and applying corrections when settlement for the contracts was demanded.

All three given cases contributed to a low rate of absorption, engendered, indirectly, by the law of public procurement and, directly, by the lack of predictability and organisation of the authorities liable in the domain, but also due to the personnel's lack of training within contracting authorities.

A measure that may have succeeded in avoiding the situations which lead to a low rate of absorption would be a realistic timetable of launching calls for projects, set-up by Managing Authorities and which would allow contracting authorities to plan public acquisitions and apply Law 98/2016 without compromising project submission or not tying in with the time frame.

Should the lack of predictability not be possible, then a viable solution would be modifying Law 98/2016 and its implementing rules, thus allowing for the settlement of acquired services before the submission of the project, on the basis of the acquisition plan relating to the project (within which all acquisitions are encompassed, including the ones

made before having submitted the project) and not on the basis of the annual plan of public acquisitions relating to the institution. The solution proposed here would benefit both public local authorities, who intend to submit projects funded by European non-reimbursable grants, and Managing Authorities, thus engendering a lower rate of applied financial corrections and an increase in the rate of absorption.

Other types of procurement procedures applicable most often in the case of projects financed by European non-reimbursable grants (and not only) are the simplified procedure, open tendering procedure and negotiation without prior public record of a participation notice.

In the case of these procedures, too, deficiencies do show up, which engender delays in the process of implementing projects and financial corrections which influence the rate of absorption.

- **In conformity with HG 395/2016, art. 17, alin. 4, lit. b) the value of technical design services and assistance from the designer cumulates with the value of the works relating to the investment goal concerned** (N.A.P.P., 2016)**, the type of applicable acquisition procedure being thus determined.**

This provident led to two types of shortcomings in the implementing process of projects funded by non-reimbursable grants. On the one hand, it hindered the acquisition of technical project and execution details development services, engendering much longer time frames even in the case of those services whose value, analysed separately from the work value, did not cross the threshold of direct acquisition. Thus, design service acquisition expanded over a longer term compared to direct acquisition, involving more human resources and, by default, supplementary financial resources but, most importantly, the kick-off of the supply of services was cancelled. This last detail led, in its own part, to longer terms for the launch of the works procurement procedure (which can be done only on the basis of a finished technical project).

We could not identify a logical/reasonable justification to introduce the provident in the legislation of public procurement of cumulating the value of services of design and technical assistance with the work value, especially in the context that in the second half of the year 2020, after approximately four years since the entry into force of Law 98/2016 and of its implementing rules, this provident was repealed, the legislation returning to the provident OUG 34/2006 *regarding the award of the contracts of public procurement, of concession contracts of public works and of concession contracts of services* which provides that the procedure of public procurement applicable to services of technical design and assistance from the designer is determined by taking into consideration only their value, not cumulating with that of execution works.

On the other hand, in the case of several projects, in order to avoid stretching out acquisition time frames, beneficiaries opted for the cumulation of the technical design services and assistance from the designer with the building works, launching a single procurement, and settling on *Design and Build* contracts. Even though this choice is not inherently flawed, beneficiaries were face up either with a lack of tenderers (as work firms were needed to find partners represented by other design firms in order to be able to take part in the procurement procedure), or with increases in the value of acquired works. This last case was engendered by the fact that the offer was submitted on the basis of a Feasibility Study/Endorsement of Intervention Works Dossier, in the absence of a dossier that would outline the works (in the present case Technical Project and execution details).

Thus, in the case of *Design and Build* contracts, at the moment of the development of the technical project, additional costs were identified, needed to be supported by the local budget.

As one may see, in none of the options available to the beneficiaries was the legislation of public acquisitions favorable to them, thus leading both to the extension of the acquisition time frames and, by default, to delays in implementing, reflected, in particular, in the low level of absorption and the high risk of decommitment at the level of operational programmes, as well as in the additional sums allotted to the local budget.

- **Financial corrections applied to the work contract due to technical reasons**

Another problem that beneficiaries of non-reimbursable grants have to deal with is the implementation of financial corrections to the work contract due to reasons relating to the lack of insurance in legal treatment. These situations do happen, in fact, as in the technical project, endorsed by the donor and attached to the terms of reference uploaded on the platform SICAP, marks or brands are identified, fact forbidden by Law 98/2016, in conformity with art. 156, alin. 2, which demands that in the case of brands or marks, the compulsory presence of the item "or equivalent".

In the cases hereby presented, identifying marks or brands by the donor's verification department leads to the implementation of financial corrections between 5-25%.

Practical example[2]:

A beneficiary submitted a project funded by means of axis 7 of the Regional Operational Programme. Following the signing of the funding contract, services for the elaboration of the technical project and execution details were acquired. At the moment of its completion, this was submitted to the Regional Agency of Development towards its endorsement.

Following its endorsement, building works were acquired on the basis of the technical project.

NB: *The procedure imposed by the Managing Authority of the Regional Operational Programme in regards to acquisitions is that once the procedure is completed, the entire dossier relating to it be sent to verification in maximum 10 working days from the moment of signing the contract.*

It should also be mentioned that the MA does not deliver a point of view in regards to the equity of the acquisition but in the moment that the first payment application request is submitted for the settlement of the expenditure in the given contract. This practice is not inherently advantageous for the beneficiaries who, at the moment of receiving the nonconformity note, no longer have the possibility of annulling the works contract or even the funding contract, a part of the works having already been executed, although the present article does not aim to analyse the procedures of the MA.

After having signed the works contract, their partial execution and the submission of a first payment request, the beneficiary received financial corrections, the reasoning behind being: "unfair technical specifications," these being granted in the basis of HG 519/2014 *on establishing the rates relating to the percentual discounts/financial corrections applicable to the irregularities provided in OUG 66/2011 with subsequent amendments and additions.*

[2] The practical examples are taken from the current non-reimbursable funding projects conducted by the author.

The initial correction applied was of 25%, the beneficiary being granted a 20% percentual reduction, thus motivated: *"considering the fact that the procedure is below the threshold of issuing in Official Journal of the European Commission, no clarification about this detail was requested by any potential offerors, no application to set aside was submitted to the National Council for Solving Complaints it is considered that the percentual reduction may be decreased to 5%* (General Direction Of The Regional Operational Programme, 2019)*".*

Calculated at a works value of approximately four million euros, the correction of 5% exerts a significant pressure onto the local budget, also influencing the rate of absorption of European funds.

In the case of the enforcement of these types of financial corrections, I do not consider that the applicable legislation of public procurement represents a main factor to contribute to the decrease in the rate of absorption, but the lack of expertise among the personnel responsible with the preparation of the dossier relating to the acquisition procedure, corroborated by the lack of responsibility among the persons who check the technical dossier (both that of the beneficiary's personnel and of the Managing Authority's).

About the public procurement legislation, there is but one thing to be mentioned: considering the previously outlined casuistry and the fact that (1) no clarifications were requested by any potential offeror while the acquisition procedure took place and (2) a single firm took part in the procedure, thus there being no competition, corroborated by the provident relating to the decrease of the applied financial correction of 25% to 5%, then the arising question would be whether these corrections were indeed necessary since no potential offeror was affected. Some degree of flexibility in the public procurement legislation may be necessary, by means of adapting to specific cases, though this is a sensitive issue and one that proves difficult to be addressed by authorities who, indeed, have to maintain a balance between the cases with no impact on the governing principles of the public procurement legislation and the potential frauds caused by possible adjustments to their flexibility,

- **Implementation of financial corrections through erroneous legal interpretation**

Another shortcoming identified following the implementation of non-reimbursable grants is represented by the interpretation of the public procurement legislation by officers within financing institutions, while ignoring the legislation in force and, in particular, the points of view issued by the National Authority for Public Procurement. This leads to the implementation of financial corrections outside of the law, to an increase in the financial burden among beneficiaries by means of additional earmarking from the local budget and, by default, to a low rate of absorption.

Such an example[3] would be the implementation of financial corrections by the Managing Authority of the Regional Operational Programme onto the beneficiaries who acquired advisory services in management and advisory services in the progress of acquisition procedures whose cumulated value crosses the threshold of direct acquisition provided in Law 98/2016.

[3] The outlined example is factual, with information taken from the current non-reimbursable funding projects conducted by the author.

The reasoning (General Direction Of The Regional Operational Programme, 2019) behind implementing these financial corrections is an insubstantial one, by means of calling upon ISOs and occupational standards, without considering the legislation in force applicable to public acquisitions:

> *The act of managing a project includes an array of principles, practices and techniques used in order to lead the project's work team and control the time limitations, costs and risks towards producing the desired result. In conformity with the Romanian standard SR ISO 21500:2014, Guidelines in project management, art. 4.2.3, the advisory activity in acquisition is included in the project's management. There are several definitions but all of them point to the fact that the project's management includes the management of all the activities within the project. As such, counselling in the project's management involves, among other activities, counselling in the domain of public acquisitions made within the project.*
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> The same conclusion also emerges from the occupational standard "Project manager", code COR 241919, approved by the National Authority for Qualifications, where, among the 9 categories of occupational competences are listed and detailed, among other things: the achievement of acquisition proceedings for a project, that is precisely the subject-matter in the two contracts concerned/under consideration.

Figure 1: Taken from the note of non-conformity issued by AMPOR – a Brief description of the manners in which the law was infringed

At first sight, the motivation of the Managing Authority seems fair, but the arising question is whether the public procurement legislation provides the same conditions in the cumulation of the two types of services. Thus, the answer, as one may note below, is no.

As this reason of correction is often met, with repercussions onto public beneficiaries, a point of view from NAPP was requested, precisely on the case mentioned above, in order to determine whether the two types of services cumulate in the moment of settling on the acquisition procedure.

The reply of the NAPP is outlined as follows:

> *For the advisory services in the organization of public acquisitions proceedings relating to a project we mention the fact that in the aforesaid Case Library, by accessing the "Estimated Value Calculation" tab in the section "FAQ" one may find Question No. 8, which is enlightening in this way.*
>
> *Thus, in the situation that these services are acquired after signing the funding contract, the estimated value of advisory services in the organization of public acquisitions proceedings will be calculated at the level of each individual project, towards choosing the assignment procedure.*
>
> *As such, after signing the funding contract, the estimated value and the assignment procedure applicable to the acquisition of advisory services in the management of the project (during the implementation period), as well as that of the auxiliary assistance services in the progress of acquisition procedures, will be determined by taking into consideration each type of service separately, without cumulating the estimated value of the two types of services.*

Figure 2: Taken from the reply of the NAPP with regards to the cumulation of advisory services in management with advisory services in the progress of acquisition procedures (N.A.P.P., 2020)

The interpretation of the acquisitions made by beneficiaries of European non-reimbursable funds outside of the applicable law causes not only confusion among them, but also delays in the acquisition of services need in the projects and financial burden on

the local budget, with additional costs generated for the Managing Authority and wasted time as most of the beneficiaries, on the basis of the reply from the NAPP, proceed to court in order to recover the sums declared ineligible.

To all of these, at a macroeconomic level, the reduced absorption of European non-reimbursable funds and the risk of decommitment are added.

Should, then, the Managing Authority interpret the legislation? Or should it (the MA) be based on the replies issued by the National Authority for Public Procurement, the sole one in Romania able to clarify the means of applying the public procurement legislation? It is up to each reader to answer these questions.

- **Erroneous interpretations of the legislation which lead either to the dismissal of projects, or to delays in their application**

Among the shortcomings in the area of public acquisitions that generate temporal and financial delays in their application, one may also find erroneous interpretations of the legislation which, in some cases, led to the unjustified dismissal of a project[4] impactful onto the local community or to the extension of the times of completion in acquisition procedures and, by default, to the extension of the period of application of the projects.

In this case, a proper example would be issuing a point of view from an Intermediary Body of POR with regards to the necessity of cumulating compulsory information and advertising services (in the present case, publishing press releases and creating a notice board), with specialised marketing services (implementing a marketing strategy). Even though cumulating acquisitions does not seem intricate, it generates delays (1) in the light of the lack of the identification of specialised suppliers to provide both types of services and (2) in the case of launching batch acquisitions, in the light of the lack of the supplier's presence in the acquisition of compulsory information and advertising services, the reasoning behind being the trivial amounts of money (usually, these are standardised through the Applicant's Guide at 10.000 lei), along with the excessive bureaucracy imposed by the legislation for a simplified procedure.

Thus, the lack of a literal interpretation of the law of public procurement engenders, in these cases too, impediments in the implementation of projects, generating adverse effects at each level involved in Managing European non-reimbursable funds.

According to a study published by the European Commission, it is estimated that over 48% of European structural and cohesion funds are expended as a result of the course of public acquisitions (European Commission, 2015).

The current low rate of absorption of European funds presents several root causes, with public acquisitions as a principal one.

The impact of the public acquisition legislation onto public investments financed by means of European structural and cohesion funds is a significant one, influencing several large institutions.

The implementation of the public acquisition legislation stands for a challenge from both the point of view of the beneficiaries of non-reimbursable funds, and of Managing Authorities and of National Authority for Public Procurement. Although, last years, notable efforts towards balancing national legislation with the European one were

[4] The present project is taken from the author's portfolio. It was rejected by the Intermediary Body but, following its objection submitted to the Managing Authority, its financing was granted, being implemented as we speak. It is possible that such cases are not singular.

made, as well as towards clarifying the norms and procedures applicable in the domain, these are, nevertheless, cumbersome.

From the point of view of the contracting authorities, the problems they are faced with are closely linked to their lack of experience, the absence of document models to aid them in preparing and launching the processes of acquisition, as well as the lack of predictability and the absence of clearly defined regulations, applicable at national level, without leaving any space for legislative interpretation.

On the other hand, however, the interpretation of public acquisition legislation done by Intermediary Bodies and by Managing Authorities generates not only confusion among the beneficiaries of non-reimbursable funding, but also in the implementation of differentiated measures which, in the end, lead to inequality amid them.

This situation was also confirmed by a report done by Delloite at the request of the European Commission, according to whom the National Authority for Public Procurement plays but an advisory role in relation to the Managing Authorities, while the NAPP only monitor the acquisition procedures made during non-reimbursable funds projects, issuing guidelines and recommendations to beneficiaries which, most of the time, are not balanced with the NAPP procedures (Delloite, 2011).

If (1) public acquisition legislation will not be optimised and clearly described so that it may be applied by beneficiaries of European funded projects, (2) there will be no clearly defined system of verification and control, applicable from the level of the National Authority for Public Procurement up to the level of the Managing Authorities, in the absence of applying interpretative legislation, the low rate of absorption of European non-reimbursable funds will remain in its reduced state and the efforts employed by all parts in Managing non-reimbursable funds projects, be it beneficiaries, Intermediary Bodies or Managing Authorities, will be rendered costly and inefficient.

BIBLIOGRAPHIE

Brie, Mircea; Florentina Chirodea, Constantin Vasile Ţoca (coord.), *European Public Policies. Instruments, Models and Behaviour in the Public Space*, supliment *Analele Universităţii din Oradea, Seria Relaţii Internaţionale şi Studii Europene*, Oradea, 2013

Brie, Mircea; Istvan Polgar, Florentina Chirodea (coord.), *European Union. Identity, Diversity and Integration*, supliment *Analele Universităţii din Oradea, Seria Relaţii Internaţionale şi Studii Europene*, Oradea, 2012

Brie, Mircea, *The Reform of the EU Neighbourhood Policies and Instruments in the Post-2020 Period*, in *Analele Universităţii din Oradea, Seria Relaţii Internaţionale şi Studii Europene*, 2020, p. 129-143

Brie, Mircea; Florentina Chirodea, Constantin-Vasile Toca, *European Public Policy. Tools, Models and Behaviour in Public Space. Introductory Study*, în Mircea Brie, Florentina Chirodea, Constantin Vasile Ţoca (coord.), *European Public Policies. Instruments, Models and Behaviour in the Public Space*, supliment *Analele Universităţii din Oradea, Seria Relaţii Internaţionale şi Studii Europene*, Oradea, 2013, p. 7-15

N.A.P.P (2016), *Law 98/2016 relating to public acquisitions*, accessed at: http://anap.gov.ro/web/wp-content/uploads/2016/05/LEGE-Nr98-2020.pdf, on 14.11.2020;

N.A.P.P (2016), HG 395/2016 *for the approval of methodological norms for the implementation of provisions in respect of the procurement procedure/ framework agreement in Law 98/2016 in respect of public procurement,* accessed at*:* http://anap.gov.ro/web/wp-content/uploads/2016/06/HG395_16.pdf, on 21.11.2020;

N.A.P.P. (2020), in reply after requesting a point of view, author's own source;

European Commission (2015), *Public Acquisitions, Guidance for practitioners on the avoidance of the most common errors in projects funded by the European Structural and Investment Funds*, accessed at: *https://ec.europa.eu/regional_policy/ sources/docgener/informat/2014/guidance_public_proc_ro.pdf*, on 13.11.2020;

Delloite (2011), *Evaluation of the Romanian public acquisition system – final report*, 2011, accessed at*: http://www.cnsc.ro/wp-content/uploads/2014/08/CEDGPR-Deloitte-Raport-FINAL-RO.pdf,* on *24.11.2020;*

General Direction of the Regional Operational Programme (2019), *Note of nonconformity*, author's own source;

General Direction of the Regional Operational Programme (2019), *Note of nonconformity*, 2019, author's own source;

Ministry of European Funds (2020), accessed at: https://mfe.gov.ro/stadiul-absorbtiei-fondurilor-ue/, on 15.11.2020.