

# Guide to the Protection of the Financial Interests of the European Union



2010  
Revised and completed edition



# Guide

## to the Protection of the Financial Interests of the European Union

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## I. Introduction

### Project presentation

The project Control and prevention of mismanagement of EU money. Training of public servants implementing structural aid programs in Romania is funded by the European Anti-Fraud Office (OLAF) via the programme Hercules II and has been carried on in partnership with the Fight against Fraud Department (DLAF), its implementation period being September 2008 – April 2009.

The part that Transparency International Romania has played in this project refers to the organisation and implementation of a series of training sessions intended for the bodies that are involved in the administration of European funds, with a view to strengthening the protection framework of the EU financial instruments.

The aim of carrying out training sessions was to strengthen the participants' capacity to identify, prevent and report situations of breach of law among public servants and representatives of the agencies for the management of European funds that ensure the proper management of these funds.

### Purpose of the Guide

The budget of the European Union is constituted through the taxes paid by the citizens of the Community. European policies, financed in this way, are intended for the realisation of projects of general interest. Evading the duties and levies, which supply the Community budget, or using Community financing wrongfully, subsequently results in harm to the European taxpayer.

Overall figures of the 2008 Annual Report to the Commission Report to the European Parliament and to The Council regarding the Protection of the Communities' financial interests — Fight against fraud<sup>1</sup> show that the number of irregularities increased for structural funds and cohesion fund, for pre-accession funds and direct expenditure sector and decreased for agriculture and own resources. The overall number of irregularities for expenditure has increased from 6 047 in 2007 to 6 595 in 2008.

Therefore, it has become clear, along the continuous development of the EU that the financial resources and complexity of such programmes funded through the community budget might also have additional negative consequences – a large percentage of the EU budget has been the victim of fraud and corruption, as shown

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<sup>1</sup> Available at [http://ec.europa.eu/anti\\_fraud/reports/anti-fraud\\_en.html](http://ec.europa.eu/anti_fraud/reports/anti-fraud_en.html)

through various reports<sup>2</sup>. Since the European Institutions have a duty to guarantee, with regard to the taxpayer, the best use of their money and in particular to fight as effectively as possible against fraud, the protection of the financial interests of the Community has turned into one of the major priorities for the European and national institutions administering Community funds. As stated by OLAF, this means “activities concerning the detection and monitoring of fraud in the customs field, misappropriation of subsidies and tax evasion, insofar as the Community budget is affected by it, as well as the fight against corruption and any other illegal activity harmful to the financial interests of the Community.”

## Methodology

The starting point of the inquiry was to separate and define the object of the Guide so as to provide the best approach to the issue of protecting the financial interests of the Community so as to answer to the needs of the target groups.

For Romania, as an EU member state, the protection of the financial interests of the Community is also a two fold issue, which might refer to:

1. Expenditure fraud: any act or deliberate omission involving the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the Community or budgets managed by, or on behalf of, the Community, non-disclosure of information in violation of a specific obligation, with the same effect; the misapplication of such funds for purposes other than those for which they were originally granted.
2. Revenue fraud: any act or deliberate omission involving the use or presentation of false, incorrect or incomplete statements or documents which has as its effect the illegal diminution of the resources of the general budget of the Community or budgets managed by, or on behalf of, the Community, non-disclosure of information in violation of a specific obligation, with the same effect; misapplication of a legally obtained benefit, with the same effect.

Taking into account the objectives of the project, the beneficiaries of the Guide were structured into two target groups:

1. The first one – including skilled and highly skilled personnel – representatives from Management Authorities, CFCU, Authority for the Coordination of Structural Instruments.

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<sup>2</sup> As shown by Notes that the financial impact of irregularities, as far as they have been identified, fell from EUR 1 024 million in 2007 to EUR 783.2 million in 2008, with reductions being recorded in all spending areas except direct expenditure and pre-accession funds <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-438.420+01+DOC+WORD+V0//EN&language=RO>.

2. The second category – including personnel from Intermediary Bodies who manage the relationship between Management Authorities, beneficiaries and public institutions acting as beneficiaries of EU funds as well as public institutions and associations at central level managing EU funds.

Consequently, the present Guide focuses on expenditure fraud affecting the financial interests of the EU, from the perspective of the identified target groups – Romanian public servants from agencies administering EU funds. In this respect, the methodology adopted for the elaboration of the Guide aimed at incorporating the elements directly related to the development of the concept of protecting the financial interests of the Community at EU-level and their application into the Romanian system. Accordingly, the guide aims at describing the underlying legal and institutional mechanism that aims at protecting the financial interests of the European Union and at preventing fraud therein.

Hence, a three-step methodology was applied addressing, first, the qualitative analysis of both European and national legislations applicable in the area of the protection of the financial interests of the EU. Secondly, the legal examination is complemented by the depiction of the institutional framework designed for its application. Third, the legal and institutional structures are treated while functioning on the field through relevant case studies. The methodology answers thus to the main objectives of the project and of the Guide:

1. a stronger input for the Romanian OLAF Contact Point to consolidate, to develop and to promote existing policy of protecting EU financial interests within the general anticorruption policy. This policy input will account for the experience of southern and-or recent EU member states and for the challenges identified by field practitioners.
2. increased exposure and level of knowledge of public service professionals with respect to the Romanian administrative and judicial control bodies competent about the protection of EU financial interests and increased awareness of Romanian top decision-makers with respect to the fight against crime and corruption about difficulties/challenges raised by procedural framework and (EU/regional and national/domestic) institutional cooperation of the bodies ensuring protection of EU financial interests as well as about the solutions put forth and suggested by field practitioners;
3. increased knowledge of the public servants from the agencies administering EU funds in identifying, preventing and reporting infringements of law on protection of EU financial interests through 3 types of tools: conflict of interests and impartiality issues, monitoring expenditure and disimbursement of EU funds contracted by Romanian beneficiary entities, and protection of whistleblowers.

## 1. Protection of the financial interests of the EU

### 1.1. The development of the notion

In order to understand the evolution of the “protection of the financial interests of the EU” and its implication for the Romanian legislative and institutional framework, it is first necessary to depict the development of the community's fight against fraud and the character of such action.

Protecting the financial interests of the European Communities has been a priority for governments and parliaments of the member states since the early 1960s. On August 10, 1976 the Commission submitted a proposal for amending the Treaties establishing the European Communities (TEC) to allow the adoption of common rules on penal protection of the financial interests of the European Communities and tracking and prosecuting violations of these provisions. Consequently, in 1983, a committee from the structure of the European Communities Council prepared a draft treaty on the criminal protection of financial interests of these communities.

Unfortunately, due to numerous disputes, such treaty was never adopted. However, the subject gained increasingly higher importance. In 1988 a special unit of coordination in this field within the General Secretariat of the European Commission was established – UCFAF (Unit Coordinating the Fight Against Fraud), representing the Community institution responsible for preventing and combating acts prejudicial to the financial interests of the community.

An important further development was the Decision no. 68/1988 of the Court of Justice of the European Community in the problem of the “Yugoslav wheat” by imposing the principle of loyalty based on art. 5 of TEC. In accordance with the decision, Member States are required to impose sanctions on individuals who violate the provisions of the Community sanctions identical to those imposed in case of similar violations of the internal law, which must be effective, proportionate and dissuasive. The Committee on Budgetary Control published, after a series of debates started because of the Decision, a first report in 1991, in which the Intergovernmental Conference was requested to establish a procedure for co-decision in order to implement the administrative and criminal matters in the protection of financial interests of the European Communities. As a result, the Maastricht Treaty introduced in TEC a new article, 209A, establishing the Member States to assimilate the Community of national interests and to cooperate among themselves and with the European Commission, underlining two fundamental principles: the principle of assimilation and the principle of horizontal cooperation.

Subsequently, the European Parliament adopted in 1994, a resolution that asks the Commission to take specific legislative measures on the harmonization of national criminal provisions for the protection of financial interests Communities and a regulation on administrative penalties. The possibility of adopting a regulation on protection of EU financial interests was created, providing a new statute to UCFAF and horizontal regulations to administrative penalties. In matters of criminal law harmonization, the Commission has proposed building a

convention under the provisions of Title VI of the TEU. The Convention was drafted and adopted in 1995, along with two Additional protocols<sup>3</sup>.

The PIF Convention provides the harmonization of the laws of the Member States impeaching fraud affecting the financial interests of the European Communities, determining the penalties applicable, establishing the criminal liability of the persons responsible with control or decision making in a trader's activity. The first protocol impeaches acts of corruption committed by or against the officials of the Community or at a national level, while the second protocol dealt on money laundering, the legal person's responsibility, applying sanctions and procedural provisions.

Therefore, the European Commission, through its specialized bodies, became very important part in coordinating the efforts of Member States for tracking and fighting these cases. This principle of straightness, introduced by the PIF Council Regulations of 1995 and 1997 in the administrative field, is enshrined in the Treaty of Amsterdam, in the new Article 280, which replaces the former Article 209A.

#### 1.2. EU legislative framework<sup>4</sup>

<p>EC. Treaty, to protect the financial interests of the European Union</p> <p>EC Treaty Article 274 (ex Article 205) EC Treaty Article 280 (ex Article 209a).</p>
<p>General Legislation on the protection of financial interests</p> <p>Council Regulation n° 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (also known as the 'PIF' Regulation) (OJ 1995 L 312).</p>
<p>Legislation setting up OLAF</p> <p>Commission <u>Decision</u> of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) (OJ 1999 L136).</p>
<p>Procedural rules for casework</p> <p>These regulations are not a legal basis for external investigation powers, but specify the procedure to be followed for all investigations.</p>

<sup>3</sup> Protocol to the Convention concerning the financial interests of the European Communities, joce No. C 313 of 23 October 1996, p. 2-10; Second Protocol to the Convention concerning the financial interests of the European Communities, joce No. C 221 of 19 July 1997, pages 12-22.

<sup>4</sup> [http://ec.europa.eu/dgs/olaf/legal/index\\_en.html](http://ec.europa.eu/dgs/olaf/legal/index_en.html)



- Regulation (CE) n° 1073/99 of the European Parliament and of the Council of 25 May 1999 concerning investigations by the European Anti-Fraud Office (OLAF) (OJ 1999 L136).
- Regulation (Euratom) n° 1074/99 of the European Parliament and of the Council of 25 May 1999 concerning investigations by the European Anti-Fraud Office (OLAF) (OJ 1999 L136).

#### Horizontal legal bases concerning on the spot checks and inspections

Horizontal legal bases can be used across the board for all sectors and for all types of investigations.

Council Regulation (Euratom, CE) n° 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292)

#### Sectoral legal bases concerning on the spot checks

There exist a large number of sectoral regulations. The following elements have a special importance :

- Traditional own resources: Regulation n°1150/2000 amended by regulation no 2028/2004
- Mutual Administrative Assistance: Regulation (EC) No 515/97 modified by Regulation (EC) No 766/2008
- Common Agricultural Policy (EAGF and EAFRD): Article 37 of Council Regulation (EC) n° 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ L 209, 11.08.2005, p. 1-25).
- Structural Funds: Article 72 of Council Regulation (EC) N° 1083/2006 of 11 July 2006 laying down general provisions for the European Regional Development Fund, the European Social Fund and the Cohesion Fund, repealing Regulation (EC) No 1260/1999 (OJ L 210, 31.7.2006, p. 25-78)
- Direct expenditures: Specific regulations, Article 87 of the financial regulation or contractual provisions.

#### Legislation on notification of irregularities and recovery of sums wrongly paid

- Commission Regulation (EC) N° 1848/2006 of 14 December 2006 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field and repealing Council Regulation (EEC) No 595/91 (OJ L 355, 15.12.2006, p. 56–62)
- Chapter II Section 4 (Articles 27 to 36) of Commission Regulation (EC) N° 1828/2006 of 8 December 2006 (J.O n° L 371 27.12.2006 and corrigendum: JO n° L 45, 15.02.2007) setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No



<p>1080/2006 of the European Parliament and of the Council on the European Regional Development Fund</p> <ul style="list-style-type: none"> <li>• Council Regulation (EC, Euratom) N° 2028/2004 of 16 November 2004 amending Regulation (EC, Euratom) N° 1150/2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources (OJ L 130, 31.05.2000, p. 01)</li> </ul>
<p style="text-align: center;">Internal investigations legal bases</p> <p>Inter-institutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) (OJ 1999 L136).</p>
<p style="text-align: center;">Conventional instruments (3rd pillar)</p> <p>EU Convention of 26 July 1995 on the protection of the financial interests of the European Communities (also known as the 'PIF' Convention) (OJ C 316 of 27.11.95, p. 48) and its three protocols:</p> <ul style="list-style-type: none"> <li>• 1st Protocol - OJ C 313, de 23/10/1996, p. 1</li> <li>• Protocol - OJ C 151, de 20/5/1997, p.1</li> <li>• 2nd Protocol (in process of ratification) - OJ C 221, de 19/7/1997, p.11</li> </ul>

Adopted under Title VI of the TEC, the Convention on the protection of the European Communities' financial interests and its Protocols aim at creating a common legal basis for the criminal-law protection of the European Communities' financial interests. The Convention entered into force on 17 October 2002, along with its first Protocol and the Protocol on its interpretation by the Court of Justice (ECJ Protocol). The second Protocol is not yet in force.

The main objective of the Convention is to tackle fraud affecting the financial interests of the European Communities. Under the Convention, fraud affecting both expenditure and revenue must be punishable by effective, proportionate and dissuasive criminal penalties in every Member State.

Thus, each Member State is required to take the necessary measures to ensure that the conduct referred to above, as well as participating in, instigating, or attempting such conduct, are punishable by effective, proportionate and dissuasive criminal penalties. In cases of serious fraud, these penalties must include custodial sentences that can give rise to extradition.

Each Member State must also take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of fraud affecting the European Communities' financial interests.

Each Member State must take the necessary measures to establish its jurisdiction over the offences it has established in accordance with its obligations under the Convention.

If a fraud constitutes a criminal offence and concerns at least two Member States, those States must cooperate effectively in the investigation, the prosecution and the enforcement of the penalties imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State.

In the event of disputes between the Member States as to the interpretation or application of the Convention, the case must first be examined within the Council. If the Council has not found a solution within six months, a party to the dispute may petition the Court of Justice of the European Communities. The Court of Justice also has jurisdiction over disputes between Member States and the Commission.

The other legislative resources regarding the protection of the financial interests of the European Union ensure transparency and equal access to public procurement, as well as the respect of integrity principles. For instance, the Directives 93/36/EEC and 92/50/EEC on public contracts establish that any supplier may be excluded from the contract if convicted for an act relating to business conduct; or if guilty of grave professional misconduct proven by any evidence that the contracting authority has at its disposal.

Directive 92/13/EEC refers to the administrative mechanisms for resolving disputes, but only to those involving the contracting authority. Furthermore, the Convention on the protection of the financial interests of the European Communities and Protocol 1 and 2, along with the Convention on Combating Corruption of officials of the European Communities or of officials of the Member States of the European Union were adopted so as to strengthen the existing European regulatory framework in this field.

### 1.3. EU Institutional framework

#### 1.3.1. The European Anti-fraud Office (OLAF)

OLAF was created in 1999, and is charged with protecting the financial interests of the EU. Its tasks are to fight fraud affecting the EU-budget, as well as corruption and any other irregular activity, including misconduct, within the European Institutions, in an accountable, transparent and cost-effective manner. OLAF has, in close cooperation with national contact points, powers to carry out a full investigation, being provided with access to files of national authorities and national bodies which, at their turn, have to provide the necessary support to enable OLAF to carry out its investigative functions.

The office also supplies Member States with the necessary support and technical know-how to help them in their anti-fraud activities. It contributes to the design of the anti-fraud strategy of the European Union and takes the necessary initiatives to strengthen the relevant legislation.

#### 1.3.1. Directorate-General Regional policy (DG REGIO)

DG REGIO is responsible for the implementation of measures to assist the economic and social development of the less-favored regions of the European Union under Articles 158 and 160 of the Treaty of Rome.

In the matter of protecting the financial interests of the EU, DG REGIO is supervising the Member State supervisors/auditors, by carrying on-the-spot audits. If they find evidence of fraud or corruption in, they inform OLAF.

Consequently, DG REGIO has a supervision and audit role, checking the effectiveness of the management and control systems implemented by Member States with the scope of ensuring the protection of the community funds.

### 1.3.2. Directorate/General Internal Market (DG MARKET)

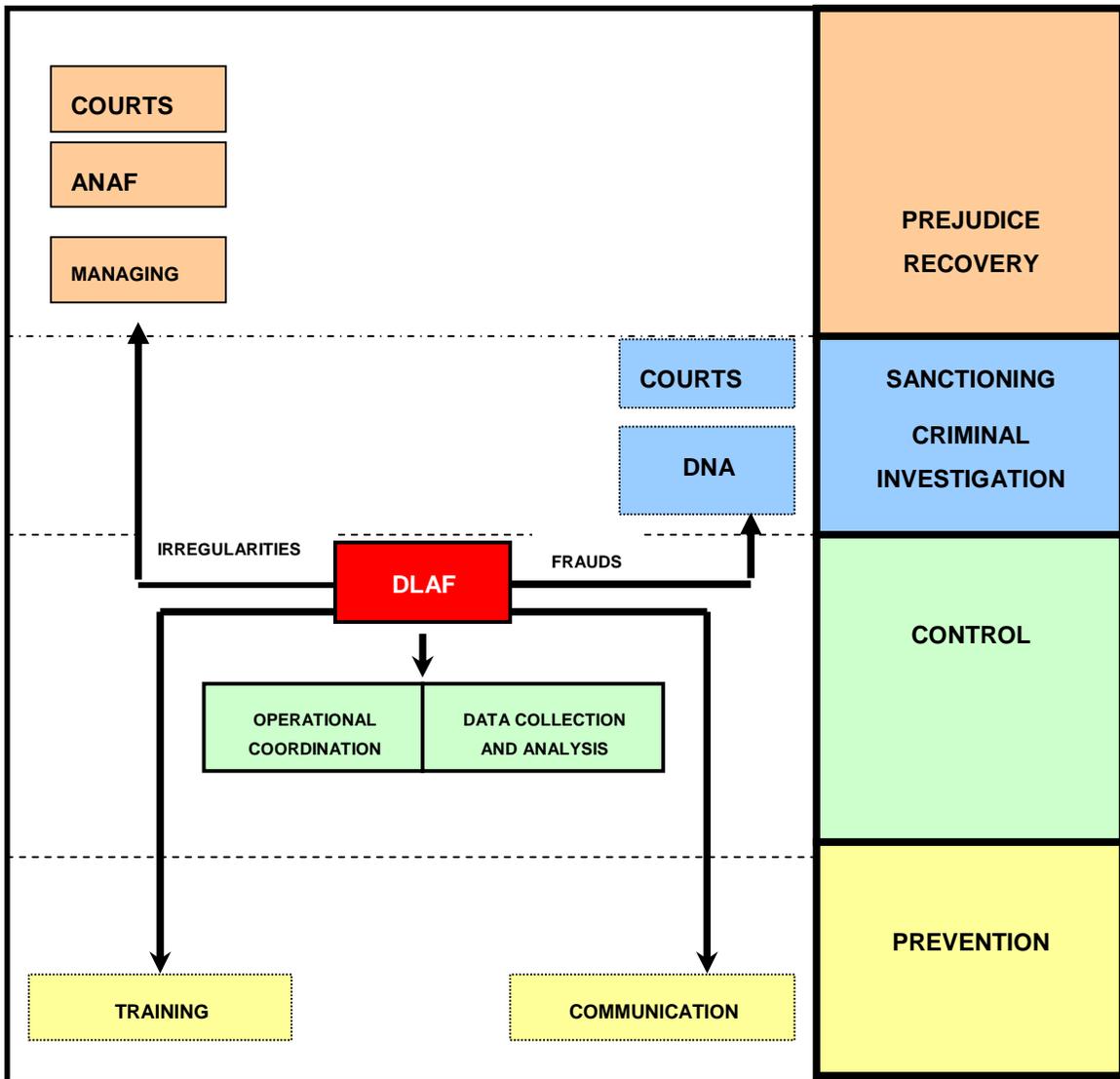
DG MARKET is responsible, together with the European Parliament and Council, for the regulation and implementation of EU procurement policy. Taking into account the large amount of EU financial resources spent through public procurement procedures, the role of DG MARKET in monitoring the proper transposition in the national legislation of the EC directives on Public Procurement becomes highly important for the protection of the financial interests of the EU. Its main instrument for acting against the non-compliance of an EU Member State's procurement law with the EC directives is the infringement procedure.

## 2. Protection of the financial interests of the EU in Romania

### 2.1. The development of the notion

In order to ensure an effective protection of EU financial interests, Romania has adopted a coordinated antifraud system comprising all the relevant institutions involved in the management and control of EU funds allotted to Romania. The antifraud coordination system has been established at the national level for the early detection of possible cases of irregularities or fraud, the coordination of control activities according to the specific detected crime and, finally, the notification of the prosecutors when penal elements have been identified.

This antifraud system is structured on three levels of cooperation. The level of information supposes the facilitation of the exchange of information between the agencies that implement projects financed from European funds. Their representatives, together with those of the management authorities and paying agencies, form the Irregularities Reporting Network. The level of administrative control implies the operational cooperation between control authorities. At this stage, the involved authorities aim at providing operational support to each other for control actions concerning the irregularities or fraud detected by any of the national partner institutions. The third level – the judiciary level – supposes the cooperation with prosecutors. At this level of control, the culprits are sent to trial and any damages are recovered.



## 2.2. Romanian legislative framework

<p>National Strategy for the fight against fraud</p>
<p>GD no. 793/2005 regarding the approval of the National Strategy for the fight against fraud for the protection of the financial interests of the EU in Romania.</p> <p>GD no. 1211/2006 for the modification of the appendix to GD no. 793/2005 regarding the approval of the National Strategy for the fight against fraud for the protection of the financial interests of the EU in Romania.</p>
<p>Control and recovery of the community funds</p>
<p>GO no. 79/2003 regarding the control and recovery of the community funds, as well as of the related co-financing funds misused, with the subsequent modifications and completions brought through Law no. 529/2003; GO no. 94/2004; GO no. 53/2005.</p> <p>GEO no. 12/2007 for the modification and completion of GO no. 79/2003 regarding the control and recovery of the community funds, as well as of the related co-financing funds misused.</p> <p>GD no. 1510/2003 for the approval of the Methodological normatives for the application of the GO no. 79/2003 regarding the control and recovery of the community funds, as well as of the related co-financing funds misused, with the subsequent modifications and completions brought through Law no. 529/2003; GO no. 94/2004; GO no. 53/2005.</p>
<p>Organization and functioning of the DLAF</p>
<p>GEO no. 115/2009 on the establishment of measures to reorganize the Government's working body.</p> <p>Decision of the Prime Minister no. 205/2007 on the organization and functioning of the Anti-fraud Department - DLAF</p>
<p>Offences against the financial interests of the EU</p>
<p>Law no. 78/2000 on the prevention, detection and punishment of corruption, as amended and supplemented, by means of the Law no. 161/2003, Law no. 521/2004, Law no. 124/2005, GEO no. 50/2006, and Law no. 69/2007.</p>

Within this process of managing and spending Community funds, the national public contracting system represents the main acting mechanism that ensures its functionality. Therefore, the existence of a credible and effective legal and institutional public procurement framework represents a prerequisite for preserving the financial interests of the European Union.

Thus, in the context of the process of European integration, the Romanian public procurement system has been reformed so as to fulfill the accession conditions requested by the Community. The process started in 2005 with the adoption of a strategy to reform the public procurement system for 2005-2007<sup>5</sup> approved by the Romanian Government in August 2005. The strategy aimed at legislative and institutional adjustment, the adoption of the EU practices in the field and at streamlining the efficiency, transparency and competitiveness of the public procurement system in order to address some of the shortcomings noticed during the 2001-2004 period.

The Romanian legislative framework in public procurement, has been reformed on the basis of the fundamental relevant Community legislation – Directive 2004/17/EC<sup>6</sup> and Directive 2004/18/EC<sup>7</sup>. As a strategic approach, the transposition was performed through elaborating and adopting of a new Law regarding the award of the public procurement contracts, intended to regulate both procurement in the “classic” sector (Directive 2004/18/EC) as well as, procurement in the utilities sector (Directive 2004/17/EC). The provisions corresponding to the Remedies Directive<sup>8</sup>, as amended by Directive 2007/66/EC<sup>9</sup>, has been also included in the scope of the new law.

As such, the Government Emergency Ordinance (GEO) no. 34 regarding the award of public procurement contracts, public works concession contracts and service concession contracts was adopted on 19 April 2006<sup>10</sup>. Due to the need to improve the public procurement system with the view to make it more effective and

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<sup>5</sup> Government Decision no. 901/2005 regarding the approval of Reform Strategy of the public procurement system and of the action plan for it's implementation in the period 2005 - 2007

<sup>6</sup> Directive 2004/17/EC of the European Parliament et of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. Official Journal of the EU L 134 / 30 April 2004.

<sup>7</sup> 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. Official Journal of the EU L 134 / 30 April 2004.

<sup>8</sup>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.

<sup>9</sup> Official Journal of the EU L 335 / 20 December 2007.

<sup>10</sup> GEO no. 34 , published in the Official Gazette no. 418 / 15 May 2006, has been approved with modifications by the Law 337/2006. published in the Official Gazette no. 625 / 20 July 2006. The adoption of this new legislation in the field of public procurement meant that the previous provisions (GEO no. 60 / 25 April 2001.) would no longer be applicable.

efficient as well as to overcome the difficulties that arose in the course of application of the procedures, the Government Ordinance no. 34/2006 was subsequently amended.

With the adoption of GEO 34/2006 and the subsequent amendments, the framework of public procurement integrates in a single document the classical system of procurement, the electronic system of public procurement, the public-private partnership, concession and sectoral agreements in full compliance with the EU Directives in the field of public procurement whereas the application norms are included in separate legal documents in order to provide a clear picture on the individual applicable framework. The public procurement law clearly makes reference to the ground principles for the award of public procurement contracts: non-discrimination, equal treatment, mutual recognition, transparency, proportionality, efficient utilization of public funds and accountability. On the other hand, respect for other essential principles is equally ensured by different provisions: incompatibilities and conflicts of interest, confidentiality and intellectual property and right to administrative and judicial review.

Speaking of the strengthening of the capacity for implementing the procurement legislation, both at the level of the contracting authority as well as at the level of the specialised regulating and monitoring bodies in public procurement, several measures have been taken. On the one hand, the Government has set up the National Authority for the Regulation and Monitoring of Public Procurement (ANRMAP), a body responsible with the creation, promotion and implementation of the public procurement policy<sup>11</sup>. ANRMAP was subordinated to the Government and in direct co-ordination with the Prime-Minister, and became fully operational in November 2005. On the other hand, another public body has been instituted, under the name of National Council for Solving Complaints (CNSC), a remedy body that would be specialized in solving administrative complaints that might occur during the process of public procurement.<sup>12</sup> The CNSC, initially attached to ANRMAP but functioning independently from an administrative and decisional point of view, has been attached, according to latest modifications brought by GEO 19/2009, to the Government's General Secretariat, maintaining however its operative independence.

The Ministry of Public Finance was designated to play an active role in this field through a specialized body functioning under its authority and responsible for the ex-ante control in the field of public procurement<sup>13</sup>. Thus, the Unit for Co-ordination and Verification of Public Procurement (UCVAP) was created within this Ministry.<sup>14</sup> The ex-ante control pursued through UCVAP was meant to ensure the independence of this operation from all structures and bodies involved in the management and contracting of public funds, as well as from the main regulation and remedy bodies (ANRMAP and the CNSC).

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<sup>11</sup> ANRMAP was set up by GEO no. 74/2005, adopted on 29 June 2005 and approved by Law no. 111/2006.

<sup>12</sup> The CNSC was set up by GEO 34/2006.

<sup>13</sup> GEO 30/12 April 2006 regarding the verification function of the procedural aspects related to the awarding process of the public procurements contracts, published in the Official Gazette no. 365/26 April 2006. Approved with modifications by Law 228/2007 and subsequently modified by GEO 129/2007.

<sup>14</sup> See GEO no. 30/2006 and Government Decision no. 942/2006 for approving the application norms of GEO 30/2006

In addition to the set-up of these public institutions, the contracting authority has been further defined: according to GEO 34/2006, the institution/authority bearing this generic name during the procurement process is responsible for the award of the contract and thus accountable for the respect and application of the public procurement law. The role of the Contracting Authority may be held by any public authority or institution, other bodies with legal personality and founded with the scope of serving a public interest, associations of contracting authorities, public enterprises or private companies that implement projects financed by more than 50% from public funds<sup>15</sup>. The contracting authority is accountable for ensuring sound financial management and the respect for the principles stated by law when using the allocated budget.

### 2.3. Romanian institutional framework

#### 2.3.1. The Fight Against Fraud Department (DLAF)

The organization and functioning of DLAF is regulated by a series of laws, emergency ordinances and government decisions: Government Decision no. 205/2007 on the organization and functioning of Anti-Fraud Department – DLAF and GEO 115/2009 on the establishment of measures to reorganize the Government's working body.

DLAF ensures the protection of the financial interests of the EU in Romania, through its control of the community funds spending, being at the same time the coordinator of the national fight against fraud. The Department is the contact point for the OLAF and it supports or coordinates the fulfilment of the obligations with regards to the Communities' financial interests' protection that Romania has as a member state, in accordance with the provisions of Article 280 of the EC Treaty.

According to the legislation enforce, DLAF has the following main competences:

- Ensures the coordination of the fight against fraud and the effective and equivalent protection of the EU financial interests in Romania;
- Performs the control upon the allocation, execution, and use of the funds coming from the financial assistance provided by the EU as well as of the related co-financing funds, with the scope of identifying the potential irregularities, while being at the same time a law enforcement body, as defined by art. 214 of the Romanian Criminal procedural code, with regards to the frauds affecting the financial interests of the EU in Romania;
- Performs control actions with the scope of revealing frauds that affect the financial interests of the EU in Romania, through the illegal diminishing of the own resources provided within EU's general budget;

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<sup>15</sup> Art. 8, GEO 34/2006 as modified.

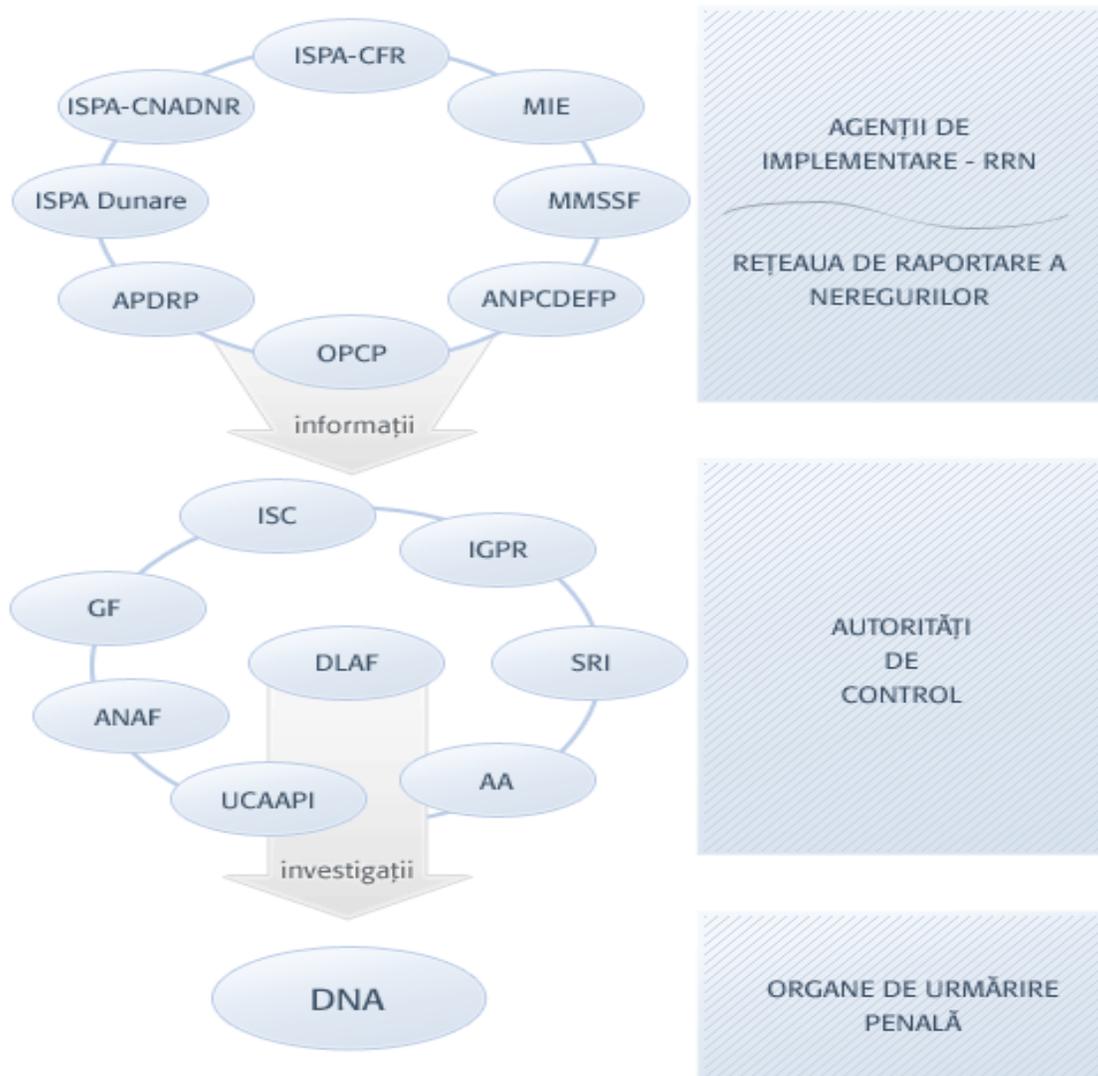
- Ensures and facilitates the cooperation between the national institutions involved in the protection of the EU financial interests protection in Romania, as well as between them and OLAF and other relevant public authorities from the EU member states;
- Initiates and notices draft normative acts regarding the protection of the financial interests of the EU in Romania;
- Collects, analyses and processes data for carrying out relevant analysis in the are of the protection of the financial interests of the EU in Romania;
- Elaborates and coordinates training programmes in the area of the fight against fraud;
- Fulfils any other functions established through normative acts or decisions of the prime minister.

The activity of the DLAF is broadly based on the National Antifraud Strategy for protecting the EU financial interests in Romania, approved by GEO no. 793/2005. This document stemmed from the necessity to harmonize the national regulations with the European standards in the field, as a requirement for accession, and, as well, from the need to streamline the financial supervision and tax control in what may concern the EU funds for Romania. It refers exclusively to the fraud against the Community's financial interests, and not to corruption.

In terms of the control and recovery of the EU funds, the applicable regulations are enclosed in the GO no. 79/2003 on the control and recovery of Community funds and related misused co-financing funds, as amended and supplemented by the subsequent normative acts.

DLAF is entitled to pursue different categories of operational activities: on-the-spot checks and inspections regarding EU-financed projects; unconditioned access to the offices and spaces used with economical purposes, operational support from the financial-fiscal control bodies, police or gendarmerie.

In this respect, at the operational level, DLAF cooperates with representatives of the Romanian Financial Guard, the General Inspectorate of the Romanian Police, the National Tax Administration Agency (ANAF) or the State Inspectorate in Constructions. Furthermore, DLAF enjoys a good collaboration in cases of criminal investigations on fraud against the financial interests of the European Union, with the National Anticorruption Directorate.



*DLAF operational cooperation structure*

[http://www.antifrauda.aov.ro/ro/despre noi/sistemul antifrauda](http://www.antifrauda.aov.ro/ro/despre_noi/sistemul_antifrauda)

### 2.3.2. The National Anticorruption Directorate (DNA)

DNA is led by the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, who carries out his attributions through the chief prosecutor of DNA. The chief prosecutor of DNA, his 2 deputies as well as the prosecutors chiefs of sections and their deputies are appointed by the President of

Romania, at the proposal of the minister of justice, following the opinion of the Superior Council of the Magistracy.

According to its organizing law, DNA is a complex structure, in the sense that at the carrying out of the investigating and criminal pursuit activities, police officers, as well as experts in the economic, financial, banking, IT etc., participate together with the prosecutors. DNA has, by law, financial independence, in the sense that the institution has its own state budget line, clearly defined in the budget of the Prosecutor's Office attached to the High Court of Cassation and Justice, being the second fund appropriation entity.

In the matter of the protection of the financial interests of the EU, DLAF is a law enforcement body, closely cooperated with DNA for the actual criminal investigation related to such cases.

### 2.3.3. The Audit Authority attached to the Court of Accounts (AA)

The AA is an operationally independent organism from the Court of Accounts and from any other authorities that are responsible with managing and implementing of the irredeemable Community funds. This organism acts both at the central level and in the territory, where agencies, management authorities and/or intermediary organisms that manage EU funds are based. The Authority has the exclusive competence to conduct external public audits, in accordance with the European and national legislation, concerning the aforementioned funds, but may extend its audit activity on other sorts of funds.

Basically, the AA has the main following attributions: system audit, based on sampling verification and final audit; external audit tests on structural funds, - Verification of eligible declared expenditure, on the basis of representative sampling; verification of the existence and correctness of the co financing elements. Thus, the AA has an essential active role in detecting irregularities and fraud with regard to the managing and spending of the European funds.

### 2.3.4. The National Authority for the Regulation and Monitoring of Public Procurement (ANRMAP)

The Order no. 107/2009<sup>16</sup> establishes the procedure for the supervision of the awarding process of public procurement contracts that falls under the competence of ANRMAP, which is expected to oversee the application by the contracting authorities of the legal provisions on public procurement process. According to this regulation, the monitoring is conducted monthly, on the basis of a periodical supervision plan, or spontaneously following ex officio or third parties' notifications. It only covers those public procurement procedures that are completed by concluding a public contract, public works concession or a concession of services. The monitoring agents responsible with the evaluation/ verification of the application of the public procurement law have the obligation to supervise and record the facts which constitute a breach of the legal

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<sup>16</sup> Order no. 107/2009 approving the Regulation on the procedure for the supervision of the awarding process of public procurement contracts. Published in the Official Gazette no. 473 from 09 July 2009

provisions and apply the correspondent legal sanctions. Furthermore, they have to recommend to the Advisory Board of the ANRMAP the use of those measures that prevent, stop and correct the effects brought by the infringement.

The main functions of ANRMAP cover the following aspects: policy making (elaborating the adequate strategies on developing the public procurement field; evaluate the risks and the assumptions; drawing the action plans for implementing the strategies); draft and improvement legislation (elaborating the framework legislation; elaborating the secondary legislation; issue legal interpretation regarding the public procurement legislation); monitoring, analysis, evaluation and supervision of awarding process of public procurement contracts; representation of Romania within the consultation committees, working parties and communication networks organized by the European institutions; initiation/maintenance of projects or training actions of the personnel involved in the specific activities of public procurement; Methodological counselling of the contracting authorities in the awarding process of public procurement contracts, with supportive role in the correct application of the legislation in this field: elaborating operational tools; developing the operational tools; help-desk – consultancy on web, phone and in person; provide consultancy on organizing internal procurement offices at contracting authorities' level; edit guides based on study cases.

#### 2.3.5. National Council for Solving Complaint (CNSC)

This institution functions on the basis of its own Organisation and Functioning Regulation, and according to the provisions of the article 291 GEO 34/2006<sup>17</sup> that describes its competencies which are accomplished by observing the principles of independence and stability in the functions of its members, of transparency and impartiality as well as the principles of legality, celerity and of the right to being protected, according to law:

- o rendering decisions on the complaints submitted during an award procedure, before awarding the contract;
- o pronouncing whether the procedure and operations conducted by the contracting authority in the award of a public procurement contract are legal or not;
- o issuing opinions regarding the litigation submitted to the Court, if the Court so requests.

The CNSC solves complaints through specialized three-member panels. According to the law, the cases regarding the legal disputes are randomly distributed to the panels. The submission of a complaint to the Council can be done by any person who considers herself/himself injured in a right or a legitimate interest by an act of the contracting authority, through the violation of the legal provisions in matters of public procurement. The

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<sup>17</sup> Government Decision no. 782/2006 approving the Regulation for the organisation and functioning of N.C.S.L.D. published in the Official Gazette no. 553 / 27 June 2006.

complaint is solved by a Council decision that is mandatory for all parties. If the public procurement contract is concluded in the period of suspension of the awarding procedure, this act is null and void.

The CNSC may render a decision that annuls in part or in whole the respective act, forces the contracting authority to issue an act or orders any other necessary corrective measures to remedy the aspects of unlawfulness that affect the procedure for public procurement. If the Council considers that other infringements of the legal provisions regarding the disputed act exist, besides those invoked by the plaintiff, it will notify the ANRMAP and send all the necessary data / relevant documents in support of the referral.

The panel for solving complaint may be held accountable for the rendered decision in case it does not take into consideration the relevant documents attached to the case file, in bad faith or favouring one party or for misinterpretation.

### 2.3.6. Unit for the Coordination and Verification of Public Procurement (UCVAP)

The establishment of UCVAP was meant to bring flexibility and avoid delays in the process of tendering and contracting by exercising a procedural control only. However, the responsibility would remain, exclusively, on the contracting authority<sup>18</sup> as the opinion issued by the ex-ante control unit is advisory. After the opinion (for or against) is issued after the ex-ante control, the contracting authorities have the final word regarding either to sign the contract or to suspend the tendering and contracting procedure.

This institutional mechanism is flexible as it supposes that the ex-ante control is performed only once during the public procurement process and that the tasks of verifications are shared between the central unit (UCVAP) and its subordinate territorial structures (named "compartments of verification") so that any overlap or delays related to the issuance of opinions be avoided.

### 2.3.7. The Contracting Authority

According to the legislation, the contracting authority is accountable for the award of the contract and, by extension, for the way the awarding procedure is followed. Hence, when organizing an awarding procedure, the contracting authority has the obligation to select the correct procedure<sup>19</sup>, to ensure the transparency of the procedure and the equal access to all potential tenderers, fair competition and the confidentiality, whenever required, in order to avoid conflicts of interest, to ensure the equal treatment of all candidates/ tenderers, to inform all candidates/ tenderers about the result of the procedure and to ensure the access to information to all interested parties.

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<sup>18</sup> Art. 6, GEO 30/2006, as modified.

<sup>19</sup> Art. 18 and art. 71-141, GEO 34/2006, as modified.



However, the contracting authority has the right to choose the necessary means for the application of the provisions of public procurement legislation. Accordingly, the contracting authorities generally have individual internal procedures, but they have to be in line with the general guidelines provided for by GEO 34/2006 and Government Decision 925/2006, as modified.



## II. Access to public interest information

### 1. Introductory Notions

It is widely recognized, at the European level, that ensuring access to information to European citizens is an efficient way to prevent fraud and misbehaviour. For instance, Articles 6, 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms clearly prescribe the access to official documents as a basic citizen right, but the Council of Europe Convention on Access to Official Documents<sup>20</sup> affirms explicitly the link between this right and integrity. In fact, article 6 of the Convention stipulates that the exercise of a right to access to official documents: provides not only a source of information for the public, but helps the public to form an opinion on the state of society and on public authorities and fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy.

Furthermore, the Declaration of the Committee of Ministers of the Council of Europe on the freedom of expression and information, adopted on 29 April 1982, as well as the recommendations of the Committee of Ministers to member states No. R (81) 19 on the access to information held by public authorities, No. R (91) 10 on the communication to third parties of personal data held by public bodies, No. R (97) 18 regarding the protection of personal data collected and processed for statistical purposes, No. R (2000) 13 on a European policy on access to archives and Rec (2002)2 on access to official documents affirm the importance and the scope of this specific right.

Thereby, any person has the right to be informed with respect to the activities and responsibilities of public authorities and institutions, namely those entities whose work is financed out of public money coming from the contributions and taxes paid by tax payers to the state.

Generally the right to be informed is ensured through the democratic process via which citizens choose their representatives in the administrative and legislative forums of the country. Thus, a framework will be created allowing the citizen-tax payer to be informed with respect to his/her interests and, by so doing, to exercise an inter-electoral control regarding the adequate use of his/her vote or of his/her contributions to the state.

Every person's right to information refers to three dimensions:

1. The right to be informed, ex officio, by public institutions and authorities with respect to important aspects of their activity;
2. The right to request information;

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<sup>20</sup> Adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers' Deputies

3. The right to be informed via mass-media regarding various important aspect of public life.

All of these aspects are stipulated in the Constitution of Romania, and the fact that they exist, that they are acknowledged and complied with and that people are aware of them lays the basis for ensuring the transparency of the management process.

By exercising the right to public information each person can contribute to rendering responsible the decision makers as well as strengthening the argument according to which public institutions and authorities are public services, entities working for each citizen of the country.

## 2. The importance of the right to be informed

There are three major aspects with respect to the importance of public opinion being accurately and completely informed by the institutions:

1. the protection of citizens against the powers of the state, an aspect which is reflected as a pledge against tyranny.

2. achievement of other principles, such as transparency, accountability, responsibility, public participation and other individual freedoms;

3. democratic consolidation.

4. control over the activities of the government, an institution that is financed by and provides services to the citizens;

5. good governance, through its eight major characteristics. It is:

- participatory;
- accountable;
- transparent;
- responsive;
- consensus oriented;
- equitable and inclusive;
- effective and efficient.
- it follows the rule of law.

With regard to the protection of the financial interests of the European Union, access to information represents an efficient means to prevent fraud. In effect, the National Antifraud Strategy for the protection of the financial

Interests of the European Union in Romania<sup>21</sup> includes, the prevention of fraud regarding Community funds through activities of communication and public relations among its specific objectives, recognizing, at the same time, the importance of increasing access to information of the public considering the procedures of allocation of the European funds, the fraud level and the actions of the authorities on preventing, combating and sanctioning it.

Crt. No.	Stage of an EU-financed project	Access to information (examples)
1.	Programming	<ul style="list-style-type: none"> <li>• Publishing clear and comprehensive information about the objectives of operational programs/ priority axes;</li> <li>• Providing clear data on the types of eligible operations;</li> <li>• Making information related to the assessment criteria fully available for the potential beneficiaries;</li> <li>• Disclosing data related to the allocation of funds according to components/geographical areas;</li> </ul>
2.	Elaboration of funding application	<ul style="list-style-type: none"> <li>•Disclosure of the methodology of application selection</li> <li>•Providing clear data on the domain and objectives that have to be covered by the eligible projects</li> <li>•Making information or clarifications available to all the potential applicants, non-preferentially</li> </ul>
	Selection of funding applications	<ul style="list-style-type: none"> <li>•Giving full and clear information on the selection of the winning projects</li> <li>• disclosing the arguments that determined the selection of the respective winning projects</li> </ul>
3.	Monitoring of financed projects	<ul style="list-style-type: none"> <li>•Providing information related to project activities and correspondent expenditure.</li> </ul>
	Assessment of financed projects	<ul style="list-style-type: none"> <li>• Disclosing reports on the assessment of the financed projects</li> </ul>
4.	Assessment of funding programmes	<ul style="list-style-type: none"> <li>• Disclosing reports on the assessment of the funding programmes</li> </ul>

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<sup>21</sup> The Strategy has been adopted by Government Decision no. 793/2005, Official Gazette no. 743 - 16/08/2005

and updated through the Government Decision no. 1211/2006, Official Gazette no.797 din 21/09/2006



## CASE STUDY 1

## Access to information and EU funds – public procurement

The public procurement law ensures equal access to the tendering documentation and the right of the stakeholders to request clarifications and modifications. As well, Law no. 544/2001 provides for such provisions on the access to information of public interest.

The public procurement legal framework also ensures transparency, fair competition and equal treatment of the procurement procedures. Any contracting authority is required to ensure transparency of the award of the procurement contract and of the concluded framework agreements through the publication, in accordance with the relevant legislation, of the notices of intent, participation and award.

All procurement processes that exceed, depending on the contracting authority, EUR 125,000 or EUR 400,000 must be made available for all potential candidates / tenderers through the publication of a forecast notice and the corresponding tender announcement and award notice into the electronic system for public procurement (ESPP)<sup>22</sup> and the Official Gazette, and, by case, in the Official Journal of the European Union. The threshold of EUR 125,000 applies when the contracting authority is any agency of state - public authority or public institution - acting at central, regional or local level. As well, this threshold applies when in the case of any other organization with legal personality, which was set up to fulfil general interest needs and that has no commercial or industrial and that is at least in one of the following situations: it is financed in majority by, subordinated to or supervised by a contracting authority that is a public authority or public institution, or other public body.

The threshold of EUR 400,000 applies to those cases in which the contracting authority is any public enterprise which pursues specific activities of public services as water, energy, transport, post, or the exploitation of a geographical area, as stipulated within the public procurement legislation. The law also includes provisions on the communication with the tenderers in order to ensure the confidentiality of the provided information, as well as stipulations on equal treatment by guaranteeing equal access to the tender documentation and subsequent clarification notes and by ensuring that the evaluation of each tender be based on the same requirements and the information provided in the original documentation not be altered. Furthermore, by virtue of the fair competition principle, it is required that the tender documents provide clear information on the services / goods / works to be procured, any indication of brand names or specifications leading to a single producer being clearly prohibited.

Access to information is also ensured through the legal requirement that all potential tenderers be clearly informed on the technical requirements of the offer, the selection and the award criteria, as well as on the results of the evaluation process and award decision. Moreover, the reasons of complaint that arose during the

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<sup>22</sup> The public utility IT system, accessible by Internet at a dedicated address ([www.e-licitatie.ro](http://www.e-licitatie.ro)) and used with the goal of applying the awarding procedures by electronic means.

tendering procedure have to be made publicly available too. The law guarantees the participation of all interested tenderers at the opening session of the offers, but access to the procurement dossier is granted to all interested bodies once the tendering procedure has been finalised and the contract has been awarded<sup>23</sup>. This equally applies in the case of concession contracts<sup>24</sup>.

BOX 1

GEO no. 34/2006 regarding the award of public procurement contracts, public works concession contracts and services concession contracts

Published in Official Gazette no. 418 - 15/05/2006

Consolidated version on 23/06/2009

Chapter II

Section 6

Special transparency rules applicable to public procurement

with regard to advertising services

Article 58. - (1) If the award of contracts for media advertising, with an aggregate annual value, excluding VAT, estimated to be greater than the equivalent in RON of EUR 20,000, the contracting authority must publish a notice of participation and a notice of award in the electronic system of public utility available on the internet at a dedicated address and on its own web page.

(2) in the meaning of par. (1), the media advertising contract means any contract of services covering the creation, production and / or distribution of advertising or other forms of promotion through t media in written, audiovisual or electronic media.

[...]

(4) The contracting authority is required to specify in the participation notice referred to in par. (1) the qualifications and selection criteria and, if the criterion for the award of contract is the best offer in economic terms, the algorithm for calculating the score; the notice must be accompanied by an opportunity report which justifies the purchase of advertising services, while stating the intended impact and the criteria for measuring the outcome.

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<sup>23</sup> Art. 215 GEO 34/2006 as modified.

<sup>24</sup> Art. 217-228 GEO/2006 as modified.



(5) Not later than 120 days from conclusion of contract of advertising services, the contracting authority must publish in the electronic system mentioned in par. (1) an evaluating report on the impact of the advertising services purchase.

(6) media advertising contracts must contain as well the following specific clauses with regard to the Parties' obligations to ensure public access at least regarding the following information, including during the enforcement of the contract: the final recipients of advertising funds, the allocation criteria concerning these funds, the amounts allocated to each of the final beneficiaries and the deadlines for fulfilling the contractual provisions.

(7) Public access to information referred to in par. (6) is ensured by the contracting authority which is required to detain updated information on the fulfilment of the contract.

(8) For media advertising contracts it is mandatory that the name of the contracting authority / authorities be mentioned in the advertising material.

#### Confidentiality vs. transparency as giving access to information

Regarding the confidentiality requirements, this aspect holds a particular importance, due to the effects they are called to produce: if not used, they may inflict on principles as transparency, fair competition, equal treatment, but if used abusively, they may harm the same principles as it may render the same procedures opaque and uncompetitive. Accordingly, the contracting authority must not disclose any information that may harm the commercial secret or the intellectual property. As well, all offers are confidential until the opening session and all information is not to be disclosed until the tendering process is finalised, except for the data communicated during the tendering opening session or information provided by the tenderers following requests for clarifications. Consequently, the members of the evaluation committees and the personnel of the contracting authority must obey to the requirement of confidentiality of the content of the offers and clarifications during the tendering process<sup>25</sup>.

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<sup>25</sup> Art. 74 and 75 , Government Decision 925/2006 as modified.

### 3. National Legislative instruments

#### The Constitution of Romania

The starting point in this field is reflected by the provisions of the constitution, which stipulates in Chapter II – Fundamental right and freedoms, art. 31 right to information:

1. A person's right of access to any information of public interest shall not be restricted.
2. The public authorities, according to their competence, shall be bound to provide correct information to the citizens in public affairs and matters of personal interest.
3. The right to information shall not be prejudicial to the measures of protection of young people or national security.
4. Public and private media shall be bound to provide correct information to the public opinion.
5. Public radio and television services shall be autonomous. They must guarantee any important social and political group the exercise of the right to broadcasting time. The organization of these services and the parliamentary control over their activity shall be regulated by an organic law.

#### Law no. 544 of 12 October 2001 regarding the free access to information of public interest

A series of concepts relevant to the domain of access to information of public interest are defined in this Act.

Thus, the law defines as public authority or institution any entity that uses public financial resources and that develops its activity on the territory of Romania, be that a public authority, a public institution, an autonomous agency, a national company, or even a trading company, in which the Romanian state or a territorial administrative unit owns all or the majority of stocks, working under the management of a central or local public authority.

The same document stipulates that any piece of information that regards the activities or results from the activities of the public authority or institution, no matter the prop or form or the way of expressing the information is to be considered information of public interest. To sum up, public interest can be evinced regarding any piece of information generated or managed by the public authorities and institutions.

As compared to the explanation above, the law also defines a category of classified information. Thus, the following information: the information, data, documents concerning national security must be protected because of their level of importance and of the consequences that may result from their unauthorized dissemination or disclosure.

The law regarding free access to information of public interest stipulates the fact that access to information may be granted ex officio – each public authority or institution has the obligation to communicate ex officio specific information with respect to the institution and its activity –, but also upon request on the part of a given agent

interested in the evolution of the institution. According to article 5, paragraph 1, the public institution or authority has the obligation to provide the following information of public interest:

- the legal regulations that regulate the organisation and functioning of the public authority or institution;
- the structure that organises, the attributions of the departments, the programme of functioning, the audience programme of the public authority or institution;
- the name and first name of the persons from the management of the public authority or institution and of the employee, responsible for disseminating the public information;
- the contact coordinates of the public authority or institution: the denomination, headquarters, telephone and fax numbers, e-mail address and the address of the web page;
- the financial sources, budget and accounting balance sheet;
- the own programmes and strategies;
- the list including the documents of public interest;
- the list including the categories of documents made and/or administered, according to the law;
- the modalities to contest the decision of the public authority or institution in the situation when the person considers himself harmed in what concerns the right of access to the requested information of public interest.

The same article also mentions the means by which this duty is fulfilled:

- information published at the at the headquarters of the public authority or institution;
- publishing information in the Official Gazette of Romania;
- publication by means of mass information;
- in own publications;
- In the webpage of the public authority or institution.

With respect to public information requests, public authorities and institutions have the obligation to answer to any request for information of public interest, regardless of the manner it has been formulated: orally or in writing. The refusal to provide the requested information shall be motivated and communicated to the person who requested the information using the same means by which the respective information was requested. The motivated refusal shall be communicated in writing within 5 days from receiving the petitions.

#### 4. Exceptions and „exceptions to exceptions“

Article 3 from the Council of Europe Convention on Access to Official Documents states that possible limitations to access to official documents may occur when it comes to protecting national security, defence and international relations; public safety; the prevention, investigation and prosecution of criminal activities; disciplinary investigations; inspection, control and supervision by public authorities; privacy and other legitimate private interests; commercial and other economic interests; the economic, monetary and exchange rate policies of the state; the equality of parties in court proceedings and the effective administration of Justice; environment; or the deliberations within or between public authorities concerning the examination of a matter. However, these limitations have to be set down precisely in law, and be proportionate to the aims that determined the restriction of the right to access to official documents. However, these limitations are no longer valid when an “overriding public interest” is in disclosure. That is when “exceptions to exceptions” intervene. These are however further depicted in the national legislation of each member state. (See Table 1 from below)

In the Romanian legislation, the aforementioned provisions related to access to official documents and to its limitation are mainly resumed in the Law no. 544/2001 regarding the free access to information of public interest, which also contains stipulations on the specific situations when, and types of information to which public access is restricted. This type of information is categorised as follows:

- the information in the field of the national defence, public safety and order, if it falls under the category of classified information, according to the law;
- the information regarding the deliberations of the authorities, as well as the one regarding the economic and politic interests of Romania, if it falls under the category of classified information, according to the law;
- the information regarding the commercial or financial activities, if its publicity prejudices the principle of loyal competition, according to the law;
- the information regarding personal data, according to the law;
- the information regarding the procedure during the penal or disciplinary inquiry, if it jeopardises the outcome of the investigation, if confidential sources are revealed, or the corporal integrity and health of a person are endangered, as a consequence of the investigation carried out or underway;
- the information regarding the judicial procedures, if its publicity prejudices the assurance of a fair trial or the legitimate interest of any of the parties involved in the process;
- the information whose publication is prejudicial to the measures for youth protection.

Besides these cases, there are also situations in which information which is usually excepted from the free access of the citizens must be made public. We are therefore referring to exceptions to the exceptions. The following table contains examples of such situations:

Crt. No.	Law	Article	„Exception to the exception“
1.	Law no. 544/2001 regarding the free access to information of public interest	13	The information that favours or hides the infringement of the law by a public authority or institution cannot be included in the category of classified information and shall be considered as information of public interest;
2.		14	The information regarding the citizen's personal data may become information of public interest only as far as it affects the capacity of exerting a public function;
3.	Law no. 182/2002 on protection of classified information	24 <sup>5</sup>	Classification as state secrets, of information, data or documents with the purpose to conceal law violations, administrative errors, to limit access to information of public interest, to illegally restrict certain rights of a person or to cause damage to other legitimate interests shall be forbidden;
4.		24 <sup>6</sup>	Information, data and documents, referring to a fundamental scientific research having no justified connection with national security shall not be classified as state secret.

Table 1: Situations in which information which is usually excepted from the free access of the citizens must be made public

## 5. Recommendations

In the light of the aforementioned Declarations and Conventions on access to official documents, the European Union is an instant promoter of this right. Bearing in mind that, among other benefits, the right to access to information helps prevent fraud and misbehaviour through giving to citizens the possibility of scrutiny and oversight, the financial interests of the European Union can be protected through adopting and ensuring the application, by all the public bodies dealing with EU funds, of codes of conduct and internal regulations that include rules on access to public documents and ways of giving them full meaning in practice.

Speaking of guidelines for this matter, the European Parliament adopted the Code of Good Administrative Behaviour<sup>26</sup> that contains two specific articles related to the citizens' right to access to information. Article 22 stipulates that an official shall, when he has responsibility for the matter concerned, provide members of the public with the information that they request and, when appropriate, facilitate their access to it. In case of confidentiality regarding the information requested, an official may not disclose it, but he or she shall indicate to the person concerned the reasons why he cannot communicate the information. In addition, according to article 23, the official shall deal with requests for access to documents in accordance with the rules adopted by the Institution and in accordance, with the general principles and limits laid down in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.<sup>27</sup>

As a general recommendation, these rules ought to be adopted and implemented by all the national and supranational organisms that enter, directly or indirectly, the circuit of allocation, ordering, payment and verification related to EU funds. As well, institutional mechanisms have to be in place in order to ensure the effective application of rules on the right to access to information.

In terms of specific recommendations, several aspects deserve to be mentioned. With respect to the applicable judicial norms, the modification of regulations on the basis of procedures which are faulty from the point of view of the legislative technique must be avoided. The provisions of the law should be interpreted in the sense of rendering it applicable and not in the sense of restricting the access to information, given the fact that exceptions are strictly interpreted.

Regarding the organisational aspects, there's a need for specialised departments within each public institution or authority where there should be personnel qualified in providing information, purchasing for the respective institution adequate equipment in order to process and keep records of requests and answers, protecting with

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<sup>26</sup> The European Code of Good Administrative Behaviour. Luxembourg: Office for Official Publications of the European Communities, March 2002, pp. 7-16

<sup>27</sup> Examples of principles laid down in the Regulation (EC) No 1049/2001, at Art 1: ensuring the widest possible access to documents, ensuring the easiest possible exercise of this right, and promoting good administrative practice on access to documents.



utmost diligence personal information, as well as setting up procedures for the permanent updating of the information provided ex officio.

The content of the answers provided by the public authority or institution should be clear and accessible to the citizens. A motivation should be provided whenever the information provided does not fully correspond to what was requested, the quality or the quantity of the information is diminished or the information cannot be provided since it falls under the exceptions of the law. Along the same lines, should the beneficiary of the information provided not be satisfied with the received answer, the means of appeal available to him/her should always be mentioned.

With regard to the professional training, the public institution or authority should have as one of its management objectives the inclusion in the training programmes of the norms existent in the codes of conduct and the legal provisions which refer to transparency and access to information.

Strictly speaking of preventing fraud in dealing with European funds by the means of communication and giving access to relevant information to the public, all the public authorities involved in the allocation, management, payment and verification of the European funds may organize seminars and press conferences with journalists, communication sessions with public officials, and roundtables with various categories of beneficiaries of EU funds. As well, they may promote their activity in this area through information campaigns pursued on a regular basis.



### III. Decisional transparency

Generally, transparency in the case of the decision making process should be interpreted in terms of four aspects. It is an obligation which must be fulfilled by any public authority or institution, it must have a predictability feature regarding the impact of the decision that have been made, it is a good management standard and, at the same time, a criterion for lawfulness in accordance with the regulations.

Transparency involves „a clear knowledge of the persons making the decisions, of the decisions that are being made, of the people that have something to gain from it and the persons that will pay the costs“<sup>28</sup>.

The principle of transparency in dealing with public matters is widely included in the *acquis communautaire*. Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending the Directive 2001/34/EC and the Directive 2006/111/EC of 16 November 2006 of the Commission on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings are only two examples of application of the transparency principle. Specific European regulations on public contracting include, as well, provisions related to complying with transparency principle.<sup>29</sup> (For an exemplification of the application of transparency requirement in the Romanian public contracting sphere, see below)

In what may concern the specific legislative and institutional framework on the protection of the financial interests of the European Union, the principle of transparency appears therein as a means to prevent and combat fraud related to EU funds.

Strictly regarding the protection of the financial interest of the EU, the decisional transparency represents a matter of great importance for the functionality of the institutional framework that was set up for this purpose. For that matter, the National Antifraud Strategy (See above s.v. "2. The importance of the right to be informed") mentions, among other general principles, the transparency of the activities pursued by the institutions involved

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<sup>28</sup> Black, J. – *Oxford Dictionary of Economics*, Oxford University Press, 2003, ISBN 978-0198607670

<sup>29</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, Official Journal of the EU L 134 / 30 April 2004, as last amended by Directive 2006/97/EC, 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. Official Journal of the EU L 134 / 30 April 2004, as last amended by Directive 2006/97/EC. **Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing**

in the fight against fraud. Furthermore, in order to ensure the application of the principle of decisional transparency in relation to EU funds, the applicant guides for EU-financed projects are submitted to the public consultation procedure before being adopted.

Crt. No.	Stage of an EU-financed project	Decisional Transparency
1.	Programming	<ul style="list-style-type: none"> <li>• Submitting to public consultation programmatic documents and strategies related to the operational programs/ priority axes;</li> </ul>
2.	Elaboration of funding application	<ul style="list-style-type: none"> <li>• Submitting to public consultation applicant guides and informative guides regarding the prevention of irregularities</li> <li>• Submitting to public consultation the technical specifications related to expenditure verifications</li> <li>• Submitting to public debate the informative guides concerning the application of the Value Added Tax.</li> </ul>
3.	Monitoring of financed projects	<ul style="list-style-type: none"> <li>• Ensuring the consultation of the beneficiaries with regards to the changes in the legislation and/or evaluation criteria related to the expenditure of the EU funds</li> </ul>
4.	Assessment of funding programmes	<ul style="list-style-type: none"> <li>• Allowing the input of all relevant stakeholders in the evaluation of the operational programmes funded through the budget of the Community</li> </ul>

## 1. Law on decisional transparency

Law no. 52 of 21 January 2003 on decisional transparency in public administration ensures the opening up of the activity of the central and local public administration towards the citizens via two important mechanisms:

- a. citizens' participation in the legal regulation elaboration process;
- b. citizens' participation in administrative decision-making.

This law should not be confused with the law regarding free access to information of public interest or with direct democracy. Unlike the law regarding access to information of public interest, allowing the citizen to have access to public information managed by various public entities, the law on transparency offers citizens the opportunity to actively participate in the process of elaborating legal regulations by means of suggestions directed towards public administration authorities.

Also, unlike direct democracy, the law on transparency does not grant the citizens the right to make the final decision regarding the legal regulations to be adopted. This will remain one of the prerogatives of public administration authorities, who will decide whether or not to include in the draft regulations the suggestions and information provided by citizens, non-governmental organisations or business associations.

The law on transparency presupposes collaboration between two partners: public administration, on the one hand, and the receiving end of the regulations elaborated by it (citizens, non-governmental organisations, business associations) on the other hand. Besides public administration, the law refers to public institutions as well as public services, although these bodies do not have direct competences in the process of adopting regulations.

The local and central public authorities, as well as the other public institutions that use public financial resources have the obligation to make draft regulations public before they are adopted. Subsequently, the receiving end of the regulations, whether they are a natural person or a legal person, has the possibility to make suggestions and recommendations regarding the regulations they have been informed of as draft regulations. The formulated suggestions will be analysed by the initiating authorities, who will decide upon the need to include them in the final text of the regulation. As far as the public participation in the decision making process is concerned, the law stipulates the possibility for anyone interested in this to participate and express their point of view during the meetings of the bodies mentioned above.



Public administration	Citizens
<ul style="list-style-type: none"> <li>○ Receives further information free of charge with respect to the fields of activity that are to be subject to the proposed regulations;</li> <li>○ Explains the necessity for the proposed regulations;</li> <li>○ Eliminates problems related to the implementation of the regulation which may occur due to lack of awareness;</li> <li>○ Eliminates problems related to the implementation of the regulation which may occur due to editing faults</li> <li>○ Earns the trust of the public opinion.</li> </ul>	<ul style="list-style-type: none"> <li>○ Become aware of draft regulations proposed by the public administration bodies;</li> <li>○ State their point of view with regard to these draft regulations;</li> <li>○ Adapt their activity in due time to the requirements that are to be introduced.</li> </ul>

Table 2: The benefits of the Law on Transparency

Regarding the subject of the law on transparency, the citizens and the organisations set up by them will be able to express their opinions and interests related to the elaboration of legal regulations and the administrative decision making process. Being consulted by public authorities about drafts of legal regulations and participating in public meetings of the respective authorities are the instruments available to the citizens.

## 2. What citizens can change through transparency

It is widely acknowledged that citizens' participation to the oversight and scrutiny of public institutions through transparency mechanisms can prevent or at least signal misbehaviour and fraud. Knowing that affecting the financial interests of the EU equals to affecting the interests of any community tax-payer, the promotion of an active citizen involvement in the public affairs through transparency has been one of the leading objectives of the EU institutions.

It deserves to be mentioned, in this context, that all decisions related to the allocation, ordering and payment in what may concern EU funds, are considered administrative acts that have normative character, and consequently are submitted to the same transparency rules as those provided for by the Romanian Transparency Law (see, below, at sections 3,4 and 5). Otherwise, bringing the action before administrative court following the non-respect of transparency rules may affect the implementation and impact of the respective EU-funded projects in Romania and may lead to blocking the respective funding Programme. The running risk of omitting transparency rules is, besides opacity and the increase of the value of "inside information" on the corruption market, the impairment of the competitively principle, as the level of information is not equal, unitary and freely distributed to all potential beneficiaries of EU funds.

In generic terms, public authorities whose activity is subject to the Law on Transparency constantly adopt or draw up legal regulations and make decisions that influence or affect people's life or activity. This law allows the citizen to comment upon the draft regulation and state their opinion concerning the decisions adopted by public authorities during public meetings. Draft legal regulations can be categorised as draft regulations elaborated within some of the public administration bodies and draft regulations elaborated outside public administration bodies. All acts adopted by administrative authorities, with the exceptions stipulated by the law, fall under the Law on Transparency.

There are legal exceptions to public consultation when it comes to the elaboration of a legal regulation:

- regarding national defence, public order and safety;
- the country's strategic economic and political interests;
- regarding values, deadlines, technique and economic data of commercial or financial activities, if publication of those infringes loyal competition principle;
- regarding personal data.

In case the public authorities use the exceptions to the process of consultation as an excuse in order not to set in motion the processes regulated by law, it is important that such decisions are disputed via memoranda directed to the respective institution or, in the absence of any positive reaction, in court. Thus, the court will be able to clarify the applicability limits of the law. Having as few limits as possible so that the majority of draft regulations can be publicly presented and debated, depends to a great extent on the people who use the law.

For situations which, due to exceptional circumstances, require the adopting of immediate solutions in order to avoid severe infringement of public interest, the possibility of adopting legal regulations without going through the public consultation process is stipulated. This provision can prove itself useful in a crisis situation, in which a consultation process could not take place.

The fact that the opinions of the citizens or of organisations are purely consultative is stipulated several times throughout the Law of Transparency. The decision is taken by the public authority. In accordance with the legal procedures concerning the elaboration of legal regulations, the legal regulation, after the consultation process has taken place, will be submitted for examination and opinion. It will include modifications drawn up on the basis of those opinions expressed during the consultation process which have been selected by the people responsible for editing the respective act.

According to the law, public authorities have the obligation to state in the annual report regarding decisional transparency the number of recommendations that have been included in the draft legal regulations. It might prove useful if the citizens request a motivation of the choice that has been made by public authority. This option is not stipulated as such in the Law, but public authorities may choose to publicly explain the reasons for including part of the viewpoints expressed or for rejecting some other viewpoints.

### 3. How citizens can be a part of it

In order to have an influence on decisions or legal regulations, every person can participate either individually, as citizens, or organised as “legally established associations”. The law does not restrict in any way the access to the stipulated mechanisms. Anyone has the right to participate no matter the interest he/she stands for.

Citizens can participate in the processes stipulated in the Law on Transparency regardless of race, nationality, ethnic origin, language, religion, gender, opinion, political affiliation, properties or social origin.

Organisations may also participate, via their representatives. The law of Transparency grants the right to participate only to “associative civic representation groups”, namely non-governmental organisations, unions and other legally acknowledged non-profit organisations.

Companies, Corporate organisations, agricultural associations and political parties cannot use directly the mechanisms of this law. They can intervene via representatives – landowners, members, people who work in management positions –, or via non-governmental organisations created in order to represent their interests.

A viewpoint can be supported by a person, an association with no legal personality, by a non-profit legal person or by a coalition.

#### 4. How citizens may express their point of view

Consultation concerning legal regulations is a process in which the agenda is established by public institutions. Public institutions decide which acts will be elaborated according to the circumstances or to their priorities. This requires permanent attention so as to realise when certain acts your field of activity is subject to are under debate.

The first step is to become informed with respect to the acts that are to be debated by public authorities. Public authorities will inform the persons, beforehand and ex officio, about draft legal regulations that are to be debated.

The following are sources of information concerning draft legal regulations which are debated by public administration authorities:

- announcement on the webpage of the respective authority;
- announcement displayed on the premises of the authority's headquarters within a space accessible to the public;
- mass media, when they disseminate the announcement made by the public authority.
  - The announcement will contain:
    - a substantiation notification, a grounds exposal or an approval paper on the necessity of adopting the submitted legal regulation;
    - the complete text of the draft of the respective act;
    - the deadline in which comments may be sent – at least 10 days;
    - the modality in which those who might be interested in it may send their comments.

Another modality to receive information about public meetings concerning draft legal regulation elaboration is to request the draft from the respective public authority.

In the case of draft legal regulations relevant for business environment, the announcement on elaboration of such drafts shall be transmitted by its initiator to business associations or to other legally established associations, on specific activity domains.

According to the law, participation in the legal regulation elaboration is possible during the drawing up process of the respective draft legal regulation, before it is analysed and approved by the public authority that elaborated it. There is a limited period available for citizens to do this; the time limit is established and made public by the respective public authority in the initial announcement. The time limit cannot be shorter than 10 days since the announcement was published.

Any comments, which appear in the legal provisions as „proposals, suggestions, opinions used as recommendations“, will be received by a person specifically appointed by the head of the public authority.

## 5. Actions to be taken in case of lack of transparency

The Law on Transparency also stipulates means of appeal in case of infringement. There are four such modalities. In article 13, any person or organisation that considers himself / herself infringed in his/her rights stipulated in the law may lodge a complaint to the administrative contentious section of the Court<sup>30</sup> against the public institutions that have breached the law. The provision refers to the procedure regulated by Law no. 544/2004<sup>31</sup>, including its modifications and amendments up to date. The plaintiff will need to prove that one of his/her rights or legitimate interests have been infringed due to lack of or erroneous application of the Law on Transparency. The person will first need to follow the procedure regarding administrative complaints according to which such complaint needs to be sent to the public administration institution which allowed for the right(s) or interest(s) to be infringed.

Should a public servant incapacitate the interested persons from involving in legal regulation of public interest elaboration process, he/she can be punished for disciplinary deviation. An emphasis is necessary on the fact that the law refers to public servants, meaning any employee of a public institution. The punishment is applied differently if the person is a public servant that if the person is another type of employee of the respective public institution. The persons who are prevented from participating in the elaboration process of a public regulation must direct a memorandum to his/her immediate superior or to the disciplinary committee from whom he/she will request for punishment of the public servant. For those employees of public institutions who are not public servants, the punishment shall be applied in accordance with the Romanian Labour Code. The heads of public institutions who are not public servants, but who are high officials, elected officials or personal advisers of such dignitaries cannot be punished with this method. The only available modality is the one stipulated in the Law regarding Administrative Contentious.

An appeal to the Ombudsman is the other method available to the citizens who believe their rights, as stipulated in the Law on Transparency, have been infringed. The Advocate of the People Institution is aimed at the defence of the citizens' rights and freedoms in their relations with public authorities<sup>32</sup>. Although this method is not expressly stipulated in the Law on Transparency, it can be used.

The Law also mentions an instrument that citizens can use to verify the manner in which public authorities have applied the law: the annual report on decisional transparency. This report makes visible, at least from a quantitative viewpoint, to what extent the law has been applied. Legal action can be taken against all public institutions subject to this provision that do not publish the annual report.

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<sup>30</sup> The Law on Administrative Contentious regulates the right of every person to take legal action against either documents issued by public administration authorities if these documents have infringed his/her rights or legitimate interests, or the refusal of public administration to answers a request involving his/her legitimate rights or interests.

<sup>31</sup> Law no. 29/1990 was repealed by Law no. 554/2004 regarding Administrative Proceedings.

<sup>32</sup> Law no. 35/1997 on the Organisation and Function of the Advocate of the People Institution.

## III. The Conflict of Interests Regarding European Funds

Conflicts of interests occur when the employees or the officials in the public sector are or seem to be influenced by personal interests while performing their activity.

The perception of an apparent conflict of interests can be as damaging as a real conflict, since it will undermine the people's trust in the integrity of the respective institution and its employees.

### 1. Definitions and regulations

According to article 52 in Regulation (CE, Euratom) no. 1605 of 25 June 2002 on the financial regulation applicable to the general budget of the European Communities, „all financial actors and any other person involved in budget implementation, management, audit or control shall be prohibited from taking any action which may bring their own interests into conflict with those of the Communities“. Should such a case arise, the person in question must refrain from such actions and refer the matter to the competent authority.

There is a conflict of interest where the impartial and objective exercise of the functions of a financial actor or other person is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary.

In addition to the Regulation mentioned above, the Practical Guide to Contract Procedures Financed by the General Budget of the European Communities within the external actions domain (PRAG) mentions also any event that influences the capacity of a candidate, applicant or tenderer to objectively and impartially express their professional opinion or that might prevent him/her at any time from granting priority to the interests of the Contracting Authority.

Any considerations related to possible granting of future contracts or conflicts regarding other commitments, past or present, of a candidate, a tenderer or a contractor.

These restrictions are applicable to any subcontractors or employees of the candidate, the tenderer or contractor.

There is a conflict of interests also as stipulated in article 52 of the Financial Regulation in cases where the impartial and objective exercise of the functions of an actor with prerogatives in budget implementation or of an internal auditor is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary.

In national law, there are definitions of the conflict of interests in Law no. 161 of 19 April 2003 on certain measures for ensuring transparency while exercising public dignitaries, public positions and within the business environment, the prevention and sanction of corruption, as well as in Government Emergency Ordinance no. 34 of 19 April 2006 with regard to the award of public procurement contracts, of public works concession contracts and of services concession contracts.

Thus, article 70 of Law no. 161/2003 describes the conflict of interests as „the situation in which the person in exercise of a public dignity or holding a public office has a personal interest in a property, which could affect the objectivity of the performance of duties incumbent on him under the Constitution and other regulations”, the provisions of this Law being applicable to presidential advisers as well as state advisers within the Presidential Administration, the Prime Minister, ministers, minister delegates, secretaries of state, undersecretary of state and similar offices, prefects and subprefects, as well as local elected officials and public servants who are appointed or perform their activity in accordance with Law no. 1888 of 8 December 1999 with regard to the Public Servant’s Statute, republished in the Official Gazette of Romania, Part I, no. 365 of 29.05.2007, while article 67 of the Emergency Ordinance mentions the fact that „the natural or legal person who has taken part in the elaboration of the tender documentation, has the right as a business operator, to be a tenderer, associate tenderer or subcontractor, if and only if the person’s involvement in the elaboration of the tender documentation cannot distort competition”.

According to the same Government Ordinance, „the natural or legal persons that directly take part in the process of verification/assessment of the candidatures or tenders do not have the right to be candidate, tenderer, associate tenderer or subcontractor, under the sanction of the exclusion from the awarding procedure” (article 68). The following persons do not have the right to be involved in the process of verification/assessment of the candidatures or tenders:

- persons who own shares, partnership interests shares of the subscribed capital of one of the tenderers, candidates or subcontractors or persons who are part of board of trustee or the managing or supervisory body of one of the tenderers, candidates or subcontractors;
- husband or wife, relative or relative-in-law, up to and including the fourth degree of kinship with persons who are part of the board of trustee or the managing or supervisory body of one of the tenderers/candidates;
- persons who are proven to have an interest that may affect impartiality throughout the process of verification/assessment of candidatures or tenders.

Article 70 stipulates that the contractor does not have the right to hire, with a view to fulfilling the public procurement contract, natural or legal persons who have been involved in the verification/assessment process of the candidatures/tenders submitted as part of an application for a public procurement procedure, for at least 12 months since the termination of the contract, under sanction of nullity of the respective contract on grounds of immorality.

These aspects are also mentioned in the Applicant’s Guide inherent to all operational programmes.

As rendered by the facts outlined above, the conflict of interests can have a patrimonial or a non-patrimonial dimension. Financial interests may involve an actual or potential gain, which can be obtained with the help of an employee, a government official or a person elected by vote or one of the family members of any of the people in the categories mentioned above, who own properties, shares or hold a certain position in one of the companies participating in the bid with a view to being awarded government contracts, who accept presents or other or have an income from a second job.

Usually, non-patrimonial interests are related to political power or to increased control. They can emerge from personal or family relationships, or from participation in social, cultural and sports activities.

It is not always easy to decide when and if personal interest is or could be in conflict with public duty. This is proven by a simple test, whether a person can be influenced by his/her personal interest in fulfilling his/her public duty or whether a correct, reasonable person believes that he/she could be influenced in this respect. Everyone has personal interests, important for them or for the people close to them. The persons who exercise their activity in the public sector can't always avoid situations in which these interests are in conflict with the decisions they make or with their official duties. The fact that such interests exist is not a problem per se – the most important thing is how they are approached. The integrity of the organization and of its employees will be protected and the risk of corruption within it will be diminished if the organization has policies and procedures to help solve potential conflict of interest situations.

A conflict of interests implies a conflict between the public duty and the personal interest of a public official, if the personal interest of the public official could have an improper influence on the fulfilment of official tasks and obligations. This basic definition mentions three conflict of interest elements in a simple manner. They can be tested. The basic idea is that any situation where there is an unacceptable possibility of occurrence of a conflict between the personal interest of a public servant and his duties as a public servant shall be deemed a case of conflict of interests.

The basic definition may also be used to test the situations where there is an apparent conflict of interests, but in reality the situation is or could be different. Such a situation is regarded as an apparent conflict of interests. It can generate a significant issue for the respective official, as serious as the existence of a real conflict of interests, since it may cause potential suspicions to arise concerning the integrity of the official and his/her organisation. Apparent conflicts may be investigated by using a definition instrument, by asking the question: „does official X seem to have a conflict of interest or not?“

An official can have personal interests which might by their very nature be the cause of a future conflict of interests: we are in this case referring to a potential conflict of interests. The definition implies that any reasonable person who knows all the relevant factors reaches the conclusion that the nature of an official's personal interest is such that it could improperly influence his/her behaviour or capacity to make correct decisions. When such definition is applied, for instance in the case of a government policy, a regulation or a law, „personal interest“ is defined in specific terms. Likewise, a very clear definition of the phrases „ public official“



and „public duties and obligations” might be necessary in order to eliminate any possible confusion regarding their use<sup>33</sup>.

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<sup>33</sup> Alistar, V., Georgescu, I. and Turturic , R. – *Guide to Integrity and Good Practice in Public Procurement* – Transparency International – Romania, within the project Advocacy and Legal Advice Center, implemented by the Transparency International Secretariat and TI-Romania, TI- Bosnia and Herzegovina and TI-Macedonia, with the financial support of the Federal Foreign Office of Germany, through the Stability Pact for South Eastern Europe.



Crt. No.	Stage	Possible conflicts of interests
1.	Programming	<ul style="list-style-type: none"> <li>• Establishing the objectives of operational programs/ priority axes;</li> <li>• Establishing the types of eligible operations;</li> <li>• Establishing eligibility as well as assessment criteria for the potential beneficiaries;</li> <li>• Allocation of funds according to components/geographical areas;</li> </ul>
2.	Elaboration of funding application	<ul style="list-style-type: none"> <li>• Providing information or clarifications to potential applicants, preferentially;</li> <li>• Providing counselling for part of the applicants;</li> <li>• Involvement in consultancy activities;</li> <li>• Postponing deadlines in order to favour some applicants;</li> </ul>
	Selection of funding applications	<ul style="list-style-type: none"> <li>• Transmitting confidential information regarding the assessment process;</li> <li>• Accepting documents, corrections or additional papers, throughout the assessment, beyond what is allowable according to applicable rules;</li> <li>• replacing or removing part of the documents submitted in the bid file;</li> </ul>
3.	Monitoring of financed projects	<ul style="list-style-type: none"> <li>• Accepting justifying documents that are not in accordance with the applicable rules;</li> <li>• Ignoring infringements of some applicable rules, discovered either at the level of reports, or during field visits;</li> <li>• Recommending the award of subcontracts to certain natural/legal persons;</li> </ul>
	Assessment of financed projects	<ul style="list-style-type: none"> <li>• Preferential favourable interpreting of assessment criteria and indicators of projects;</li> <li>• Ignoring the infringement of applicable rules, discovered at the level of reports;</li> </ul>



4.	Assessment of funding programmes	<ul style="list-style-type: none"> <li>• Preferential favourable interpreting of assessment criteria and indicators of funding programmes;</li> <li>• Ignoring the infringement of applicable rules.</li> </ul>
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Table 3: Possible conflicts of interests within the main stages of structural instruments



## 2. Special Elements

There are two identifiable special elements for the prevention of conflicts of interests in the documents specific to the projects financed by European funds: the declaration of impartiality and contract clauses.

The declaration of impartiality is signed at the beginning of the assessment process of the bids, funding applications etc. With respect to contract clauses, the funding contract: special conditions, the funding application, including annexes, the correspondence and the documents submitted with a view to concluding the contract, as well as other various instructions, report templates, visibility rules etc. are meant to prevent the occurrence of a conflict of interests.

### CASE STUDY 2

#### Conflicts of interest and EU funds – public procurement

The general principles of integrity that apply to the public procurement sphere, as well as to the other domains of the public sector, are spelled out in the Law no. 161/2003 regarding some measures for guaranteeing transparency in the exercise of public dignities, public functions and in the business environment, for preventing and sanctioning corruption<sup>34</sup>.

However, as already mentioned in the first section of this chapter, provisions on incompatibilities and conflicts of interest are included in the specific legislation on public procurement.<sup>35</sup> A special section from the GEO no. 34/2006 that is named “Rules to avoid conflicts of interest” describes what is prohibited in order for the parties involved in the procurement process to steer clear from this infringement.

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<sup>34</sup> Official Gazette no. 273/2003.

<sup>35</sup> Art. 66-70 forming the section “Rules to avoid conflicts of interest”, from the second chapter of the GEO no. 34/2006 as modified.



## BOX 2

GEO no. 34/2006 regarding the award of public procurement contracts, public works concession contracts and services concession contracts

Published in Official Gazette no. 418 - 15/05/2006

Consolidated version on 23/06/2009

## Chapter II

## Section 8

## Rules to avoid conflict of interest

Art. 66. - During the application of the award procedure, the contracting authority must take all the necessary measures in order to avoid situations likely to cause a conflict of interest and / or the appearance of unfair competition.

Art. 67. - The person or entity who participated in the preparation of tender documentation has the right, as economic operator, to be tenderer. Associate tenderer or subcontractor, but only if his or her involvement in the preparation of tender documentation is not likely to distort competition.

Art. 68. - Natural or legal persons directly involved in the verification / evaluation of applications / bids are not allowed to be candidate, tenderer, associate tenderer or subcontractor, under the penalty of exclusion from tender procedures.

Art. 69. – The following persons have not the right to be involved in the verification / evaluation of applications / tenders:

a) the persons who hold shares, parts of stocks, shares of the subscribed capital of one of the tenderers or subcontractors, or persons who are part of the management board / governing body or supervisory body of one of the tenderer/applicant or subcontractors;

b) the spouse, relative or in-law relative up to four times removed, of the persons who are part of the management board / governing body or supervisory body of one of the tenderers/ Applicants;

c) the persons that are found to potentially have an interest likely to affect their impartiality during the process of verification / evaluation of applications / bids.

Art. 70. – The contractor is not entitled to employ, for the fulfilment of the public procurement contract provisions, natural or legal persons who were involved in the verification / evaluation of applications / tenders that were submitted during the process of application of award procedures, within at least the following 12 months from signing the contract, under penalty of invalidity of the contract for immoral cause.

As stated in the Government Decision no. 925/2006 on the norms of application of the provisions contained in the GEO no. 34/2006, during the process of application of the awarding procedure, the contracting authority has the obligation to take all the necessary measures in order to avoid the situations that might determine a conflict of interest and/or unlawful competition. In case these situations prove to have occurred, the contracting authority has the obligation to eliminate the effects that the abovementioned situations have produced and take all necessary measures to correct, modify, revoke or annul etc. those acts that affected the lawful application of the procurement procedure.<sup>36</sup>

GEO 34/2006 contains clear provisions regarding incompatibilities and conflicts of interest for the members of the CNSC<sup>37</sup>. According to these, they have the obligation to submit the declarations of wealth and interests<sup>38</sup> and are not allowed to carry out commercial activities, directly or conducted by other persons; to be associates or members in the executive, management or control bodies in civil companies, trading companies, including banks or other credit institutions, insurance or financial institutions, national companies, national associations or state enterprises; to be members of economic interest groups; to be members of political parties and carry out political activities or participate in political activities; to hold any public or private function, with the exception of didactic activities, of scientific research and of literary-artistic creation; to run any other professional activity or consultancy. Furthermore, they are not allowed to participate in solving a legal dispute if they are subject to one of the following situations: when he/she, their spouse, their ascendants or descendents have a particular interest in solving the legal dispute or when he/she is the spouse, the relative or the in-law relative up to four times removed, with any party involved; if he/she was under criminal trial with any of the parties involved up to 5 years prior to the respective legal dispute; if he/she issued a public position on the legal dispute in the process; if he/she received goods or promises to receive goods or any other advantages from any of the parties involved.

The ANRMAP representatives responsible of the evaluation / verification of the application of the public procurement law have the obligation to act according to the objectivity and impartiality principles in the exercise of their office, and to assure the confidentiality of the facts, information and documents, with the exception of the information of public interest. As well, they are forbidden to request or receive money or other material benefits and to create personal advantages in connection with or resulting from their position<sup>39</sup>.

The UCVAP agents who are designated to conduct the ex-ante control over the procurement procedures must comply to the same legal provisions regarding the incompatibilities and conflicts of interest as they are stipulated

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<sup>36</sup> Art. 2(3) of the Government Decision no. 925/2006 approving the norms of application of the provisions of GEO no. 34/2006, as modified.

<sup>37</sup> Art. 264, GEO 34/2006, as modified.

<sup>38</sup> Law no. 161/2003 regarding some measures for ensuring transparency in carrying out public functions, preventing and sanctioning corruption, as modified.

<sup>39</sup> Art. 14(1), g), h), i) of the Order no. 107/2009.

in GEO 30/2006<sup>40</sup>, as well as with the confidentiality clause regarding the acts, information or documents assimilated to the awarding procedures under verification<sup>41</sup> and that do not fall under the scope of the legislation on the free access to information of public interest.

Specific rules on gifts and hospitality are included in codes of conduct which are regulated by the Law no. 7/2004 and the Law no. 477/2004 and transposed in the internal procedures.<sup>42</sup> According to these rules, public servants and other contractual staff are not allowed to request or to accept gifts, services, favours or any other advantages which are addressed to them, their family, friends or persons with whom they had business or political relations, that may affect their impartiality in the exercise of their functions or that may constitute a reward in relation with these functions.

An essential role in detecting and handling of situations of conflicts of interest is attributed to the National Integrity Agency, whose mission is to control the wealth gained while exercising a public function, conflicts of interest and incompatibilities.<sup>43</sup> According to the relevant legislation, the National Integrity Agency functions as an autonomous administrative authority of control and enjoys operational independence. Practically, the President, Vice-President and the integrity inspectors are not allowed to request, nor receive dispositions regarding the conduct of verifications from any public authority, institution or person. The ANI is able to verify all the persons involved in the allocation, ordering, payment and verification of the EU funds, including the members of the evaluation commissions of the projects that receive European financial support. In addition, the Audit Authority attached to the Court of Accounts may have, throughout its external public audit activities (as it is mentioned above), a basic role in identifying possible and existing conflicts of interests involving persons who deal with EU funds.

The administrative and judicial review is ensured in all cases of procurement procedures<sup>44</sup>. The public procurement legislation describes the procedures for complaints and stipulates important provisions on the legal proceedings. The reasoning for these provisions is to ensure a viable and flexible public procurement system and to avoid unnecessary delays in the implementation of major projects. The most important stipulations in this field refer to:

- the right of those economic operators that were involved in the tendering process, to request the adoption or annulment of an act issued by the contracting authority, the recognition of a claimed right or a legitimate

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<sup>40</sup> Art. 8, GEO 30/2006, as modified.

<sup>41</sup> Art. 20, Government Decision 942/2006, as modified.

<sup>42</sup> Law no. 7/2004 on the Code of Conduct for civil servants(r2), Official Gazette no. 525 - 02/08/2007 Law no. 477/2004 on the Code of conduct on the contractual staff from public authorities and institutions, Official Gazette no. 1105 - 26/11/2004

<sup>43</sup> Law no. 144 /2007 on the establishment, organization and functioning of the National Integrity Agency, republished, Official Gazette no 535- 03.08.2009.

<sup>44</sup> Chapter IX GEO 34/2006.

interest, by judicial or administrative proceedings<sup>45</sup>. Thus, the number of complaints addressed to the CNSC that unnecessarily delay the finalization of the procurement process would be reduced;

- the reduction of the period for the issuance of a decision on the reasons of complaint;
- the obligation of the economic operator to notify the contracting authority in case the operator intends to bring the matter to court and the right of the contracting authority to take those measure that are considered appropriate in order to remedy the situation<sup>46</sup>; however, it is also provided that the absence of the notification does not exclude the submission of the request to the competent judicial authority<sup>47</sup>. Moreover, insofar as the appellant considers that the measures taken by the contracting authority are sufficient to remedy the acts alleged to be unlawful, the complainant may abandon the appeal.
- in the case of tender procedures per lots, the submission of a complaint suspends the procedure for the award of the respective lot without affecting the entire procedure<sup>48</sup>;
- provisions referring to the applicable procedure to solve the complaint in court.<sup>49</sup>

#### Solving Complaints

In general terms, the solution of complaints by administrative-judicial proceedings supposes that the complainant addresses either to the CNSC or to the competent court (the submission of a double complaint being prohibited), but before addressing to the competent Court, the claimant notifies the contracting authority with regard to the intention to seize the court for matters of legal violations. After having received the notification, the contracting authority may take any measures it considers necessary to remedy the alleged violations, including the suspension of an award procedure or the revocation of an act issued within the respective proceeding. Following the measures taken by the contracting authority, the injured party may waive the right to legal proceedings or to the trial proceedings<sup>50</sup>.

#### Appeal against decisions

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<sup>45</sup> Art. 255 GEO 34/2006 as modified.

<sup>46</sup> Art. 256<sup>1</sup> GEO 34/2006 as modified.

<sup>47</sup> Art. 256<sup>1</sup> (5) GEO 34/2006 as modified.

<sup>48</sup> Art. 277 (5) GEO 34/2006 as modified.

<sup>49</sup> Art. 286-287, GEO 34/2006 as modified.

<sup>50</sup> Art. 256, GEO 34/2006, as modified.

In what may concern the submission of grievances to the decisions issued by the CNSC, following a Decision of the Constitutional Court,<sup>51</sup> it is now acknowledged that any person entitled, according to the legislation, to lodge a grievance with regard to the CNSC' decisions, may address it to the CNSC or directly to the competent court. The provision that was under the Constitutional Court's discussion stipulates that the grievance against a decision of the CNSC is submitted to the CNSC which is to forward the dossier to the competent court within 3 days from the deadline for exercising an appeal.<sup>52</sup>

The Court that is competent to give a legal hearing to complaint against the decision handed down by the CNSC is the Court of Appeal, contentious-administrative and taxation branch, according to the provisions of the Code of Civil Procedure.<sup>53</sup>

#### Dispute settlement in Court

The legal cases and requests regarding the acts of the contracting authorities, the compensation for damages resulting from the awarding procedure, as well as the execution, the nullity, the cancellation, the rescinding, the termination or withdrawal of public procurement contracts are settled in the Court of first instance, within the contentious-administrative and taxation branch. However, the disputes related to the tender procedures for services and / or public works of transport infrastructure of national interest are to be solved by the Bucharest Court of Appeal as first instance Court.<sup>54</sup>

The litigations regarding the awarding procedures and regarding the corresponding contractual rights and obligations have to be solved following the principles of emergency and pre-eminence by the respective Courts.

#### Sanctions

The public procurement legislation clearly stipulates the applicable sanctions<sup>55</sup> in case of legal violations. Considering that the contracting authority is ultimately responsible for the application of the public procurement law, the sanctions provided by the law regard the contracting authority as well.

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<sup>51</sup> Constitutional Court Decision no. 569/2008 on the admission of the exception of unconstitutionality of art. 281 para. (1) and the rejection of the objection of unconstitutionality of the provisions of art. 281 para. (2) and (3) of GEO no. 34/2006 concerning the award of public procurement contracts, of public works concession contracts and services concession contracts, published in MOF no. 537 of 16.07.2008

<sup>52</sup> Art. 281, GEO 34/2006, as modified.

<sup>53</sup> See Art. 304<sup>1</sup> of the Code of Civil Procedure, 26/07/1993, [consolidated version].

<sup>54</sup> Art. 286, GEO 34/2006 as modified.

<sup>55</sup> Chapter 10 of GEO 34/2006, as modified.



## BOX 3

GEO no. 34/2006 regarding the award of public procurement contracts, public works  
concession contracts and services concession contracts

Published in Official Gazette no. 418 – 15/05/2006

Consolidated version on 23/06/2009

According to the article 293 (Chapter X. Contraventions and penalties, Section 1. Contraventions) of  
the GEO 34/2006 as modified, the following facts represent contraventions and are sanctioned  
accordingly:

- a. the incorrect application of the rules of estimating the value of the public procurement contract
- b. the violation of the provisions regarding the tender documentation and the infringement of the elaboration rules of technical specifications
- c. the breach in the provisions regarding of procedures of open or restricted auction and negotiation
- d. the application of other award procedures than those laid down in the legislation
- e. the infringement of the transparency and publicity rules
- f. the infringement of the special transparency rules applicable to public procurement of advertising service
- g. the misapplication of data communication and transmission with the effects of restricting the access of the economic operators to the award procedures and that of transgressing the principles of equal treatment and transparency
- h. the use of qualification and selection criteria other than those laid down in the law,
- i. the violation of the proportionality principle through the use of the qualification and selection criteria as a means of restricting competition
- j. the use of other award criteria than the ones stated in the legislation
- k. trespassing the principle of efficient use of funds through the application of assessment factors that do not reflect the economic advantages of the contracting authority or that have a share in the final score that is disproportionate compared to quantified economic advantages
- l. the incorrect enforcement, within the selection and/or evaluation process, of the established criteria in the award documentation or the use of other criteria than those specified by the award documentation



- m. the refusal to provide to the ANRMAP or to other competent institutions with the information on the awarding of the public procurement contracts that these are entitled to request, according to the legal provisions

The contraventions are solved by fines and/or by the invalidity of the public procurement contract/framework agreement. The nullity of the contracts/framework agreements is declared only by the competent Court, following the request formulated by the ANRMAP<sup>56</sup>

There are also (internal) regulations applicable to the public institutions/authorities involved in the procurement process that contain provisions on the disciplinary sanctions for those infringing the legal requirements. As well, there are specific (internal) regulations that apply to the public bodies that deal with the regulation, monitoring, verification administrative-judicial review etc. of the public procurement sector. The common characteristics of these sets of rules regarding the applicable sanctions for breaches of internal procedures, bad performance or non-observance of the rules on incompatibilities and conflict of interest are laid down in the Law no. 188/1999 on the Statute of civil servants, as modified<sup>57</sup>.

The Code of Ethic Conduct laid down by the ANRMAP gives details on the prevention, identification and application of measures to combat corruption in the process of awarding public procurement contracts and to the facts related to the corruption phenomenon, as well as on the corresponding applicable sanctions.<sup>58</sup> Bearing in mind that corruption in public procurement may affect directly the financial interest of the European Union when Community funds are at stake, the Code of Ethic Conduct acts as a prevention tool for this sort of acts.

On the same token and serving the same purpose, the Regulation regarding the organization and functioning of the CNSC<sup>59</sup> stipulates that the disciplinary offences and penalties applicable to the CNSC members are set out in the Law no. 188/1999 on the Statute of Civil Servants, republished, with subsequent modifications and additions.

In what may concern UCVAP, the Operational Manual regarding the activity of observation and verification of the procedures of award of public procurement contracts, public works concession contracts and services concession contracts<sup>60</sup> enumerates the legal provisions that apply in terms of conduct and disciplinary measures

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<sup>56</sup> Art. 296<sup>1</sup>, OUG 34/2006 as modified.

<sup>57</sup> Law no. 188/1999 on the Statute of civil servants(r2), republished in the Official Gazette no. 365 / 29.05.2007.

<sup>58</sup> A.N.R.M.A.P., Code of Ethic Conduct in Public Procurement, <http://www.anrmap.ro/PDF/cod%20etica%20achizitii.doc>

<sup>59</sup> Government Decision no. 782/2006 approving the Regulation of organization and functioning of the C.N.S.C., Official Gazette no. 553 , 27/06/2006.

<sup>60</sup> The Manual has been approved by the Order no. 2181 of 23 November 2007 of the Ministry of Economy and Finances, Official Gazette, part I, no. 55 of 24.01.2008

for staff: Law no. 188/1999 on the Statute of Civil Servants, Law 7/2004 on the Code of Conduct of Civil Servants, and Law no. 161/2003 regarding on certain measures to ensure transparency in the exercise of public dignities, public offices and in business environment, prevent and punish corruption, with the subsequent modifications and additions. As well, this Manual contains a Code of ethical conduct of the observer responsible for the verification of the procedural aspects related to the process of public procurement contracts awarding. Compliance with this Code is mandatory for all UCVAP staff and that of the subordinated structures and the failure to comply may result in disciplinary accountability, civil or criminal offence. The disciplinary sanctions that apply to the civil servants are:

- a) written reprimand;
- b) the diminution of the labour rights by 5-20% for a period of up to 3 months;
- c) the suspension of advancement in pay grade or, where appropriate, of promotion in the civil service for a period between 1 and 3 years;
- d) the downgrading in pay or the downgrading in the civil service for a period of up to one year;
- e) dismissal from civil service.<sup>61</sup>

The crimes against the financial interests of the EU and the correspondent sanctions were introduced in the Law no. 78/2000 on the prevention, detection and punishment of corruption, as amended and supplemented, by means of the Law no. 161/2003.<sup>62</sup> Criminal investigations in these cases are made by the National Anticorruption Directorate, on the basis of a close cooperation with DLAF. (For a closer view, see "2. Protection of the financial interests of the EU in Romania")

The competence regarding the criminal offences against the financial interests of the European Union has been introduced in the legislation regulating the activity of the National Anticorruption Directorate through the GEO no. 134/2005.<sup>63</sup> Accordingly, DNA is competent pursue criminal investigations if the caused material prejudice exceeds the equivalent in national currency of euro 1,000,000, in the case of certain types of infractions stipulated in the Penal Code, in the Law no. 141/2007 on the Customs Code of Romania, and in the Law no. 241/2005 on preventing and combating tax evasion.<sup>64</sup>

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<sup>61</sup> See Art. 77(3), Law 188/1999(r2).

<sup>62</sup> Law no. 161/ 2003, Official Gazette no. 279 of 21/04/2003.

<sup>63</sup> GEO no. 43/2002 on the National Anticorruption Directorate, has modified with the adoption of the GEO no. 134/2005, Official Gazette no. 899 - 07/10/2005

<sup>64</sup> It is about the crimes provided for in Art. 215 para. 1, 2, 3 and 5, Art. 246, 247, 248 and 248<sup>1</sup> of the Penal Code; Art. 175, 177 and 178-181 of the Law. 141/1997 on the Customs Code of Romania, and those crimes provided for in Law. 241/2005 on preventing and combating tax evasion.



## BOX 4

Law no. 78/2000

Published in Official Gazette no. 219 - 18/05/2000

## Chapter III

## Section 4

## Offences against the European Communities' financial interests

Art. 181. - (1) The use or production of false, inaccurate or incomplete documents or declarations, resulting in unlawfully obtaining funds from the general budget of the European Communities or from budgets managed by them or on their behalf, shall be sanctioned with imprisonment from 3 to 15 years and interdiction of certain rights.

(2) The same sentence applies in the case of wilfully omitting to provide data required by law, in order to obtain funds from the general budget of the European Communities or from the budgets managed by them or on their behalf, if the act results in obtaining unjustly these funds.

(3) If the facts mentioned in para. (1) and (2) caused very serious consequences, the penalty is imprisonment from 10 to 20 years and the interdiction of certain rights.

Art. 182. - (1) The unlawful change of the destination of the funds from the general budget of the European Communities or of the budgets managed by them or on their behalf shall be punished by imprisonment from 6 months to 5 years.

(2) If the offence referred to in para. (1) caused very serious consequences, the correspondent punishment is imprisonment from 5 to 15 years and the interdiction of certain rights.

(3) The unlawful change of the destination of a legally obtained benefit, if the act results in the illegal diminution of resources from the general budget of the European Communities or from the budgets managed by them or on their behalf, shall be sanctioned with the punishment provided at para. (1).

Art. 183. - (1) The use or production of false, inaccurate or incomplete documents or declarations, resulting in the illegal diminution of resources from the general budget of the European Communities or from budgets managed by them or on their behalf, shall be sanctioned with imprisonment from 3 to 15 years and interdiction of certain rights.

(2) The same sentence applies in the case of wilfully omitting to provide data required by law, if the fact results in the illegal diminution of resources from the general budget of the European Communities or from the budgets managed by them or on their behalf.



(3) If the facts mentioned in para. (1) and (2) caused very serious consequences, the penalty is the imprisonment from 10 to 20 years and interdiction of certain rights.

Art. 184. - The attempt of the infractions laid down in the Art 18<sup>1</sup>-18<sup>3</sup> is to be punished.

. Art. 185. - The violation by fault of an employment obligation through its failure or its improper performance made by the director, the manager or the person in charge of decision-making or control within an economic operator, resulting in any of the offences laid down at art. 18<sup>1</sup>-18<sup>3</sup> or the offence of corruption or money laundering in connection with the funds of the European Communities, committed by a person who is subordinate to and who acted on behalf of that operator, is punished by imprisonment from 6 months to 5 years and interdiction of certain rights.



## IV. Whistleblowers

It goes without saying that Law no. 571/2004 concerning the protection of personnel within public authorities, public institutions and other institutions reporting infringements of the law is also applicable concerning the area covered by the EU financial support. As the management of the Community funds is done by the member states through their specific administrative structures, any person working inside these structures or pursuing an activity related to the allocation, ordering, payment or verification of EU funds is subject to the provisions of the whistleblowing law.

Art. 5 of the aforementioned law mentions explicitly that offences against financial interests of the European Communities, and violations of the legal provisions concerning public procurements and the non-returnable financing are covered by the Whistleblower Protection Act.

The public procurement legislation also clearly stipulates the sanctions applicable in case of legal violations. Considering that the contracting authority is ultimately responsible for the application and respect of the public procurement law, the sanctions provided by law are generally directed to the contracting authority.

Nevertheless, the internal regulations on which each institution performs its functions also provide sanctions against breaches of internal procedures, for bad performance or for non-observance of the rules on incompatibilities and conflict of interest. These sanctions are also provided for by Law no. 188/1999 on the Regulation for public servants, as modified.

### 1. Conceptual definitions

1. Whistleblowing is the disclosure made in good faith with regard to any deed or action that involves breaching the law, professional deontology or principles of good management, efficiency, efficacy, cost effectiveness and transparency.
2. Whistleblower is the person who reports in good faith any deed which is in breach of law, professional deontology or principles of good management, efficiency, efficacy, cost effectiveness and transparency and who is part of a public institution or whose work is supported through public funds or who manages public goods or resources.

3. Disciplinary committee is any body in charge of disciplinary duties, pursuant to law (both Law no. 188/1994 on the Status of Public Servants and Law no. 53/2003 on the Labour Code) or to internal regulations of public authorities or institutions.

4. Public integrity requires that three conditions be cumulatively met:

- a. Making unbiased decisions irrespective of the beneficiary;
- b. Complying with the principles of transparency and competitiveness;
- c. Ensuring a good management in terms of cost effectiveness, efficacy and efficiency;

For these conditions to be easily met in the absence of a check list for each deed or action, the following 'safety nets' will be considered:

- Complying with procedures, without derogation
- Ensuring the transparency of administrative procedures
- Avoiding preferential or discriminatory practices
- Adopting solutions which ensure achieving the target with minimum resources
- Complying with legislative orders
- Avoiding conflict of interests
- Acknowledging limitations and devolving competence
- Meeting principles which lay the foundation for the law.<sup>65</sup>

5. Corruption, in a broader sense, is the abusive use of power for the purpose of satisfying a personal or group interest.

Any action of an institution or authority which results in a prejudice to public interest, for the purpose of promoting a personal interest/profit may qualify as 'corrupt'.

Nonetheless, it is possible to flag a corruption deed in the absence of a prejudice (physical or material) to public interest.

In a nutshell, we may say that we have a case of corruption as long as a public servant, taking advantage of his/her position, obtains personal benefits for him/her or others, except for those he/she is entitled to by law (wages/remunerations).

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<sup>65</sup> See chapter Principles of the Law

This broader definition of corruption is transposed in the Romanian law through several definitions of specific crimes falling under the umbrella of the generic term of corruption, such as: giving and accepting bribe, influence peddling, receiving undue benefits etc.

## 2. Why should there be a law regarding the protection of whistleblowers?

The Law on whistleblowers, the operational name of Law no. 571/2003, was drafted in order to ensure the framework for the self-regulation of the integrity system within public administration and public services.

The Law covers the need to develop public integrity in a professional way by engaging the personnel of public administration in the fight against corruption, through:

- Encouraging a civic attitude centred on compliance with law and by limiting a personalized behaviour within public institutions;
- Increasing the efficiency of the fight against corruption;
- Heightening the integrity of public institutions and authorities.

The Law introduces some new elements in an effort to defend public integrity:

- a) Applicability of the law to all public institutions and authorities and to national state owned companies;
- b) Encouragement to defend public interest;
- c) Principle of non abusive sanctioning;
- d) Principle of good management;
- e) Principle according to which the disclosure regarding a breach of law may be made by one or several public or private entities, as the whistleblower may see fit;
- f) The principle of good faith requires the whistleblower to act in good faith in making the disclosure; still in line with this principle, the whistleblower is only required to prove his/her good faith and the burden of proof regarding the existence or non existence of a breach lies with the person that brings the matter before the disciplinary committee which is to decide on the whistleblowing act.
- g) The publicity of the disciplinary commission's meetings for the inquiry of the whistleblower for abuse of their right to blow the whistle.

Whistleblowing is meant to uncover things and to open the system to the public by defeating the 'law of silence'. According to most disciplinary regulations, if public servants want to flag a breach of the principles of law or good management their only options were disciplinary commission or the superior or in worst case scenario the prosecutor, any other way may be easily sanctioned as creating a prejudice to the institution. At present, such provisions are no longer in force by establishing the special status of Law no. 571/2004 in relation to the Labour



Code and Law no. 188/1999 on the Status of Public Servants, at article 10 of its text. Moreover, with regard to public servants, Law no. 50/2007, amending Law no. 7/2004 regarding the code of conduct of public servants, expressly states that this code of conduct does not justify any derogation from the right of public servants to make disclosures under Law no. 571/2004 on the protection of whistleblowers.

The Law per se creates the safety instrument in case a public servant or contractual employee intends to refuse carrying out an order which the latter sees as illegal owing to its possible effects.

Another purpose of the law is to create the premises for defending the image of professional bodies within the public sector by allowing them to take attitude. Expressions such as 'they are all the same' may be avoided only by protecting people from 'dalmatians' inside the system or even by excluding the latter or ensuring their withdrawal from the system.

The Law on whistleblowers naturally adds to the regulatory system in place, together with Law no. 682/2002 on the protection of witnesses, extending its provisions also outside the legal and judiciary framework and adapting protection to the specificity of public administration.

Another effect of the law is that the obligation to act, under the deontological and disciplinary provisions which demand the public servant to react to abuses they witness, can no longer be eluded due to fears of reprisal. These are the first steps in the disciplinary sanctioning of complicity and secrecy.

### 3. Principles of the law

The principles which form the basis of this law are the key to its interpretation and application throughout the various situations it regulates and contribute to setting the framework for individualizing whistle blowing when protection mechanisms are invoked.

The principles also apply to situations which are not expressly regulated by the law but which are supported by the judicial reality that the law is regulating. They reflect the spirit of the law limiting interpretation to finalities which ensure the protection of the whistleblower and not to those devoid of such effects.

Another important role of the regulatory component of the principles which govern the law is covering a potential legislative gap created by the final provisions which expressly stipulate that Law 571/2004 derogates from the Labour Code and the Status of Public Servants and from any other subsequent norms applicable to categories of employees within the public sector. In this regard, some provisions defending the supremacy of public interest and compelling to meet the principle of good faith have been transferred.

#### 3.1. Good Management

This principle calls for all public entities to carry out their activity for the fulfilment of public interest, in a highly professional way, efficiently, efficaciously, cost effectively and compliance with this principle is ensured through compliance with the other indicative principles.

Its application implies that representatives of public entities must be unbiased and fair to all persons addressing them and that they should be acting within a reasonable time interval.

This is supported by the very Constitution of Romania, according to which all are equal before the law and public institutions, without privileges or discriminations (art. 16) and which enshrines the citizen's right to file petitions (art. 51), imposing on public institutions the obligation to provide an answer pursuant to the terms and conditions set out by the law.

Several norms were adopted in the internal legislation, enshrining as principles each of the elements forming this principle.

A first component is the transparency of the activity, which in turn encompasses two dimensions, namely involving the public in the decision-making process and ensuring their access to information of public interest.

On the other hand, transparency is limited to keeping personal data confidential, as an obligation incumbent on the personnel managing such information.

At the same time, legislation stipulates the obligation to provide reasons for deeds issued by most public entities, especially of a judicial or criminal and administrative nature, whereby petitioners' requests are discarded.

The personnel is liable for acts and deeds which are directly or indirectly in breach of these principles and citizens are entitled to request damages for prejudices they suffered (art. 52 – Constitution of Romania).

### 3.2. Efficiency

According to this principle, guidelines must be drafted in answer to real needs, existent in the community which public entities are serving, and their application must take place based on clean-cut hierarchised objectives and on prior impact assessments. These guidelines must be applied within the scheduled deadline, as established in assessments, so as not to increase costs associated with their implementation.

Thus, efficiency involves ensuring a favourable balance between resources used and results yielded.

Nonetheless, the application of this principle goes beyond the above mentioned information, namely: the activity carried out should be aimed at yielding maximum and not merely reasonable results in comparison with resources used. This implies a quality management performed by a well trained and responsible personnel.

### 3.3. Effectiveness

The application of this principle is closely linked to the application of the efficiency principle and implies the effective use of resources, protecting the resources of the public entity from inadequate use or loss as well as identifying and managing liabilities.

At the level of public entities, this implies attaining to a high extent the purposes set forth and solving public problems which have been brought to their attention.

The effectiveness of an activity may be assessed depending on the extent to which scheduled objectives are achieved and on the ratio between estimated effect and real result for the respective activity.

So, we can say that an activity is effective when scheduled objectives are achieved in line with initial designs, with a minimum of resources and in due time. It is necessary to take into account that these conditions must be met cumulatively in order to ensure a maximum effectiveness. Any minus or plus versus initial designs generates a change in the ratio and a dwindling effectiveness, either as a result of overestimating objectives and using needless resources or of underestimating objectives which makes it impossible to get the result wanted with the resources allocated.

### 3.4. Economy

Economy relies on the two principles mentioned above and involves minimizing the cost of resources allocated in order to achieve the estimated results of the activity, ensuring the necessary quality of these results.

This principle is dependent on the other two and their separate application is impossible. For this reason, the three principles are also known under the name the 'Three E's': efficiency, effectiveness and economy.

### 3.5. Transparency

The conviction that higher transparency may lead to more responsibility is expressed on a much wider scale. It is similarly acknowledged that a fundamental and long lasting change of attitudes and practices may only occur by capitalizing on the three cornerstones of a country: state, private sector and civil society.

Traditionally, by transparency we mean a particular working style of some entities, which make their activity public at all times. Yet, this notion encompasses several dimensions: free access to public information, transparency in the decision making-process and budget execution and identification of personnel in their relation to third parties. (For a wider view on the first two dimensions, see the correspondent chapters present in this Guide.) This last form of transparency is justified by the individuals' interest to know the person responsible for the act or deed affecting them so as to use their right to challenge the public servant's actions when these are seen as illegal or abusive. On the other hand, there is also an interest for the public entity, namely that of knowing the name of the public servant to be served with a third party claim or who is liable for the prejudice created to the citizen by threatening a right or legitimate interest, through failure to carry out their work duties adequately.

The application of this principle is an important tool in ensuring that other principles are complied with, such as: supremacy of law, equal rights before the law and responsibility. In this way, transparency is meant to protect public interest, national and European, reducing the likelihood of a defective management or corruption. On the other hand, it plays a crucial part in protecting the rights and interests of individuals given that it provides a legal basis for the administrative decision and therefore it helps the party in question exert its right of correcting deficiencies by using the available means of appeal stipulated in the law.

### 3.6. Legality

Traditionally, this principle has the following meaning:

- a) the duty to comply with the legal provisions
- b) ordering all legal provisions in a single, unitary system which implies the compliance of inferior regulations with the superior ones;
- c) laws should be adopted by the competent authority, according to the procedure specified in the Constitution.

From a material point of view, legality means that all legal provision adopted by state authorities shall be general and impersonal and that every single action of the state authorities shall be performed based on and according to the previously adopted general and impersonal provisions. From a formal point of view, any legal provision shall be adopted by the competent authority, as specified in the Constitution or in other laws.

Special attention should be paid to ensuring the citizens' rights and liberties which are guaranteed in the Constitution, the subsequent legislation and the international treaties to which Romania is a party.

This also applies for the rules of procedure, free competition and equal treatment of the beneficiaries of public services, in accordance with the legislation.

In order to ensure that this principle is efficiently applied, legislation should be passed based on an in-depth analysis of the measures proposed and on a correct analysis of the consequences of applying these measures.

On the other hand, the related obligation of the addressees of the legislation - natural and legal persons, private or public organisations – is that of strict compliance with the legislation.

State institutions, officials and other public entities shall be organised and shall perform their duties in strict compliance with the legislation and the subordinated regulations, according to the competences granted to them by the law. Furthermore, they have the obligation to apply the legislation in force in strict compliance and without deviations, as well as to prevent any case of breach of the citizens' fundamental rights and liberties.

### 3.7. Supremacy of the public interest

Interest means the preoccupation of a natural or legal person to do something in order to satisfy a need. The legislation in force only considers legitimate interests; that is, those interests which can be valued according to the legal provisions.

Law no. 544/2004 on contentious-administrative matters defines the legitimate public interest as the possibility to claim a certain conduct, considering the collective exercise of a fundamental right or, as the case may be, the defence of public interest. This definition concerns those general collective interests related to the fundamental rights granted by law, which are collectively exercised.

At the same time, public interest also refers to ensuring the rule of law and the constitutional democracy, guaranteeing the fundamental rights, liberties and obligations of the citizens, satisfying community needs and creating the competence of public authorities.

On the other hand, private legitimate interest refers to the fact that a person has the possibility to claim a certain conduct, considering the exercise of a future subjective right, which can be foreseen. In other words, such private interests are connected to a right which is granted (and acknowledged) by law to an individual who intends to exercise this right in the future, as means of satisfying a need.

As specified by Law no. 571/2004, the rule of law, integrity, impartiality and efficiency of the public authorities and institutions and of other bodies specified in article 2 are protected and promoted by law.

Therefore, the supremacy of public interests should be understood as the priority of public interest as compared to private or individual interests, not to the disadvantage of the latter, but as a sum of the private joint interests and a guarantee that all private interests which may be contradictory and over which joint interests should prevail shall be ensured.

### 3.8. Responsibility

This generally means that a person or a public entity should explain, justify and be responsible for its actions in front of administrative, legislative or judicial authorities. Responsibility is an instrument to ensure that other principles are ensured, such as: the rule of law, transparency, impartiality and equality before the law, as well as values such as: efficiency, effectiveness and profitability.

The responsible performance of acts of authority implies commitment, compliance with the law and the professional deontology, performance of tasks, as well as the acceptance and liability for their consequences, in case previous requirements are not met.

Law no. 571/2004 defines responsibility as the duty of each person who reports a breach of the law to support this accusation with data or clues concerning the breach of the law. The whistleblower must only prove that he/she has evidence or clues related to the breach of the law, because proving the actual action is the task of the competent authorities.

This principle is tightly connected to the presumption of innocence, which should favour the person who is the object of the report, until his/her guilt is proved.

Every whistleblower should report in good faith, persuaded that he/she is telling the truth. This law does not apply to unreal or abusive reports. The person who presents such a report can be liable for the report.

### 3.9. Prevention of abusive sanctions

According to this principle, persons who report or complain against a breach of the law, either directly or indirectly, cannot receive an unfair and more severe sanction for other disciplinary violations.

The principle of prevention of abusive sanctions should be related to the principle of good faith. It should also be taken into consideration that a whistleblower that reports in good faith should not be sanctioned, even if, following the investigation, the report is proved unfounded. In this case, vindictive sanctions applied by the person who was the object of the unfounded report shall not be allowed.

In case of whistleblowing, the deontological or professional rules which prevent whistleblowing shall not apply.

### 3.10. Good Conduct

The law protects and encourages whistleblowing as long as it protects a public interest. This should be related to aspects which concern public integrity and good administration, with the purpose of increasing the administrative capacity and the prestige of public entities.

The reason of whistleblowing is that of preventing and fighting against violations of the law, codes of conduct or principles of law which govern the good administration.



### 3.11. Balance

This law shall not constitute sufficient grounds to request a lesser administrative or disciplinary sanction for a more severe action.

The principle of balance means that an appropriate sanction should be applied for each action, without arbitrary judgements.

### 3.12. Good Faith

Good faith is the whistleblower's confidence that the reported action is a breach of the law, of the professional deontology or of the principles above and that the respective action was committed by the person named by the whistleblower. At the same time, whistleblowing should have the purpose of protecting a public interest and only in a subsidiary manner that of protecting a private interest, if the reported action harms both the public and the private interests.

Until proved otherwise, it is presumed that the whistleblower acted in good faith.

In these conditions, the whistleblower is protected by law and can request from the disciplinary commission or the similar body that conducts the disciplinary investigation following the report to invite the press and a representative of the trade/labour union or the professional association. Furthermore, the court can cancel the sanction if it was applied following whistleblowing done in good faith.

Therefore, good faith protects the people against denunciation, abusive exercise of rights and instability.

## 4. The applicability scope of the law

### A. Public Entities

From the analysis of the internal regulations in force, we can conclude that the concept of public entity has two major components:

#### 1. The one determined by the type of tasks assigned by law: public authorities and institutions

The Parliament, the Presidential Administration, the ministries, the other special organs of the central and local public administration, other public authorities, autonomous public institutions and the institutions subordinated to them, irrespective of the way in which they are financed

#### 2. The one determined by the use of public funds in the activity: budget sources, managed goods, services assigned under monopoly

##### a) entities the directors of which are main budget administrators

Ministries, special organs of the central public administration, autonomous public institutions

##### b) entities the directors of which are secondary or tertiary budget administrators: public institutions incorporated as legal persons and subordinated to the main budget administrators

- secondary budget administrators;
- tertiary budget administrators.

##### c) Private institutions owned by the state or of which the state is shareholder:

- National Societies;
- National Companies;
- Autonomous administrations of national interest;
- Autonomous administrations of local interest;
- Companies with state-owned majority capital;

##### d) Other budget administrators: hospitals, public libraries, social canteens, schools, high schools and state universities



## B. Categories of personnel

Based on these grounds, personnel employed based on Law no. 571/2004 can be classified as follows: The personnel of public entities is made up of:

- public servants, who are persons appointed in a public office from the structure of a public institution of authority, having certain prerogatives which are meant to ensure that they fulfil their duties, defined as public powers with the purpose of ensuring a public interest.
- personnel employed based on an individual labour contract, according to the Labour Code. For this category of personnel, the level of studies is irrelevant, Such may be the case of the director of a deconcentrated institution - such as the School Inspectorate, as well as that of a cashier or a cook working at the social canteen
- Personnel employed based on special laws: doctors, teachers, police officers, court clerks, priests, etc.

The Criminal Code in force includes the other two categories of personnel in that of public servants, who are defined as any person who performs, either permanently or temporarily, under any form and irrespective of the manner of appointment, tasks of any kind for a public entity.

## 5. Deeds that may become the object of whistleblowing

A. Corruption offences, offences included in the category of corruption offences, offences directly related to corruption, forgery and malfeasance while in office or other job-related offences;

### 1. Corruption offences

#### a. Taking/giving bribery (Criminal Code, articles 254 and 255)

Taking bribery (art. 254 of the Criminal code) is the act of a public servant who claims or receives money or other undue benefits, or accepts the promise of such benefits or does not reject it, in order to perform, not to perform or to delay the performance of an action with regard to his/her job duties or in order to perform an action that is contrary to these duties.

Giving bribery (article 255 of the Criminal Code) is the same offence, but reversed, and is the act of promising, offering or giving money or other benefits to a public servant, in order to satisfy an interest against the law.

It shall not be considered an offence if the public servant whom the money was offered to was not entitled to perform the action for which he/she was bribed.

#### b. Receiving undue advantages (Article 256 of the Criminal Code)

Receiving undue advantages is defined as the act committed by a public servant of receiving, either directly or indirectly, money or other benefits after having accomplished an act by virtue of his/her office and which was incumbent upon him/her because of his/her office.

#### c. Influence peddling and buying influence – (Criminal Code, article 257 and Law no. 161/2003, article 6<sup>1</sup>)

This offence is defined as the request of money or other benefits from a natural or legal person, by another person who is influential or who claims that he/she has influence over a public servant in order to determine him/her to perform or not to perform an action which is part of the job duties of that public servant.

The person has committed the offence of influence peddling even if he/she does not really have the alleged influence. According to the law, a person who has or claims to have influence has committed this offence when accepting or requesting money, influence or other benefits, or when accepting a promise, a gift, towards the stated purpose of influencing a certain professional conduct of that public servant.

If the influence buyer had the initiative of influence peddling, in order to consider that a person committed this offence, the active subject must have actually received the money or products or have accepted the influence buyer's promise concerning money, products or other advantages.

If this was the initiative of the influence peddler, than the request is enough to consider that he/she has committed this offence.

## 2. Offences assimilated to the corruption offences

- a) deliberately establishing a diminished value, compared to the real market value, of the assets of business enterprises in which the state or an authority of the public administration is a shareholder, (committed) during privatization or on the occasion of a commercial transaction, or of the assets of public authorities or public institutions, when these are sold, committed by directors, administrators or managers;
- b) granting subsidies by infringing the law or not keeping track of the beneficiaries of the subventions, as the law requires;
- c) using subsidies for other purposes than those for which they had been granted and using loans guaranteed from the state budget or reimbursed from the state budget for other purposes than those for which they had been granted.
- d) It is also an offence when a person who, by virtue of his/her office, of the duty or task appointed to him/her, has the obligation to supervise, control or liquidate a private business enterprise, performs certain tasks for this enterprise, mediates or facilitates the conduct of business or financial operations by the respective private business enterprise or is a shareholder in such enterprise, if this brings him/her undue advantages, either directly or indirectly.
- e) if they are performed for the purpose of obtaining, for oneself or for another, money, goods or other undue advantages, the following actions are considered offences:
  - performing financial operations, such as trading, which are incompatible with the office held or with the task carried out by a person, or concluding financial transactions by using the information obtained by virtue of one's office, duty or task;
  - using, either directly or indirectly, information which is not public or granting access to such information to unauthorized persons.
- f) When a person who has a leadership office in a party, trade union, employers' organization, or a foundation uses his/her influence or authority in order to obtain for himself/herself money, assets or other undue advantages.
- g) The blackmail offence, involving a person who:
  - holds an office in a public authority or institution, irrespective of the manner in which he/she was appointed;
  - permanently or temporarily holds an office or performs a task, according to the law, in the public service, in an autonomous administration, a business enterprise, a national company, a national society, a cooperative authority or other business enterprise and takes part in the decision-making process or can influence this process;
  - has control prerogatives, according to the law;

- grants specialized assistance to the units stipulated under letter a) and b), to the extent to which he/she participates in the decision-making process or can influence the decisions;
- who, irrespective of their office, controls or grants specialized assistance, to the extent to which he/she participates in the decision-making process or can influence decisions with respect to: operations which involve capital circulation, banking operations, currency exchange or loan operations, investment operations in stock exchanges, insurance, mutual investment or operations regarding the bank accounts or those assimilated to them, domestic and international transactions;
- holds a management office in a political party or formation, a trade union, an employers' organization, a non-profit association or a foundation;

#### h) Abuse of office

Law no. 524/2001, amending and completing Law no. 78/2000 on the prevention, discovering and sanctioning of acts of corruption included in the category of acts of corruption the abuse of office against the public interest, against personal interests and by restraining certain civil rights, if the public servant obtained financial or non-financial advantages for himself/herself or for another person.

The purpose was to reduce the number of cases of abuse of office, which, until now, resulted, in the best case, in cancelling the actions performed. Another purpose was to stress the severe sanctions of the abuse of office against personal interests.

- The abuse of office against personal interests (art. 246 of the Criminal Code) is the act of the public servant who, by doing his/her duty, consciously does not perform an action or performs that action in a faulty manner, thus harming the legal interests of a person
- The abuse of office by restraining certain civil rights (art. 247 of the Criminal Code) is the deed of the public servant who restrains the exercise of certain persons' rights or creates for this purpose a situation of inferiority based on race, nationality, ethnicity, language, religion, gender, sexual orientation, membership in a political party, views, fortune, social origins, age, disability, chronic non-contagious disease or HIV/AIDS infection.
- The abuse of office against the public interests (art. 248 of the Criminal Code) is the deed of the public servant who, by doing his/her duty, consciously does not perform an action or performs that action in a faulty manner, thus seriously disturbing the performance of a state institution or organ, or other public institution, or a damage to the assets thereof.

### 3. Offences directly related to corruption offences

- a) the concealment of goods obtained by means of an offence stipulated in sections A and B, as well as favouring the persons that committed such offence;
- b) the association for the purpose of committing an offence stipulated in sections A or B or under point 1 of this section;
- c) the forgery and the use of forgery, committed in order to conceal the fact that one of the offences stipulated in sections A and B had been committed, or committed for achieving the aim pursued by such an offence;

- d) abuse of office against the public interests, abuse of office against personal interests and abuse of office by restraining certain civil rights, if these offences were committed for the same purpose as that of an offence stipulated in sections A and B;
- e) blackmail, committed in relation with the offences stipulated in sections A and B;
- f) the offences of money laundering, when the money, goods or other values are the result of an offence stipulated in sections A and B;
- g) smuggling goods which are the result of an offence stipulated in sections A and B or committed to achieve the purpose of such offence;
- h) tax evasion offences, committed in relation with the offences stipulated in sections A and B;
- i) fraudulent bankruptcy and the other offences stipulated in Law no. 31/1990 on business enterprises, committed in relation with the offences stipulated in sections A and B;
- j) drug trafficking, trafficking toxic substances and non-compliance with the regulations concerning firearms and munitions, committed in relation with an offence stipulated in sections A and B;
- k) human trafficking, committed in relation with the offences stipulated in sections A and B;
- l) an offence stipulated in the Government Emergency Ordinance no. 159/2001 for the prevention and fight against using the financial-banking system for financing acts of terrorism, committed in relation with an offence stipulated in sections A and B.

#### 4. Forgery and malfeasance while in office or other job-related offences;

##### B. Offences against the financial interests of the European Communities;

These offences have already been included in the Chapter III, section 3.

##### C. preferential or discriminatory practices or treatment in the exercise of competences by public units

Preferential or discriminatory practices are not legally defined under the law, but reference is made to the overall legislation on discrimination or uncompetitive practices.

In case a whistleblower wants to signal the existence of such practices, he must simply invoke the administrative procedures, point out the deviations and make sure these deviations are not a constant bad practice, but are in direct connection with the applicant.

As a defender of public integrity, the whistleblower is not required to draft the entire legal dissertation of the situation, but he must make reference to the legal regulation of the institution and to current practice.

#### D. breach of the provisions on incompatibilities and conflicts of interests;

Incompatibilities and conflicts of interests have already been treated in the Chapter III.

#### E. Other situations provided by the law

1. abuse use of material or human resources;
2. political bias in exercising job duties, except for persons elected or appointed on a political basis;
3. breaches of the law on access to information and decision-making transparency;
4. breaches of legal provisions on public procurement and non-reimbursable funds;
5. incompetency and negligence on-the-job;
6. non-objective personnel assessments during recruitment, selection, promotion, downgrading and dismissal;
7. breaches of the administrative procedures or establishing new internal procedures in breach of the law;
8. issuing administrative documents or documents of other type which serve group or client interests;
9. faulty or fraudulent management of public and private patrimony of public units;
10. breach of other legal provision which require observance of the principle of good administration and the principle of protection of public interest.

Although it is not clearly defined which of the legal provisions represent at the same time maladministration<sup>66</sup>, seven potential causes of maladministration have been highlighted by a decision of the European Parliament in reference to the procedure of the European Ombudsman (in the Romanian institutional system the equivalent of the European Ombudsman is the People's Attorney).

- a. lack of transparency;
- b. avoidable delay,
- c. discrimination,
- d. unfairness or abuse of power (administrative, not criminal excess of authority)
- e. non-compliance with procedures
- f. legal/judiciary error;
- g. negligence on-the-job (poor operation or incompetence)

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<sup>66</sup> Art. 41 of the Charter of Fundamental Human Rights of the EU signed in Nice in 2000 it is referred to as "right to good administration" and it stipulates that any person is entitled to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. It makes reference to the obligation of the administration to give reasons for its decisions and to make good any damage caused by the institution or its servants in the performance of their duties.

These acts are not corruption offences and in general an act of maladministration should not be regarded as corruption. It is important to retain that such acts can be generated or may generate acts of corruption, if behind an apparent “maladministration” there is a motive (amounts of money, benefits, influence etc.)

## 6. Legal methods of protection

Law no. 571/2004 provides that a notification of public interest may be made alternatively or cumulatively to one of the following entities:

- a. juridical bodies;
- b. bodies in charge of finding and researching conflicts of interest and incompatibilities;
- c. parliamentary commissions;
- d. the mass-media;
- e. professional, trade union or employee union organisations;
- f. non-governmental organisations
- g. the hierarchical superior of the person breaching the legal provisions;
- h. the manager of a public entity which the person breaching the legal provisions is a employee of, or within which the illegal practice is signalled, even if the author cannot be identified;
- i. disciplinary committees or other similar bodies within the public entity which the person breaching the law is an employee of.

The legal protection is determined on two procedural levels and for two legal realities of providing protection against persecution.

### A. Administrative level

Its main characteristics are the impossibility of launching a disciplinary investigation concerning the whistleblower for the integrity warning, starting from the following working hypothesis:

- In case the disciplinary procedure is launched, the whistleblower must state his capacity, because the law does not impose rights not invoked and because the right must be opposed to the authority to allow enforcement of the law.
- In case the disciplinary committee perseveres, considering that it is the use of privileges without any rights when the law imposes an open and transparent procedure, and removes the burden of proof by granting the whistleblower the presumption of good faith.
- whistleblowers enjoy a presumption of good faith, until proven otherwise;
- at the request of the whistleblower under disciplinary investigation as a result of a warning act, the meetings of the disciplinary committee shall be made public;
- the whistleblower under disciplinary investigation may take part in the administrative investigation in person or may be assisted or represented by lawyers;
- at the request of the whistleblower under disciplinary investigation as a result of a warning act, the disciplinary committees of other similar bodies within public authorities, institutions or other units, are

under the obligation of inviting the media and a trade union or professional association representative. The announcement must be made by press release on the website of the public authority or institution or state unit, at least 3 working days before the meeting, otherwise the report and the disciplinary sanction shall be null;

- in case the person denounced in the warning in public interest is a hierarchical superior, direct or indirect, or it is a person with duties of control, inspection and assessment of the whistleblower, the disciplinary committee or another similar body must provide protection of the, by hiding his identity;
- The public servant whose act is the object of the notification is submitted, under penalty of nullity, a copy of the notification against him.
- The public servant displeased with the disciplinary sanction applied may address the National Agency of Public Servants, which, according to the law, has capacity to bring proceeding and may request a control on the compliance by the public authorities or institutions of the legislation on the public office and public servants.

#### B. Judiciary level

It is represented by the litigation court or by employment disputes and relies on the following working hypothesis:

- The burden of the proof concerning bad faith rests with the institution and not the whistleblower.
- In case the whistleblower is sanctioned for his warning act, it shall recognize the absolute nullity of the sanction only by recognizing the capacity of integrity whistleblower, without going into a debate on the substance of the notified act, which may be the object of another dispute.
- In case the court finds that the person sanctioned is the integrity whistleblower, it shall check ex officio the sanctioning procedure in case the person is sanctioned for another act subsequent to the warning, to make sure it is not a case of indirect and disproportional sanctioning.
- The law presumes the existence of an integrity whistleblower, and subsequent to this the observance of the conditions shall be verified. Also, the law presumes good faith in the disciplinary procedure, and in the litigation procedure the burden of proof rests with the person contesting the capacity of the whistleblower.

If whistleblowing refers to corruption offences, offences related to corruption offences, offences in direct connection with corruption offences, forgery and offences on-the-job or related to the job, and offences against the financial interests of the European Communities, then the provisions of art. 12 paragraph (2) letter a) of Law 682/2002 on witness protection shall apply ex officio.



## V. Glossary

- public servant – a person holding a public office under the terms of Law 188/1999 on the statute of public servants;
- contractual personnel or contractual employee - a person appointed to a position within public authorities and institutions, under the terms of Law 53/2003, as subsequently amended;
- public office – the set of duties and responsibilities set forth by the public authority and institution, based on the law, for the purpose of exercising its competences
- office – the set of duties and responsibilities set forth by the public authority or institution, based on the law, in the job description;
- public interest – an interest which involves the protection and observance by public institutions and authorities of rights, freedoms and legitimate interests of citizens, acknowledged by the Constitution, the internal legislation and international treaties of which Romania is a signatory, as well as carrying out job duties, in observance of the principles of efficiency, effectiveness and economy of resources.
- personal interest – any advantage, either material or of a different kind, pursued or obtained, directly or indirectly, for himself or for others, by a public servant using their reputation, influence, facilities, relations or information to which they have access, as a result of exercising their job duties;
- conflict of interests – the situation or circumstance in which the direct or indirect personal interest of the employee is contrary to the public interest, which influences or could influence his independence and impartiality in making decisions or in carrying out on time and objectively his duties in exercising the position held;
- information of public interest – any information with regard to the activity or resulting from the activity of a public authority or institutions, regardless of its format;
- personally identifiable information – any information regarding an identified or identifiable person.
- operational programme – a document presented by a Member state and approved by the Commission, which defines a development strategy in line with a coherent set of priorities, for the achievement of which a Fund must be resorted to or, in case of the convergence objective, the Cohesion Fund or the ERDF;

- priority axis – one of the priorities of the strategy in an operational programme, consisting of a group of correlated operations with specific measurable objectives;
- operation – a project or a set of projects selected by the Managing Authority in charge of the operational programme in question, in compliance with the criteria set forth by the monitoring committee and implemented by one or several beneficiaries, which allows achieving the objectives of the priority axis it refers to;
- beneficiary – an operator, a body or a company, in the public or private sector, in charge of the initiation or for the initiation and implementation of the operations. In the sense of the aid schemes in Art. 87 of the Treaty, the beneficiaries are public or private companies, which carry out an individual project and which receive public aid;
- public expenditure – any public participation in the financing of the operation, coming from the state budget, the budget of regional or local authorities, from the expenditures of the European Communities related to Structural Funds and the Cohesion Fund or any similar expenditure. Any contribution to the financing of the operations, made from the budget of public law institutions or RO 15/78 of the associations composed of one or several regional or local authorities or public law institutions, which act in accordance with Directive 2004/18/EC of the European Parliament and of the Council of the 31st of March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, shall be regarded as similar expenditure;
- intermediary body – any public or private body or service, which acts under the responsibility of a Managing or Certifying Authority and which carries out the duties on behalf of such Authority in relation to the beneficiaries which implement the operations;
- irregularity - any infringement of a Community law provision resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget.

## VI. Regulation summary

### General legislation on the management of non-refundable community funds

- G.D. no. 1179 of 29/07/2004 modifying and amending Government Decision no. 497/2004 on the establishment of an institutional frame for the coordination, implementation and management of structural instruments.
- G.D. no. 2001 of 16/11/2004 amending art. 18 of Government Decision no. 497/2004 on the establishment of an institutional frame for the coordination, implementation and management of structural instruments.
- G.D. no. 128 of 29/01/2006 modifying and amending Government Decision no. 497/2004 on the establishment of an institutional frame for the coordination, implementation and management of structural instruments.
- G.D. no. 577 of 13/06/2007 amending Government Decision no. 497/2004 on the establishment of an institutional frame for the coordination, implementation and management of structural instruments.
- Law no. 315 of 28/06/2004 on the regional development of Romania
- G.D. no. 1115 of 15/07/2004 on the development in partnership of the National Development Plan
- G.D. no. 759 of 11/07/2007 on the eligibility of expenditures incurred during operations financed through operational programmes

### Public procurement legislation

- G.E.O. no. 34 of 19/04/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts
- Law no. 337 of 17/07/2006 for the approval of the Government emergency ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts

- Law no. 128 of 05/05/2007 on modifying and amending Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts
- G.D. no. 925 of 19/07/2006 on the approval of standards of application of the provision related to the award of public procurement contracts under Government emergency ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts
- G.D. no. 1337 of 27/09/2006 amending Government Decision no. 925/2006 on the approval of standards of application of the provision related to the award of public procurement contracts under Government emergency ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts
- G.D. no. 71 of 24/01/2007 on the approval of standards of application of the provision related to the award of public procurement contracts under Government emergency ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts
- ANRMAP Order no. 183 of 03/11/2006 on the application of provisions related to the media advertising contract
- G.D. no. 1660 of 22/11/2006 on the approval of standards of application of the provision related to the award of public procurement contracts by electronic means under Government emergency ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts
- G.D. no. 525 of 30/05/2007 on the organization and functioning of the National Authority for the Regulation and Monitoring of Public Procurement
- G.D. no. 782 of the 14<sup>th</sup> of June 2006 on the approval of the Regulation of organization and functioning of the National Council for Settlement of Contestations
- G.E.O. no. 74 of 29/06/2005 on the establishment of the National Authority for the Regulation and Monitoring of Public Procurement
- Law no. 111 of 27/04/2006 for the approval of the Government emergency ordinance no. 74/2005 on the establishment of the National Authority for the Regulation and Monitoring of Public Procurement
- G.E.O. no. 30 of 12/04/2006 on the verification of procedural aspects related to the award of public procurement contracts

- Law no. 228 of 04/07/2007 for the approval of the Government emergency ordinance no. 30/2006 on the verification of procedural aspects related to the award of public procurement contracts
- G.D. no. 942 of 19/07/2006 for the approval of the standards of application of the Government emergency ordinance no. 30/2006 on the verification of procedural aspects related to the award of public procurement contracts
- Order of the Ministry of Public Finance no. 2181 of 23/11/2007 for the approval of the operational manual on the observation and verification of the award of public procurement contract, public works concession contracts and service concession contracts – model and contents of the forms and documents used

### State aid legislation

- G.E.O. no. 117 of 21/12/2006 on the national procedures related to state aid
- Law no. 137 of 17/05/2007 for the approval of the Government emergency ordinance no. 117/2006 on the national procedures related to state aid
- G.D. no. 1164 of 26/09/2007 on granting de minimis state aid for developing and modernizing enterprises

### Public finance legislation

- Law no. 500 of 11/07/2002 on public finance
- Law no. 314 of 08/07/2003 modifying art. 15 of Law no. 500/2002 on public finance
- G.D. no. 1856 of 21/12/2006 modifying the limit values concerning the approval abilities of technical economic documentation of new investment objectives
- Law no. 96 of 21/04/2006 on the Status of deputies and senators – modifies art. 61 of Law 500/2002
- Law no. 273 of 29/06/2006 on local public finances
- G.D. no. 1213 of 06/09/2006 on determining the frame procedure for assessing the environment impact of certain public or private projects

## Legislation on the general financial framework for managing non-refundable community funds granted to Romania

- G.D. no. 64 of 03/06/2009 on financial management of structural instruments and their use for the convergence objective.
- Law no. 249 of 12/07/2007 for the approval of the Government emergency ordinance no. 29/2007 on the allocation of structural instruments, pre-financing and co-financing granted from the state budget, including from the National development fund, to the budget of institutions involved in the management of structural instruments and in their use for the convergence objective.
- Order of the Ministry of Economy and Finance no. 911 of 10/08/2007 for the approval of the methodological standards of application of Government ordinance no. 29/2007 on the allocation of structural instruments, pre-financing and co-financing granted from the state budget, including from the National development fund, to the budget of institutions involved in the management of structural instruments and in their use for the convergence objective. 249/2007.

## Legislation on control and recovery of Community funds

- G.D. no. 79 of 28/08/2003 on the control and recovery of Community funds, as well as of improperly used related co-financing funds
- Law no. 529 of 11/12/2003 for the approval of the Government ordinance no. 79/2003 on the control and recovery of Community funds as well as of improperly used related co-financing funds
- G.D. no. 94 of 26/08/2004 regulating several financial measures
- G.D. no. 53 of 25/08/2005 regulating several financial measures in the budgetary and public accounting field
- G.D. no. 12 of 31/01/2007 modifying and amending Government Ordinance no. 79/2003 on the control and recovery of Community funds, as well as of improperly used related co-financing funds
- Law no. 205 of 02/07/2007 for the approval of Government ordinance no. 12/2007 modifying and amending Government Ordinance no. 79/2003 on the control and recovery of Community funds, as well as of improperly used related co-financing funds
- G.D. no. 1306 of 24/10/2007 for the approval of the methodological standards of application of Government ordinance no. 79/2003 on the control and recovery of Community funds, as well as of improperly used related co-financing funds

- G.D. no. 2396 of 21/12/2004 for the approval of the methodological standards of application of Government ordinance no. 79/2003 on the control and recovery of Community funds, as well as of improperly used related co-financing funds, approved by Government Decision no. 1.510/2003
- G.D. no. 1358 of 27/09/2006 for the approval of the methodological standards of application of Government ordinance no. 79/2003 on the control and recovery of Community funds, as well as of improperly used related co-financing funds, approved by Government Decision no. 1.510/2003

AA	Autoritatea de Audit Audit Authority
ANRMAP-	National Authority for the Regulation and Monitoring of Public Procurement (Autoritatea Națională pentru Reglementarea și Monitorizarea Achizițiilor Publice)
CNSC	National Council for Solving Complaints (Consiliul Național de Soluționare a Contestațiilor)
DLAF	Fight Against Fraud Department (Departamentul pentru Luptă Antifraudă)
GEO	Government Emergency Ordinance (Ordonanță de Urgență a Guvernului)
GO	Government Ordinance (Ordonanță a Guvernului)
OLAF	European Antifraud Office (Oficiul European de Luptă Antifraudă)
UCVAP	Unit for the Coordination and Verification of Public Procurement (Unitatea pentru Coordonarea și Verificarea Achizițiilor Publice)

Includes excerpts from:

Control and prevention of mismanagement of EU money. Training package for public servants implementing structural aid programs in Romania

Guide developed by Transparency International Romania and Anti-fraud Department (DLAF) within the “Control and prevention of mismanagement of EU money” project, financed by the European Anti-Fraud Office (OLAF) through the Hercules II programme

The integrity guide for the management of structural funds

Guide developed by Transparency International Romania within the PHARE project RO/2005/017/553.01.02/02/33 Building a national network of NGOs for the purpose of monitoring integrity in the use of structural funds in Romania

Whistleblowing

Implementation of the provisions on the protection of whistleblowers’ integrity– Monitoring report at the level of local public administration

Guide developed by Transparency International Romania within the PHARE project RO/2005/017/553.01.02/02/33 Strengthening the capacity of the civil society to promote public integrity at the level of local public administration

Guide on the legal methods to fight corruption in public administration

Guide developed by Transparency International Romania within the PHARE project RO/2004/016-772.01.05.03 Improving the fight against corruption, for the Ministry of Justice

Guide to integrity and good practice in public procurement

Guide developed by the Romanian Association for Transparency (Transparency International – Romania) within the Anticorruption Advocacy and Assistance Center for Citizens project (Advocacy and Legal Advice Center)