

Access to Public Contracts in Romania: A Compliance Puzzle - Foreign Participation, Subsidies & Investments

Public procurement rules in the EU are harmonized at a minimum, yet comprehensive level, by EU law, with the aim to create a level playing field for businesses across Europe.

Such rules may be relied upon by all economic operators established within the EU, as well as those established in countries that are signatories to the World Trade Organization Agreement on Government Procurement (the "GPA") or other international agreements by which the Union is bound no less favorably than EU economic operators.

No direct exclusion from public procurement procedures is provided under EU law for non-EU economic operators from countries which are not signatories of treaties binding the EU to grant free access to public procurement ("*third countries*"), this "gap" being subject to different approaches by Member States, as well as regulation of specific EU law tools.

Romanian Law Approach

Throughout Government Emergency Ordinance no. 25/2021, access to public procurement procedures has been limited only to operators established within EU, EEA, third countries that have ratified the GPA or other international agreements by which the EU is bound to grant free access to public procurement, as well as third countries that are in the process of joining the European Union.

While the compatibility of such restrictions (though under indirect aspects) with EU law is subject to interpretation by the European Court of Justice (Case no C - 266/22), it seems to have passed Commission scrutiny, within infringement procedure initiated in November 2023 (INFR(2023)2114).

The International Procurement Instrument ("IPI")

The IPI was established throughout Regulation 2022/1031, as a new tool enabling the Commission to assess whether EU companies are facing restrictive public procurement measures or practices when attempting to enter markets in third countries and to adopt IPI measures, which may take the form of a score adjustment or of an exclusion of tender.

Although, in Romania, IPI seems to have no direct effect on participation to public tenders, in case of public procurement procedures subject to a IPI measure, successful tenderers might be limited in the amount of goods that may be supplied from the respective third country.

The Foreign Subsidies Regulation ("FSR")

FSR requires notification to and prior approval by the Commission of foreign financial contributions granted by



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countries that are not EU Member States (thus including those granted by EEA, EFTA countries or candidate countries for EU membership) in connection with public procurement procedures within certain thresholds.

Regardless of the restrictions to third country operators from participating in public procurement procedures in Romania, FSR implies different assessments, namely the existence of a foreign subsidy and not the incorporation country of the company.

The Foreign Investment Directive ("FDI")

The FDI does not directly target public procurement procedures. It may, however, be applicable to any public procurement process that entails a foreign direct investment, such infrastructure concessions or PPPs.

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To summarize, while participation of *third country* economic operators to public procurement in Romania is restricted, regardless of nationality, all tenders are subject to notification of foreign subsidies and foreign direct investments. Moreover, an IPI measure might lead to limitation in the amount of goods originating from a *third country* that may be supplied within public procurement procedures.



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• At PNSA, the Public Procurement Practice Stands at the Forefront of the Market!

The Legal500 ranks PNSA PPP and procurement group top tier in the latest edition:

The PPP and procurement group at Popovici Nitu Stoica & Asociatii works closely with the firm's concessions, infrastructure and project finance offerings to support clients ranging from large entrepreneurs and construction companies to corporate entities across the energy, environment, IT, healthcare, and agriculture sectors. The development and implementation of national projects involving road rehabilitation, construction and utilities is the team's key area of strength; clients also praise the team's ability to work internationally. Practice head Florian Nițu is supported by the "*technically impeccable*" Ramona Pentilescu and Diana Dobra, who is noted for her experience in EU law.

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PNSA continues to support the Stradivarius International Tour

Popovici Nițu Stoica & Asociații pledged once again its full support to the Stradivarius International Tour, initiated and supported every year by the violinist Alexandru Tomescu, also ensuring the legal services required for its organisation.

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