THE PRIORITY OF PUBLIC INTEREST PRINCIPLE IN THE PUBLIC PROCUREMENT CONTRACTS

Viorel ROȘ*
Andreea LIVĂDARIU**

Abstract

Important by object, value and general interest for which they are concluded, the public procurement contracts have a dual nature, although they are most often qualified as administrative contracts, with particular characteristics. Based on models known as FIDIC contracts, they contain standard clauses, but also clauses in accordance with the specifics of the contracted works and the need to adapt them to the problems that arise during execution. Terminating them is the last resort the parties should make use, but this can sometimes be inevitable. In such cases, the damages suffered both by the contracting authority and the entrepreneur may be significant.

The concept of "public interest" is assigned a supernatural aura of something that goes beyond the power of understanding of ordinary people, that is, those at whose service state administration should be in its broadest sense. The concept of "public interest", although overused in and by public administration, seems as difficult to define as the concept of "freedom". The "public interest" is for many people just like freedom: we all know what it is until we have to define it, explain it, apply it in concrete circumstances. The "public interest" seems to us, by its very nature, to be an imprecise, evolutionary and random notion. But in all cases, it is subsumed to the idea of the well-being of the public, not of the arbitrary will of the public authority, not of the eventual limited interest of such an entity.

In public administration "public interest" is so often mentioned and invoked that it can be said that it has already become a kind of legal institution but... without rules or with rules hard to identify! But an institution in law may be defined, as is well known, as a set of rules, substantive and procedural rules, set up to regulate legal relations, behaviours, and to take appropriate decisions in specific situations and penalize violations of accepted and known rules. Or shorter: the institution is a uniform set of legal rules that are joined together by object and purpose.

Keywords: *public interest, public procurement, contract, public authorities, contracting authority.*

1. The origins of the concept of "public interest"

Etymologically, the concept of "public interest" comes from English law, whereas that of "general interest" comes from French legal language. Despite what is sometimes claimed, namely that the "public interest" would be an "invention" from the beginning of the last century of an American lawyer named Louis Brandeis[1], it appears to be more like an "invention" of Aristotle. Anyway, we believe that this cannot be considered a serious deed compared to many others that have occurred in the history of intellectual property[2]. We could even add that the "public interest", taken as such, is just an idea. And like any idea, is free, that is to say, it doesn`t belong to no one and it is free for everyone at the same time, so it can be resumed and developed by anyone. But as Law No. 206/2004 on good conduct in research activity considers plagiarism as being also the appropriation of ideas from another person, we have to remember the one who has the right of priority in its formulation, more than 23 centuries ago.

In fact, Aristotle, in his book named ***Politics***, when referring to state revenue and expenditure (which are of general interest), he claimed that for the distribution of public works - jobs or services – it should not be taken into account the principle of quid pro quo, because the state has social policy considerations that have to change the prevailing principle in the private economy. Aristotle also stated that ***"the good is justice, that is, the general interest"***.

In the absoluble monarchies, the king and the state were one, according to the famous and synthical definition of Ludovic's 14th of France autocracy. But the sunset of this perspective on the relationship

* Professor, PhD, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: viorelros@asdpi.ro).

** PhD Candidate, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: andreea.livadariu@rvsa.ro).

[1] Louis Brandeis (1856-1941), has been a lawyer in Boston (quality in which he has been noted as a defender of the progressive cases and a *pro bono* defender which brought him the "Ombudsman" and the "Robin Hood of Justice" names), the parent of the concept of "right to privacy", his work on the subject, inspired by the new fashion of photography (being appreciated as one that added a new chapter in US law) and then a judge at the US Supreme Court between 1916 and 1939. It has been a critic of monopolies, all-powerful corporations and public corruption.

[2] In the context, we have to remember here that the famous statement attributed to J. B. Kennedy, made by him in his speech from 1961, when he took oath of office: *"Don't ask yourself what the country did for you, ask yourself what you did for the country"* belongs in reality to the Lebanese-American poet and philosopher Khalil Giban, being written more than 30 years before, to encourage their compatriots in their fight against the Ottomans. But it also belongs to Nicolae Iorga, assassinated in 1940, who in one of his writings urged: *"At the end of each day consider not what others have done toward you, but what you have done toward others."* Attributed unfairly, but with obsession to J.F. Kennedy, this had the effect of much repeated lies coming from an authority, which have been accepted as truths since it is useless to be contested!

between the state and the sovereign and on that between the state and its subjects was not far from the moment when it was made, Enlighteners such as Jean-Jacques Rousseau[3] supporting in their works the supreme value of the **general will** (of the sovereign people) and **the general interest by which he understood the common good** and the general act, that is the law. The same Jean-Jacques Rousseau, considered by Edmund Burke[4] as the principal ideologist of the French Revolution, argues that *"**since no man has a natural authority over his fellow human beings, no authority is legitimate unless it is based on the consent of those who submit to him.** Social order is a holy right that underpins all others. This right does not come at all from nature, but is based on agreements (...). Each of us shares the person and all his power under the supreme leadership of the general will; and we receive each as an indivisible part of the whole."*

That J-J Rousseau influenced the revolutionaries is also demonstrated by Le Chapelier[5], who had the initiative, in 1791, to disband the corporations. In his report on the law stated that *"there are no more corporations in the state, **there is only the individual's particular interest and general interest**"*. Interests that are not excluded one from each other. On the contrary, they are enhancing each other.

It is therefore not fair to attribute neither to John Stuart Mill[6] nor to his mentor, Jeremy Bentham[7], the "invention" of this concept of "public interest". But it can`t be excluded their important contribution to its development. However, the one who is considered to have influenced with his ideas regarding the "public interest" the case law is, indeed, Louis Brandies who invoked the concept in 1905 in a work in which he deplored the fact that good lawyers abdicated their duty to use their knowledge and skills for the protection of human beings, to protect the interests of big corporations. In other words, L. Brandies claimed that the public interest was about defending and protecting people, not corporations, whose interests are limited to profit and a small number of beneficiaries. But it was only more than 50 years after Brandies's work that young US law graduates started to define themselves as "**public interest lawyers**" to distinguish themselves from **corporate lawyers**. The concept was meant to warn that **they chose not to represent the interests of strong companies, but to be lawyers of those living in poverty, of the vulnerable**.

However, the concept of "public interest" is also found in the US press legislation of the '20s and this is perhaps the area that best demonstrates that **the "public interest" is imprecise, evolutionary and random**. Thus, for example, a few decades ago, of "public interest" was considered to be informing the public that one or another MP was homosexual or drug-consuming, being irrelevant his possible violent behavior in the family or to people of other colors, or to the fact that an accident has been committed in a state of inebriation. However, nowadays the vision of these types of behavior is completely different and it can be said that if "public policy" and "public interest" are not identical concepts, there is a close connection between them.

Little by little, along with principles such as "transparency" or "accountability", and later "economicity" or "efficient spending of public money", which are seen as the yardsticks of democracy and of the public economies of States (public finances) and rules of law and behaviour in actions without which the administration is not democratic and/or efficient, the concept of "public interest" has become... a principle of public administration and is now considered a foundation of public law. An area in which, although one of the most used terms, the concept of "public interest" is neither defined nor correctly understood.

While in the press, in morals or in pure politics, the concept of "public interest" is by definition evolutionary and non-homogeneous, it is not and cannot be the same in the public administration, a legal definition with a high degree of generality being welcome. Even if in the administration, it must be interpreted and applied in accordance with concrete circumstances. In other words, it's a case-by-case fact. However, it is not easy to define the concept of "public interest". And we believe that understanding and applying it correctly to each case in which it is invoked also involves taking into account the "general interest" and the "private interest".

---

[3] Jean Jacques Rousseau (1712 - 1778) became famous in France with an essay about the damaging consequences of the progress of arts and sciences on public morals. Its works "The Social Contract", "Emile" and "Encyclopedia" for which he worked with Diderot and, after writing and publication, have been banned in France, are considered fundamental to the 1789 French Revolution.

[4] Edmund Burke (1729-1797) detested J.-J. Rousseau, accusing him of never practicing a single virtue (there are enough arguments) and named him "*Socrates lunatic of the National Assembly*" (French, n.n).

[5] Isaac René Guy Le Chapier or Jean le Chapier (1754-1794), a French lawyer and a revolutionary politician, was a Member of the National Constituent Assembly and its first president for a short period (3-16 August 1789), dedicated to preparing important laws. Among those that were adopted with his contribution was the law against corporations, guilts, workers' organizations and the right to strike. Suspected of wanting to reinstate Royal Authority, also because of fear of terror fled to London (from where he came back to avoid the seizure of his property), he was charged with espionage, sentenced to death and guillotine on the same day as Malesherbes (lawyer of King Ludovic XVI, With Raymond de Seze).(*http://en.wikipedia.org/wiki/Isaac_Ren%C3%A9_Guy_le_Chapelier*).

[6] John Stuart Mill (1806-1873), utilitarian phylosopher.

[7] Jeremy Bentham (1748-1832) lawyer and philosopher with ideas of amazing timeliness. He promoted individual freedom and free initiative, separation of religion from the state, freedom of expression, universal suffrage, equal rights for women, the right to divorce, decriminalization of homosexuality, abolition of slavery and death penalty, the abolition of corporal punishment, including for children and animal rights.

2. "Public interest" and/or „general interest" and „private interest"

The "Public interest" and "general interest" are often considered in doctrine, especially administrative one, as they appear to be equivalent in terms of one and the same. In this view of the two concepts, the difference between them would only be of a semantic nature, so their different expression would seem to have no consequences in terms of substance. We believe that a difference between these notions, which are, however, interrelated, exists, it is obvious and important. The link is that both are considering an interest belonging to a large number of people. But the differences are not just about semantics. In particular, we do not believe that the terms "public" and "general", or those of "public interest" and "general interest", are equivalent and (always) interchangeable. The public interest is seen from the perspective of the authority. General, from a crowd perspective. This differentiation criterion is not enough either, but it still seems important to us: we do not have general institutions, we have public institutions and even the legal fiction called the Public Ministry.

As regards the "private interest" or "personal interest", it is most often seen in opposition to the "public interest" and/or the "general interest". Here things are relatively simple: the "private interest" and "public interest" or "general interest" cannot be in conflict or should not be in conflict. When the two categories of interest are fundamentally to the contrary, either the "private interest" is illegitimate, or the alleged "public interest" or the alleged "general interest" is contrary to the constitutional order, fundamental rights and freedoms of citizens, and in this case, it ceases to be a real "public interest" or a "general interest".

The concept of "public" itself has multiple meanings in law depending on the various branches of law. And within the same field, it depends on the context in which it is used. For example, the concept of "public" in criminal law is very distant from that of the public in administrative law, but it has no single meaning under criminal law either.

The most general meaning is the term "public" and "public interest" in administrative law (in which it is also considered to be the most important[8]), but also here the nuances may differ. In general, in administrative law, the term "public" refers to the state, to the whole population, to what is made available to all. However, public institutions do not only work to satisfy "general interests" or "public interests". Whenever they act, they also follow, even if only mediated, a private interest. And when all legitimate private interests are satisfied, the action of the public entity is of a "general interest" or a "public interest".

Public law (never called a general law) governs relations between public entities and between such entities and individuals, whereas private law consists of rules governing relations between individuals, understanding by private individuals, all those who do not hold a public office or are not in the exercise of public office. However, we note that the public interest and the general interest are protected both by rules under public law and by rules under private law. That the limitation of the rights of the data subject is justified by the need to protect the legitimate interests of all, i.e., the general interests, and that these general interests are implemented and protected by public institutions. But these entities are not called upon to defend only the general interests of the population, but also the individual interests, and when such an entity acts to protect an individual interest, its action also aims at protecting the general interest.

However, we do not believe that the concepts of "public interest" and "general interest" are equivalent and interchangeable, and the distinction between the two concepts can be easily seen and achieved when it comes to rights and freedoms, to the interests that are protected by the law: general interests by public law rules, legitimate interests of individuals under private law rules.

For the proper assessment of the relationship between the public interest and the private interest, we have to remember here that it is also a principle of law that which states that the authority acting in the name of the achievement of the "public interest", even when its action is intended to protect or penalize the rights of a private individual, is allowed only what the law expressly allows it, while the individual is allowed everything that the law does not expressly prohibit him.

3. The public interest and the priority of the public interest in public procurement contracts.

Europe's fallen behind at the number of kilometers of highways achieved over the last 30 years (we are last among EU Member States) but first in terms of the price per kilometer of highway built, Romania has paid huge amounts of money in compensation to contractors with whom it has contracted highway works and this cannot be in line with the public interest, the general interest or the particular interest. We believe that the (multiple) reasons of this state of affairs are also a wrong vision of the administration and of the entity representing the Romanian state in contracting for such works and as far as the public interest is concerned, the way in which it is intended to be truly accomplished.

The factual situation which led to the applied research from which this Paper was born is as follows (it comes as a study-case):

The BBB – Beneficiary (a contracting authority) announced in 2015 the organization of a tender for the construction of a highway segment and made available

[8] C. Clipa, "The concept of public interest, between legal definitions and economic speculation", *Romanian Magazine of Private Law* (Universul Juridic) no. 1/2019.

to bidders, inter alia, a geotechnical study carried out in 2007 and updated in 2011. The Geotechnical study classified the location of the auctioned segment of the highway as having a moderate geotechnical risk. The maps provided were not in line with the situation on the ground at the time of the tender. In addition, at the time of the tender, the beneficiary had not completed the procedures for expropriation of all the land necessary for the construction of the highway.

The tender was won in 2016 by the contractor AAA, with an agreed execution deadline of 18 months, of which 6 months for the design work and 12 months for the actual execution of the construction works. Under the contract, the works were scheduled to be completed by summer 2017.

After the conclusion of the contract for the execution of works, which also stipulated the time limits for the land to be given and the order to start works to be issued, the beneficiary requested twice to extend the date for the start of works by more than 5 months, the reason invoked being that the beneficiary was not provided with the funds (for the first 4-month extension) and that of non-completion of the expropriation procedures (for the second extension). The contractor accepted the beneficiary's requests and undertook (by the signed amendment) not to request penalties from the beneficiary for these extensions to the date of the location's handover and of the start of the works.

By conducting the geotechnical studies related to the design phase of the works, the contractor has found that the geotechnical risk level of the site is high and not moderate, as established by the beneficiary study of 2007/2011, that construction works and archaeological works were necessary in addition to those envisaged at the time of the conclusion of the contract and that those new elements involved a significant extension of time but also higher costs, given their scale and difficulty. The beneficiary, however, refused to grant the requested time extensions (the cost extensions being also rejected) and penalized the contractor's failure to implement the work schedule by terminating the contract.

Upon termination of the contract, the **contractor AAA**:

(i) has sued the contracting authority because the contracting authority has unduly terminated the contract;

(ii) has requested that the contract be terminated by judicial decision on the fault of the contracting authority;

(iii) has claimed damages of 60 million lei from the contracting authority and a significant amount of money as costs.

In turn, the Beneficiary BBB:

(i) has made a counterclaim requiring the contractor to pay interest for not fulfilling the obligations on term and to pay a half (1/2) of the costs of advice paid in the course of the performance of the contract;

(ii) resumed in 2020 the procedure for tendering and awarding works, completed in 2021 at a price of 9 million lei per kilometer higher than the one contracted with AAA.

By the judgment delivered in December 2020, both the AAA's main claim and the BBB's counterclaim were accepted by the court, a common fault was found in the failure of the contract and the beneficiary was forced the entrepreneur to pay damages of 20 million lei, whereas the entrepreneur had to pay damages of 3 million lei to the beneficiary. The court held that the beneficiary limited its claims to the payment of penalties and part of the advice given during the execution by the engineer, although the damage suffered as a result of the failure of the contract was higher.

One of the defenses of the Beneficiary during the process was that the termination of the contract was justified by the principle of priority of the public interest and of its primacy over the principle of freedom of contract.

The beneficiary has thus indicated that:

(i) ***in the settlement of disputes relating to the entering, execution and termination of an administrative contract, shall be taken into account the rule that the principle of freedom of contract is subordinate to the principle of priority in the public interest***;

(ii) ***while the principle of "contract is the law of the parties" applies to private contracts****, the administrative contract* ***contains four types of powers exercised by the public authority****, namely: (A) the power of direction and control which may be shown in instructions and orders; (B) the right to impose penalties for delays; (C) unilateral modification power under the public interest which is one of the fundamental characteristics of the administrative contract and (D) unilateral termination of the contract*;

(iii) ***the parties are not on an equal position in public procurement contracts***, as this is manifested in *the right of the administration to lay down, as a matter of principle, certain contractual terms (the so-called regulatory part of the contract) which cannot be negotiated with the entrepreneur and subsequently to unilaterally amend the terms imposed on the entrepreneur, in accordance with the public interest*;

(iv) that ***works on the public infrastructure of the state serve the public interest and aim at developing infrastructure in line with current needs and EU requirements****, so that they must have* ***the shortest possible deadlines for completion, that does not go far beyond the term assumed by entrepreneurs when signing the contracts***;

(v) that in public procurement contracts *the parties are obliged to accept certain regulatory clauses laid down by law or subsequent regulatory acts, but also have the power to negotiate other contractual clauses, however,* ***where the public interest so requires****, or where the performance of the contract is*

too difficult for particular, or has failed to perform his obligations as a result of default, the contract can be terminated unilaterally without recourse to justice;

(vi) that public procurement contracts *are also characterized by the special forms necessary for their conclusion, i.e., the specifications which contain some of the terms of the contract to be concluded, **with entrepreneur having only the possibility of accepting or refusing to conclude the contract***;

(vii) that *contracts for the design and execution of road infrastructure works are financed from public and European funds, which are strictly monitored and that any application by the contractor must be duly substantiated*;

(viii) *as a general rule, entrepreneurs do not respect the deadlines to which they commit and, during the execution of the contract, they seek to make use of any situation arising during the execution of the contract in order to obtain the extension of the execution period and the related additional costs*;

The court, it has rightly examined, this defense of the beneficiary, noting and expressing observations, judgments and arguments which can be summarized as follows:

(A) The public procurement contract has indeed the characteristics and characteristics shown by the beneficiary. However, the court added, *these contracts are concluded for **the purpose of meeting general needs** and it is undeniable that the road infrastructure is of **major public interest***, the special regulation of this type of contract being justified by the method of financing and the high value of the infrastructure, the need for public funds to be spent economically and effectively, whether from state budget or European funds;

(B) In the light of their value and importance, and of the needs to be satisfied by the performance of the contracts, the conclusion of the contracts requires that the public authority draw up complete, accurate and updated documentation, such that the tenders and the appointment of the successful tenderer make it possible to carry out the contracts **in line with the need to achieve public interest objectives**.

(C)The fact that **the parties are not on an equal footing in public procurement contracts does not mean that the procuring entities may abuse their position and that the principle of contractual balance, involving related rights and obligations, can be ignored**. This does not mean that the public authority is entitled to impose the performance of the contract on a timely basis and to impose sanctions, including that of termination of the contract, where the non-performance according to the terms of the contract or non-performance of a contractual obligation by the performer is also due to fault (higher, lower or exclusive) of the public authority.

(D) In public contracts, too, the rights and obligations of the parties to the contract must be established in a manner which respects the principle of contractual equilibrium but also which makes it possible both for the contracting authority and the entrepreneur to fulfill their obligations.

(E) the inequality between the parties in public procurement contracts and the way in which they are financed *does not transform the contractual relationship of public procurement contracts into one of subordination. On the contrary, their value and the public interest call for deeper cooperation by contracting parties even in the case of private contracts, because both the public authority and the entrepreneurs have to work together to satisfy the public interest.*

In our opinion, other arguments can be added to the those of the court. And we begin here by mentioning the contractual imbalance, to the extent that it exists and makes it impossible to perform the works, to carry out the contract and thus to carry out the public interest. Obligations which cannot be met by entrepreneurs cannot be imposed in the name of the public interest and contractual balance must also exist in such contracts. The contractual imbalance exists whenever the real costs of the contractor would be higher than the real value of the works performed. The contractual imbalance, whether it does exist, it makes impossible to carry out the contract and to satisfy the public interest, because it does not meet the public interest that the entrepreneur is unable to fulfill his obligations, whose effects are propagated in the chain. However, this does not create wealth: the benchmark of "public interest" is ultimately the well-being of all.

However, despite its importance, public procurement laws have not defined the "public interest" and do not provide criteria for its assessment. By trying to identify such criteria, we should first recall that the "public interest" must be identified, as "public order" by the judge, on a case-by-case basis, obviously with due regard for the general principles of law, the rules of law relating to incidents and the particular case in which they apply.

Indeed, despite its importance, neither Ordinance no. 34/2006, which governs the contract from which the rose the dispute which is subject to our comments, nor Law no. 98/2016 (applicable to award procedures initiated after the date of its entry into force), defines the “public interest” or the “public interest priority”.

A legal definition of the "public interest priority" is, however, stated in the Law no. 477/2004 on the Code of Conduct for contracting staff of public authorities and institutions, which states that ***“the priority of the public interest is a principle that contractual staff have the duty to consider the public interest above the personal interest in the performance of their duties”***. Form this definition we understand that **although the public interest is superior to the personal interest, these interests are not mutually exclusive and are interrelated**.

The doctrine, in the few dedicated works, defines the "public interest", similar to the definition of "legitimate public interest" met in the law on administrative litigation, as ***"that interest which aims***

***at the rule of law and constitutional democracy, and this implies the guarantee and observance by the institutions and public authorities of the legitimate rights, freedoms and interests of citizens, meeting community needs, carrying out the competence of public authorities" and/or "performing the service tasks in accordance with the principles of efficiency, effectiveness and cost-effectiveness of resource spending"* (article 2 (1)(r) of the Law no. 554/2004)[9].**

It follows that even according to the administrative law and doctrine:

(1) the public interest aims at **guaranteeing and respecting citizens' rights and freedoms**;

(2) **the public interest does not annihilate the private interest**, on the contrary, it is intended **to guarantee and leverage it**;

(3) achieving the public interest means **satisfying the general interest, the needs of the population** and

(4) the public interest obliges the beneficiaries of budget funds and public money, to spend them in accordance with the principles of transparency, efficiency and cost-effectiveness. However, as the **"resources"** (public money) are made up of and on the basis of contributions from the public, private persons, it follows that the aim pursued and the obligation of the authority to make transparent and effective use of financial resources is also imposed in respect of the legitimate interests of citizens.

These conclusions are not, however, sufficient where the public interest is called into question for a decision to terminate public procurement contracts, in particular those of the type from which the dispute analysed in the present paper arose, that is to say, contracts of high value and the realization of which the public authority is interested and which involve not only substantial material resources. Then it is necessary to examine the practical application of the principle to the present case.

In contractual matters, the common sense of interest obliges all participants in the legal life to be bound by the contractual rules they have themselves agreed, the fact that these rules are laid down in purely civil law contracts (the rules of which are, however, to a large extent applicable), either of administrative law being devoid of special legal significance.

Generally seen, **the interest** appears to be **a concern to obtain success, advantage**. Nor from this point of view the two categories of interest (public and private) does not exclude each other: the public interest can only be that of gaining an advantage for the general population, **but neither should the particular interest be seen as merely to obtain advantages or profits for personal purposes, and this is because part of the profit (and not only part of the profit itself) is the source of revenue to the state budget or, where appropriate, local budgets, by compulsory levies (taxes and duties) due according to the law**. In other words, the realization of the private interest, of the profit, part of which is to be paid as taxes on the state budget in order to secure the funds necessary for the realization of the general interest expenses.

In the case of public procurement contracts, the interest, satisfaction of the interest is also the reason for the **selection** of any legal entity **between two or more options** available to that entity and is the reason for **reasonable, profitable** (material and moral) **actions**, which is the reason why **any decision maker makes a decision, an act or commits an action**. And in the case of public authorities, who do not have their own interest in what they do, and who work and act not for themselves but in the general interest, their decisions must take this interest into account as a matter of priority. The correct decision of the acquiring authority depends on the correct identification and determination of the general interest and in determining it, the criterion of opportunity is one of those which even determines the legality of the decision.

In this respect, it should be noted that the Ordinance no. 34/2006, in article 287^7 (2) (introduced by the Ordinance no. 19/2009), provides when decisions must be taken as to whether or not such contracts are to be maintained. The provisions contained therein, although concern requests for **suspension and interim measures** which may be ordered by the courts in the event of such requests, are to be considered as being of principle for public contracts and, *mutatis mutandis*, they shall apply in all those circumstances in which the fate of such contracts is called into question.

According to this law:

(1) when dealing with an application for suspension or interim measures, the court must take into account **the likely consequences of the measure for all categories of interests likely to be harmed, including that of the public interest**;

(2) the court **may not order** the measure of suspension or interim measures if **their negative consequences could be greater than their benefits**; and

(3) that a decision **not to take provisional measures must not prejudice any other rights** of the person making the request for suspension or for interim measures.

We believe that if the legislator has provided for **provisional measures**, by definition, that they have to be time-limited, reduced and revisable (such strict rules) and made their adoption/disposal conditional on **any possible consequences**, requiring that **losses should not be greater than the benefits**, even more so, **these rules are applicable when the very existence and/or performance of public contracts is at issue**, i.e. when decisions are much more important than the time-limited measures, as is the case with termination of contracts. Such measures may be

[9] For the interpretation of article 2 (1)(r) of the Law no. 554/2004: E. Marin, *The administrative law no. 554/2004. Comments on articles*, Bucharest (Hamangiu, 2020), p. 30 and G. Bogasiu, *The administrative law commented and annotated*, Bucharest (Universul Juridic, 2018), pp. 58-134.

decided and/or ordered only with due regard for all interests and not only for the public interest, and in particular with due regard for, on the one hand, **the fact that measures with negative consequences greater than the benefits may not be ordered in the name of public interest**, and, on the other hand, the fact that measures taken on the grounds of the public interest cannot harm the rights and legitimate interests of other participants in the legal life.

4. Conclusions

We believe that the legislator has imposed an opportunity criterion not only for the provision of an investment in the budget and for the conclusion of public procurement contracts (article 42 of Law no. 500/2002 on public finances), but also when a measure is to be taken by the public authority concerning the termination of a public contract, because the main public interest is that of the performance of the contract, the public interest being satisfied by the achievement of the objective (obviously respecting the rules governing spending public money), and not by abolishing the contract that causes substantial material damage and extends the time required to achieve the goal. And where the losses resulting from such a measure taken by the contracting authority outweigh the benefits, the measure giving rise to such effects cannot be considered appropriate, cannot be considered to be in line with the "public interest".

We are, of course, convinced that the identification of the real public interest in public procurement contracts, in particular highway construction contracts, is a delicate matter, the good decision, the desirable decision involving complete information, the correct and fair assessment of these contracts, taking into account the concrete circumstances of the execution and problems arising during the performance of the contract, establishing whether or not there is justification for the performance of the obligations, interpreting the terms of the contract to the extent necessary to produce the useful effects for which the contract has been concluded, **assessment by the decision maker of the direct cost and time impact of its decision and the subsequent impact arising from the postponement of meeting the general interest which is the achievement of the objective.**

In addition, it is necessary to analyze and assess objectively the fulfillment of its obligations by the decision-maker (authority). It is necessary that the decision-maker not having fault in performing the contract, or contributing by his actions or inactions to the failure of the contract, the public interest – because in such situation, the parties' unequal position, the decision-making and supervisory powers of the authority may not be invoked by the authority to cover possible non-compliance with its contractual obligations or factual circumstances having an impact on the ability to fulfill obligations which were not fully and correctly addressed by the authority at the auction stage and at the time of the conclusion of the contract.

In the present situation, we believe that **the criterion of opportunity for termination of the contract was not fulfilled either**, given that the realization of the section of highway contracted with the entrepreneur whose contract was terminated was not recontracted until 2021 and that the financial losses are also significant, even taking into account only the price differences per kilometer of highway between the contract that was terminated and the contract concluded in 2021. However, as regards public expenditure, opportunity is also a criterion of legality: in the present case, the losses resulting from termination of the contract are high (in our view huge and difficult to identify in full), plus those necessary to conclude the new contract at a much higher price, which means that the termination measure was not legal in this respect.

It is true, however, that comparing and weighing the benefits and losses of such decisions is not easy. But it is in the public interest that this should happen. In the public interest it is also the obligation that the tenders for highway works be carried out on the basis of complete and correct documentation.

Termination of public contracts should be an extreme measure, desirable only in those situations where the breach of contractual obligations by any co-contractor has no other remedy given its severity.

References

- C. Clipa, "The concept of public interest, between legal definitions and economic speculation", Romanian Magazine of Private Law (Universul Juridic) no. 1/2019;
- E. Marin, The administrative law no. 554/2004. Comments on articles, Bucharest (Hamangiu, 2020);
- G. Bogasiu, The administrative law commented and annotated, Bucharest (Universul Juridic, 2018).