Promoting Social Considerations into Public Procurement Procedures for Social Economy Enterprises

Matrix explaining how social considerations have been embedded in the Romanian law transposing Directive 24/2014/EU

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March 2019

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Article 18(2) of the Directive ► Article 51 of Law No. 98/2016 on public procurement - published in the Official Gazette of Romania, Part I - the "OG" - No.390/23.05.2016 (national transposition law)			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 51. - (1)The contracting authority shall indicate in the tender documentation the mandatory regulations applicable in the fields of environmental, social and labour law established by Union law, national law or collective agreements or by the international treaties, conventions and agreements concluded in these fields, which must be complied with during the performance of the contract, or the competent institutions from which economic operators may obtain detailed information in connection therewith. (2) In the case provided under paragraph (1) above, the contracting authority has therewithal the obligation to ask economic operators to indicate in their tenders that, at the elaboration thereof, they duly observed the relevant rules applicable in the fields of environmental, social and labour law.	There aren't any *direct* implementing provisions in relation with this particular text. There are however a series of 'instructions' and 'guidelines' which the main Romanian regulatory authority – the National Agency for Public Procurement , i.e., the 'NAPP' – has issued to help practitioners apply the new rules, which contain examples of social criteria and clauses to be used in the procurement process (see for example the Procurement Guide, an electronic instrument administered by the NAPP and available at https://achizitiipublice.gov.ro/workflows/view. This matrix includes several draft tender documents which contracting authorities may use as such. Among them, documents for the acquisition of fuel – available at https://achizitiipublice.gov.ro/matrix/cell/79/1 etc. The NAPP recommends through this document that contracting authorities use instead of the 'lowest price' criterion a combination of factors among which 'the corporate social responsibility of the economic operator in relation with the concrete activity carried out under the contract'. This factor is thus purported to account for 5 to 10 per cent of the overall scoring. According to the cited instructions, additional points should be awarded for the 'nominal value determined as a portion of the total price of the contract which the contractor intends to invest for the improvement of the life of the community in which it carries out its activities, in areas such as health, security or environment'. As supporting documents, the	This provision aims at making the compliance with all the relevant *mandatory* provision contained in the applicable social and labour legislation a contract performance yardstick based on which contracting authorities may evaluate the delivery thereof and, upon the case, accept or deny the final takeover. This in the end may weigh decisively in other procedures where the same economic operator has the intention to participate as, according to Article 167 (1) g) from Law 98/2016 – which transposed Article 57 (4) g) from Directive 2014/24 – contracting authorities *must* exclude from the relevant procedure all bidders who *significantly* or *repeatedly* breached one or more *substantive* obligations set under a previous public contract. It nevertheless remains to be clarified whether the observance of social or labour law falls into the category of 'substantive obligations' or not. On the other hand, in line with the clarifications contained in Recital 40 of the Directive, the Romanian transposition law has established, but in some merely elusive general terms (and not necessarily in direct connection with the rule contained in Article 51), that the obligation to exclude a tenderer for not complying with the rules contained in Article 51 exists at all stages of the procurement (which means that the noncompliance with the social and labour laws may in fact be a reason for exclusion but also for the refuse to award the contract to that bidder even if it has passed the selection stage or, as	Relevant in this context are the Romanian Labour Code – i.e., the Law No. 53/2003, the Law No. 16/2017 on the posting of workers, the Law No. 67/2006 on the protection of the employees' rights in case of the transfer of undertakings, businesses or parts thereof, but also the national legislation transposing the relevant Directives adopted in the social field, as well as the Government Decision No.937/2018 for the setting of the basic minimum gross wage applicable at national level (which, in light of the CJEU's recent case law, in particular the RegioPost decision, and the provisions of the Law No.16/2017 and Law No. 67/2006, may be highly relevant). It is however worth mentioning that, currently, in Romania there isn't any collective agreement concluded at national level. According to Articles 264

	bidders are advised to present a draft investment plan, based on the quality of which the contracts are actually supposed to be awarded. It is however not clear how this scheme is able to effectively make sure the implementation of some concrete social objectives since the document offers no answers to the question how are contracting authorities supposed to verify whether the presented plans have been completely and correctly implemented during the life of the contract and especially what happens if the bidder that has been awarded the contract fails or refuses to implement it. Anyway, this arrangement resembles to a certain extent to the offsetting schemes characteristic to defence procurement (which, if applied on a general basis and not duly justified, may not comply with the general rules of the Treaties).	Article 51 explicitly sets forth, for the contract performance evaluation). It is an obvious inconsistency between Article 18(2) of the Directive and the other texts referring to the obligation to comply with the social legislation mentioned thereunder, and it is a pity that the Romanian legislature did not resolve it during the transposition process. Significant in this regard are Article 169 from Law 98 which will be discussed further below, in the table corresponding Article 57 from the Directive. This provision must anyway be read in connection with the provisions or Articles 164 (especially the paragraph concerning the exclusion of bidders for failing to comply with the rules on child labour and the trafficking of human beings), 165 (to do with the exclusion of bidders for not complying with their fiscal obligations) and 167 (establishing an obligation for contracting authorities to exclude from competition any economic operators who fail to comply, in general, with the obligations established under Article 51 of Law 98).	and 265 from the Romanian Labour Code, child labour and that performed by persons who are illegally residing in Romania and are victims of trafficking in human beings, are crimes. Moreover, according to Article 265 (4) b), the employers who are found guilty of having illegally employed victims of trafficking of human beings may, apart from the specific criminal sanctions, be forbidden to participate in future procurement procedures for up to five years.
Open questions	Paragraph (2) of the cited Article 51 is a bit elusive (e.g. it is not very clear what is the meaning of the reference made to the situation described in paragraph (1), nor how contracting authorities may verify whether the declarations made via tenders are true or not – since they apparently need not be also included in the ESPD and Articles 60 et seq. from Directive 2014/24 are not applicable to this situation). On the other hand, Article 51 appears to be particularly relevant in the context of the concrete delivery of the contract but, as explained above, is somewhat useless in the award procedure itself. The breach of any mandatory obligation stemming from the relevant 'social' legislation should thus translate in a defective delivery of the contract. The relevance of this is however not very clear, since the law fails to clarify which would be the relevance of this failure for future procedures and contracts. Thus, the wording of Article 167 from Law 98/2016 – allowing the exclusion of bidders for breach of previous public contracts or for grave professional misconduct etc., is really puzzling in this context, as the grave professional misconduct is defined in paragraph (3) and appears to rather be connected to bid rigging and the breach of IP rights but not necessarily to the failure to abide by the relevant social-law rules and obligations. In the same manner, Article 167(1)g) from Law 98 speaks of "main" contractual obligations (which are concretely defined under Article 167 (8) without any reference to the obligation to observe the social rules mentioned under Article 51) and it would be pretty difficult to demonstrate that/how the general obligation to follow the mandatory social laws and the concrete obligation to supply goods, or provide services, or do the works in the terms and conditions set by contract are on a par.		
Example of application from the national level (where applicable)			

Article 20 of the Directive ► Article 56 of Law No.98/2016 on public procurement			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 56 - (1) the contracting authority may reserve the right to participate in a procurement procedure to only the sheltered units authorized in accordance with Law no. 448/2006 on the protection and the promotion of the rights of the persons with disabilities, recast, as subsequently amended and completed, and to the social enterprises for insertion regulated by Law no. 219/2015 on social economy. (2) The call for competition shall make specific reference to this Article.	This Article is not accompanied by any concrete implementing provisions.	This article basically allows contracting authorities to foster the active involvement of social actors into the economic life of the state or region through the means of public procurement. It on the other hand gives contracting authorities the possibility to use specific public procurement mechanisms with the explicit purpose to boost the integration of certain categories of disadvantaged or otherwise impaired or debilitated persons into the labour market or with the other members of the community. The mechanism of reserved contracts is the only form of positive discrimination explicitly permitted by Directive 2014/24 in an area where fundamental public interests of a social nature prevail over the economic ones which, as a matter of principle, demand free competition as a guarantee needed to secure the four freedoms enshrined in the EU Treaties and which constitute the foundation of the Internal Market. Anyway, once it took the decision to reserve the contract for authorised sheltered units and/or social enterprises for insertion, the contracting authority must necessarily refer in explicit terms to Article 56 of Law 98 as the basis for this restriction, under the sanction of seeing the entire procedure annulled for an *unjustified* exclusion of those entities that do not fall into one or the other of the two categories listed in the law and, thus, an unlawful restriction of competition, on that market, between *all* potential bidders. Unfortunately, the Romanian lawmakers refused to transpose also the second part of the first paragraph of Article 20 from Directive 24, depriving the Romanian contracting authorities of the possibility to reserve a public contract through the mechanism of instituting an obligation for the winning bidder to deliver it under a sheltered employment programme. It may be thus concluded that, inasmuch as the Romanian contracting	Article 56 is explicitly linked to Law no. 448/2006 on the protection and the promotion of the rights of the persons with disabilities (accompanied by the Procedure for the authorisation of sheltered units) and Law no. 219/2015 on social economy. Also relevant in this context might be Government Decision No. 784/2018 for the setting of certain measures necessary for the implementation of the Operational Programme “Aiding the Deprived Persons” (crafted on the basis of the EU Regulation 223/2014 on the Fund for the European Aid to the Most Deprived), or the Methodology for the selection and the financing of the projects drafted in the field of the protection of persons with disabilities for the year 2018, or the Methodology for the selection and the financing of the projects of national interest drafted for the protection and the promotion of the persons with disabilities under the programme “The Establishment of Day Centers, Crisis Centers and Sheltered Homes with a View to Facilitating the De-Institutionalization of the Persons with Disabilities Placed in Old-Type Institutions and for the Prevention of the Institutionalisation of the Persons with Disabilities (of 4 November 2016), or the Procedure regarding the access to the measures for employment

		authorities are concerned, they may use the instrument of reserved contracts only based on the *quality* of bidders (sheltered units and/or social enterprises) but not on also their effective *capacity* to carry out a specific social programme (in this case, a sheltered employment programme – which, as a matter of principle, could be delivered not only by social enterprises *per se*, but also by other organisations engaged in the materialisation of the larger concept of social market economy). Transposed into practice, this means that a Romanian contracting authority may reserve a public contract to, exclusively, sheltered workshops authorized according to the Romanian Law 448/2006 or, upon the case, social enterprises for insertion set up and authorised according to the Romanian Lawno. 219/2015, but not to also other entities which, without being a sheltered workshop or a social enterprise for insertion, are constantly involved in the implementation of various sheltered employment programmes.	stimulation, their financing sources and setting Instructions for their implementation, or Order 62/2016 setting up the minimum Standards which must be applied for the procurement, by the Ministry of Internal Affairs, of the services relating to the reception and the hosting of asylum seekers. Similarly relevant are the laws regulating the domains where the entities targeted by Article 56 are active.
Open questions	By making direct reference to, explicitly and exclusively, the sheltered units "authorised in accordance with Law 448/2006" and the social enterprises of insertion "regulated by Law 219/2015", the Romanian law appears in fact to be restricting the access to all the other entities which, although meeting the same standards as the Romanian ones and pursuing a similar objective, have not been authorised under, specifically, the Romanian law but in accordance with the laws applicable in their respective countries of residence. This, in fact, represents an infringement of the principle of mutual recognition and a discrimination on grounds of nationality forbidden by Articles 49 and 56 TFEU. More concretely, according to Article 81(3) of Law 448, any sheltered unit must, for the purpose of validly carrying out its activities in Romania, be *authorised by the Romanian competent authority*. Similarly, pursuant to Article 8 from Law 219/2015, all social enterprises (in general, including social enterprises for insertion) *must be certified by the competent regional employment authorities*. Thus, in order to attest that an enterprise is a "social enterprise", the Romanian competent authority will issue a "certificate" confirming that it has included in its setup deeds (and thus undertook) at least the following requirements / obligations: (a) to act for an exclusive social purpose and/or in the general interest of the community; (b) to allocate at least 90 % of its net profit to that social purpose; (c) to disperse, following its winding-up, all its assets to one or several other social enterprises; and (d) to apply the principle of social fairness to all its employees, while ensuring fair levels of wages so that the highest not to be more than 8 times bigger than the lowest. The validity of such a certificate is usually limited to 5 years.	
Example of application from the national level (where applicable)	It is on the other hand worth noting that the reserve of public contracts was much more used under the *previous* national legislation (i.e., the national rules transposing the repealed Directive 2004/18). Its wider use under the former framework was in fact occasioned not by the relevant provisions of the law on public procurement but, surprisingly, by a specific provision contained in Law 448! Basically, according to Article 78 (2) and (3) from Law 448, all employers (public authorities and institutions or public or private enterprises) with at least 50 employees were and still are required to ensure that at least 4 % of them are persons with disabilities, under the pain of paying, monthly, to the state budget, a penalty equal to the minimum basic gross salary guaranteed by law multiplied with the number of	

	positions not effectively occupied by persons with disabilities. Anyway, before August 2017 – when it was amended following a political debate, paragraph (3) thereof allowed all contracting authorities which refused to hire persons with disabilities in the conditions stated above to opt between: (i) paying, monthly, to the state budget, 50 % of the same minimum basic gross salary multiplied with the number of positions not occupied by persons with disabilities and (ii) *purchasing goods or services manufactured or delivered directly by such persons with disabilities, through authorised sheltered units, on a partnership basis, of a value equal to the amount defined above*. In practice, most contracting authorities falling within the ambit of this text went for the second choice. This latter alternative has unfortunately been eliminated from Article 78, a solution which, in our opinion, has the upsetting potential to discourage both the hiring of persons with disabilities and the procurement of goods and services from authorised sheltered units, in a context where, given various national or, upon the case, regional economic but mostly social dysfunctionalities, the right (and not the obligation, as stipulated for example in the Spanish law) of contracting authorities to reserve at least part of their contracts to such entities is not sufficient to stimulate this form of social protection, in the lack of some strong concrete mechanisms which to give it the needed efficiency, if not coerce contracting authorities to walk this path. This way, it is more likely that, given its permissive character, Article 56 from the Romanian law will end up dud (a good proof of this is that, since the adoption of Law 98, practically no authority has taken advantage of the mechanism regulated by Article 56).

Article 40 of the Directive ► Articles 139 and 140 from Law No.98/2016 on public procurement			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 139 – (1) Before launching a procurement procedure, the contracting authority has the right to conduct market consultations with a view to preparing the procurement, by reference to the subject matter of the contract, and to informing economic operators of their procurement plans and relevant requirements, by making this public via the SEAP (i.e., the national e-procurement portal) as well as by any appropriate means. (2) The contracting authority has the right to invite to the consultations mentioned under paragraph (1) above independent experts, public authorities or economic operators, including any representative organisations thereof. (3) The contracting authority has the right to use or implement any opinions, suggestions or recommendations received during the consultations mentioned under paragraph (1) above with purpose to prepare the procurement and the organise the award procedure, provided that the use or the implementation of those opinions, suggestions or recommendations does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency. (4) The concrete methods, conditions and the procedure for carrying out the consultations mentioned under paragraph (1) above shall be established by the methodological norms which shall adopted in the application of this	Articles 18 and 19 from the Government Decision No. 395/2016 for the approval of the Methodological Norms for the application of the provisions concerning the award of public procurement contracts / framework agreements as contained in Law No. 98/2006 on public procurement (OG No. 423/06.06.2016) explain and complement the provisions of Articles 139 and 140 from Law 98. According to **Article 18**: (1) Under the conditions described in Article 139 from Law 98/2016, the contracting authority may, in case it seeks to acquire products/services or works with a highly complex technical, financial or contractual structure or in a field characterised by a fast technological evolution, carry out a market a consultation process as part of the procurement process and during the planning/preparation stage thereof, which shall be set out by the publication, via the SEAP or through any other appropriate means, of a market consultation notice. (2) The notice mentioned in paragraph (1) above shall contain at least the following information: a) the name of the contracting authority; b) the internet page where the information on the market consultation process has been made available; c) the aspects subjected to consultation; d) the date up to which interested persons may submit proposals in the consultation process; e) the deadline of the consultation process; f) the description of the consultation process, i.e., how the interaction with the economic operators responding to the consultation invitation is planned to take place. (3) The aspects making the object of market consultation shall be targeted at identifying, without limitation, potential technical, financial or contractual solutions which to satisfy the needs of the contracting authority, as well as aspects relating to the most suitable contracting strategy, including the division of that contract into lots or the possibility	The cited articles have the same meaning and aim at the same purpose as Article 40 from Directive 24. They allow contracting authorities to scrutinise the market in search for new, innovative answers to their problems, which may not only facilitate substantial savings but also open the door for much better solutions than the traditional ones, including new ways to use public procurement to generate additional benefits to (local) communities – including social benefits. They require, on the other hand, strong measures which to ensure that those who took part in the consultation process are not favoured in the procurement process itself (including as a result of having had	Relevant in this context are the laws on fraud, corruption and bid rigging as well as the general rules on competition and, in general, all norms (criminal or administrative) aimed at protecting the public purse (national or EU budgets) against illegal activities.

Law (i.e., No. 98/2016). **Article 140** – (1) Where a candidate/bidder or an entity linked to a candidate/bidder has submitted opinions, suggestions or recommendations in connection with the preparation of the procurement process either during the consultations mentioned under paragraph (1) of Article 139 above or in any other way, including as a part of the consultancy services rendered to the contracting authority, or has participated in any other way in the preparation of the procurement process, the contracting authority takes all the necessary measures to ensure that the participation of that candidate/bidder in the procurement process does not have the effect of distorting the competition. (2) The measures taken pursuant to paragraph (1) above may include, among others, the sharing with all the other candidates/bidders of any relevant information transmitted in the context of the participation of that candidate/bidder in the preparation of the procurement process or which may arise from that participation, as well as the setting of some appropriate terms for the submission of tenders.	to ask for variants. Moreover, according to **Article 19**: (1) In the sense of Article 139 (2) from Law 98/2016, any person/organisation interested in participating in the market consultation process shall submit to the contracting authority opinions, suggestions or recommendations concerning the aspects making the object thereof, using the forms and means of communication indicated in the consultation notice. (2) The contracting authority may decide that the opinions, suggestions or recommendations be submitted solely via electronic means, at a dedicated address. (3) The contracting authority may take into consideration the opinions, suggestions or recommendations received during the consultation process to the extent it finds them relevant. (4) The contracting authority may organise for the interested persons/organisations (i.e., that responded to the consultation call) individual or collective meetings or open events, during which the parties may confer on the submitted opinions, suggestions or recommendations or just discuss issues of general interest such as, without limitation, market structure, price evolutions or other specific trade elements relevant for the domain at issue, or other technical, innovative, social or environmental aspects, which may be followed up during the award process. (5) The contracting authority has the obligation to make public, via the SEAP, the result of the market consultation, not later than the commencement of the procurement process.	access before the others or instead of them to essential information).	

Open questions	There are some inconsistencies between the general wording offered by Articles 139 and 140 from Law 98 (which is in line with the wording – and the declared purpose - of Directive 24) and the circumstantial language of the application Norms – which refer, for some unclear reason, to exclusively the case where the contracting authority seeks to acquire products/services/works featuring highly complex technical, financial or contractual elements. This may in the end restrict the use of market consultations to a very limited number of cases (since the Romanian authorities are quite reluctant in resorting to innovative solutions and usually remain in the safe harbour of traditional ones).
Example of application from the national level (where applicable)	In Romania, many contracting authorities appear to mistake market consultation to direct awarding. Thus, a fast perusal of the notices uploaded on the SEAP – i.e., in the sector dedicated especially to market consultation notices – will reveal that in fact over 90 % of the relevant notices contain information specific to contract notices, including the relevant technical specifications and the selection and award criteria, contracting authorities simply using this instrument to ask for the lowest price (expressed in relation with the object already defined in the notice).

	It is however worth noting that in general, in Romania, most Applicants' Guides elaborated in the context of the implementation of the programmes crafted under the relevant Partnership Agreement on the ESIF do recommend, in explicit terms, that contracting authorities resort to market consultations before procuring supplies, services or works, which may only boost the general use thereof.

Article 42 (1) subparagraphs 4 and 5 of the Directive ► Article 155 (4) and (5) of Law 98/2016			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 155 – (4) For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up to take into account accessibility criteria for persons with disabilities or design for all users. (5) Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.	There aren't any relevant implementing provisions (except for those contained in Law 448/2006).	Although most practitioners think of physical access (and physical impairment) when reading these provisions, in most cases "accessibility" has to do not with that but with access to basic services (social, education, health, culture, tourism etc.) and also to information, communications and mass media and technology etc. (i.e. 'intellectual' access).	Law No. 448/2006 on the protection and promotion of handicapped persons compels all public authorities to take the necessary measures to ensure the proper integration of persons with disabilities, including by facilitating their access to buildings and public vehicles, but also to services, to all means of communication, etc. Unfortunately, in practice, very few authorities comply with its requirements. So it is very positive that the new laws on public procurement raise this rule to the level of a general principle, since any breach thereof may now be challenged not only by their direct beneficiaries (i.e. persons with disabilities, as per Law 448) but by all participants in procurement procedures.
Open questions	Neither the Directive nor the Romanian laws define the "duly justified cases" to which subparagraph (4) refers. They also contain no definition for "persons with disabilities". However, Law 448/2006 defines (in Article 2(1)) "handicapped persons" – but, *nota bene*, not "persons with disabilities" – as being all persons who, due to a social environment not adapted to their physical, sensorial, psychological or mental deficiencies, are either totally or partially hindered in accessing, with equal chances, the social life and which thus need certain special protection measures which to facilitate their integration and inclusion. The same Law clarifies, in Article 2(2), that it applies to all "handicapped" children and adults residing on the Romanian soil, regardless of their citizenship.			
Example of application from the national level (where applicable)	Except for those concerning the acquisition of buildings and public vehicles, very few technical specifications published on the Romanian e-procurement portal, i.e. the SEAP, appear to contain specifications which to facilitate the access of persons with disabilities to supplies, or to services etc. In fact, very few public authorities understand that this provision does not refer exclusively to physical access in buildings and vehicles or parking areas and are allegedly unaware of the provisions contained in Law 448. On the other hand, since Law 98 contains no sanctions for the failure of contracting authorities to include such conditionalities in the relevant technical specifications and, similarly, the sanctions provided under Law 448 are merely symbolic and never applied, the accessibility postulated by Article 155 still remains desiderate.		

Article 43 of the Directive ► Article 157 of Law No.98/2016 on public procurement			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 157 – (1) Where the contracting authority intends to purchase works, supplies or services with specific environmental, social or other characteristics it may, in the technical specifications, the evaluation factors or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled: (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract; (b) the label requirements are based on objectively verifiable and non-discriminatory criteria; (c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate; (d) the labels are accessible to all interested parties; (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence. (2) Where the contracting authority does not require the works, supplies or services to meet all of the label requirements, it shall indicate which of the label requirements must be met. (3) In case the contracting authority does require, in accordance with paragraph (1) above, a specific label in connection with the procured supplies, services or works, it shall accept all labels confirming that the works, supplies or services meet equivalent label requirements. (4) Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the contracting authority or an equivalent label within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting	This article is not accompanied by any implementing rules. However, Article 3(1) h) and u) from Law 98 offers some useful definitions for respectively “label requirement” and “label”, identical to those offered under Articles 2(1) 23 and 24 from Directive 24.	This article follows in the footsteps of the original Article 43 from Directive 24 (which it has transposed in a cut-and-paste manner). It basically allows contracting authorities to accept labels as a means of proof that the object of procurement meets the (social) criteria included in the procurement equation. Social criteria are rather hard to include in the technical specifications but fit very well the selection stage, the award stage as well as the contract performance stage.	An impact in this context might have the general rules on labels. Unfortunately, so far Romania has not adopted a specific law on social labels.

authority. (5) Where a label fulfils the conditions provided in points b) to e) of paragraph (1) above but also sets out requirements not linked to the subject-matter of the contract, contracting authorities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.			

Open questions	
Example of application from the national level (where applicable)	Unfortunately, the Romanian contracting authorities are highly reluctant to use labels in general, and particularly social labels (this perhaps since they shun, as a matter of principle, any social criteria in the procurement process).

Article 46 of the Directive ► Article 141 of Law No.98/2016 on public procurement			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 141 – (1) The contracting authority may decide to award a contract or a frame agreement in the form of separate lots and may determine the size and subject-matter of such lots, provided that it has indicated this information in the tender documents. (2) In line with paragraph (1) above, the contracting authority shall determine the object of each lot on a quantitative basis, adapting the dimension of each individual contract so to best correspond to the concrete capacity of SMEs to deliver, or on a qualitative basis, in accordance with the professions and specialisations entailed by that contract, with purpose to better adapt the contents of each individual contract (i.e., corresponding to each lot) to SMEs' specialisation, or in accordance with the various future phases of the project. (3) Where the contracting authority refuses to divide the contract into lots, it shall justify its decision. (4) In the situation described under paragraph (1), the contracting authority shall indicate in the contract notice whether the tenders may be submitted for one, for several or for all of the lots. (5) The contracting authority has the right, even where tenders may be submitted for several or for all the lots, to limit the number of lots which may be awarded to the same bidder. (6) In the case described under paragraph (5) above, the contracting authority shall indicate in the contract notice the maximum number of lots which may be awarded to the same bidder. (7) The contracting authority shall indicate in the procurement documents the objective and non-discriminatory criteria or rules which it intends to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum	According to Article 32(10) from the Methodological Norms to Law 98, where, in a procurement procedure, the contracting authority divides the contract into several lots, it may establish discrete award criteria for each lot.	Sharing the same wording and structure as Article 46 from the Directive (which it transposes), this article preserves basically the meaning of Article 46 from Directive 24. The merits of the Romanian version stem from the fact that it details, in its last two paragraphs, the concrete mechanisms which would allow contracting authorities to determine, in those cases which involve the award to the same tenderer of several lots, the tender(s) that correspond best to the needs thereof, by striking a balance between those needs and the aggregate offer tendered by that bidder.	Relevant here are, in general, all laws to do with the setup, the organisation and the functioning of SMEs (in particular, Law 346/2004 and Government Emergency Ordinance No. 44/2008).

number. (8) Where more than one lot may be awarded to the same tenderer, the contracting authority may award contracts combining several or all lots and awarding them to the same bidder where it has specified in the contract notice that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined. (9) Where more than one lot may be awarded to the same bidder, the contracting authority shall run a comparative assessment of the tenders to determine whether the tenders submitted by the same bidder for a certain combination of lots would, taken as a whole, receive a better score by applying the award criterion and the evaluation factors indicated in the tender documentation in rapport to all those lots, as compared to the overall scoring that would be awarded if taken separately. (10) The contracting authority shall run the comparative assessment described under paragraph (9) above by first determining the score of each discrete tender by applying the award criterion and the evaluation factors indicated in the tender documents on a lot-by-lot basis and, second, by comparing the aggregate score thus determined with the score awarded to all the tenders submitted by that bidder for the respective combination of lots, taken as a whole.			

Open questions	The Romanian remedies body has already clarified throughout its case law that contracting authorities cannot rely solely on the fact that a project is financed from one single external source – e.g. EU funds or other similar mechanisms such as the Romania-Swiss Cooperation Programme – to justify their refusal to divide the relevant procurement contract into several lots. Along the same lines, the same remedies body has established that, since the division of a contract into lots is binding according to the new legal framework, the fact that a project involves supplies and services bearing distinct CPV codes renders, *per se*, its division into lots mandatory.
Example of application from the national level (where applicable)	In Romania, contracting authorities usually observe the mandatory nature of Article 141 and divide complex contracts into lots. However, it appears that in many cases the procurement process reaches a deadlock due not to the procurement rules but rather to specific budgetary misapplications. Thus, in most cases the estimated value of a contract or lot is determined globally (and not on a piece-by-piece basis) which normally triggers an overall assessment of the prices offered by bidders. However, bidders are usually required to justify these prices by presenting a detailed breakdown of costs which in many cases reveal that even if the total offered price is below the estimated value, some of the prices corresponding to various components included in the procured system are higher than those estimated and approved by the accountancy department of the contracting authority – whence their refusal to approve the acquisition, even if the tender documents contained no reference to such details and bidders were not aware of the price caps approved (internally) for each component of the project, but only of the total estimated value, which they duly observed.

Article 56 (1) last sub-paragraph of the Directive ► Article 51 (2), Article 209, Article 210 (4) and Article 169 of Law No.98/2016 on public procurement			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
The last subparagraph of Article 56 (1) from Directive 24 has not been transposed as such into the Romanian national legislation. However, echoes of the rule set forth thereunder may be found in Article 51 (2) – which has already been discussed above, Article 210 (4) from Law 98/2016 according to which the contracting authority must always reject a tender where it has established that the price it contains is abnormally low because it does not comply with the applicable obligations referred to in Article 51(1) from Law 98, and Article 169 which, in general terms, compels contracting authorities to exclude from the procedure all bidders falling into one of the exclusion situation listed in the previous articles of Law 98 (i.e., including that of not complying with the social rules referred to under Article 51). Nonetheless, the other paragraphs of Article 56 have indeed been indeed transposed into the national legislation yet not unitarily, in one single article or text, but disparately, as the corresponding texts have been interspersed into the relevant sections of the law. In connection with these rules, it is interesting to note that the second paragraph of Article 56 from the Directive has been transposed somewhat askew. Thus, according with Article 57(2) from the Methodological Norms to Law 98 (adopted pursuant to Article 208 from that Law), contracting authorities may evaluate tenders before verifying the absence of any grounds for exclusion only where the carrying-out of the procedure by electronic means is not possible due to some technical glitches occurred by the fault of the e-portal administrator.			
Open questions			
Example of application from the national level (where applicable)			

Article 57 (2) and (4) a) of the Directive ► Articles 164, 165 and 166 of Law 98/2016 on public procurement			
Text of the article	National implementing provisions (if relevant)	What the article means	Interaction with other national laws
Article 164 – (1) The contracting authority shall exclude an economic operator from participation in a procurement procedure where it has established, based on the information and documents provided, or has become otherwise aware, that that economic operator has been the subject of a conviction by final judgment for one of the following reasons: f) trafficking in, or other forms of exploitation of, human beings as per Articles 209 – 217 from Law 286/2009 or per the corresponding criminal laws of the state where that economic operator has been convicted; (…). The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein. **Article 165** – (1) Where the contracting authority is aware that an economic operator is in breach of its obligations relating to the payment of taxes or contributions to the national general consolidated budget and this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which that operator is established, it shall exclude the economic operator from the procurement procedure. (2) The contracting authority shall exclude from participation in the procurement procedure an economic operator where it can demonstrate by any appropriate means that that economic operator is in breach of its obligations relating to the payment of taxes or contributions to the national general consolidated budget. (3) The economic operator is however not excluded from the procurement procedure where it has, before the exclusion decision being taken, fulfilled its obligations by effectively		As it may be easily noticed, the Romanian legislator has chosen to go beyond the scope of Article 57 from the Directive and compel contracting authorities to exclude from competition any economic operators who fail to pay not only taxes or social security contributions but any other debts to the ”general consolidated budget”, i.e., including pensions contributions, unemployment contributions, health contributions etc. Another point where the Romanian law departs from the Directive is that in which the contracting authorities are obliged (and not just encouraged) to exclude from competition any economic operators on which it may establish ”by any appropriate means” that that operator is in breach of its fiscal obligations. In connection with this particular paragraph it is important to point out on a very recent decision of the Romanian Constitutional Court establishing that the possibility – explicitly provided by law - to exclude from participation in a procurement procedure any economic operator which is subject to a pending judicial investigation is discriminatory and must be set aside as manifestly impinging on the constitutionally consecrated presumption of innocence. The cited decision concerns a text (i.e Article 167 (4) from the Romanian Law No. 98/2016 on public procurement) which has in fact been rescinded *before* the Constitutional Court to render it. However, the reasoning is generally valid and will be easy to extrapolate in case the constitutionality of other paragraphs containing similar rules (such as that established under Article 165 (2)) will be contested in the future. Before being repealed (in December	Law 286/2009 (the Romanian Criminal Code); Law on the State budget; Law 263/2010 on the unitary public pensions system; Law 95/2006 on the reformation of the national health system (also establishing the national health contributions system); Law 76/2002 for the setting up of the national unemployment contributions system and the stimulation of workforce hire.

paying the due taxes or contributions or by any other means of extinction or write-offs of its fiscal debts, or where it benefits, in accordance with the applicable laws, from a rescheduling of its debts or from other payment facilities, including, where applicable, any interest accrued or fines. **Article 166** – (1) As a derogation from the rules set forth in paragraphs (1) and (2) from Article 164 above, the contracting authority may, exceptionally, not exclude from competition the economic operator who finds itself in one of the situations described under the first two paragraphs of Article 164, for overriding reasons relating to the public interest such as public health or protection of the environment. (2) As a derogation from Article 165 (1) and (2), an economic operator is not excluded from the procurement procedure where the overall debts to the general consolidated budget amount to less than RON 10 000 (i.e. approx. EUR 2 200). **Article 167** – (1) The contracting authority excludes from the procurement procedure any economic operator who: (a) is in breach of any of the obligations set under Article 51 and the contracting authority can demonstrate this by any appropriate means, such as a decision of the competent authorities by which it is ascertained the violation of these obligations; (…) (c) is guilty of grave professional misconduct which renders its integrity questionable and the contracting authority may demonstrate this by any appropriate means of proof such as a decision of the judiciary or of an administrative authority; (…) (g) has significantly or persistently breached its main obligations arising from a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions; (…). (3) In the sense of paragraph (1) subparagraph c) above, by ”grave professional misconduct” shall be meant any misconduct that affects the professional reputation of the economic operator such as the breach of competition rules by associating with others in cartel schemes with the purpose of		2017), the contested paragraph stipulated that “[the possibility to exclude an economic operator from participating in a procurement procedure is] applicable also in the case where that operator is under a judicial investigation for one of the reasons itemised under Article 164 (1) [from Law 98/2016]”. Article 164(1) is in fact the Romanian version of Article 57 (1) from Directive 24 – which it transposed in a practically identical wording (with only a few additional references to the applicable Romanian criminal legislation). It is thus worth noting that, although Article 164 (1) is - similar to Article 57(1) from Directive 24 – referring to actions incriminated in various pieces of criminal law (which may explain the direct reference to the presumption of innocence), so are Articles 165 (2) and 167 (1) (which, while transposing Article 57(4), departs here and there from the original text and abounds in additional references and explanations). Take for example the definition offered for ‘grave professional misconduct’ which, according to the Romanian text, is any misconduct of an economic operator which could spoil its professional reputation, such as the participation in a cartel with purpose to rig the bidding or circumvent the relevant IP rules, either done intentionally or in gross negligence etc. Well, according to our laws, participation in a cartel, bid rigging and some forms of IP rights infringements are crimes and are punished as such! Not to mention that, according to the Romanian law, not just crimes but in general all misdemeanors as well as any other less serious offences - such as contraventions – should fall under the presumption of innocence. Finally, it should be also noted that the derogation referring to overriding reasons residing in the public interest such as public health or protection of the environment refers exclusively to the exclusion cases listed in Article 164 (1) and (2) – which correspond to Article 57 (1)! This only means that	

rigging the bid or by breaching IP rights, either done intentionally or in gross negligence. (…) (8) ”A serious breach of contractual obligations” is, in the sense of paragraph (1) subparagraph (g) above, for example the failure to deliver the contract, the supply / provision / execution of goods / services / works with major defects which render them improper for use in conformity with the destination provided in the contract. **Article 169** – The contracting authority shall exclude an economic operator from the procurement process in any stage thereof in which it becomes aware that that economic operator is, taking into considerations its actions or inactions made before or during the procedure, in one of the situations provided by Articles 164, 165 and 167 which may determine its exclusion from that procedure.		contracting authorities cannot apply this particular derogation also in relation with the cases provided for by Article 165 – corresponding to Article 57 (2) from the Directive. To these latter situations only the derogation provided for in Article 166(2) may be applied – corresponding to the second subparagraph of Article 57(3) from the Directive.	

Open questions	See the explanations under the column above concerning the meaning of the cited text. As for the clarifications brought by the Romanian law in connection with the terms “grave professional misconduct” or the ”serious breach of contractual obligations”, they are, of course, valuable, but fail to explain how a bidder may for example be excluded from *future* procedures for not complying – under, or in the context of, a *previous* contract - with the social rules referred to under Article 51. Indeed it still is not clear whether such a failure is a grave professional misconduct or a breach of contract (it certainly is not falling within the ambit of the other situations listed under Articles 164 to 167) and there evidently aren’t any other exclusion situations (as listed by the cited legal provisions) where such a situation can be identified to that purpose.
Example of application from the national level (where applicable)	

Article 67 of the Directive ► Article 187 of Law 98/2016 on public procurement			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 187 – (1) Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, the contracting authority shall base the award of a public contract on the most economically advantageous tender. (2) In accordance with paragraph (1) above, the contracting authority shall determine the most economically advantageous tender based on the award criterion and the evaluation factors indicated in the tender documents. (3) For the purpose of determining the most economically advantageous tender pursuant to paragraph (2) above, the contracting authority may apply one of the following award criteria: a) the lowest price; b) the lowest cost; c) the best price-quality ratio; d) the best cost-quality ratio. (3^1) The contracting authority may use the lowest price criterion only where it purchases supplies, services or works the value of which is below the thresholds provided in Article 7 (1). (4) In the meaning of paragraph (3) letters c) and d) above, the best price-quality/cost–quality ratio shall be determined based on evaluation factors including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract /	Relevant here are Articles 32, 33 and 34 from the Methodological Norms adopted for the application of Law 98/2016. **Article 32**: (1) Where the award criterion is the best price-quality ratio or the best cost-quality ratio as provided in Article 187 (3) c) and d) from Law 98/2016, the winning tender shall be determined based on a system of evaluation factors for which a relative weighting or a specific assessment algorithm shall be established. (2) The evaluation factors as well as the scoring algorithm referred to under paragraph (1) above shall be described clearly and in all details in the tender documentation and shall reflect the concrete scoring methodology applied in the assessment of the merits of the technical and the financial offers submitted by bidders and must generate a genuine advantage, must not be formal and must allow an effective verification during the evaluation process and when applying the relevant award criterion. (3) In the application of Article 187 (3) c) and d) from Law 98/2016, where the quality of the staff assigned to deliver the contract has a significant impact on the level of performance of that contract and the outcome thereof, the evaluation factors may also refer to the organisation, qualification and experience of staff assigned to performing the contract. (4) The contracting authority may not use the organisation, qualification and experience of staff assigned to performing the contract, i.e. that referred to under paragraph (3) above, in the selection stage. (5) Where, in a procurement procedure, the contracting authority sets evaluation factors such as those provided under paragraph (3) above but also selection criteria pursuant to Article 179 g) from Law 98/2016, those latter criteria shall refer exclusively to the qualification and the professional experience of the	In a strange and not-so-felicitous turn of phrase, the Romanian legislature brought some changes to the original text which can only puzzle the participants in a procurement procedure. For example, it ignored the fact that the Directive resumed the award evaluation to one single criterion which is the MEAT and instead offered four criteria the nature of which is not very clear (i.e, they are principal, or just secondary/ancillary to the MEAT criterion etc.). Anyway, in the light of the new approach that consecrates the MEAT as the sole award criterion, the determination of the most advantageous tender cannot, in our opinion, be determined simply by applying the 'lowest price' approach. This is even more problematic as the Romanian contracting authorities have so far (i.e. under the previous legislation) widely used this approach instead of any other combinations including a qualitative assessment and, due to a deadly combination of factors (including the attitude of the control bodies and the official stance of the regulatory body),	

framework agreement in question. (5) The evaluation factors mentioned under paragraph (4) above may comprise, among others: (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions; (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion. (6) In accordance with paragraph (3) letter c) above, the best price-quality criterion customarily includes a price or cost element; where the contracting authority sets out a procurement procedure with a fixed budget in which the price or cost element is expressed as a fixed price or cost, the evaluation factors may only concern aspects related to the quality of the supplies, services or works linked to the subject matter of the procurement process. (7) In the meaning of paragraph (3) b), the lowest cost shall be determined based on cost-effectiveness considerations, using factors such as life-cycle costing. (8) The contracting authority shall not use the lowest cost/lowest price criterion as an award criterion in the case of: a) procurement of works or services which include intellectual services and activities with	permanent staff, especially the senior staff, of the economic operator submitting the tender, which is indicated in the ESPD, and respectively to other persons than those explicitly assigned to performing the contract. (6) In the application of Article 187 (8) and (9) from the Law 98/2016, in the case of intellectual services contracts having as object services such as the rendering of consultancy/technical assistance, the elaboration of studies, project design or management, pertaining to projects with a high complexity, the award criterion referred to in paragraph (1) above shall mandatorily apply and the weighting allocated to the 'price' factor may be of maximum 40 %. (7) The categories of intellectual services referred to under paragraph (6) above shall be established by an Order of the President of the National Agency for Public Procurement. (8) When setting the evaluation factors, the contracting authority may not use factors which: a) are not directly linked to the subject matter and the nature of the contract which is to be awarded; b) do not reflect an advantage which the contracting authority may obtain by applying that factor; (9) The weighting set for each evaluation factor must not lead to a distorted outcome of the procurement procedure. For each evaluation factor the contracting authority must set a weighting which to correctly reflect: (a) the importance of the technical/functional characteristic which, in the view of the contracting authority, represents a qualitative, environmental or social advantage that is worth scoring; or (b) the value of the financial benefits which bidders may offer by undertaking certain additional obligations in rapport to the minimum requirements described in the tender book. (10) Where, in a procurement procedure, the contracting authority divides the contract into several lots, it may establish discrete award criteria for each lot. **Article 33** – (1) Where the award criterion is the "lowest cost",	they are determined to use it also under the new laws. It is however a good thing according to paragraph (3^1), the 'lowest price' criterion cannot be used for contracts the value of which is estimated to go over the EU thresholds (a value-based exclusion) while according to paragraph (8), this criterion cannot be used also at the acquisition of services and works pertaining to certain complex contracts (a qualitative exclusion). As for the implementation norms, they offer such complicated explanations and use such a technical wording (even for the 'lowest cost'!) that they rather thwart than help contracting authorities. The result is that, in practice, they are effectively afraid of applying other criteria than the lowest price. Also, in accordance with paragraph (10) of Article 187, contracting authorities may apply and additionally award criterion in certain circumstances. Unfortunately, this paragraph was not included in the original proposal and appeared in the limelight only during the debates that took place in the Romanian Parliament, i.e. just before the adoption of Law 98. Clearly, it transposes the conclusions	

a high degree of complexity; b) procurement of design services and works, or just of services, pertaining to trans-European infrastructure projects as defined by Law 98/2016, or to county roads. (9) The categories of procurement contracts / framework agreements foreseen under paragraph (8) above as well as the maximum weighting which the price or cost element may have in the award equation shall be determined by the methodological norms adopted for the application of this Law. (10) Where two or more offers are equivalent, contracting authorities may apply an additional criterion, such as: fighting unemployment, which shall be explicitly mentioned in the contract notice.	this will be determined by adding up the net monetary values of the financial efforts of the contracting authority, corresponding to the elements included in the life cycle and identified by the contracting authority as being relevant for the object of the contract, in each year of use of the procured supplies, services or works, in addition to the acquisition cost. The currency used for the calculation of the net values referred above is that in which to the estimated value of the contract is expressed. (2) For the financial estimation of the life cycle, the contracting authority shall take into consideration the following elements: (a) for the determination of the cost of the life-cycle elements corresponding to each year of use, the relevant prices which must be taken into consideration are those payable by the contracting authority for the effective use of the procured supplies, services of works, without VAT but including the taxes and fees falling to the contracting authority in connection with the use thereof; (b) the life-cycle costing and the relevant cost of each element thereof shall be determined by summing up different types of costs registered during each year of the life cycle and by applying to that result of the relevant discount rate so that they be expressed as a value corresponding to the procurement financial year. (3) Contracting authorities must include in the tender documentation all the information necessary for the financial assessment of each cost element included in the life-cycle costing. (4) The information made available according to paragraph (3) above shall include at least: the conditions, means and intensity of the use, the estimated period of use as well as the duration taken into consideration when applying the award criterion and comparing the offers, the financial efforts which must be quantified for each cost element, the discount rate which shall be used for the relevant financial assessment, the effective method applied for the calculation of the life-cycle costing included in the financial offer, the relevant conditionalities set for the monitoring of the realisation of each cost element from a financial perspective and the effects generated by the materialisation/non-materialisation of the financial assessment	rendered by the CJEU in the Nord-Pas de Calais case (C-225/98 - *Nord – Pas de Calais*, ECLI:EU:C:2000:494) yet it fails to clarify the entire context in which this provision may be applied. This is even more problematic as also the conclusions of the CJEU's decision are, on particularly this aspect, quite elliptic and hard to decode.	

	of the cost elements for the purpose of comparing the offers. (5) The methodology for determining the discount rate applied in the award of public procurement contracts shall be established by order of the National Agency for Public Procurement and of the National Commission for Prognosis. (6) The discount rate applicable for the next year shall be determined and updated in the last quarter of each year, by 15 December, by applying the methodology adopted as per paragraph (5) above and which shall be posted on the site of the Ministry of Public Finances. (7) Where the award criterion referred to in paragraph (1) above is applied, the hierarchy of the admissible offers shall be determined in ascending order in rapport to the life-cycle costing updated for the year when the procurement process has started, the winning tender being that which has offered the lowest life-cycle cost. **Article 34** – Where the 'lowest price' criterion is applied in accordance with Article 187 (3) a) from Law 98/2016, the winning tender shall be determined solely by comparing the prices offered through the relevant admissible tenders, without weighting other, technical, elements or other advantages resulting from the performance of that contract. Also, relevant here are the NAPP Instructions No. 1/2017 and 2/2017 (clarifying some thorny technical aspect related to the definition of the exclusion, selection and award criteria concerning respectively the similar experience and the qualifications of the staff of the bidders, including that assigned to perform the contract.		

Open questions	See the comments above.
Example of application from the national level (where applicable)	

Article 69 (2) and (3) of the Directive ► Article 210 (2) and (4) of Law 98/2016 on public procurement			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 210 – (1) Where the financial offer proposed in a tender appears to be abnormally low in relation to the works, supplies or services making the object of the contract put out to tender, the contracting authority must ask the tenderer that submitted it to provide clarifications with regard to the price or cost included therein. (2) The clarifications referred to in paragraph (1) may concern: (a) the economics of the manufacturing process, of the services provided or of the construction method; (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work; (c) the originality of the work, supplies or services proposed by the tenderer; (d) compliance with obligations referred to in Article 51(1); (e) compliance with obligations referred to in Article 218; (f) the possibility of the tenderer obtaining State aid. (3) The contracting authority shall assess the information provided by the tenderer who submitted to offer containing the abnormally low price and it may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2). (4) The contracting authority shall reject the tender, where it has established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 51(1). (5) Where the contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only if, after being requested for clarifications, the tenderer is unable to prove, within a sufficient time limit fixed by the contracting	No implementing provisions have been adopted in this regard	Since Article 210 mirrors the contents of Article 69 as such, it preserves the meaning and the margins of appreciation as established in the Directive, without any derogations or completions. So, similarly to the provisions of the Directive, the rejection of tenders for containing an abnormally low price due to the failure of bidders to comply with the 'social rules' referred to in Article 51 is *mandatory* as compared with all other causes. Moreover, contracting authorities are, before rejecting a tender for this particular reason, obliged to first ask for clarifications.	See the comments under Article 51(1) of Law 98.

authority, that the aid in question was granted in accordance with the applicable legislation. (6) Where the contracting authority rejects a tender based on the reason provided for in paragraph (5), it shall inform the European Commission after consulting the Competition Council.			

Open questions	It would be useful clarifying whether an abnormally low price which is explained by the abnormally low costs of one or several components of the offered supplies, services of works may constitute a reason for the rejection of the tender that contains it (e.g. in the situation where it is not the bidder that failed to observe the relevant 'social rules' but one or more of its suppliers – which are neither subcontractors nor third parties on which the contractor may rely in the delivery of that contract).
Example of application from the national level (where applicable)	Unfortunately, the practice in Romania is very poor in offering examples where contracting authorities have been forced to deal with tenders offering abnormally low prices due to an unclear compliance with the obligations contained in the so-called "social legislation".

Article 70 of the Directive			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Weirdly, the Romanian legislature decided not to transpose Article 70 into the national legislation so that Law 98 contains no other reference to the concrete possibility for contracting authorities to set contract performance conditions (i.e. including those of a social nature) than that contained in Article 51 (1) cited above. However, it is not forbidding it hence contracting authorities may freely include such instruments in the procurement equation.			

Open questions	
Example of application from the national level (where applicable)	Unfortunately, the Romanian contracting authorities are more than reluctant to use contract performance clauses.

Article 71 (1) of the Directive ► Article 55(2) of Law 98/2016			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 55 - (2) The proposed subcontractors must comply with the same mandatory regulations applicable in the fields of environmental, social and labour law established by Union law, national law or collective agreements or by the international treaties, conventions and agreements concluded in these fields, as mentioned in the tender documentation pursuant to Article 51 (1), as the contractor itself. The Romanian Law 98/2016 defines "subcontractor" as being "any economic operator which is not a party to a public procurement contract but which performs certain portions of the works or executes certain portions of the buildings making the object of the contract or, finally, which performs certain activities which are included in the subject matter of that contract, being held liable to the main contractor for the organisation and the carrying out of all the stages entailed by that purpose" (Article 3(1) paragraph yy)). This means that subcontractors may only be involved in the provision of works or the delivery of some particular "activities" (weirdly, the law shuns concrete references to 'services') but never in the supply of goods.		The Romanian Article 55 is not adding anything new to the Original Article 71 from Directive 24 so basically the meaning, scope and limits remain unaltered.	The Romanian Civil Code and all national legislation to do with SMEs and their access to EU markets (including the norms cited above on sheltered workshops and social economy enterprises etc.), but also, the legislation concerning the posting of workers etc.
Open questions			
Example of application from the national level (where applicable)			

Articles 74-77 of the Directive ► Article 111 and 112 of Law 98/2016 on public procurement			
Text of the article	**National implementing provisions (if relevant)**	**What the article means**	**Interaction with other national laws**
Article 111 – (1) Without any prejudice to the provisions contained in Article 2 (2), where the contracting authority puts out to tender a contract having as object social and other specific services as itemised in Annex 2 with an estimated value equal to, or higher than, the threshold provided in Article 7 (1) d), it has the following obligations: (a) to make public its intention to procure the respective services by means of a contract notice or by means of a prior information notice which shall be published continuously; (b) to publish a contract award notice. (2) As an alternative to publishing individual contract award notices, the contracting authority has the right to group the contract award notices referred to in paragraph (1) b) above on a quarterly basis, sending all the relevant award notices for publication, in one bundle, within 30 days as of the end of each quarter. (3) The provisions contained in paragraph (1) a) shall not apply in the case where the contract having as object social and other specific services listed in Annex 2 is awarded via a negotiated procedure without prior publication of a call for competition as per Article 104. (4) The award criteria used for the award of the contract having as object social and other specific services as itemized in Annex 2 and the estimated value of which is equal to or higher than the threshold provided in	According to **Article 106** (from the Methodological Norms to Law 98): (1) The call for competition referred to in Article 111 (1) from Law 98/2016, including any erratum thereto, shall be published by the care of the contracting authority via electronic means and in the Official Journal of the European Union, with the observance of the standard forms set by the European Commission according to Article 51 from the Directive 2014/24. (2) Where the contract has as object the services regulated by Law 292/2011 on social assistance, the contracting authority shall set the relevant quality criteria provided in Article 111 (4) from Law 98 in accordance with the minimum quality standards based on which the authorisations for functioning are awarded and, upon the case, in accordance with the performance indicators foreseen in Article 15 (3) from Law 197/2012 on quality assurance in the social services field. (3) The durability criteria provided in Article 111 (4) of Law 98 may regard: the continuity of the social services at hand, their long-term effects on the beneficiary, families and the community, the implementation of the proximity principle in the organising and the provision thereof, innovative solutions, including by exploiting the beneficiaries' potential as well as that of the community members to participate and involve in the delivery of social services and alike. Strangely enough, according to Article 68 from Law 98 (as amended by the Government Emergency Ordinance No. 48/2018 entered into force since June 18, 2018), the award procedures for all contracts the value of which is estimated above the thresholds set in Article 7 (5) of the same Law – i.e. that under which direct awards are permitted – are [*limitedly*]: a) open procedure b) restricted procedure c) competitive negotiation d) competitive dialogue e) innovation partnership	Article 111 from Law 98 is solely applicable to contracts the estimated value of which is at least RON 3 376 500 (i.e approx. EUR 735 000). However, the rules concerning the publicity specific to the award of this type of services are (for obvious reasons which actually make this provision redundant) not applicable to contracts awarded via a negotiated procedure without prior publication of a call for competition as per Article 104 from Law 98 (which transposes Article 32 from the Directive). Moreover, it is worth noting that Article 56 from Law 98 is (similarly to Article 20 from the Directive) not applicable to the procurement of social and other specific services listed under Article 112, as Article 112 has (similarly to Article 77 from the Directive) an evidently derogatory nature, establishing a special regime for the reserve of social services contracts. As a matter of principle, the contracts having as object social and	Law 292/2011 on social assistance, Law 197/2012 on quality assurance in the social services field as well as the other laws regulating the fields corresponding to the CPVs listed in Article 112.

Article 7 (1) d) are, limitedly: the best price-quality ratio or the best cost-quality ratio as per Article 187 (3) c) and d), taking into consideration the quality and the sustainability characteristics of the social services. **Article 112** – (1) The contracting authority has the right to reserve the award of public contracts for exclusively those health, social and cultural services referred to in Article 111, which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8 to economic operators such as not-for-profit organisations, social enterprises or sheltered units, accredited as social services providers, or public social service providers. (2) The economic operators, for which the contracts referred to in paragraph (1) above may be reserved, must cumulatively meet the following criteria: (a) the objective thereof is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1; (b) all profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations; (c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or	f) the negotiated procedure without prior publication g) design contest h) the procedure applicable for social and other specific services; and i) the simplified procedure. This means that, at least apparently, the procedure for social and other specific services is officially acknowledged to be a specific one, different from all the other procedures. This interpretation would be in line with the reasoning behind Chapter I from Title III ('Particular Procurement Regimes') from the Directive which has instituted a 'light-touch regime' for the award of this type of contract (in consideration of the fact that most of these contracts are, owing to the nature of their object, not likely to generate a cross-border interest except for those of a higher value). However, in a weird twist of phrase, according to paragraph (2) from the same Article 68 (and as a continuation of the rule consecrated in paragraph (1)), "*the award procedure applicable for the social and other specific services mentioned under para. (1)h) [of Article 68] is either:* *a) one* [nota bene: not 'any'!] *of the procedures listed under para. (1) letters a) to g) if the estimated value thereof is above the threshold set in Article 7(1) d) [from Law 98]; or* b) *contracting authority's own procedure, if the estimated value thereof is below the threshold set in Article 7(1) d) [from Law 98].*" The threshold set under Article 7(1)d) is not that set for all 'ordinary' contracts (and which triggers the application of one of those procedures) but one specific to this type of contract – for details, see the next column. Anyway, the text cited above hints at the idea that, although Article 111 offers a few derogatory rules for the award of contracts having as object social and other specific services (in line with Articles 74 to 76 from the Directive), it may however not be construed to consecrate a really distinct procedure (as specifically required by Article 76) and that, in fact, the Romanian legislature has brought these contracts back under the common regime, which departs clearly from the European lawmakers' intention. Clearly, paragraph (2)a) of Article 68 leaves practically no latitude for flexibility since it fails to clarify whether contracting authorities are allowed to choose *any* of the	other specific services (the majority of which falling within the category of SGEIs) may be reserved based on much severer conditions than those applicable to "regular" service contracts. Thus, contracting authorities may only restrict access to the procurement procedure to entities which meet several concrete conditions essentially related to the pursuit of a public service mission linked to the delivery of the services in question, to an organisation based on participatory considerations and to a management structure based on employee ownership or participatory principles. With particular regard to the technique chosen by the authors of Directive 24 to describe, in Article 77, the entities to which contacting entities may reserve a service contract corresponding to one of the CPVs described thereunder, it is obvious that they did not resort to a general reference to economic operators involved in a specific area of social protection (as in Article 20) but instead indicated, in detail, the main features which an entity must have in order to be able to compete for a reserved contract. The Romanian law kept this approach and adopted a similar wording.	

stakeholders; and (d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years. (3) The maximum duration of the contract shall not be longer than 3 years. (4) The calls for competition referred to in Article 111 (1) a) shall make reference to this Article.	procedures listed from a) to g) as long as they observe the minimal rules stipulated in 111 or not. This elusiveness shall, in practice, most certainly lead to an unwanted rigidity, all public buyers feeling safer to stick to the strict rules of open competition (as the default procedure), following to apply other procedures only where their contract would fall under the exceptional scope of the articles that regulate them.	According to the Romanian law, the only award criteria permitted in this context are the BPQR or, upon the case, the BCQR, taking into account certain specific durability touchstones.	

Open questions	Since substantially all social services falling within the scope of Articles 111-112 are social services of general economic interest (SSGEIs), they enjoy a quite complex regime and, inevitably, fall into the dichotomy that characterise such services, i.e. whether they should be reserved to national entities rather than opened up to general competition. In this regard, it is worth noting that the National Agency for Public Procurement insists, in its Procurement Guide posted on its own site, which the services referred to in Articles 111-112 have a specifically national nature and should be delivered by national entities rather than foreign entities which are not familiarized with the Romanian social specificities. This approach only constitutes a barrier to the provision of services across the internal market. On the other hand, with specific regard to the Romanian version, it is important to note that the features which must be met by organisations which desire to participate in the award of a contract reserved under Article 112 are specific to the 'social enterprises' defined by Law 219/2015 – see Article 8 thereof, which, in terms of discrimination, raises the same problems as those envisaged under Article 20 of the Directive (i.e. since such entities need, in order to legitimately provide services, to be authorised in accordance with Romanian law).
Example of application from the national level (where applicable)	