

RESERVED CONTRACTS

A NECESSITY FOR STIMULATING SOCIAL INCLUSION

- Policy brief -

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01

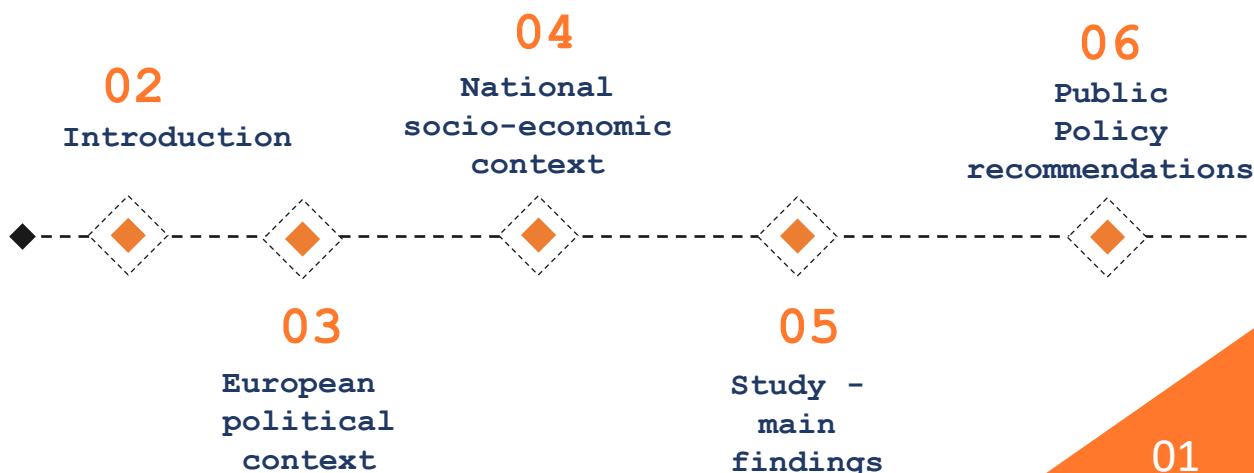
Summary

This policy brief aims to provide central and local authorities with public policy options to help them stimulate the social inclusion of vulnerable people, by implementing active measures to integrate them into the labor market and increasing access to quality social services. With 35.7% of the population at risk of poverty and social exclusion, Romania needs to adopt public policy measures to facilitate the socio-professional integration of these individuals.

The use of more reserved contracts and the allocation of a minimum of 2% of the annual amount of procurement by public institutions for such contracts will contribute to an increase in the employability of vulnerable people and a decrease in the amount of social aid granted. Similar to the EU green procurement target (having 50% of all procurement be "green"), such a share can be created for social impact purchases, such as those on reserved contracts.

The lack of tax incentives or other legal provisions to help entities employing vulnerable people, especially people with disabilities, to cover the extra cost of their integration into work, has led to the disappearance of many of these entities or has determined them to let go of this personnel. The social impact of integrating these groups of people into the labour market is great for them as individuals and for their local communities. These entities need fiscal facilities to give them access to a market for products and services. (representative of a social insertion enterprise)

Policy brief Contents





Introduction


The social inclusion of vulnerable groups is a declared and assumed priority of Romanian public authorities, with active labor market integration measures or the provision of quality and accessible social services provided in various strategic documents or legislation. However, these measures are implemented to a very limited extent on the one hand due to a very limited knowledge of them from the part of the public authorities, and on the other hand because of limited public funding for such activities/services and the lack of a structured dialogue between public institutions, control authorities and entities implementing programs integrating vulnerable persons into the labor market or providing social services.

Transforming vulnerable groups from socially assisted into net contributors to the state budget involves granting tax incentives to those entities hiring such persons and providing social support services for them. Given that Romania has one of the largest proportions of a population in the European Union at risk of poverty and social exclusion, it is necessary to implement all the measures provided for in the legislation, in order to facilitate the socio-professional integration of people from vulnerable groups. Reserved contracts and reserved social, health or cultural services are such measures that can have a major

impact on vulnerable groups.

The cessation of the activity of more and more protected units, the registration of a very small number of social inclusion enterprises and the increasingly difficult access of citizens to social services of general interest, make it necessary to analyze all the mechanisms that can facilitate the socio-professional integration of different categories of disadvantaged populations.

The European Union has introduced provisions on reserved contracts in the Public Procurement Directive 24/2014, in order to stimulate the integration of people with disabilities or vulnerable groups into the labor market, by increasing the economic performance of economic operators employing such persons, by providing access to the market and increasing the quality of social services of general interest.



However, their implementation at national level is extremely low due to the political and socio-economic context, the related legislative changes in the field, but also due to the lack of knowledge of these provisions by public authorities and the limited awareness of the importance of these measures for the social inclusion of the disadvantaged.

The current public policy document analyzes the state of implementation of the provisions on reserved contracts and reserved social, health and cultural procurement acquis under the national Public Procurement Law 98/2016. It analyzes how the provisions regarding reserved contracts and reserved social, health and cultural services acquisitions of the European Public Procurement Directive have

been transposed into Romanian legislation and it identifies the main challenges in their implementation at the level of public institutions.

Starting from the study on reserved contracts which analyzed the views expressed by representatives of both public institutions as well as those of protected units, social enterprises of insertion, social service providers, the document summarizes the most important research results and proposes a series of solutions for improving the current public policy framework.


03



European Political Context

In April 2014, The European Union adopted Directive 24/2014, which regulates, inter alia, reserved public procurement and introduces social clauses in public procurement contracts worth more than or equal to the 4 thresholds contained in the Directive, depending on the nature of the procedure and the contracting public authority (Art. 4 of the EU Directive 24/2014). The main purpose

of introducing social clauses in public procurement contracts is to transform public policies based on the provision of benefits to vulnerable groups in policies based on change of status, meaning to replace passive measures (social benefits) with active measures (vocational training, labor market support, employment).



In other words, the vulnerable individual is supported to move from assisted status to that of net contributor to the social assistance system. This paradigm shift has benefits for each and every part of this approach: the vulnerable person is integrated into work, receives qualification support and gains experience in a social insertion enterprise, and the state diminishes from the pressure on the social insurance budget.

The adoption of the European Social Rights Pillar in 2017 focused on three key themes, which are extremely important for vulnerable people: equal opportunities and access to the labor market, decent working conditions and social protection and inclusion (ANED, 2018). For people with disabilities, it is foreseen that they have the right to financial support to ensure a proper quality of life, services that enable them to participate in the labor market and society, and a working environment tailored to their needs (Principle 17).

04



National socio-economic context

In 2017 Romania, only about 5% of people with disabilities were integrated into the labor market, the rest being beneficiaries of various types of social benefits and being in most cases in the care of the family (97.5 % of people with disabilities are non-institutionalized).

For the period 2007-2016, European Life Quality Research Data (EQLS) indicates a lower living standard for people with disabilities, as well as a negative perception amongst them regarding their social inclusion and participation in society (EQLS, 2016). People with disabilities who are integrated on the labor market feel less socially marginalized according to EQLS research (EUROFOUND, 2018).

The existence of fiscal facilities for protected units introduced by Law 448/2006 on the protection and promotion of the rights of disabled persons through which economic agents with over 50 employees could use the disability tax for the purchase of services and products from protected units has made their number increase substantially in the period 2008-2016.

If in 2006 there were 48 protected units, in 2007 their number rose to 150 protected units, with 481 protected units being accredited in 2010, 564 in 2012, 723 in 2015, and 759 in 2016 (Table 1). The removal of this facility has reduced the number of units to 5 at the end of 2018.



Table 1. The evolution of the number of employees in protected units

| Authorized protected units | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|--|-------|-------|-------|-------|-------|-------|
| Total number of authorized protected units | 564 | 667 | 691 | 723 | 759 | 708 |
| Number of employees with disabilities in APU | 1690 | 1769 | 1733 | 1785 | 2015 | 1550 |
| Number of people with disabilities employed | 28756 | 29842 | 30556 | 32147 | 33449 | 33593 |
| % of people with disabilities in APU from total people with disabilities employed | 5.88% | 5.93% | 5.67% | 5.55% | 6.02% | 4.61% |

Source: ANPD, 2015; ANPD, 2016; ANPD, 2017; Alături de voi, 2014; Constantinescu, 2013

Romania has funded the creation of social enterprises in 2009-2015 through the Human Resources Development Operational Program. Thus, through Axis 6, funds amounting to EUR 429,153,699 were earmarked for both the development of new social enterprises and the general development of knowledge of the field. Through these funds, 1339 social enterprises were created, which in turn created 8332 jobs. Of these, 70% (933) were organized as trading companies, 22% (293) as associations and foundations,

6% (82) as cooperative societies and 2% (26) as mutuals (Table 2). A percentage of 74% (6148) of all jobs was for vulnerable persons, 67% (5584) of jobs were created in rural areas. The sustainability rate of these social enterprises in the absence of fiscal facilities has made only 114 (9%) of them officially registered in the Single Register of Social Enterprises



Table 2. POSDRU financing for social economy structures 2009-2015

| OIR financier | Social enterprises financed | Work places created | Form of organizing | | | | |
|----------------------------------|-----------------------------|---------------------|--------------------|--------------|----------------------------|-----------|----------|
| | | | SRL | Cooperatives | Associations & Foundations | CAR | Other |
| OIPOSDRU South East | 251 | 1481 | 195 | 4 | 49 | | 3 |
| OIRPOSDRU South West | 175 | 1196 | 106 | 54 | 15 | | |
| OIRPOSDRU South Muntenia | 340 | 2005 | 241 | 4 | 95 | | |
| OIRPOSDRU Bucharest-Ilfov | 67 | 399 | 49 | 8 | 10 | | |
| OIRPOSDRU North West | 250 | 1767 | 180 | 4 | 64 | | 2 |
| OIRPOSDRU Center | 256 | 1484 | 162 | 8 | 60 | 26 | |
| Total | 1339 | 8332 | 933 | 82 | 293 | 26 | 5 |


05



Study – main results

The study “Reserved Contracts. Challenges, Trends, Ppportunities” published by the Center for Not-for-Profit Law in March 2019 analyzes the main challenges in applying the provisions on reserved contracts from Law 98/2016 on public procurement and proposes a series of solutions to facilitate its implementation on a much larger scale at national level.

The transposition of European public policy (Directive 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC) in the Romanian one (Law 98/2016 on public procurement) regarding reserved contracts and the reserved procurement procedure for health, social and cultural services was achieved by introducing nuances that make the implementation be slightly hampered.




Therefore, according to Romanian legislation:

- Reserved contracts of products/services can be attributed only to protected workshops or social insertion enterprises because, according to their specific legislation, only these entities satisfy the condition of the EU Directive, namely that at least 30% of the employees of the workshops, economic operators or programs concerned are workers with disabilities or belonging to disadvantaged groups. Thus, it was preferred that the fulfilment of this condition be verified by applying the legislation specific to these entities, instead of leaving the contracting authority the option of requesting documents attesting to the fulfilment of said condition.

- The reservation of participation in public procurement award procedures exclusively for health, social and cultural services can be done for economic operators such as non-profit legal entities, social enterprises and protected entities accredited as social service providers, public service providers. There is no related legislation on the certification of organizations in order to provide the health, cultural and educational services listed in Annex 2 to Law 98/2016. Thus, by specifying in the national procurement legislation the types of economic operators able to provide these services (such as non-profit legal entities, social enterprises and protected entities accredited as social service providers, public social service providers) makes it so that only social services can be contracted out because only social service

providers are accredited according to the legislation in force (Law 197/2012). Healthcare providers are recognized by the National Health Insurance House, through contracts concluded for the provision of medical services. However, there is no legislation whereby cultural or educational service providers are accredited (while these services are listed in CPV codes in the legislation). This makes them not be purchased through the reserved procedure.

The use of procedures regarding reserved contracts by public authorities is extremely low in Romania even though the impact on the social inclusion of people with disabilities or vulnerable groups as well as on the quality of social, cultural or health services would be much higher if they would be applied on a much wider scale. The development of protected facilities and social insertion enterprises that hire individuals from vulnerable groups and offer them social support services depends on the provision of some facilities, and reserved contracts are one of the most important (T & CO Social Development Center, 2019).



The main challenges in implementing the provisions of Law 98/2016 on public procurement on reserved contracts indicated by the report are related to:

- Limited knowledge of legal provisions related to reserved contracts by both public authorities and NGOs providing social services, and those managing protected units or social insertion enterprises. This limited knowledge of the legal provisions is the main reason for their extremely limited implementation.
- Extremely low awareness among public institutions of the potential social impact of using the provisions on reserved contracts. Public authorities do not understand the importance of using this type of contracts for the socio-professional integration of people from vulnerable groups, which makes them unwilling to apply it. The lack of information on this subject from the National Authority for Persons with Disabilities (ANPD) or The National Agency for Public Procurement (ANAP), as well as of a legal requirement that from the procurement budget, a minimum of 2% is dedicated to reserved contracts, makes the only public institutions that apply these provisions to be DGASPCs due to the fact that they have a better understanding of the issue of social integration.
- The lack of knowledge of the activity of protected units and social insertion enterprises by public authorities is another factor which substantially contributes to the non-use of the legislative provisions regarding reserved contracts.
- The administrative issues of the SICAP platform, a platform that does not contain a special field to be ticked if the contract is reserved so that these purchases can be more easily monitored by those interested. At the same time, neither the suppliers of products/services have a field in SICAP where they can tick if they are a reserved unit/social enterprise / social insertion enterprise /NGO accredited as a social service provider etc. For this reason, public authorities may have difficulties in identifying potential suppliers with whom to conclude reserved contracts.
- Restrictive legal provisions limiting the duration of contracts awarded through a procurement procedure to a maximum of 3 years in the case of social services. This provision is difficult to implement in the absence of clarification on the possibility of continuing the contract after those 3 years, especially in cases where beneficiaries are people who cannot be moved frequently from one center to another (e.g. children, people with disabilities, elderly) due to possible emotional trauma or other issues.



• Predominantly using the lowest price criterion due to concerns about possible sanctions imposed by control bodies (eg. the Court of Accounts). The lowest price is the criterion that responds to the principle of economic efficiency (economy and efficiency) under the Public Finance Law 500/2002 (Article 21, paragraph 8) but which, in the case of reserved contracts, should not be the most important, to the detriment of the social impact criteria or the quality of services. Practice has shown that using the lowest price criterion is preferable to avoid any suspicion from control authorities or potential contestants, which does not favour the use of reserved contracts by public institutions. Even if according to art. 111 par. (4) of Law 98/2016: "The award criteria used for the award of public procurement contracts/framework agreements dealing with social services and other specific services, as set out in Annex no. 2, and whose estimated value is equal to or higher than the threshold in art. 7 par. (1) lit. d) are the best value for money or the best quality-cost ratio provided in art. 187 par. (3) lit. c) and d), taking into account the criteria of quality and sustainability of social services", they are difficult to implement by public institutions in the absence of guidance on how to measure and establish this cost-effectiveness ratio

• The small number of authorized protected units and social insertion enterprises registered in the National Register of Social Enterprises in the absence of tax incentives to help cover the additional cost of using workforce from vulnerable groups (adapting the workplace to the needs of people with disabilities, the lesser work capacity of some of those employed, social support services etc.). The list of accredited protected units is not up to date in order to know which are functioning and which are not, following GEO 60/2017. In addition, the list of social insertion enterprises is very limited. Due to this, there is a risk that public authorities may be accused of favouring certain organizations in a potential control by the Court of Accounts, or of restricting competition by the Competition Council.





Public policy recommendations

General public policy recommendations

- Informing public authorities on the impact that reserved contracts/acquisitions for social, health or cultural services have on the social inclusion of vulnerable groups. Other themes for information sessions should be: procedures to be followed in order to grant reserved contracts, products and services provided by protected units/social enterprises, social service providers and their work.
- Informing NGOs, protected units, social insertion enterprises about the opportunity to participate in reserved procurement procedures/ purchases of social, health or cultural services. This would allow for a better understanding of the procedures to be followed and the better promotion of products and services.
- Development of guidelines by NAPA that include procedures to be followed by local authorities to award reserved social, health, and cultural services contracts. This would facilitate the implementation of legal provisions by local or central public authorities.
- Guidance to be issued by the Court of Auditors.

Specific recommendations for reserved public procurement (Art. 56 of Law 98/2016)

- Introducing the obligation to allocate a minimum 2% of the procurement budget of public institutions for reserved contracts in order to facilitate the social inclusion of vulnerable people, increase the quality of social services as well as the access to such services.
- Establishing a national mechanism of "social certificates" to be required from economic operators in order to participate in public procurement procedures. These social certificates should be generated by the bidder by meeting certain social criteria or bought through the purchase of products, services or works from protected units, social enterprises or other social entities.

Social certificates may be included either in the qualifying conditions or in the evaluation criteria and can be proportionate to the estimated value of the public procurement contract. The introduction of social certificates will also lead to the development of partnerships between economic operators and social economy entities that are generating social certificates.

- Amending the provisions of Article 56 of Law 98/2016 in order to introduce the possibility for contracting authorities to assess the social criteria fulfilled by bidders. The current provisions of the national law are more restrictive than the provisions of the European Directive, which does not establish an accreditation obligation but only the fulfilment of certain conditions/criteria.

At present, the number of accredited entities is very limited due to the lack of facilities. However, there are many of entities (especially NGOs and cooperatives) that do meet the conditions/criteria for qualification as a social economy entity.

- Creating a tick in the SICAP platform to indicate whether the purchase is made through a reserved contract/if the right to participate in the acquisition is reserved, in order to facilitate the monitoring of this type of procurement.

- Creating a tick in the SICAP platform so that suppliers of products/services registered as protected units, social insertion enterprises, or accredited as social service provider can be quickly identified by public institutions wishing to award reserved contracts.

Specific recommendations regarding the procurement of social services

- Modifying the current public procurement legislation so to allow the acquisition of continuous social services through contracts of more than 3 years, with the obligation to monitor annually the fulfilment of quality standards by the contracting public institution.

- Introducing a special line for social services in the Local Authorities' Plan of Accounts to allow for a better monitoring of the funding provided for these active socio-occupational measures.

- Aligning the provisions of Art. 112 of Law 98/2016 with the provisions of the European Directive, in order

to establish a "moderate regime" of social services procurement, irrespective of the estimated value of the acquisition of social services.




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The Center for Not-for-Profit Law is a non-profit, non-governmental organization set up in 2013 with the aim of providing accurate information and clear answers to the legal issues faced by associations and foundations in their current work. The Association has created a resource platform for non-governmental organizations (www.legiong.ro) and a public policy monitoring service (issuemonitoring.ro).