*Chapter 2*

# Construction

*The Construction sector is important, both as the creator of infrastructure for other sectors and as a great source of employment (over 1.1 million people in 2014). It is also a major contributor of GVA (EUR 9.4 billion in 2014). Among its major constraints are unclear procurement practices with unguided discretion by public authorities, caps on prices for major components such as gravel and sand and constraints on specific types of business such as market stalls and tourist constructions. Potential conflict of interest with public authorities, obsolete legislation and laws that have not kept up with recent EU legislation, such as those governing the environment have also led to wide discretion granted to authorities.*

## 2.1. Economic overview of the Romanian construction sector

### *General Overview*

#### *Definition of the relevant sectors and areas of investigation*

The construction sector can be defined and segmented into submarkets using various criteria:

**Statistical and financial definitions** are largely related and rely on the European standard classification system (NACE) which groups all core construction activities under group F (consisting of F41 Construction of buildings, F42 Civil engineering and F43 Specialized construction). A number of construction-related activities which could be considered as part of the wider construction sector[1] fall outside the scope of NACE Group F but rather are dispersed into other NACE Groups such as B Mining and Quarrying, C Manufacturing, G Wholesale and Retail Trade or M Professional, Scientific and Technical Activities.

For the purpose of this study, **depending on the availability of information, report objectives and relevant market,** the analysis focusses on a list of NACE groups and codes which have been identified as relevant for each subsector analysed. An adapted business approach to defining the construction sector was used to define the relevant sectors/market according to the NACE classification.[2] This study will attempt to focus on the areas of interest consisting of NACE group F42 Civil Engineering[3] and its subsectors as well as identified subsectors relating to construction materials from groups B Mining and Quarrying and C Manufacturing.[4]

#### *International Comparisons*

According to the World Economic Forum, the *Global Competitiveness Report 2015-2016*, Romania is ranked 91st on the competitive index on quality of overall infrastructure, with a score of 3.6 on a scale from 1 to 7 (Table 2.1). Looking at the second pillar that is focussed specifically on infrastructure, on the quality of roads, Romania is in 120th place, and on the quality of railroad infrastructure in 62nd place.

In comparison with the other 27 EU countries (Figure 2.1, Figure 2.2 and Figure 2.3), Romania is placed last on the quality of overall infrastructure and the quality of railroad infrastructure, whereas the European leader is the Netherlands. On the quality of railroad infrastructure Romania is ranked as second-last in Europe, the country scoring the lowest in this area being Croatia; the European leader in this category is Spain.

#### *Development of the constructions sector*

The overall construction sector's importance for the Romanian economy is highlighted by the **gross value added** (GVA) of the sector (as a percentage of total gross domestic product [GDP]). From 2005 until 2007 construction intensified and the construction sector's contribution to GDP reached over 9%. However, the situation changed

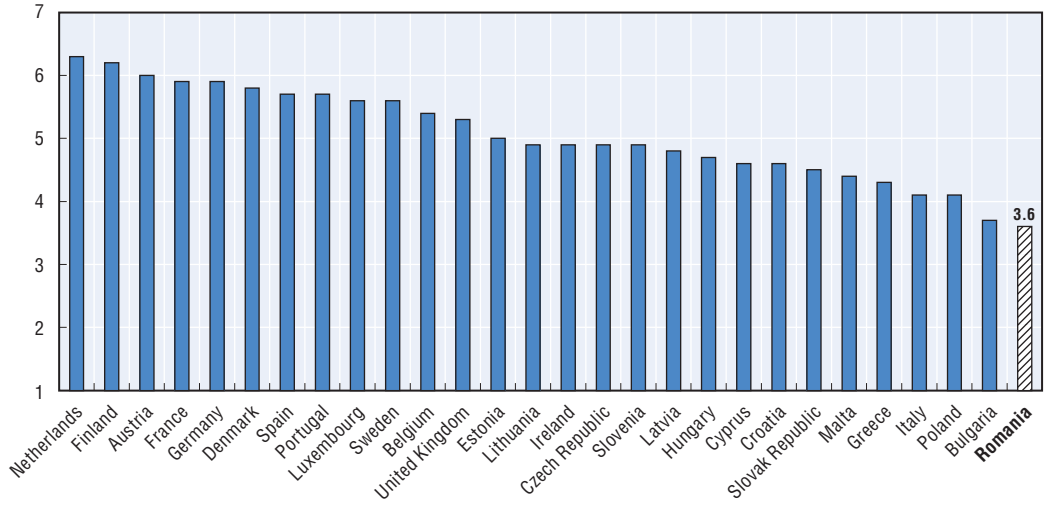
Table 2.1. **Global Competitive Rank**[1]

| Indicator | Rank of 144 |
|---|---|
| **Quality of infrastructure overall** | 91 |
| **Quality of roads** | 120 |
| **Quality of railroad infrastructure** | 62 |

1. The World Economic Forum calculated the scores for the above-mentioned indicators by sending a questionnaire to different respondents from all targeted countries. Respondents included companies from the main sectors of the economy (agriculture, manufacturing industry, non-manufacturing industry, and services), representing private, public and foreign companies. The companies include small companies (<50 employees), small-medium companies (50-150 employees), large-medium companies (151-1000 employees) and large companies (>1 000 employees). The respondents also include private, public and foreign companies. The respondents were asked to assess the quality of the overall infrastructure with the question: "How would you assess general infrastructure (e.g., transport, telephony and energy) in your country?", the quality of roads: "How would you assess the quality of roads?" and the quality of railroad infrastructure: "In your country, how would you assess the quality of the railroad system?" The respondents were given a range of scores for each question, from 1 (implying extremely underdeveloped – among the worst in the world) to 7 (meaning extensive and efficient – among the best in the world) and the final score for each indicator was calculated as a weighted average from the scores representing the responses.

*Source:* World Economic Forum, *Global Competitiveness Report (2015-16), http://reports.weforum.org/global-competitiveness-report-2015-2016/.*

Figure 2.1. **Global Competitive Index: Score for quality of overall infrastructure (2014)**




*Source:* World Economic Forum, Global Competitiveness Report (2015-16), *http://reports.weforum.org/global-competitiveness-report-2015-2016/.*

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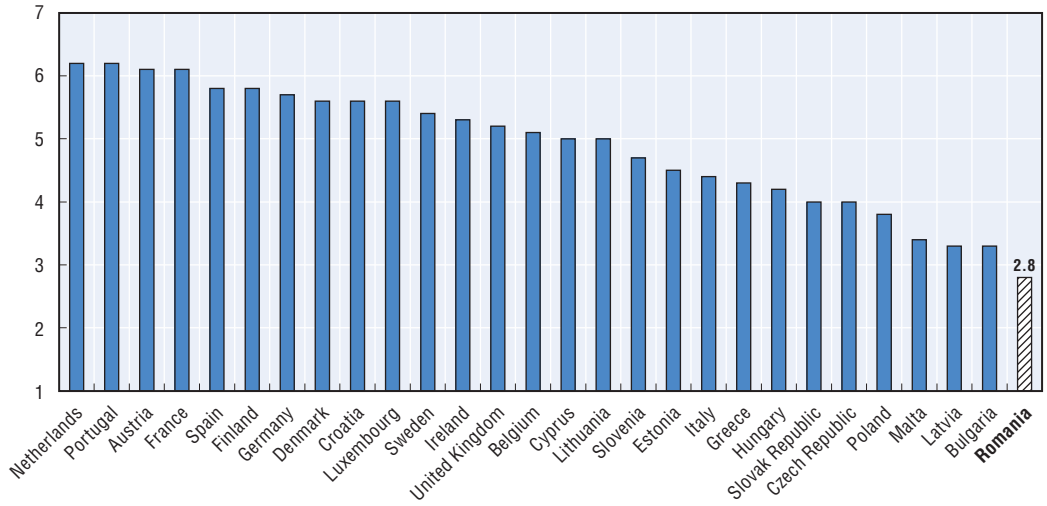
in 2008 as a consequence of the economic and financial crisis as a slowdown of the overall real estate business, adjustment in value of real estate and budget balance issues emerged. In 2009, however, the sector reached a peak in its contribution to national GDP (10.23%), but followed a decreasing trend the years after (until 2015).

The reduction of the GVA as a percentage of GDP was accompanied by a drop of revenues in the roads and railways sector, a decrease of fixed assets and a reduction in public spending in this sector (Coface, 2015). Even though the sector is still recovering and certain subsectors are still struggling to return to pre-crisis levels, others have seen **slow growth resuming in the last few years**.

Figure 2.2. **Global Competitive Index: Score for quality of roads (2014)**




*Source:* World Economic Forum, *Global Competitiveness Report* (2015-16), *http://reports.weforum.org/global-competitiveness-report-2015-2016/.*

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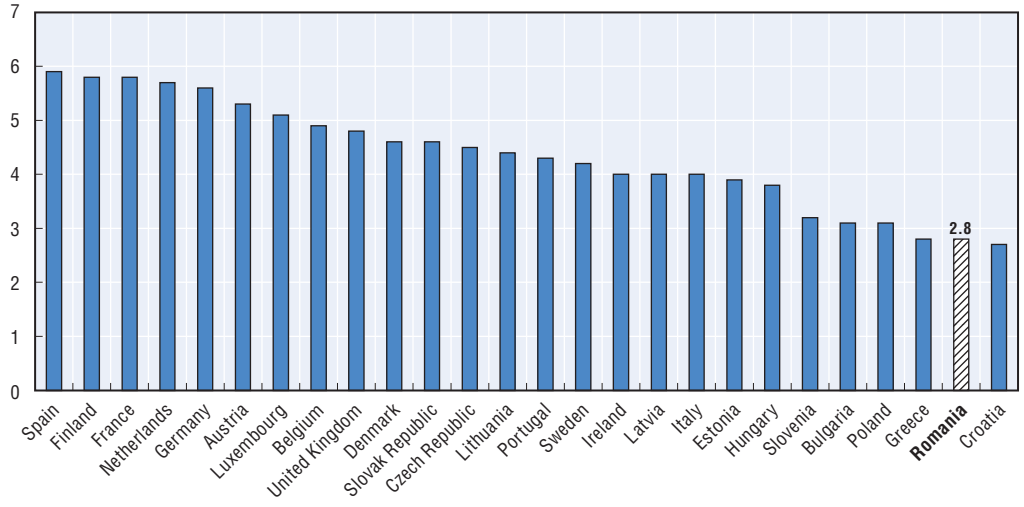
Figure 2.3. **Global Competitive Index: Score for quality of railroad infrastructure (2014)**




*Source:* World Economic Forum, *Global Competitiveness Report* (2015-16), *http://reports.weforum.org/global-competitiveness-report-2015-2016/.*

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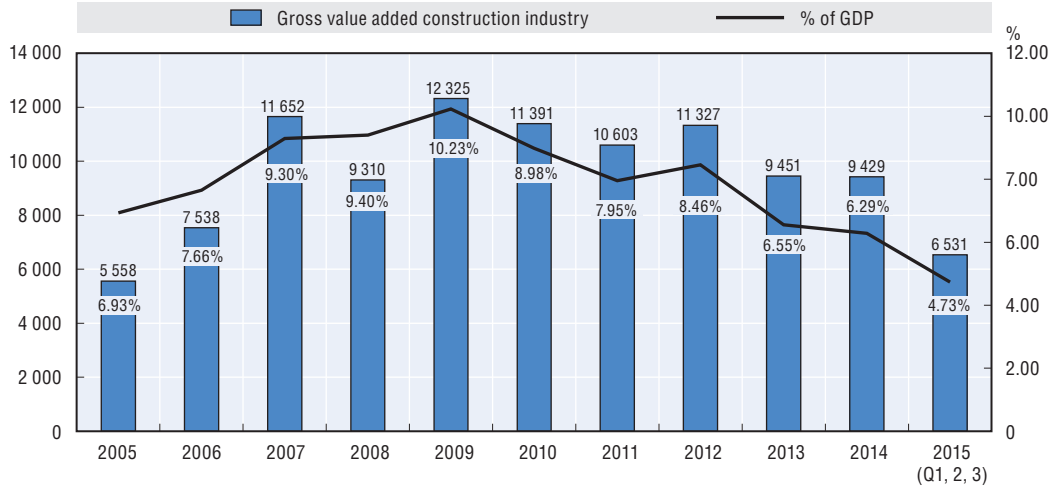
The construction of roads and railways has seen a steady increase in the number of companies active on the market since 2010 but subsector turnover and number of employees only increased between 2010 and 2012 and contracted in 2013 (Figure 2.5).

The Construction of utility projects subsector was relatively stable from 2008 to 2013 but has seen slight improvements in turnover throughout the period. The Construction of other civil engineering projects subsector has seen the most dramatic continued decrease in numbers of companies, employees and turnover.

Figure 2.4. **Gross value added construction industry**




*Source:* National Institute of Statistics and Deloitte calculations.

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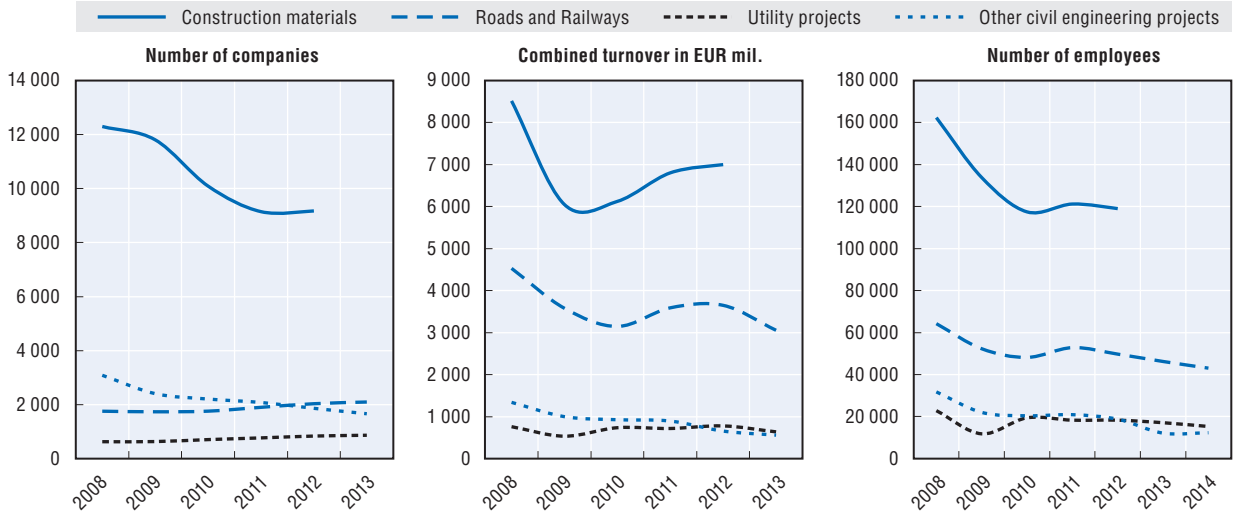
Figure 2.5. **Evolution of main indicators in the civil engineering and construction materials industries**




*Source:* ANAF.

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### *Relevant government authorities and associations*

In Romania the main government authorities involved in regulating, managing and supervising construction activity (including the area of construction materials) are the following:

- The ***Ministry of Regional Development and Public Administration*** (MDRAP) carries out, as appropriate, together with the line ministries, government policy in the following areas of activity: regional development, cohesion and spatial development, cross-border, transnational and interregional co-operation, discipline in construction, spatial planning, urban planning and architecture, habitation, housing, residential buildings, thermal rehabilitation of buildings, real estate and urban planning management and development,

public works, construction, central and local public administration, decentralisation, reform and administrative-territorial reorganisation, taxation and regional and local public finance, dialogue with the associative structures of local public administration authorities, development of public community services, state aid provided to local public administration authorities, industrial parks, public service management, planning, co-ordination, monitoring and control of the use of non-reimbursable financial assistance provided to Romania by European Union programmes in its areas of activity[5].

- ***Romanian National Company of Motorways and National Roads*** (CNADNR) is working under the authority of the Ministry of Transport with responsibility for the administration, exploitation, maintenance and development of the national roads and motorways on Romanian territory;[6]
- ***Construction State Inspectorate*** (ISC) has as its main scope to verify and ensure the observance of applicable urban planning regulations and the legal requirements to assure the quality of construction work and materials.[7]
- The ***Ministry for Environment, Waters and Forests*** promotes a unitary, coherent environmental policy, setting itself some major targets to comply with the *acquis communautaire* for the environment, increasing energy efficiency, promoting the renewable sources of energy and the ecological rehabilitation of the historically polluted areas or coastal erosion.[8]
- ***Standing Technical Council for Construction*** (CTPC) is composed of qualified specialists who are part of organisations involved in introducing construction materials onto the market; its main responsibilities are: applying Romanian legislation in regard to *acquis communautaire* to construction materials, managing and supervising conformity certification of construction materials, managing and supervising technical agreement activity for construction and construction materials.[9]
- ***National Agency for Mineral Resources*** (ANRM) has as its main responsibilities the administration of hydrocarbon resources (petroleum and natural gas resources) and mineral resources (public property), concluding agreements for mining concessions, for petroleum extraction and exploitation permits and monitoring compliance with petroleum agreements and with permits and licences.[10]
- ***National Commission on Seismic Engineering*** is composed of technical experts and specialists in the construction domain. The main activities of the Commission are: it technically approves the recondition interventions on constructions considered vital for the society of which the functionality during and after an earthquake has to be fully assured, it approves the interventions for buildings considered as high seismic risk.[11]

The ***Social Dialogue Commission*** is part of the Ministry of Regional Development and Public Administration and has a consulting role. Its main responsibilities are to inform and consult its social partners about the legislative initiatives and to ensure social partnerships between the administration, employers' associations and trade unions (in order to ensure permanent communication of issues derived from the main activity of the Ministry of Regional Development and Public Administration).[12]

The industry players are organised in various associations, especially:

- Federation of Building Materials Industry (PATROMAT)
- Professional Association of Mineral Aggregates Producers (APPA)
- Romanian Construction Entrepreneurs Association (ARACO)

- Patronal Association of Constructors (PATROCONS)

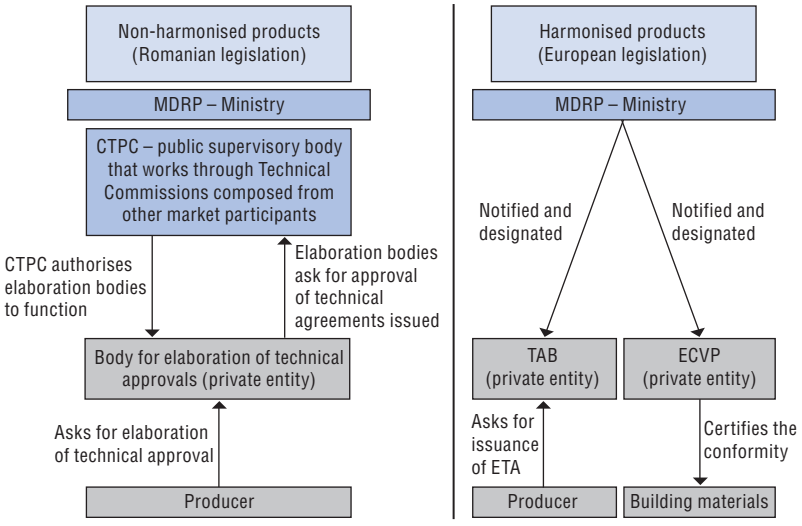
In Europe, ***technical assessment bodies*** (TABs) are designated for technical assessment of construction materials and for issuing the **European Technical Assessment** (ETA). In Romania, the following institutions make up the TAB:

- **The National Institute for Research and Development in Construction, Urban Planning and Sustainable Spatial Development** "URBAN-INCERC"
- **The Research Institute for Construction Equipment and Technology** (ICECON)
- **The Research Institute for Transport** (INCERTRANS)

Moreover, the Body responsible for standardisation of construction in Romania is the ***Romanian Standards Association*** (ASRO) which is a non-governmental private legal entity of public interest. The main responsibilities of ASRO consist of developing, approving and managing documentation and editing, publishing and disseminating information related to national and international standards.[13]

The chart below describes the process and parties involved in issuing technical approvals and ETAs for construction materials:

Figure 2.6. **Relationship between several institutions for issuance of technical approvals and ETAs**




*Source:* Deloitte calculations.

## *Civil Engineering*

### *Overview*

The construction of roads and railways accounts for approximately 66.7% of the turnover of the overall civil engineering sector. In second place is the construction of utility projects with approximately 17% of turnover in the sector and the last contribution to the cumulated turnover is in construction of other civil engineering projects.

In the **Civil engineering** sector the supply generally consists of a diversified group of private companies, both Romanian owned and international, which often partner together and engage in subcontracting to execute complex projects. The following table presents the top ten companies in the civil engineering construction industry, in terms of 2014 turnover:

Table 2.2. **Structure of the civil engineering industry**

| Sector | Code | | Turnover 2014 (EUR mil.) |
|---|---|---|---|
| **Construction of roads and railways** | F 421 | Abs. | 2 564.31 |
| | | *Percentage* | *66.72%* |
| **Construction of utility projects** | F 422 | Abs. | 654.7 |
| | | *Percentage* | *17.04%* |
| **Construction of other civil engineering projects** | F 429 | Abs. | 624.24 |
| | | *Percentage* | *16.24%* |
| ***Total*** | F 42 | *Abs.* | *3 843.25* |
| | | *Percentage* | *100%* |

*Source:* ANAF and Deloitte calculations.

Table 2.3. **Top 10 players in the civil engineering construction industry**

| No. | Company | NACE Code | Description NACE | Turnover 2014 (EUR mil.) | Total market share 2014[1] |
|---|---|---|---|---|---|
| **1** | HIDROCONSTRUCTIA SA | F 4291 | Construction of water projects | 116.27 | 3.03% |
| **2** | DELTA ANTREPRIZA DE CONSTRUCTII SI MONTAJ 93 SRL | F 4211 | Construction of roads and motorways | 113.05 | 2.94% |
| **3** | SOCIETATEA FILIALA DE INTRETINERE SI SERVICII ENERGETICE "ELECTRICA SERV" S.A. | F 4222 | Construction of utility projects for electricity and telecommunications | 85.82 | 2.23% |
| **4** | TANCRAD SRL | F 4211 | Construction of roads and motorways | 70.14 | 1.82% |
| **5** | STRACO GRUP SRL | F 4211 | Construction of roads and motorways | 68.39 | 1.78% |
| **6** | FCC CONSTRUCCION SA BARCELONA SUCURSALA BUCURESTI | F 4211 | Construction of roads and motorways | 68.24 | 1.78% |
| **7** | TEHNOSTRADE SRL | F 4211 | Construction of roads and motorways | 66.06 | 1.72% |
| **8** | ELECTROMONTAJ SA | F 4222 | Construction of utility projects for electricity and telecommunications | 53.86 | 1.40% |
| **9** | EURO CONSTRUCT TRADING 98 SRL | F 4211 | Construction of roads and motorways | 53.30 | 1.39% |
| **10** | MAX BOEGL ROMANIA SRL | F 4211 | Construction of roads and motorways | 67.48 | 1.76% |
| ***TOTAL*** | | | | ***3 843.25*** | ***19.84%*** |

1. References to "market characteristics", "market shares" or "markets" in general, included in this report, do not reflect the same definitions used for purposes of applying competition law.

*Source:* ANAF, Credit Info and Deloitte calculations.

Table 2.3 demonstrates that the top ten companies in the industry account for approximately 20% of the total turnover generated in the entire civil engineering construction subsector, of which 13.18% comes from the Construction of roads and railways sector (more specifically, from the Construction of roads and motorways subsector), 3.63% from the utility construction sector (construction of utility projects for electricity and telecommunications subsector) and 3.03% from other civil engineering projects (however, this turnover comes from only one company).

### *Construction of roads and railways*

**Description of the subsector.** The construction of roads and railways capitalises on sizable amounts allocated from the state budget and other financing sources (Competition Council, 2013), such as government loans, European funds and funds provided by international development organisations such as the European Bank for Reconstruction and Development (EBRD), the European Investment Bank (EIB), the European Investment Fund (EIF), the World Bank, etc. It is an auction market where companies have to participate in auctions organised by state authorities; the state accounts for most of the demand for these projects, and previous experience, recommendations and scale

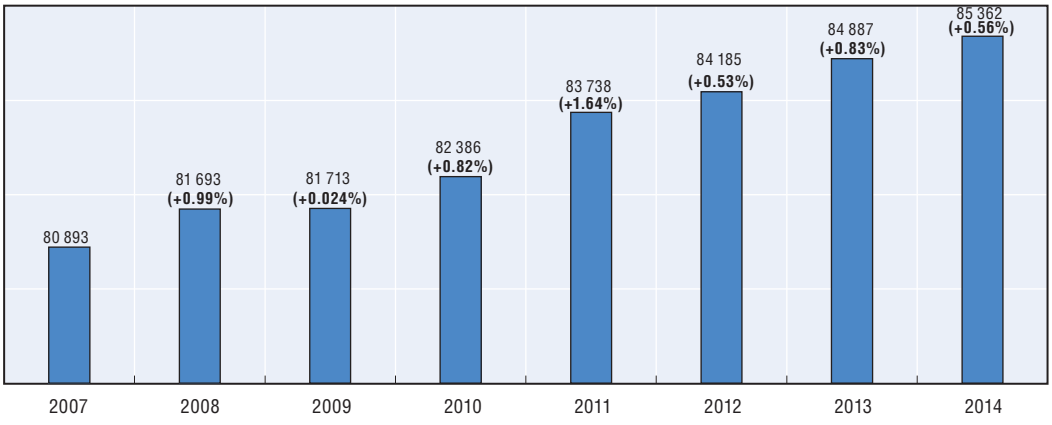
requirements for participating in auctions are requested by typical tender books. Complex projects spanning long periods of time expose the sector to delays and cancellations and lead to frequent subcontracting and/or partnering. The high cost of transportation of building materials favours local suppliers.

For the **Construction of roads and railways** subsector demand is generally represented either by the National Company of Motorways and National Roads of Romania (CNADNR), CFR SA (for railway infrastructure), local government or state owned public transportation companies (tram networks). Private sector demand for roads and railways is limited though there are infrequent small scale projects for private beneficiaries.

The main driver of demand for construction of roads and railways is government policy in the infrastructure/transportation sector – the pipeline of projects.

The total road network of Romania (Figure 2.7) increased by 4 469 km between 2007 and 2014 or 5.5% while the motorway network (Figure 2.8) increased by 402 km in the same interval – representing a growth of a 143%.

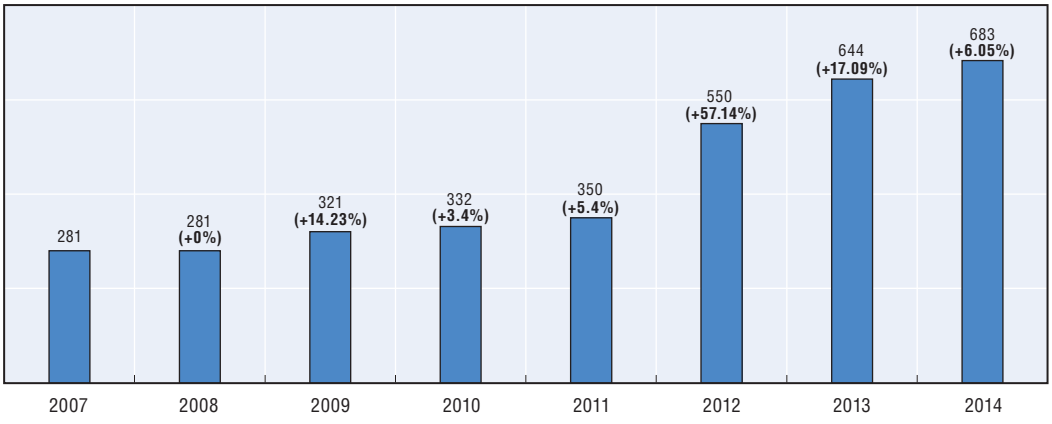
Figure 2.7. **Total length of road network in Romania (km)**




*Source:* National Institute of Statistics.

StatLink http://dx.doi.org/10.1787/888933361186

Figure 2.8. **Total length of motorway network in Romania (km)**

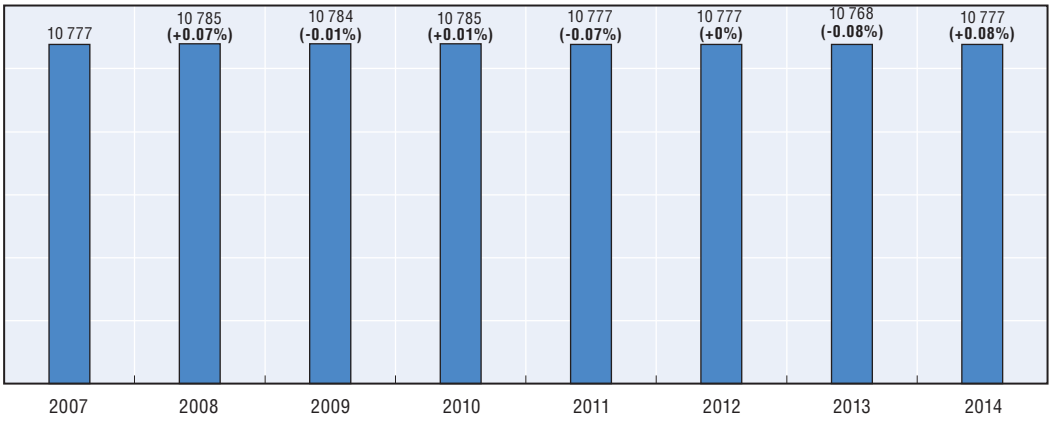



*Source:* National Institute of Statistics.

StatLink http://dx.doi.org/10.1787/888933361198

On the other hand, the length of railways in use (Figure 2.9) did not experience any changes from 2007 until 2014. Even if in some years there has been some variation in this indicator, in 2014 it returned to the same level as in 2007, namely 10 777 km of railways in use.

Figure 2.9. **Total length of railway network in use in Romania (km)**




*Source:* National Institute of Statistics.

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**Subsector characteristics.** The top ten companies in terms of turnover in the **Construction of roads and railways** sector[14] are presented in the following table:

Table 2.4. **Top 10 players in construction of roads and railways sector**

| No. | Company | NACE Code | Description NACE | Turnover 2014 (EUR mil.) | Market share 2014[1] |
|---|---|---|---|---|---|
| **1** | DELTA ANTREPRIZA DE CONSTRUCTII SI MONTAJ 93 SRL | C 4211 | Construction of roads and motorways | 113.05 | 4.41% |
| **2** | TANCRAD SRL | C 4211 | Construction of roads and motorways | 70.14 | 2.74% |
| **3** | STRACO GRUP SRL | C 4211 | Construction of roads and motorways | 68.39 | 2.67% |
| **4** | FCC CONSTRUCCION SA BARCELONA SUCURSALA BUCURESTI | C 4211 | Construction of roads and motorways | 68.24 | 2.66% |
| **5** | TEHNOSTRADE SRL | C 4211 | Construction of roads and motorways | 66.06 | 2.58% |
| **6** | EURO CONSTRUCT TRADING 98 SRL | C 4211 | Construction of roads and motorways | 53.30 | 2.08% |
| **7** | MAX BOEGL ROMANIA SRL | C 4211 | Construction of roads and motorways | 50.98 | 1.99% |
| **8** | DIFERIT SRL | C 4211 | Construction of roads and motorways | 45.09 | 1.76% |
| **9** | ANTREPRIZA DE REPARATII SI LUCRARI A R L CLUJ SA | C 4211 | Construction of roads and motorways | 42.41 | 1.65% |
| **10** | IMPRESA PIZZAROTTI & C SPA ITALIA SUCURSALA CLUJ | C 4211 | Construction of roads and motorways | 40.20 | 1.57% |
| **TOTAL** | | | | **617.86** | **24.09%** |

1. References to "market characteristics", "market shares" or "markets" in general, included in this report, do not reflect the same definitions used for purposes of applying competition law.

*Source:* ANAF, Credit Info and Deloitte calculations.

The top ten[15] companies in the Construction of roads and railways sector (Table 2.4) account for 24.1% of the sector's turnover. The highest share in this sector is held by "DELTA ANTREPRIZA DE CONSTRUCTII SI MONTAJ 93 SRL", which contributed to the turnover of the Construction of roads and railways sector by 4%.

Table 2.5 shows that the most important activity in the construction of roads and railways is represented by the construction of roads and motorways, with over 95% of the turnover of the sector coming from this activity (ratio quite stable in the last 3 years), representing EUR 1 732 m in 2014.

Table 2.5. **Structure of roads and railways construction activities**

| Sector | Code | | Turnover 2014 (EUR mil.) | Employees 2014 |
|---|---|---|---|---|
| **Construction of roads and motorways** | F 4211 | Abs. | 1 732.7 | 27 683 |
| | | *Percentage* | *95.97%* | *91.40%* |
| **Construction of railways** | F 4212 | Abs. | 53.9 | 2 346 |
| | | *Percentage* | *2.98%* | *7.75%* |
| **Construction of bridges and tunnels** | F 4213 | Abs. | 18.87 | 259 |
| | | *Percentage* | *1.04%* | *0.86%* |
| ***Total*** | **F 421** | **Abs.** | ***1 805.5*** | ***30 288*** |
| | | ***Percentage*** | ***100%*** | ***100%*** |

*Note:* For companies with a turnover higher than EUR 50 000 and more than 50 employees in 2014.
*Source:* Credit Info and Deloitte calculations.

In terms of gross profit (Table 2.6), in 2014 the construction of roads and motorways registered EUR 24.6 m, representing 94% of the gross profit of the sector. In the last three years, gross profit in the sector has experienced a downward trend from 2012 until 2014, with the only exception being in the construction of railways where in 2014 the subsector registered a cumulated positive gross profit after two years of losses.

Table 2.6. **Gross profit in the construction of roads and railways sector**

| Sector | Code | Gross profit 2012 (EUR mil.) | Gross profit 2013 (EUR mil.) | Gross profit 2014 (EUR mil.) |
|---|---|---|---|---|
| **Construction of roads and motorways** | F 4211 | 100.20 | 95.14 | 24.62 |
| **Construction of railways** | F 4212 | -3.29 | -4.55 | 1.60 |
| **Construction of bridges and tunnels** | F 4213 | 3.60 | 1.30 | 0.10 |
| ***Total*** | ***F 421*** | ***100.50*** | ***91.90*** | ***26.32*** |

*Source:* Credit Info and Deloitte calculations.

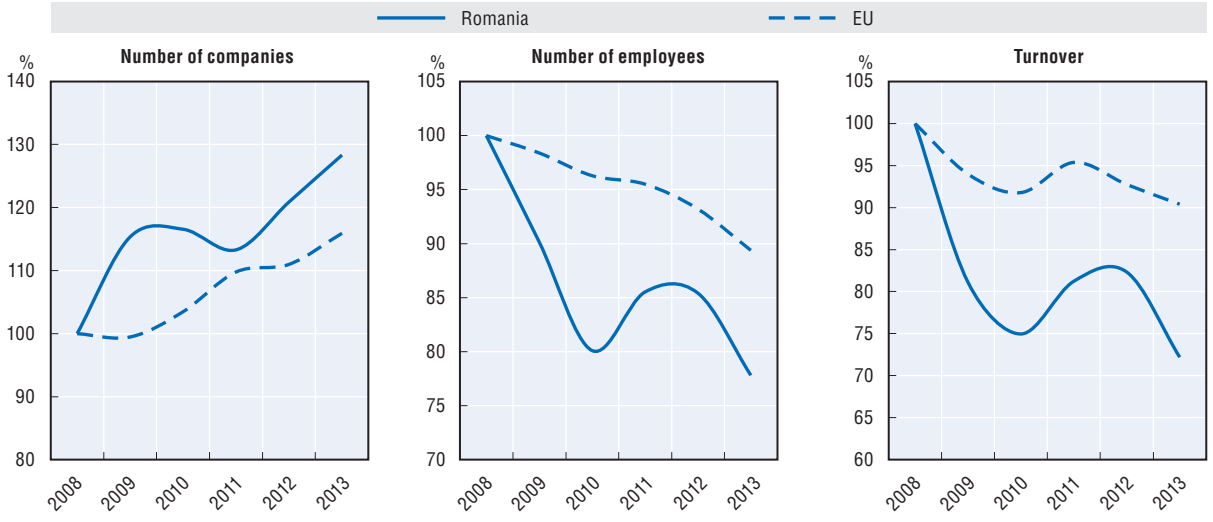
In roads and railways construction, in 2014, 10.7% of the enterprises accounted for 80% of the turnover from the sector.[16]

The development of the sector points to an increasing trend from 2008 until 2013 regarding the number of companies in Europe. Romania follows the same trend with the exception of 2011 when there was a brief drop in this indicator. However, the general trend between 2008 and 2013 was a reduction in the number of employees in this sector in both Europe and Romania (with the exception in Romania in 2011 where the number of employees increased by 6.8% compared to 2010, despite the reduction in the number of companies in the same year).

### *Construction of utility projects*

**Description of the subsector.** Construction of utilities often relies on financing from local budgets and external financing from the European Union (which runs programmes and national programmes in the area of transportation, environment, regional and rural

Figure 2.10. **Evolution of main indicators (base year 2008) in the construction of roads and railways sector**




*Source:* Eurostat and Deloitte calculations.

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development, large projects programme etc.), international development organisations (e.g. EBRD, EIB, EIF, World Bank) or the banking system. Local policies to extend network coverage to address availability gaps as well as government policy in the energy and utilities sector are key for these projects. It is also an auction market where companies have to participate in auctions organised by state authorities by following the general procurement procedure. This is frequently the case because the state is often the ultimate beneficiary, including where distribution networks are leased to private companies (due to the practice of granting concessions of networks to private operators rather than selling/transferring these, even for new projects).

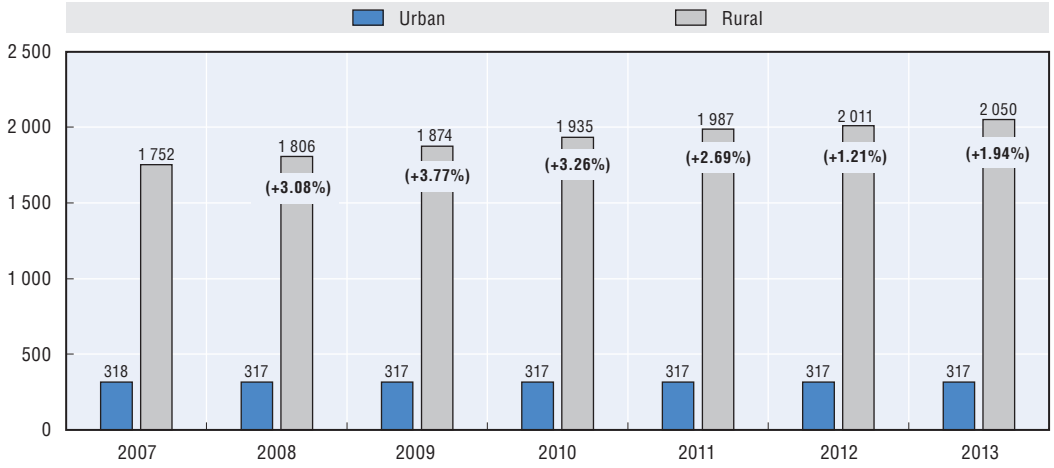
In the **Construction of utility projects** subsector both supply and demand can be represented by the same companies. For example, in some cases Transgaz acts as a beneficiary of construction of utilities projects, in other cases it can act as a supplier. In general, subsector demand consists of both private and state companies mainly in the production, transportation and distribution chains for natural gas, electricity, petroleum products, water and sewage, telephones, TV and data.

Major state-owned companies include Transgaz (gas transportation), Transelectrica (electricity transportation), Conpet (transportation of petroleum products), water companies owned by public administrations and even public data projects such as the Netcity project in Bucharest. Private beneficiaries include natural gas distributors (GDF Suez and EON), electricity distributors (Electrica regional companies, Enel regional companies, CEZ, EON), private water companies (e.g. Apanova), etc.

The main drivers of demand for the construction of utility projects include the following: government, local authority and state company policies to cover any utilities availability gaps and to develop new capabilities in the energy and utilities sectors; available external funding including available EU funds; and foreign direct investment.

Access to public utilities has been slowly improving as 298 towns and villages in the rural area gained public water distribution networks between 2007 and 2013 (Figure 2.11).

Figure 2.11. **Number of settlements with public water distribution networks**

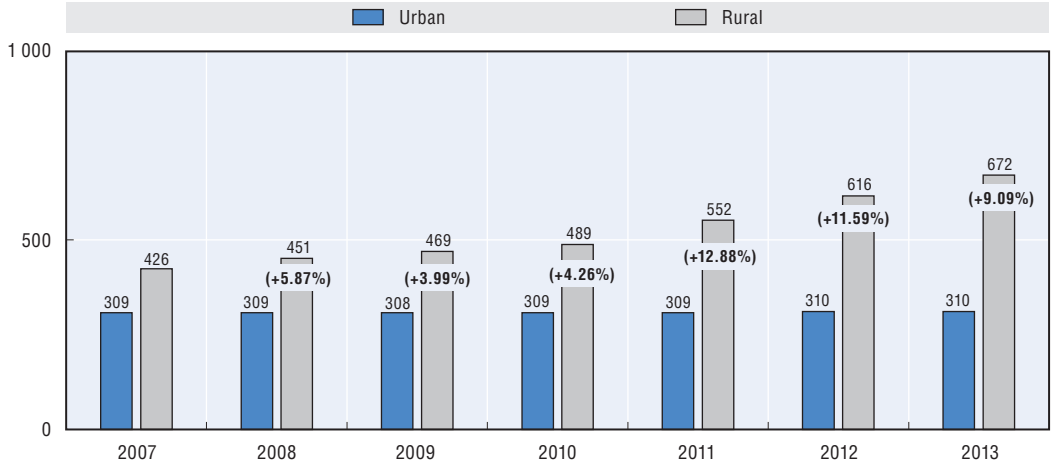



*Note:* Urban settlements are defined according to Romanian statistical standards which identify all municipalities and cities as urban settlements and all villages and communes as rural settlements.
*Source:* National Institute of Statistics.

StatLink http://dx.doi.org/10.1787/888933361224

As well, 246 rural towns and villages and one urban town gained public sewage networks in the same time period (Figure 2.12), 94 towns and cities had natural gas distribution networks built (Figure 2.13) and the overall number of households with an internet connection improved from 31% to 56%. Further extensions of utilities networks were completed in the period.

Figure 2.12. **Number of settlements with public sewage networks**



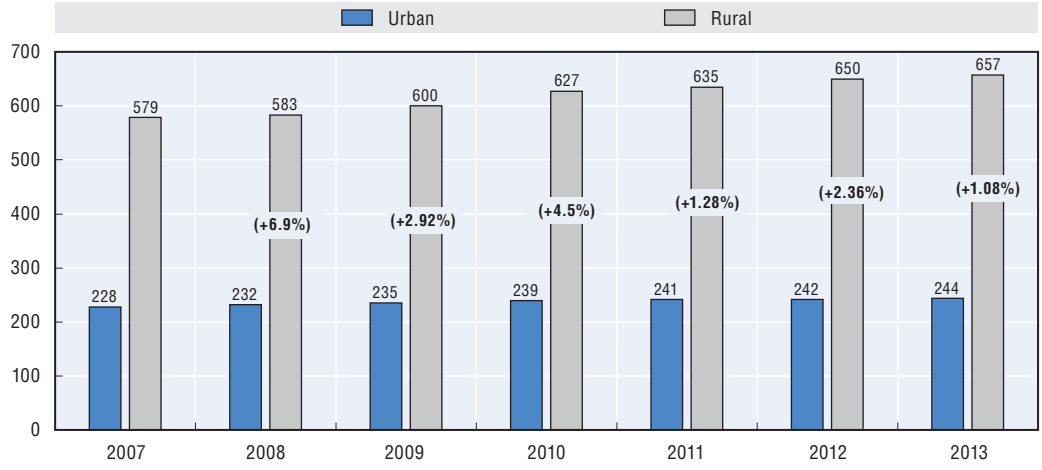

*Source:* National Institute of Statistics.

StatLink http://dx.doi.org/10.1787/888933361231

**Subsector characteristics.** The top ten companies in terms of turnover in the **Construction of utility projects** sector[17] are presented in the following table:

In the construction of utility projects sector, the main players (presented in Table 2.7) account for 44.92% of the total turnover from construction of utilities projects. The top company, "SOCIETATEA FILIALA DE INTRETINERE SI SERVICII ENERGETICE 'ELECTRICA SERV' S.A.", contributed 13.11% to the turnover of sector followed by "ELECTROMONTAJ SA" with 8.23%.

Figure 2.13. **Number of settlements with natural gas distribution networks**




*Source:* National Institute of Statistics.

StatLink http://dx.doi.org/10.1787/888933361246

Table 2.7. **Top 10 players in the construction of utility projects sector**

| No. | Company | NACE Code | Description NACE | Turnover 2014 (EUR mil.) | Market share 2014 [1] |
|---|---|---|---|---|---|
| **1** | SOCIETATEA FILIALA DE INTRETINERE SI SERVICII ENERGETICE "ELECTRICA SERV" S.A. | C 4222 | Construction of utility projects for electricity and telecommunications | 85.82 | 13.11% |
| **2** | ELECTROMONTAJ SA | C 4222 | Construction of utility projects for electricity and telecommunications | 53.86 | 8.23% |
| **3** | CONDMAG SA | C 4221 | Construction of utility projects for fluids | 39.03 | 5.96% |
| **4** | INSPET SA | C 4221 | Construction of utility projects for fluids | 38.20 | 5.83% |
| **5** | COMESAD RO SA | C 4221 | Construction of utility projects for fluids | 17.81 | 2.72% |
| **6** | CAMUSAT ROM-TELECOMUNICATII SRL | C 4222 | Construction of utility projects for electricity and telecommunications | 17.02 | 2.60% |
| **7** | IRIDEX GROUP CONSTRUCTII SRL | C 4221 | Construction of utility projects for fluids | 11.88 | 1.82% |
| **8** | T.A.G.C.M. DUNĂREA SOCIETATE PE ACŢIUNI | C 4221 | Construction of utility projects for fluids | 11.19 | 1.71% |
| **9** | ALPENSIDE SRL | C 4221 | Construction of utility projects for fluids | 10.07 | 1.54% |
| **10** | AL STOM COMPANY SRL | C 4221 | Construction of utility projects for fluids | 9.17 | 1.40% |
| ***TOTAL*** | | | | ***294.06*** | ***44.92%*** |

1. References to "market characteristics", "market shares" or "markets" in general, included in this report, do not reflect the same definitions used for purposes of applying competition law.

*Source:* ANAF, Credit Info and Deloitte calculations.

Table 2.8 presents the structure of the financial results from the companies active in the construction of utility projects sector. There are two main activities in this sector, namely construction of utility projects for fluids (53% of the sector's turnover) and construction of utility projects for electricity and telecommunications (47% of the total turnover of the sector).

The gross profit of the companies involved in construction utility projects registered a cumulated loss in 2014 for construction of utility projects for electricity and telecommunications of EUR 1.19 m (Table 2.9). However, the loss was compared to the one previous year. In the construction of utility projects for fluids, gross profit amounted to EUR 7.65 m, and this indicator followed an increasing trend over the last three years.

From 2008 until 2013, the number of companies active in the construction of utility projects has followed an increasing trend, with the only exception in 2011 when the

Table 2.8. **Structure of construction of utility projects activity**

| Sector | Code | | Turnover 2014 (EUR mil.) | Employees 2014 |
|---|---|---|---|---|
| **Construction of utility projects for fluids** | F 4221 | Abs. | 231.58 | 4 079 |
| | | *Percentage* | *53.25%* | *37.87%* |
| **Construction of utility projects for electricity and telecommunications** | F 4222 | Abs. | 203.3 | 6 691 |
| | | *Percentage* | *46.75%* | *62.13%* |
| **Total** | **F 422** | **Abs.** | **434.88** | **10 770** |
| | | ***Percentage*** | ***100%*** | ***100%*** |

*Note:* For companies with a turnover higher than EUR 50 000 and more than 50 employees.
*Source:* Credit Info and Deloitte calculations.

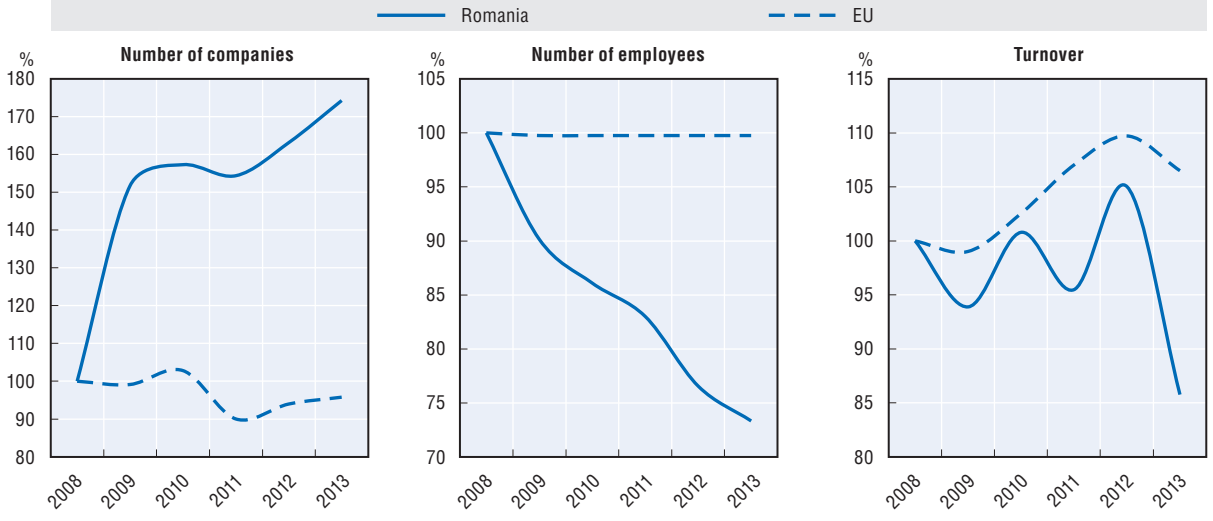
Table 2.9. **Gross profit in the construction of utilities projects sector**

| Sector | Code | Gross profit 2012 (EUR mil.) | Gross profit 2013 (EUR mil.) | Gross profit 2014 (EUR mil.) |
|---|---|---|---|---|
| **Construction of utility projects for fluids** | F 4221 | 5.13 | 7.54 | 7.65 |
| **Construction of utility projects for electricity and telecommunications** | F 4222 | 4.39 | -4.55 | -1.19 |
| ***Total*** | *F 422* | *9.51* | *2.99* | *6.46* |

*Source:* Credit Info and Deloitte calculations.

number of active companies was lower than in 2010. In Europe, the situation was not the same, as the evolution of the number of companies in this sector did not follow a clear trend. However, the evolution of the number of employees shows a general personnel reduction in Romania, while in Europe the number of employees working in the construction of utility projects remained relatively stable.

Figure 2.14. **Evolution of main indicators (base year 2008) in the construction of utilities projects sector**




*Source:* Eurostat and Deloitte calculations.

StatLink http://dx.doi.org/10.1787/888933361257

### *Construction of other civil engineering projects*

**Description of the subsector.** In the **Construction of other civil engineering projects** subsector demand consists of state companies and administrations relating to waterways, port management, flood prevention (for port infrastructure, dredging, dykes), both state and private companies and private or state companies for industrial construction work excluding chemical plants and refineries.

The main drivers of demand for **Construction of other civil engineering projects** include general economic and industrial sector growth, government policy in the infrastructure/water transportation sector and available external funding including available EU funds.

**Subsector characteristics.** The top ten companies in terms of turnover in the **Construction of utility projects** sector[18] are presented in the following table:

Table 2.10. **Top 10 players in the construction of other civil engineering projects sector**

| No. | Company | NACE Code | Description NACE | Turnover 2014 (EUR mil.) | Market share 2014 [1] |
|---|---|---|---|---|---|
| **1** | HIDROCONSTRUCTIA SA | C 4291 | Construction of water projects | 116.27 | 18.63% |
| **2** | ROMELECTRO SA | C 4299 | Construction of other civil engineering projects | 32.61 | 5.22% |
| **3** | KREMSMUELLER ROMANIA SRL | C 4299 | Construction of other civil engineering projects | 24.93 | 3.99% |
| **4** | IREM CONSTRUCȚII GENERALE SRL | C 4299 | Construction of other civil engineering projects | 14.65 | 2.35% |
| **5** | LESCACI COM SRL | C 4291 | Construction of water projects | 10.76 | 1.72% |
| **6** | PETROCONST SA | C 4299 | Construction of other civil engineering projects | 10.60 | 1.70% |
| **7** | LUCA PREST SRL | C 4299 | Construction of other civil engineering projects | 10.24 | 1.64% |
| **8** | ISAF-SOCIETATE DE SEMNALIZARI SI AUTOMATIZARI FEROVIARE SA | C 4299 | Construction of other civil engineering projects | 9.52 | 1.52% |
| **9** | S.U.C.T. SA | C 4299 | Construction of other civil engineering projects | 8.42 | 1.35% |
| **10** | SOCOT SA | C 4291 | Construction of water projects | 8.05 | 1.29% |
| ***TOTAL*** | | | | ***246.05*** | ***39.42%*** |

1. References to "market characteristics", "market shares" or "markets" in general, included in this report, do not reflect the same definitions used for purposes of applying competition law.

*Source:* Credit Info and Deloitte calculations.

Table 2.10 shows that the top ten companies in the construction of other civil engineering projects sector account for 39.42% of the sector's turnover. Out this percentage, 21.64% of the market share comes from the construction of water projects, while the rest – 17.78% – comes from construction of other civil engineering projects. "HIDROCONSTRUCTIA SA" alone contributed to the total turnover of the sector by 18.63%, as the main player in the sector.

Based on data on the top ten constructors, Table 2.11 shows that the main subactivity in 2014 was the construction of water projects, representing almost 60% of the total turnover of this activity. Also, 66% of the employees are working in this area.

With regards to gross profit (Table 2.12), the construction of water projects suffered a loss of EUR 34.14 m in 2014. The construction of other civil engineering projects reached a low total profit of EUR 83 606. For each subsector the trend of the previous three years was a decrease in gross profit, the most significant reduction being in 2014.

Table 2.11. **Structure of construction of other civil engineering projects activity**

| Sector | Code | | Turnover 2014 (EUR mil.) | Employees 2014 |
|---|---|---|---|---|
| **Construction of water projects** | F 4291 | Abs. | 185.71 | 5 218 |
| | | *Percentage* | *59.42%* | *66.31%* |
| **Construction of other civil engineering projects** | F 4299 | Abs. | 126.80 | 2 651 |
| | | *Percentage* | *40.58%* | *33.69%* |
| **Total** | **F 429** | **Abs.** | **312.51** | **7 869** |
| | | ***Percentage*** | ***100%*** | ***100%*** |

*Note:* For companies with a turnover higher than EUR 50 000 and more than 50 employees in 2014.
*Source:* Credit Info and Deloitte calculations

Table 2.12. **Gross profit in the construction of other civil engineering projects sector**

| Sector | Code | Gross profit 2012 (EUR mil.) | Gross profit 2013 (EUR mil.) | Gross profit 2014 (EUR mil.) |
|---|---|---|---|---|
| **Construction of water projects** | F 4291 | 8.70 | 3.43 | -34.24 |
| **Construction of other civil engineering projects** | F 4299 | 7.06 | 6.29 | 0.08 |
| ***Total*** | ***F 429*** | 15.76 | 9.72 | -34.16 |

*Source:* Credit Info and Deloitte calculations.

Between 2008 and 2013 the number of companies involved in the construction of other civil engineering projects (in Romania) decreased (on average) – Figure 2.15, the only increase being in 2010 compared to 20.8% in 2009, followed by a drop of 22% in 2011. In Europe the evolution of the number of companies show a decreasing trend from 2009 until 2013. The number of employees in Romania also fell over the same period, by more than the number of companies. The only year when there were more people employed in this subsector than the previous year was 2011 (but it was followed by a higher drop in 2012). The turnover of the companies also suffered a reduction from year to year between the period 2008 to 2013, for both Romania and the European average.

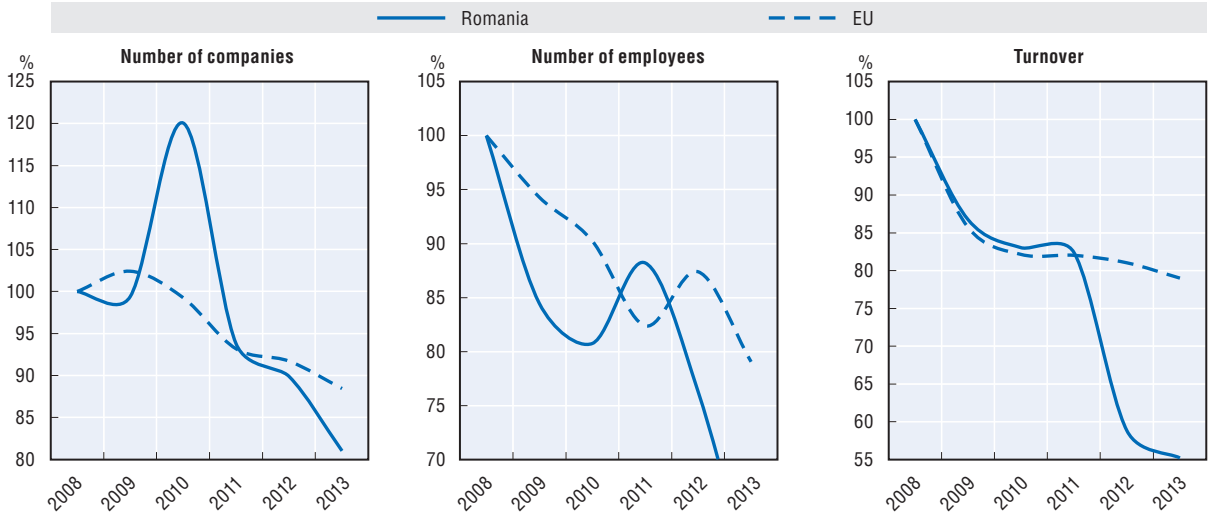
### *Construction materials*

#### *Overview*

Construction materials generally represent inputs for the construction industry and as such there is a significant overlap between demand for construction materials and supply of construction works. Demand for building materials is mainly driven by the construction sector and ultimately by the overall state of the economy. The nature of both production and consumption of most building materials contributes to this close link between local building materials and the construction sector as a whole (including construction of residential and commercial buildings and specialised construction).

Demand for building materials also originates from sources such as international demand, especially in the case of high value added construction materials, construction materials which can easily be transported over long distances and certain products such as those derived from wood, glass and plastics, and from “do it yourself” construction, renovation and repair activities. Imports of construction materials also play a role in satisfying demand for the products mentioned above.

Figure 2.15. **Evolution of main indicators (base year 2008) in the construction of other civil engineering projects sector**




*Source:* Eurostat and Deloitte calculations.

StatLink http://dx.doi.org/10.1787/888933361260

### *Sector characteristics*

The sector is highly dependent on the development of the construction industry which provides demand for construction materials. It is a largely local market due to high transportation costs – building materials are generally supplied to construction companies in relative vicinity of the manufacturing facilities. However, some construction materials are more easily transported and have a higher value, and are therefore suited to transportation over long distances e.g. wood, glass or high value added products. Construction materials represent a diversified subsector consisting of a wide range of products resulting from processing of outputs from various materials/resources industries (e.g. metals, glass, chemical, forestry).

The top ten companies in the construction materials industry[19] (in term of the turnover from 2014) are the following:

Table 2.13. **Top 10 companies in the construction materials industry**

| No. | Company | NACE Code | Description NACE | Turnover 2014 (EUR mil.) |
|---|---|---|---|---|
| **1** | EGGER ROMANIA SRL | C 1621 | Manufacture of veneer sheets and wood-based panels | 297.76 |
| **2** | KRONOSPAN SEBES SA | C 1621 | Manufacture of veneer sheets and wood-based panels | 253.17 |
| **3** | Holcim (Romania) SA | C 235 | Manufacture of cement, lime and plaster | 219.23 |
| **4** | CARPATCEMENT HOLDING SA | C 235 | Manufacture of cement, lime and plaster | 171.59 |
| **5** | LAFARGE CIMENT (ROMANIA) SA | C 235 | Manufacture of cement, lime and plaster | 155.50 |
| **6** | HENKEL ROMANIA SRL | C 236 | Manufacture of articles of concrete, cement and plaster | 132.06 |
| **7** | KRONOSPAN ROMANIA SRL | C 1621 | Manufacture of veneer sheets and wood-based panels | 112.64 |
| **8** | SAINT-GOBAIN GLASS ROMANIA SRL | C 2311 | Manufacture of flat glass | 70.76 |
| **9** | ADEPLAST S.A. | C 236 | Manufacture of articles of concrete, cement and plaster | 67.63 |
| **10** | SAINT-GOBAIN CONSTRUCTION PRODUCTS ROMANIA SRL | C 236 | Manufacture of articles of concrete, cement and plaster | 67.48 |

*Source:* ANAF, Credit Info and Deloitte calculations.

Data for the last complete available year from Eurostat are presented in Table 2.14 (2012). Incomplete data for 2014 is referred to in the analysis below depending on availability.

Table 2.14. **Main results of the construction materials sectors**

| Sector description | NACE Code | Number of companies 2013 | Number of employees 2013 | Turnover (EUR mil.) 2013 |
|---|---|---|---|---|
| **Quarrying of stone, sand and clay** | B081 | 828 | 7 431 | 316.8 |
| **Manufacture of wood and of products of wood and cork, except furniture; manufacture of articles of straw and plating materials** | C16 | 1 444 | 20 347 | 1 757.1 |
| **Manufacture of chemicals and chemical products** | C20 | 164 | 3 818 | 280 |
| **Manufacture of other non-metallic mineral products** | C23 | 1 959 | 26 241 | 2 006 |
| **Manufacture of fabricated metal products, except machinery and equipment** | C25 | 3 164 | 39 233 | 1 525 |
| ***TOTAL*** | | ***7 559*** | ***97 070*** | ***5 884*** |

*Note:* The data presented are for 2012 as it is the last available year with complete information from Eurostat.
*Source:* Eurostat.

In 2014, there were 846 companies in the **quarrying of stone, sand and clay** activity, representing a 2.17% increase compared to 2013.[20] The total number of active companies for this activity followed a decreasing trend from 2009 until 2013. In 2013 there were 7 431 people employed in this area, a relatively stable value between 2010 and 2013 (in 2010, however, there was a 14% drop). The turnover generated by these companies followed a general increasing trend after a sharp contraction in 2009, reaching EUR 355 m in 2014.

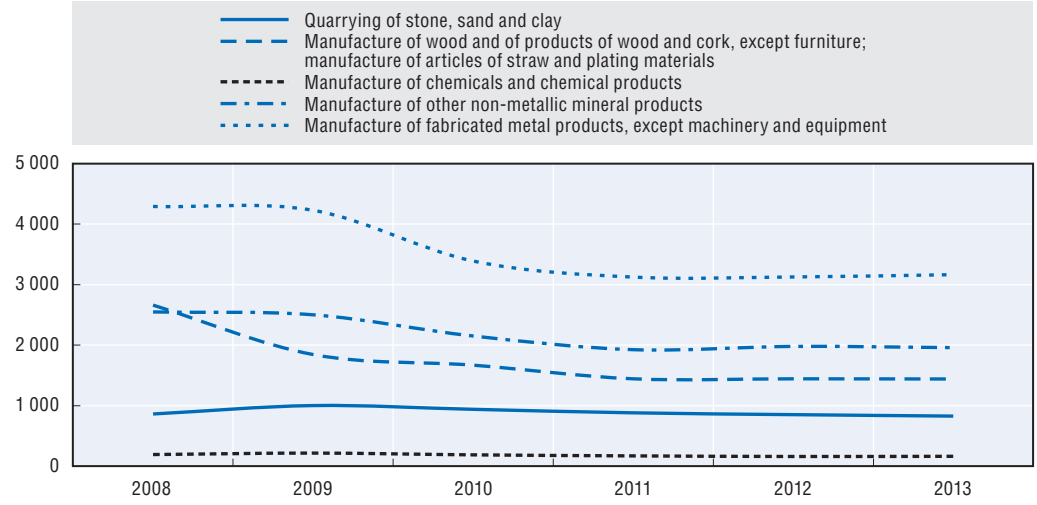
In the **manufacture of wood and products of wood and cork, except furniture, manufacture of articles of straw and plating materials** subsector the total number of companies in 2013 was 1 444.[21] The number of companies has decreased every year since 2008, resulting in a total reduction of 45.8% over the period 2008 to 2013. On the other hand, the number of employees has decreased only in the first two years after 2008, but more people were employed in 2011, 2012 and 2013 compared to the previous period, reaching 20 337 employees in 2013. The companies in the three activities considered relevant in this study generated a total turnover of EUR 1 757 m in 2013, following an increasing trend from 2009 on.

In the **manufacture of chemicals and chemical products** subsector, the number of active companies was 162 in 2014, showing a 1.2% decrease compared to 2012.[22] The number of employees was 3 818 people in 2013, decreasing by almost 1.5% from the previous year. The turnover generated by the companies operating in this area was relatively stable over the period 2010-2014, reaching EUR 311 m in 2014.

For the relevant activities operating in the **manufacture of other non-metallic mineral products** subsector, there were 1 959 active companies in 2013, employing 26 241 people and generating a turnover of EUR 2 006 m. The evolution of the number of companies shows in 2012 the first year of superior value compared to the previous year, after three consecutive years of reduction. The number of employees registered a cumulated reduction of 35% over the period 2008-2013, and the turnover decreased by 40% from 2009 until 2012.

In 2014, there were 3 279 companies operating in the **manufacture of structural metal products** subsector, representing a 3.63% increase compared to 2013.[23] The total number of active companies for this activity followed a decreasing trend from 2009 until 2013. In 2013 there were 39 223 people employed in this area. The 3 279 companies generated a cumulated turnover of EUR 1 513 m, a value lower than in 2013.

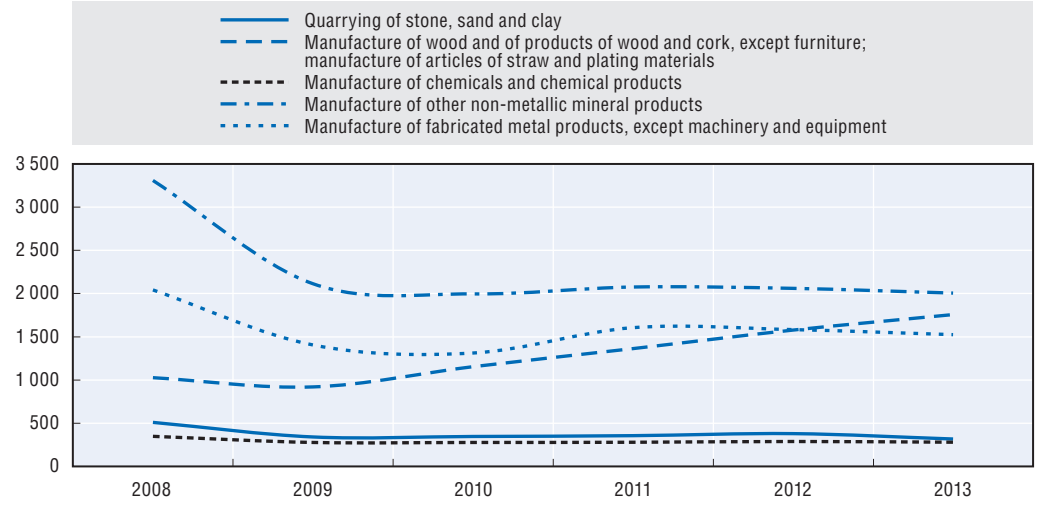
Figure 2.16. **Evolution of the number of companies in construction materials sectors**




*Source:* Eurostat and Deloitte calculations.

StatLink http://dx.doi.org/10.1787/888933361276

Figure 2.17. **Evolution of the number of employees in construction materials sectors**




*Source:* Eurostat and Deloitte calculations.

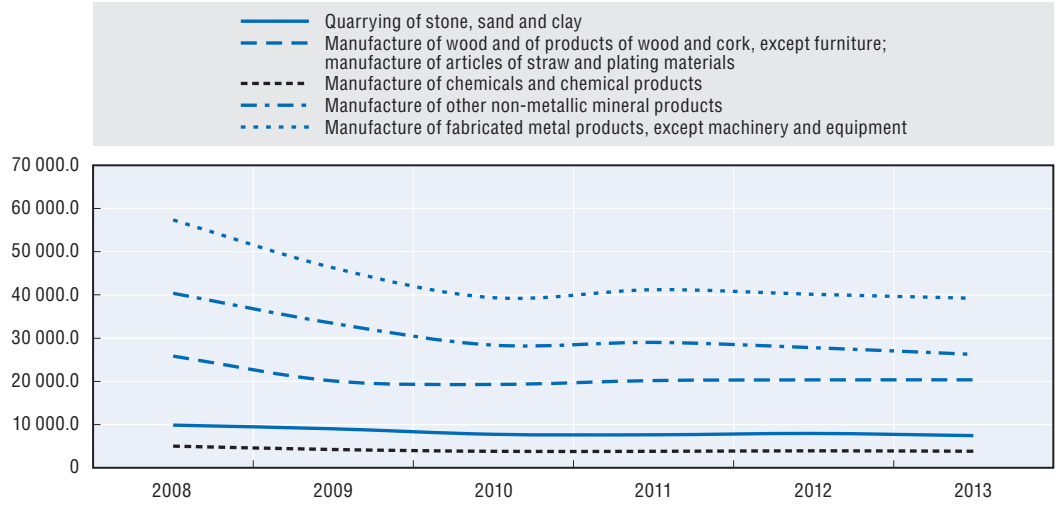
StatLink http://dx.doi.org/10.1787/888933361286

## *Public Procurement*

### *Relevant legislation*

The field of public procurement in Romania is currently regulated in primary legislation by a single act: Government Emergency Ordinance (GEO) No. 34/2006 on the award of public procurement contracts, public works concession contracts and concession of services,[24] which implements EU Directives 2004/17/EC and 2004/18/EC in public procurement and concessions.

Figure 2.18. **Evolution of turnover (million EUR) in construction materials sectors**




*Source:* Eurostat and Deloitte calculations.

StatLink http://dx.doi.org/10.1787/888933361291

Secondary legislation details the implementation in specific areas, including procurement and operational aspects of the general sector, utilities sector, concessions and electronic procurement.

The public tender procedures are regulated in the former EU Directives on procurement, respectively open tender, restricted tender, competitive dialogue, negotiated procedures, frameworks agreements and dynamic purchasing system. The deadlines set within the procedures, including those regarding the submission of offers or contestations, the timeframe for requesting clarifications and the obligation of contracting authorities to respond to requests, comply with the provisions of the directives.

Also, the thresholds for publication of the different announcements regarding the public procurement procedures, such as the tender announcement, tender documentation or awarding announcement, in the national and European publication systems, implement the provisions of the EU Directives.

### *Relevant government authorities*

Central functions of the public procurement system are fulfilled by the following institutions:

- ANRMAP (***National Regulatory and Monitoring Authority for Public Procurement)*** is the institution managing the public procurement system in Romania, with the fundamental role of defining, promoting and implementing the public procurement policy. The institution has a legislative function, offers advisory and operational support and performs *ex ante* evaluation of the tender documentation and *ex post* control.
- UCVAP (***Unit for the Coordination and Verification of Public Procurement)*** is an institution under the Ministry of Finance responsible for the *ex ante* verification of the procedures for awarding public procurement contracts, public works concession and service concessions by the contracting authorities;
- CNSC (***National Council for Solving Complaints***) is an independent body with administrative-jurisdictional activity, which has jurisdiction to hear appeals made in the award of public

procurement procedures before the contract is concluded. In exercising its powers, the Council takes decisions.

- AADR (***Agency for Romanian Digital Agenda***) is a specialised public institution under the Ministry for Information Society which aims to operate nationwide systems for eGovernment. It is the administrator of the Electronic System of Public Procurement (Sistemul Electronic de Achizitii Publice – S.E.A.P.).
- ***Court of Auditors*** is an operationally independent body within the Court of Accounts. The Court of Auditors is the only competent national authority to conduct external public audits in accordance with EU and national legislation, performing system audits and audits of operations.
- ***Competition Council*** is an autonomous body, which administers and implements Competition Law and which aims to protect, maintain and stimulate competition and a normal competitive environment, in order to promote the interests of consumers.
- ***Courts of appeal*** are courts in the constituency within which several tribunals and specialised courts operate. They represent the second instance for settlement of disputes in the matter of public procurement.

In addition, the management authorities and the implementation bodies which are charged with managing EU funds can also issue opinions on the conformity of a procurement procedure.

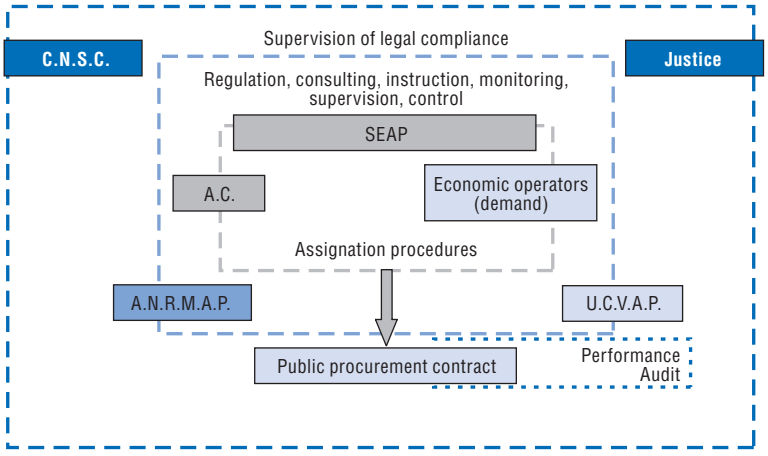
The steps of a public procurement procedure are as follows:

1. The contracting authority asks for approval of the tender documentation from ANRMAP.
2. After obtaining ANRMAP`s approval, the contracting authority publishes tenders above the legal threshold in the Electronic System of Public Procurement (SEAP).

   The procurement directives define a variety of procurement procedures. The basic characteristics of the most common ones are:

   - In an open procedure any business may submit a tender.
   - In a restricted procedure any business may ask to participate, but only those who are pre-selected will be invited to submit a tender. This saves time and money for both businesses and buyers.
   - In a negotiated procedure the public authority invites at least three businesses with whom it will negotiate the terms of the contract. This procedure can take place with or without prior publication. Most contracting authorities can use this procedure only in a limited number of cases.
   - The competitive dialogue is often used for complex contracts where the public authority cannot define the technical specifications at the outset.
3. Bidders submit their offers online or offline.
4. UCVAP performs *ex ante* verification of the procedures for awarding public procurement contracts.
5. The contracting authority designates a winner of the procedure.
6. Any interested third party can appeal the result of the procedure in the first instance with CNSC and in the second instance with the Court of Appeal.
7. A contract is signed between the contracting authority and the economic operator(s).
8. ANRMAP, the Competition Council and the Court of Auditors can verify various aspects of the procurement procedure after the contract is signed/finalised.

Figure 2.19. **Relationship of the main institutions involved in public procurement activity**




*Source:* ANRMAP (2012), "Sistemul de achizitii publice din Romania" (Romanian Public Procurement System), *http://romaniacurata.ro/wp-content/uploads/2012/04/Sistemul-de-achizitii-publice.pptx*.

Following the issuance of three new EU Directives in 2014 on public procurement, respectively Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, the national legislation in force is due to change. The transposition of the new EU Directives into Romanian legislation is planned to be made through four pieces of primary legislation that are, at the moment of writing this report, subject of public debate (one piece of legislation dealing with classical procurement, one dealing with utilities, one dealing with concessions and public private partnership and one piece of legislation dealing with appeals). Also, the national strategy on public procurement is subject to public debate.

Following the enactment of Government Emergency Ordinance No. 13/2015 on the set-up, organisation and functioning of the ***National Agency for Public Procurement*** ("ANAP") in May 2015, ANRMAP and UCVAP shall be dissolved and their attributions will be undertaken by ANAP, which is an institution subordinated to the Ministry of Public Finance. However, until the issuance of the methodological norms for the functioning of ANAP, ANRMAP and UCVAP shall continue to perform their attributions.

### *General problems of public procurement in Romania*

According to the European Commission's Single Market Scoreboard,[25] the overall performance of the Romanian public procurement system is below average, with a poor score for two out of the three dimensions[26] (bidders' participation, accessibility and effectiveness of the procedure).

In Romania, public procurement is currently carried out by thousands of decentralised contracting authorities (in accordance with the National Strategy on Public Procurement[27] in the period 2007-14, an annual average of 7 300 public contracting authorities conducted online and offline procurement procedures using SEAP or direct commitment with values below or above the thresholds set by EU law).

According to the National Strategy on Public Procurement, some of the main deficiencies of the national procurement system are:

- lack of integrated functionality and co-operation among responsible authorities;

- emphasis on regulation and control functions within the system, leading to a lack of involvement of the contracting authorities; and
- insufficient orientation of involved institutions towards an efficient use of public funds, but rather towards compliance with procedures.

The National Strategy on Public Procurement (2015) states that there is a generalised perception that deficiencies of the system are imposed primarily on the persons involved in the procedure who are punished as individuals, instead of identifying and solving the shortcomings of the system. This perception determines risk avoidance behaviours through which implementing best practice is replaced by an emphasis on the literal application of the rules and using just judgment is replaced by a mechanical approach. Some of the consequences are:

- the widespread use of the criterion "the lowest price", even if significant intellectual services or complex works are required;
- a focus on detailed technical specifications instead of performance specifications; or
- a focus on qualification criteria in the evaluation of technical proposals.

Ultimately, the consequences are detrimental to obtaining a good price-quality ratio and the effective use of public procurement in promoting public policies.

Therefore, despite validation by *ex ante* control of procurement procedures applied by contracting authorities, some issues can be challenged and held to be illegal at a later stage (*ex post* control, auditing), obliging the contracting authority to bear penalties/related financial corrections. In the absence of a common approach, *ex post* control is carried out by various institutions (ANRMAP, Court of Auditors) analysing the same items (documents/procedures), determining the contracting authority to adopt the option with minimal risk when awarding contracts.

Moreover, due to the requirement to justify in detail the award criterion "the most advantageous offer economically", contracting authorities are discouraged from using this criterion and prefer to rely on the criterion of "the lowest price", even when it is not appropriate to use it, because it is perceived as the most secure in the event of subsequent checks. Such an approach substantially restricts the development of strategic procurement policies and leads to losses of efficiency in the use of public funds.

According to the same strategy mentioned above, due to the widespread use of the criterion "the lowest price", reflected in substantial differences between the estimated price and the contract price, current market conditions in Romania determine economic operators to compete strongly on the price criteria which has an adverse effect on ensuring sustainable and efficient use of public funds ("value for money").

According to the CNSC Activity Report[28] of 2014, out of over 18 000 procedures published in SEAP, 20% were appealed in first instance, out of which 40% referred to construction contracts. Thus, according to the National Strategy on Public Procurement the large number of appeals was perceived by the administration more as an abuse of the economic operators rather than as an indicator of the lack of capacity in the public procurement system. Legislative solutions envisaged, respectively the guarantee of good conduct, were repealed by the Constitutional Court[29] and are also subject to an infringement procedure before the European Court of Justice.

According to a recent report of the Romanian Academic Society,[30] because of an unclear, unstable, and overregulated legislative framework worsened by sometimes

contradictory implementation of the rules and a lack of administrative capacity, contracting authorities and economic operators end up being sanctioned both by national monitoring and control bodies and corresponding EU institutions via financial corrections. Furthermore, public projects are placed on hold until contestations and legal disputes are settled in courts, thus leading to a waste of public resources. Nevertheless, putting on hold public procurement projects is not mandatory according to national legislation, but is left for the decision of the CNSC and the courts.

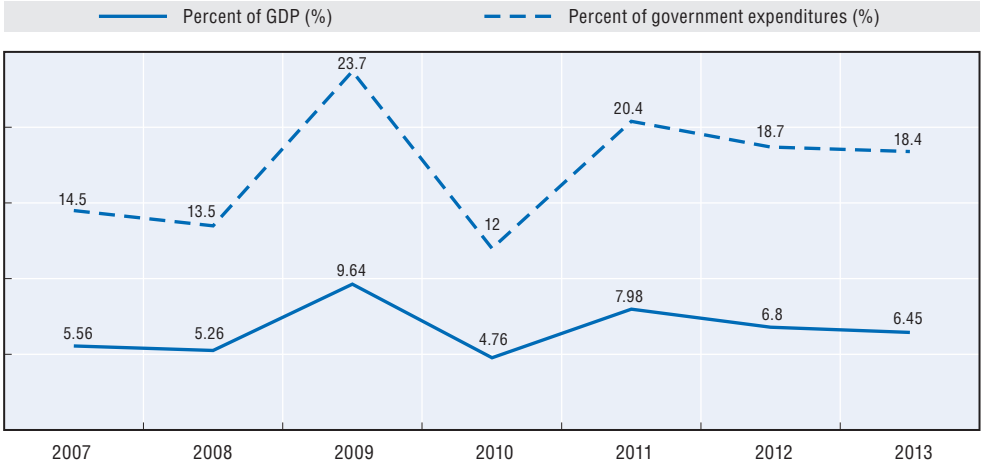
In 2013, the Romanian Competition Council issued a report following a sector inquiry on the construction market of roads and highways. The competition authority scrutinised the said market and identified certain factual situations which could trigger competition issues, as we describe below:

- partnerships between companies active on the market with the view of participation in tenders;
- sub-contracting of part of works awarded to a contractor following completion of tender procedure;
- increase of initial cost of works after the tender procedure through addenda to the contract until in the end the final cost overtakes the initial one.

### *Relevance of public procurement for the Romanian construction sector*

According to a report of the Romanian Academic Society,[31] public spending in the construction sector accounts for 58% of total public procurement. More precisely, public spending in construction reached nearly EUR 7 billion in 2007, peaked at EUR 11.6 billion in 2009 and one year later dropped to EUR 6 billion. Afterwards it surged again to EUR 10.6 billion (2011) and in the following two years it settled to around EUR 9.1 billion. Public procurement in the construction sector follows the same trend as total public procurement. The year 2009 represents the peak, both in absolute value and in percentage share of GDP and the share of total government expenditure.

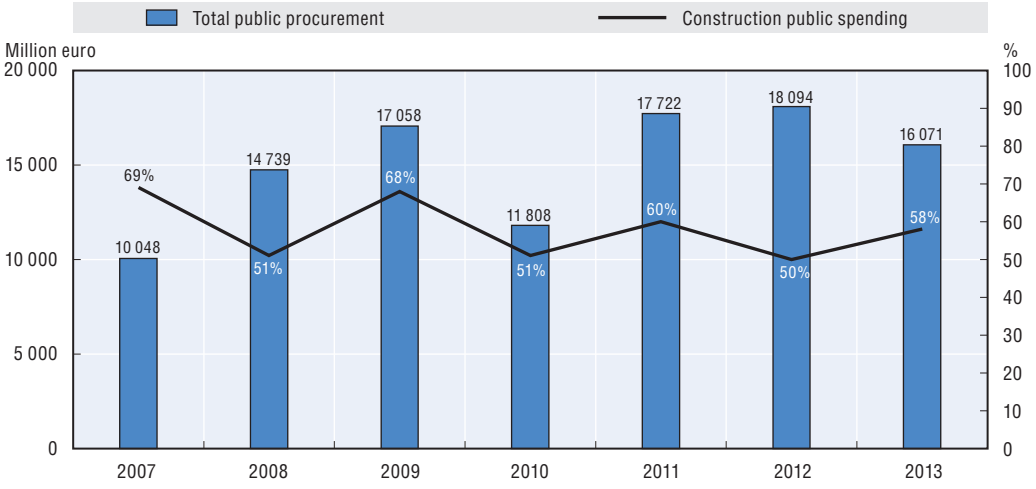
Figure 2.20. **Construction sector procurement: volume and share in GDP and government expenditure**




*Source:* Romanian Academic Society (SAR) (2015) Romanian public procurement in the construction sector. Corruption risks and particularistic links (30 March 2015): *http://anticorrp.eu/publications/report-on-romania/*. Construction procurement constitutes a significant share of total procurement, as shown in the figure below.

StatLink http://dx.doi.org/10.1787/888933361308

Figure 2.21. **Share of construction spending in total public procurement**




*Source:* Romanian Academic Society (SAR) (2015) Romanian public procurement in the construction sector. Corruption risks and particularistic links (30 March 2015): *http://anticorrp.eu/publications/report-on-romania/*.

StatLink http://dx.doi.org/10.1787/888933361316

The corruption report prepared by SAR (2015) reveals that the award criterion for **construction procedures** over EUR 1 m was in 46.3% of the cases "the lowest price". Instead, contracts receiving European funding were awarded at "the lowest price" in 37.4% of the cases, the rest being awarded based on "the most economically advantageous" criterion.

Among the most frequent public authorities awarding works public procurement contracts over EUR 1 m (SAR, 2015), there were five entities that signed over 100 contracts from 2007 to 2014: the Romanian National Company of Motorways and National Roads (CNADNR: 444 contracts), the Bucharest City Hall (118 contracts), the National Housing Agency (110 contracts) and two gas national companies (over 100 contracts). Bucharest road and public domain administrations followed closely (under 100 contracts).

The National Strategy on Public Procurement mentions some of the main deficiencies identified during implementation of works contracts, such as: the transfer of responsibility for authorisation of works from the contracting authority to the supplier, thus leading to significant delays in execution of contracts; lack of flexibility of technical indicators used in the procurement procedure; barriers in subcontracting after the award of the contract, low quality of works performed due to tight financing; addenda to contracts in order to satisfy the real needs of the contracting authority.

## 2.2. Restrictions to competitiveness in construction

According to the OECD paper "Competition in the construction Industry" (2008), the construction industry plays a fundamental role in the economy and development of every country. Its significance stems from the creation of structures and infrastructures on which every other industry depends, as well as making a major contribution in generating employment. The report describes the construction sector in general as a fragmented industry that is prone to cartel activity. This fragmented structure also exists in Romania, as described in the Economic overview above. According to the report, the following features encourage cartel formation: i) a lack of differentiation in product delivery among construction firms, ii) a lack of transparent bidding procedures, iii) the large number of clients, and iv) the need for subcontracting of works (OECD, 2008).

### *Unclear provisions*

In the revised construction legislation we identified several unclear provisions that give public authorities far-reaching discretional powers unguided by any requirements or guidelines. This discretion might lead to possible abuses among market participants if interpreted by public authorities on a case-by-case basis. Also, the provisions granting discretionary powers to public authorities result in regulatory uncertainty for market participants.

The restrictions that have been identified come from two types of legal provisions: i) a lack of definition of the important notions used in the legislation, or a lack of clear criteria that can be objectively applied by the authorities when taking a decision, and/or ii) far-reaching powers/discretion granted to local authorities. Based on these provisions, authorities can make administrative decisions on a case-by-case basis and may come to different conclusions or interpretations in similar situations, thus favouring one competitor and discriminating against another. This may lead to additional costs for market participants and to an unpredictable business environment for private investors.

Although administrative decisions may sometimes require discretion and the flexible exercise of judgement and decision, legislation should be clear enough not to allow any practical discrimination between undertakings that are active in the same market. Although we do not recommend excessive regulation of all possible situations that might arise in practice, we suggest eliminating the lack of clarity in legislation, either by clarifying the provisions or by giving examples and/or guidelines with clear and objective criteria on how the legislation should be interpreted. Additionally, previous decisions of the authorities on the same subject should be published on its website. Thus, while administrative discretion remains for public administrations, such measures would ensure a higher degree of transparency and reduce unpredictability for the business environment.

### *Granting parking places on public land*

**Description of the obstacle.** According to Article 33 of Annex 1 of Government Decision No. 525/1996 for approving general urbanism regulation, when requesting a building permit for execution of construction works for a building that, by its purpose requires parking places, the building permit can only be obtained if a minimum number of parking places are placed outside the public grounds (i.e., on private land). Exceptionally, local public authorities can allow the building of parking places on public land.

Two issues arise as regards this legal provision:

- It is not clear whether the requirement refers solely to new buildings. The legal provision may also be interpreted in the sense that the existence of a sufficient number of parking places is required by the authorities each time a building permit is required for construction works to an existing building (or when the owner changes the existing purpose of the building to a new one);
- It is not clear whether the local authorities may use public land to grant parking places at their sole discretion.

In order to establish the conditions under which such provisions apply, several cities have concretised the general norm through decisions of their local councils. For example, the Local Council of Bucharest, through Decision 66/2006,[32] established that the obligation to have parking spaces for new buildings is not applicable for the city centre and buildings not having access to roads. Moreover, developers building outside the central area of the city have the option to build only 80% of the parking places necessary, provided that they pay the

public authority a fee of EUR 10 000 for each parking place not built. The fees collected are deposited by the public authority in a fund for building parking spaces on public land.

Other local authorities, such as Brasov,[33] Cluj-Napoca[34] and Pitesti,[35] have issued similar local council decisions establishing how the parking places available (residential or not) will be assigned to natural persons or legal entities.

**Harm to competition.** The wording of the legal provision may lead to an arbitrary application of the law on a case-by-case basis, thus leading to heterogeneous practices across various cities or even inside the same city.

First, it is not clear if the obligation to ensure parking places outside public land applies only to newly-built constructions. It seems to be at the sole discretion of local authorities in each city to decide when and where such a requirement is applicable. If interpreted in the sense that parking places are also necessary in each case where a building permit is required for construction work to an existing building or when the owner changes its current purpose to a new one, the owners of existing buildings might be prevented from performing such works (of course, only if the existing building does not have the minimum number of parking places).

Second, due to lack of any clear objective criteria for granting parking places, one undertaking might receive parking places on public land (in exchange for an amount to be paid below the real costs of building a parking space) while another would need to invest significant funds in building its own parking places.

The analysis presented in Annex 2.A2 leads to the conclusion that the cost of each parking space differs from area to area and from city to city. The main influential factor that causes these differences to occur is the cost of land. The range of costs for each parking place (also including the cost of land) is between EUR 2 644 and EUR 49 024 (in central Bucharest). However, on average, the cost per parking place is EUR 11 574 for a ground floor option, EUR 15 121 for the two floors of underground parking and EUR 13 777 for three floors of underground parking. The cost per parking place calculated on each scenario is equivalent to the cost advantage/benefit of a private investor for each parking place granted by the local public authority through the exception identified.[36]

**Policy maker's objective.** The objective of the provision is to provide a solution for the lack of sufficient parking places by allowing public land to be used for the necessary parking places.

**Recommendation.** We recommend amending the legislation in the sense that the requirement to ensure parking places in order to obtain the building permit is applicable only when erecting new buildings. Furthermore, in order to avoid discretionary application of the legislation by public authorities, the possibility of granting parking places on public land should be limited solely to areas such as city centres, protected areas or areas in which the buildings have no direct access to roads. Each city hall would then establish which areas fall under the exception.

### *Lack of clear/objective criteria to be used in the control activity of the State Construction Inspectorate*

**Description of the obstacle.** In Romania, the State Construction Inspectorate (SCI) is responsible for controlling and inspecting construction activities, thus ensuring compliance

of constructions with the legislation in force, the quality of the construction works and the uniform application of legal provisions in the field. SCI decides on the type of control applicable to each construction process (including the type of control in case of verification of a quality management system), taking into account the complexity of the works. The control applied may be either a regular one (planned control of all important documents and operations which is carried out on the basis of a prior established agenda) or a random one (unplanned control of selective documents and operations).

The legislation in force does not prescribe any criteria for SCI when deciding to pursue random control.

**Harm to competition.** Due to a lack of clear criteria when assessing the type of control applicable, SCI might discriminate between competing undertakings on the market. There is only limited predictability for the subjects of the random control activities. Those operators subject to random control need to allocate supplementary time resources for controls by SCI.

**Policy maker's objective.** The lawmaker has allowed SCI to decide on the type of control applicable to each construction process during the execution phase in order to use its resources efficiently and to prioritise. According to SCI, a "system procedure" could be implemented containing criteria on the type of control (a "system procedure" provides general rules in comparison to an "operational procedure" which provides detailed criteria).

**Recommendation.** Implement a "system procedure" to be used by the SCI when assessing the complexity of the works and deciding when to apply random controls.

### *Annexes subject to a demolition permit*

**Description of the obstacle.** Article 8 of Law No. 50/1991 regarding authorisation for the execution of construction works establishes the obligation to obtain a demolition permit prior to any demolition, removal or dismantling, partial or total, of a construction. The constructions that are subject to a demolition permit are not clearly defined in this piece of legislation, as the lawmaker also included the installation annexes in the notion of constructions, a notion which is not explained in the law.

**Harm to competition.** Lack of definition for installation annexes to constructions, might trigger arbitrary application of the provision by public authorities, on a case-by-case basis. In practice, this would result in discrimination among market participants as the authorities might come to different interpretations when issuing the building permit.

**Policy maker's objective.** The demolition permit should guarantee that demolitions of constructions are performed in a safe manner, both for the construction and for the population. The object of the provision is to discourage any potentially dangerous demolition works without obtaining a demolition permit, by including in the buildings subject to demolition permit a broad category of assets of the building.

**Recommendation.** We recommend to define the installation annexes to construction that are subject to a demolition permit, taking into account what affects the structural stability of buildings.

### *Different treatment of undertakings in comparable situations*

Under the revised legislation, we identified several provisions that limit services/sales of goods without an objective justification. Especially, by limiting the categories of products that can be sold in specific places, by interfering with the business activity of the undertakings depending on their location or by establishing a different treatment towards undertakings active on the market depending on their size, there might be discrimination between undertakings in comparable situations.

#### *Street sales from stalls*

**Description of the obstacle.** According to Article 1 of Law No. 50/1991 regarding authorisation for the execution of construction work, the execution of construction work is possible only after obtaining a building permit. Among the exceptions to this rule, according to Article 11 of the same law, construction work for placing stalls for the distribution and trading of newspapers, books and flowers is exempt from the obligation to obtain a building permit. This exception is applied in cases where the stalls are affixed directly to the ground, do not have foundations or platforms, and are not supplied with any public utilities except electricity.

**Harm to competition.** Restricting the products that vendors are allowed to sell in stalls may potentially limit the development of businesses of market participants and may also limit consumer choice. These restrictions affect three groups: i) the vendors who already have the respective stalls are restricted to trading only newspapers, books and flowers; ii) the undertakings that are interested in street trading of products other than newspapers, books and flowers do not benefit from the exception, resulting in potentially higher costs for them compared to the "preferred traders" and iii) consumers have access to a more limited variety of products.

Our research in other EU Member States (for example Austria) showed that the differentiation of construction regulations is based on the size of the project but not on the categories of products sold.

**Policy maker's objective.** The objective of this provision is to reduce the administrative burden for simple constructions with low complexity. We have not identified the reasons why only stalls selling books, flowers and newspapers are covered by the exception.

We identified street trading regulations in municipalities in Austria, Germany and in the United Kingdom. Street trading provisions in London, for example, foresee an application in writing, including information on the time, date and location of the envisaged street sale, to a local district council. An application may be rejected, among other reasons, if the stall would cause interference or inconvenience to street users or if there are convictions for previous behaviour (e.g. the failure to pay fees or misusing the licence) making a seller unsuitable to hold a licence.

**Recommendation.** We recommend extending the exemption from the obligation to obtain a building permit to also include all stalls which are directly affixed to the ground, without foundations or platforms and that only need to be supplied with electricity.

However, keeping in mind environmental and public safety considerations together with the public's right to use the street, we recommend that each city hall issues a public policy with respect to street trading and the conditions under which such businesses may be permitted to operate without a building permit.

The availability of spaces to be used for street trading should be a decision for each city hall and each city hall should implement limits in order to ensure that the undertakings carrying out commercial activities on public land are not abusing this right. It should ensure that vendors are not transforming such stalls into actual stores and that environmental and public safety considerations together with the public's right to use the street are observed.

Thus, the legislation should provide, for example, the following types of limitations for a stall erected on public land:

- It shall not lead to, or cause, congestion or block pedestrian traffic on the sidewalk (establishing thus maximum sizes of the stall).
- Commercial activities would involve a short transaction period necessary for completing the sale or rendering the service.
- It shall not cause undue noise or offensive odours.

### *Construction work in coastal areas*

**Description of the obstacle.** According to Law No. 597/2001 regarding certain protection and authorisation measures of construction in the coastal areas of the Black Sea, in seaside resorts and tourist beach areas, it is prohibited to carry out construction or maintenance works between 15 May and 15 September. Starting in 2014, works within a project financed with non-reimbursable external funds, on-going works, seasonal works, urgent works and works that do not affect touristic activities are exempt from the abovementioned prohibition, and are therefore allowed.

**Harm to competition.** This provision interferes with the business activity of undertakings due to the fact that the interdiction to carry out construction or maintenance works in coastal areas is applicable automatically, without prior assessment of the execution period, location to risk the health and safety of persons made by the local public authority.

In addition, the legal provision discriminates between undertakings carrying out economic activity inside the interdiction zone and those located outside the interdiction zone (i.e. resorts in the mountains or at historical sites) for which there is no such prohibition.

Finally, the large number of exceptions may allow circumvention of the application of the interdiction, considering that the interdiction is not applicable for a project financed with non-reimbursable external funds, on-going works, seasonal works, urgent works or works that do not affect tourist activities.

**Policy maker's objective.** The objective of the provision is to keep construction works from interfering with tourist activity during the full occupancy season in coastal areas.

International comparison did not reveal regulations similar to the Romanian legislation on works in tourist areas. In the EU Member States investigated, for example in Croatia, hotels and similar tourist buildings may only be constructed within special spatial areas and have to be built in accordance with regional and municipal zoning plans (thus, rules are established at a local level). In addition, further spatial zoning rules apply to construction in most parts of the coastal area and islands.

In Romania, when issuing a building permit, the local authorities have the power to analyse each case and to regulate the periods when construction can be carried out or prohibited in cases where such construction works may damage the health of the population.[37]

**Recommendation.** We recommend to abolish Article 6 of Law No. 597/2001. Any restriction to build should only be established when necessary at the local community level rather than at the national level. Each public authority has the capacity to establish when a construction could affect tourist activities and thus to regulate the time periods when construction can be carried out or prohibited.

### *Fire protection authorisation*

**Description of the obstacle.** Government Decision No. 1739/2006 for approving the types of constructions for which fire protection authorisation should be obtained establishes that buildings under a specific size (determined in consideration of the number of square metres [$m^2$] of a building and type and the purpose of a building) do not need a fire protection permit.

A fire protection permit certifies the implementation of fire safety measures provided by the law. This permit is mandatory, as a functioning condition, for undertakings owning buildings who carry out their activity in these buildings.

**Harm to competition.** This provision might create advantages for those enterprises owning small-size buildings.

**Policy maker's objective.** Most probably, the lawmaker has considered that small buildings are easier to evacuate.

**Recommendation .** We recommend abolishing this exception and making fire protection authorisation compulsory for all buildings, irrespective of their size.

### *Conflict of interest*

#### *Description of the obstacle*

We have identified several provisions in the revised legislation which might lead to potential conflict of interest between competing undertakings (or potential competitors), mainly due to the involvement of professional associations in the decision-making process of the competent public authorities. Members of professional associations, usually experts in their field, participate and collaborate with public authorities, providing technical expertise, and thus contributing to the decisions taken by the authorities and even control the activity of other competitors, and are subsequently involved in the control carried out by the SCI. Thus, competitors are in a position to (potentially) directly affect competing undertakings. This risk is increased even more by the fact that the national competent authority for controls in the construction sector, the SCI, works together with professional associations on multiple levels.

Romanian law does not provide mechanisms and rules to determine, manage or avoid possible conflict of interest for these specific scenarios.

#### *Examples of the involvement of professional associations in the construction field.*

All construction works must be verified by quality experts in all phases of construction. In accordance with Article 23 of Decision No. 925/1995 approving the regulation of verification and technical expertise of quality of projects, execution work and construction, the certificate of the quality experts can be suspended/cancelled by the Ministry of Regional Development and Public Administration (MDRAP), based on a report

prepared by a group of three experts. One member of the group must be an expert recommended by a professional association active in the field.

A similar situation was identified in the legislation regarding the measures undertaken to mitigate the seismic risk of existing buildings. According to Government Ordinance No. 20/1994 on measures to mitigate the seismic risk of existing buildings, intervention works to buildings containing a seismic risk are carried out by state authorities (MDRAP) based on a technical solution issued by a designer. Technical solutions are also reviewed by the National Commission for Seismic Risk, a technical body set up by the authority with a consultative role. This commission analyses the technical solution and advises MDRAP, the authority that approves the technical solution. Members of the commission also include experts appointed by professional associations and representatives of employers' unions in the field. Even though formally MDRAP is not obliged to consider the input received from the National Commission for Seismic Risk when deciding whether to approve or not the technical solution, it is likely that MDRAP follows the advice of the National Commission for Seismic Risk (as its members are the ones providing technical input and expertise).

Additionally, the SCI also works with professional associations in order to develop expertise, prepare research reports and issue technical solutions.

Finally, professional associations also collaborate with public authorities in the field of energy performance of constructions. According to Emergency Ordinance No. 18/2009 for increasing the energy performance of housing blocks, representatives of professional associations in the field of energy performance (such as energy auditors) collaborate with technical committees when approving local programmes for increasing the energy performance of housing blocks. A possible conflict of interest might arise as the energy auditors would be subsequently involved in the control procedure of the SCI. Two provisions are provided in the current legislation:

- According to Article 31 of Law No. 372/2005 regarding energy performance of buildings, specialists appointed by professional associations in the construction field participate in the checks carried out by the SCI.
- According to Article 16 of Order No. 3152/2012 approving Control procedures regarding the unitary application of the legal provisions regarding energy performance of buildings and the control of heating/air conditioning systems, the professional associations of construction designers, plumbing engineers, energy auditors, architects and technical experts in air conditioning/heating systems participate in the checks carried out by the SCI.

Thus, energy auditors contribute in the first instance to the technical committees in creating the rules which they then also control by participating in checks together with the SCI.

### *Harm to competition*

In all the cases above, market participants decide on the matters of their competitors. There is a danger of foreclosure of competition, a dictation of the interests of the professional associations, especially against newcomers or so-called mavericks, which aggressively compete in a market, and the possible exchange of sensitive information between competitors. Another negative consequence could be the implementation of unnecessary administrative barriers due to a tendency to standardise interests and actions in cases where the members of private associations may influence the attitude of the public authorities and the legislation in their favour.

*Policy maker's objective*

The involvement of professional associations in the decision-making process of the authorities could prove to be beneficial as they come with high expertise. The lawmaker established such a procedure due to a lack of their own experts working in public administration.

*Recommendation*

We recommend amending the national legislation in order to establish a complete, clear and accessible set of conflict rules to be followed by professional associations. The implementation of an ethical code of conduct should be mandatory for each professional association involved in public decisions. The code of conduct should cover at least rules regarding identification of what constitutes a conflict of interest (i.e., an expert who is part of a technical commission or committee controlling or analysing the issuance of a permit for a competitor), the disclosure procedure and the obligation to abstain from actively participating in the decision-making process of the authority in case of conflict. As a result of this recommendation, each representative of a professional association taking part in a government decision would have the necessary knowledge and tools to disclose the potential conflict of interest and, if this is the case, refrain from actively participating in the activity of the technical commission or committee in question. Such codes of conduct are also implemented in other fields in other Romanian sectors (see, for example, Law No. 7/2004 regarding the code of conduct applicable to public servants or Regulation No. 5/1995 on the code of ethics and conduct of the members and staff of the National Securities Commission).

It might also be helpful (although not a legal measure) to hire more independent experts for the internal structures of public authorities, which would mitigate the risk of conflict of interest. Also, compliance training within the associations and ministries might be helpful. However, this as well as the hiring of experts may be difficult to implement in practice, from the perspective of both the number of experts available and the increased costs for public authorities.

***Opportunity notice***

*Description of the obstacle*

In Romania, the functions of an area (such as housing, services, production, circulation, green spaces and public institutions) and the coefficient of utilisation of a terrain (the part of the land that can be used for buildings) are mentioned in planning regulations.

When a private investor wishes to build but the project is not compatible with existing planning regulations, he/she may request a derogation from the existing planning regulations already approved for the respective area. For that purpose, the investor prepares and submits to the public authority (i.e., the local council) a technical document generally called an "opportunity study". After analysing the opportunity study, the planning and the Territory Arrangement Department within the city hall can issue the opportunity notice. Often, this department is advised by a consultative technical commission (such consultative commissions do not exist in every municipality). The opportunity notice also needs to be approved by the mayor of the municipality. Based on the opportunity notice, the local council can then issue a new zonal urbanistic plan.[38]

We identified the following issues in relation to this process:

- As described, the decision of the planning and territory arrangement department within the city hall that issues the opportunity notice is often based on the input given by a consultative technical commission. Each city hall can decide through a local council decision if it wants to set up such a consultative technical commission or not. The technical commission i) has no clear criteria when it advises on the opportunity study prepared by the investor and ii) it is not organised in the same manner in all localities.
- Upon amendment and based on the opportunity notice, the initial coefficient of terrain usage[39] may be exceeded by a maximum of 20%. This limitation applies to all lands except those located in an area with an economic purpose, such as industrial parks, technological parks, supermarkets, hypermarkets, commercial parks, service areas and other similar areas. There are two issues related to this matter: i) for those excepted areas there is no limitation of percentage by which the initial coefficient of land usage may be exceeded, and ii) the notion of "similar areas" is not defined.

### *Harm to competition*

Considering that the consultative technical commissions are not organised in the same manner in all counties and that there are no clear criteria when giving input for changing existing urbanistic plans, this might lead to arbitrary advice in granting the opportunity notices.

As regards the coefficient of land usage:

- The lack of a definition for the notion of "similar areas" may lead to an uneven application of the law by the local authorities and discrimination may take place between market participants.
- The possibility for the land located in areas designated to be of economic interest should have different coefficients of land usage.

### *Lawmaker's objective*

We have not identified any objective concerning the organisation of the consultative technical commission. As regards land usage, according to the official recital, the objective is to allow economic and industrial development in certain areas in accordance with local economic interests.

### *Recommendation*

The legislation should be amended in order to ensure that the technical commissions have the same organisational structure in all localities. Also, MDRAP should prepare a checklist and clear elements should be taken into consideration by the consultative technical commission when advising the planning and territory arrangement department within city hall with respect to the opportunity study.

In order to limit possible differing interpretations of "similar areas", we recommend either defining the notion of "similar areas" or eliminating it from the exception. In all cases, the lawmaker should set a threshold for the changes that can be made to the usage coefficient for land located in areas destined for economic activity.

### *Technical approvals*

#### *General description of legal framework*

T**echnical approval,** also called a technical agreement, is a favourable technical assessment regarding the use of new products, procedures or equipment for which there are no national standards or other official technical regulations in force, or the existing standards or rules are not completely suitable for the products, procedures or equipment. Technical approvals are required for a wide range of products including building materials.

The applicable legislation and issuance mechanism is different for harmonised or non-harmonised products:

- ***For non-harmonised products***, the technical approvals are elaborated by specialised entities which must be Romanian legal persons or associations of Romanian legal persons. The elaboration entities are private companies. According to data from the Standing Technical Council for Construction (CTPC) website,[40] there are currently 12 such entities active on the market. The elaboration entities must be authorised by the CTPC, a public supervisory body under MDRAP. The CTPC also approves the technical approvals issued by elaboration entities.
- ***For harmonised products***, EU legislation (mainly EU Regulation No. 305/2011 setting forth harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC) is directly applicable in Romania. In this case, the technical approval that is to be obtained by each manufacturer and applicable at the European level is called a European Technical Assessment (ETA). It is elaborated by technical assessment bodies (TABs). TABs are private Romanian entities notified to MDRAP, as providing this type o work. According to data from the CTPC website,[41] there are currently three such entities active on the market.

For further reference, please see Figure 2.6Relationship between several institutions for issuance of ETAs in Section 2.1 of this chapter.

#### *Issues identified in the relevant legislation with respect to technical approvals for building materials*

We identified several restrictions to competition. One of them consists of the composition of the CTPC and the participation of competitors in the authorisation process of the elaboration entities. The CTPC is formed, among others, of representatives appointed specifically by such existing elaboration entities. This means that the entities elaborating technical approvals are in a position to influence the decision of the CTPC according to their own interests. This is an issue of conflict of interest, similar to that described in Section 2.2.3 above. For such cases, we also recommend that national legislation be amended in order to establish a complete, clear and accessible set of conflict rules to be followed by the CTPC.

The other issues we identified with respect to technical approvals refer to prolongation or amendments of technical approvals and the distribution of contracts of entities elaborating technical approvals whose activity was suspended:

#### *Amendment or extension of technical approvals*

**Description of the obstacle.** An extension or an amendment of a technical approval can only be requested of the competent body that elaborated the initial technical approval. Only strict exceptions are allowed, for example if the issuing competent body no longer exists or if its activity was suspended by the competent authority.

**Harm to competition.** An undertaking intending to amend the initial technical approval or to prolong its duration is not free to choose the body that will make such amendments. This restriction thus affects competition between private companies authorised by the CTPC to elaborate technical approvals.

**Recommendation.** We recommend that this provision should be abolished.

### *Distribution of contracts concluded with a suspended entity which elaborated technical approvals*

**Description of the obstacle.** If the activity of an entity elaborating technical approvals is suspended for any reason, the CTPC may discretionarily distribute the contracts of the suspended entity to other entities which elaborates technical approvals if the manufacturer (solicitor) cannot wait for the delay caused by the suspension of activity (suspension of activity lasts from three to six months). The law provides no criteria for the CTPC's allocation of the suspended entity's contracts to other entities. The opinion of the undertaking requesting the elaboration is not requested.

**Harm to competition.** Considering that the CTPC may discretionarily distribute the contracts to other entities that elaborate technical approvals, without criteria and without having to ask the producer, there is a risk of abuse and discrimination. Moreover, considering that representatives of the elaborating bodies are members of the CTPC, the distribution of contracts may be dictated by the representatives' own interests.

**Recommendation.** We recommend that the company requesting the elaboration of technical approval should be consulted when the project is allocated to another entity. The final decision on the allocation should remain with the solicitor and not with the CTPC.

### *Unclear provisions regarding the duration of validity of a technical approval*

**Description of the obstacle.** The validity of a technical approval is three years but it may be extended by the CTPC to five years for certain products, services or equipment that are "safe" and "without risks". The provision does not define these notions.

**Harm to competition.** The unclear wording of the provision triggers the risk of abuse and discrimination in practice. Moreover, there is no predictability among the elaborating entities with respect to the application of this legal provision.

**Recommendation.** The national legislation should be amended so that it clearly defines the notion of products, services and equipment "without risk" and the notion of "safe" products, services and equipment.

### *Different criteria in evaluating the entities authorised to elaborate technical approvals*

**Description of the obstacle.** The CTPC assesses the activity of entities elaborating technical approvals. Among others, the number of previously issued technical approvals is a criterion taken into consideration by the CTPC when determining whether or not to prolong or preserve the authorisation. Such a criterion is used in practice, but it is unclear how much this aspect counts when a decision is taken not to renew an authorisation.

**Harm to competition.** Taking into consideration the lack of guidelines in deciding whether to prolong or preserve the authorisation of entities elaborating technical approvals, this

provision is likely to create an unjustified barrier to entry for newly-authorised entities, as well as for small ones.

**Recommendation.** We have identified two options:

- Abolish the provision that mentions the number of previously issued technical approvals as information to be provided to the CTPC when deciding on renewal of the authorisation to function.
- Amend the national legislation to mention explicitly that such information is required solely for statistical purposes and is not taken into consideration by the CTPC when assessing the activity of entities elaborating technical approvals.

### *Unclear provision with respect to the duration of the mandate of technical assessment bodies for harmonised building materials*

**Description of the obstacle.** As described above, for harmonised building materials, TABs are the competent entities in elaborating the technical approval (i.e., ETA, as defined above). According to Article 6 para. (3) of Order No. 2142/2013 approving Procedures for designating the Technical Assessment Bodies for construction products, the duration of appointment of TABs by MDRAP is "generally" unlimited. The national law fails to provide criteria in order to assess whether the appointment is limited or not.

**Harm to competition.** This provision is likely to trigger the risk of discrimination and abuse, considering that national law practically allows the CTPC to discretionarily decide when to grant an unlimited designation for certain TABs. Thus, this provision is likely to favour the TABs with an unlimited mandate, considering that the designation procedure involves several stages of preparation and audit, which involves additional costs.

**Recommendation.** We have identified two possible options:

- to expressly stipulate cases in which the appointment is limited in time; and
- to amend the national legislation and to eliminate the word "generally" from the text of the legal provision, so that all appointments of TABs are granted for an unlimited period of time.

### *Regulatory burden*

While legislation is essential for achieving policy objectives and creating benefits for businesses and society, it can also generate regulatory costs and burdens on businesses. In order to ensure competitiveness in a globalised world, to adjust to new social challenges and to achieve the purpose of a policy more efficiently and effectively, legislation and the regulatory cost and burden arising from it must be constantly revised and improved (European Commission, 2014).

We have identified several provisions of the legislation that constitute an administrative burden on businesses. These regulations do not have a direct bearing on competition; nonetheless, they constitute burdens on businesses and clearly affect the general environment. Two examples are provided below.

- The law establishes the obligation of obtaining a building permit or a demolition permit for any type of construction prior to commencement of works by the developer. The entire process of obtaining a building permit is bureaucratic as it involves submission of

a significant amount of documentation, part of which includes documents issued by other state authorities involved in the process.

- The planning certificate is an informative document issued by the local public authorities ascertaining, among others, how land and existing constructions can be used in accordance with existing planning regulations. The planning certificate also informs the applicant of the approvals and notices necessary to obtain a building permit. The issuance of a planning certificate serves informational purposes and contains conditions that need to be observed in terms of construction work, green space requirements and classification as a historical monument.

In order to reduce the administrative burden on businesses, we recommend the use of all electronic means available and the elimination from the application dossier of all documents already in the possession of a state authority.

Strategies for reducing the administrative burden as well as various reports on the same issue have been prepared by the Romanian authorities responsible.[42] According to MDRAP, initiatives are currently being undertaken to simplify the bureaucracy and to implement e-government systems for issuing building and demolition permits as well as planning certificates. However, there are several conditions to be fulfilled at the local level in order to make the systems functional, such as the necessary IT resources and the availability of sufficient human resources with the required abilities.

### *Outdated legislation*

We have identified several pieces of legislation that no longer correspond to the current socio-economic context of Romania. Those provisions contain unjustified restrictions or outdated rules no longer applicable in practice. Some of these provisions are left over from Romania's communist era. Outdated legislation should be abolished.

#### *Examples of outdated legislation*

**Location of constructions used for service provision outside industrial areas**

**Description of the obstacle.** According to Annex No. 1, section 1.3.7 of Government Decision No. 525/1996 approving the general urbanism regulation, it is forbidden to locate constructions used for services in industrial areas – except for services provided in buildings integrated with other purposes. Instead, buildings destined for service provision can only be built in central, commercial, residential or recreational areas. For example, within an industrial area, a car wash, shop or canteen could not be built if it was not integrated with other existing facilities.

**Harm to competition.** Although industrial activities should not be carried out in residential or service areas, it is not clear why the reverse should not be possible.

**Policy maker's objective.** The objective of the regulation might be to preserve the health of the labour force in service provision. Most probably, the provision comes from communist era Romania when there should have been dedicated areas for each purpose.

**Recommendation.** Amend legislation in order to allow service provision in industrial areas as long as specific health and safety regulations for each activity are observed.

### *Location of professional schools*

**Description of the obstacle.** According to Government Decision No. 525/1996 approving the general urbanism regulation, professional schools can only be built within 1 000 metres of housing areas and neighbourhoods.

**Harm to competition.** Operators wanting to build a school outside a housing area are prevented from doing so.

**Policy maker's objective.** The provision establishes a maximum distance to be travelled by students. However, the limitation seems excessive considering the rapid expansion of cities and the means of transport available to the population in order to move around.

**Recommendation.** We recommend abolishing this provision.

### *Location of specialised medical centres*

**Description of the obstacle.** According to Annex 1, point 1.7.4 of Government Decision No. 525/1996 approving the general urbanism regulation, specialised medical assistance for functional recovery, chronical diseases, psychiatric diseases and disabled persons need to be located in out-of-town areas. The law does not differentiate between contagious and non-contagious chronic diseases such as cancer.

**Harm to competition.** This provision is likely to affect private investors providing specialised medical assistance, which may have to bear additional costs for assuring all required treatment of conditions outside city areas, where access to utilities or transportation is limited. This is the opposite of other medical service providers located within the boundaries of a city. In addition, providers of services already located within the boundaries of a city are prevented from developing their businesses by also offering services for chronic diseases.

**Policy maker's objective.** This restriction is destined to protect healthy citizens and to offer an appropriate environment for the recovery of the sick, which is easier to achieve if the facility is located outside urban areas and is close to green spaces. Most probably, the provision comes from Romania's communist era when there should have been dedicated areas for each purpose.

Our research has shown that there are no limiting regulations on the location of medical centres in out-of-town areas in the regulations of other EU Member States.

**Recommendation.** The provision should be amended in order for the restriction to apply solely to contagious diseases if they require medical isolation, or if specific medical equipment used in curing the disease presents a risk to the surrounding population.

### *Export ban on timber and related products*

**Description of the obstacle.** Since 1991, the export of timber and related products has been forbidden for all private agents, except companies or other entities under the Ministry of Resources and Industry (original name). Such entities are required to obtain a licence from the government. Following discussions with the business community, this limitation (imposed by Government Decision No. 1364/1990 prohibiting the export of raw or semi-finished wood products) we know that this is no longer applied in practice and that the

export of timber is possible, in accordance with Article 35 of the Treaty of Functioning of the European Union – prohibition of export bans or equivalent.

However, we have identified a draft of a law regulating the export ban with respect to wood products which is currently under the legislative process of the Parliament.[43] The proposed law mentions as its objective the preservation of Romanian forests, which are currently being illegally exploited on a large scale. Also, the preamble of the proposed law specifies a limited applicability of the export ban for five years.

**Harm to competition.** The provision qualifies as an export ban, which triggers fragmentation of the market for trading timber. In addition, by granting the possibility of exporting solely to state-owned companies, a legal monopoly is created for those undertakings with a negative impact on pricing. Although it seems that the law is not applied in practice, keeping it in force might create legal uncertainty for undertakings.

**Policy maker's objective.** None of the ministries asked could explain the interdiction in the existing piece of legislation. However, the proposed law mentions as its objective the preservation of Romanian forests which are currently being illegally exploited on a large scale.

Our international research found no obstacles to the trade of timber in the European Union. Currently, Bulgaria only foresees an automatic licence mechanism by registration for the export of raw timber.

**Recommendation.** Abolish Government Decision No. 1364/1990. With regard to the new proposal of law currently under the legislative process, we recommend that the lawmaker reconsider the necessity of such a measure.

### *Powers granted to the General Inspectorate for Emergency Situations in relation to cases of unfair competition*

**Description of the obstacle.** According to Article 19 of Order No. 607/2005 approving the control methodology regarding the monitoring of the market of construction products designed to protect constructions against fire, the General Inspectorate for Emergency Situations has the responsibility for solving unfair competition complaints.

**Harm to competition.** This provision infringes the provisions of Competition Law No. 21/1996 and Law No. 11/1990 regarding unfair competition, which provide for the exclusive attributions of the Romanian Competition Council (RCC) in this field. The RCC is best placed to decide on such cases.

Also, according to the Romanian legislative system, an order issued by the ministry cannot infringe a law of a superior force. The existence of such legal provisions may create uncertainty regarding the state authorities' competency in solving competition issues among market participants.

**Recommendation.** This provision should be abolished. Complaints of unfair competition should be solved in accordance with Competition Law No. 21/1996 and Law No. 11/1990 regarding unfair competition.

### *Not-published legislation, double legislation*

#### *Double legislation*

In the revised technical legislation in the construction field we have identified several pieces of legislation which are not published in the *Official Gazette* of Romania. We also found cases where, although legislation was published, it is not generally available and a separate fee must be paid in order to obtain it. Moreover, we identified several pieces of legislation in force regulating the same object. This might affect the activity of economic operators and create legal uncertainty considering that it is unclear which piece of legislation should be followed.

**Double legal framework on technical approvals.** There are two pieces of legislation in force with the same object of regulating the legal framework, main elements, methodology and organisation on technical approval in the construction field. They are Order No. 1889/2004 approving certain procedures for technical approvals in the construction field, and Annex 5 of Government Decision No. 766/1997 approving certain regulations regarding quality in construction (Regulation on the technical approval of products, processes and equipment in construction). Considering that the content of the two pieces of legislation does not seem to be completely identical, the national legislation should be unified into one legislative act.

**Double control activities.** Annex 4 of Government Decision No. 766/1997 approving certain regulations regarding the quality of constructions regulates the same control activity as mentioned under Order No. 847/2014 approving the Procedure regarding control activities performed for enforcing the legal provisions related to the current and specialised monitoring of the serviceability of constructions. However, the control activities pertain to two different authorities, namely specialists of MDRAP and SCI. This uncertainty regarding the applicable legislation creates legal uncertainty and affects the activity of economic operators in complying with the legal requirements. The national legislation should be amended to establish a sole control authority.

**Double legislation regarding ETA.** Two pieces of legislation are in force regulating the European technical approval for construction products. Order No. 2190/2004 has the same objective as EU Regulation No. 305/2011 setting forth harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC. Similarly, Government Decision No. 622/2004 approving the conditions to introduce construction products onto the national market has the same objective as European Regulation No. 305/2011 setting forth harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC. Therefore, dual pieces of legislation are in force creating legal uncertainty for companies active in the field. According to the policy makers' objective, the national legislation was no longer applied once the European legislation came into force. We recommend that the part of the national legislation related to the harmonised technical approvals should be abolished to eliminate uncertainty regarding the applicable piece of legislation.

#### *Legislation not published*

We have identified several pieces of legislation which are not published in the *Official Gazette* of Romania. Moreover, sometimes pieces of legislation have been published but they are not easily available and it is necessary to pay a separate fee in order to obtain

them. Some of these pieces of legislation are only contained in construction bulletins. Thus, the legislation in force is unclear for companies active in the field which may create legal uncertainty for undertakings willing to enter the market. Moreover, even if the interested undertakings find the legislation in a construction bulletin, it remains unclear for them whether these provisions have been replaced or if they are still in force. For example, Order No. 615/2003 approving the technical regulation "Regulation regarding the organisation and conduct of traffic surveys, origin, destination. Preparing data for processing" (revision DD 506 – 1988), having indicator DD 506 – 2001, was published in the *Official Gazette* of Romania (only the order was published, not the Annex containing the actual regulation). According to a list published by MDRAP on its website containing the technical enactments in force as of 1 January 2016 (the list was revised on 9 February 2016), the abovementioned regulation, with the identification DD 506-2001, was replaced by another regulation (DD 506-2015), in accordance with Decision No. 155/02.12.2015 of the National Company for Highways and National Roads of Romania. Neither the decision nor the new regulation were published in the *Official Gazette* of Romania, but only in a construction bulletin.

We recommend that all relevant provisions should also be published on the dedicated website of MDRAP in order to make the information easily available to all market participants.

### *Approval of neighbours*

#### *Description of the obstacle*

Among the documents that must be submitted when applying for a building permit is the neighbours' approval. A neighbour`s approval is required in the following situations:

- when erecting a new construction adjacent to another building or in their immediate neighbourhood, if there are necessary measures for protecting such adjacent/ neighbouring buildings;
- when construction works which are necessary for changing the purpose of an existing building are performed; and
- when erecting new buildings having a different purpose from the surrounding buildings (e.g., erecting an office building while the surrounding buildings have a residential purpose).

#### *Harm to competition*

The obligation to have the neighbours' approval with respect to the purpose of a building creates uncertainty in the market and raises a barrier to entry onto the market for any potential investor. According to discussions held with the business community, such provisions sometimes lead to abuses in practice, in cases where neighbours request money for the approval or use it to keep competitors away. The neighbours' discretionary power not to allow an investment is contrary to the principles of economic freedom and competition. In practice, it would require significant time and costs for the undertakings to challenge the ungrounded refusal of neighbours to give their approval.

#### *Policy maker's objective*

The objective of the provision is to ensure that the neighbours have been informed about the construction works to be performed in their vicinity and have given their consent

that their living environment will not be affected by the works. The lawmaker's intention was to protect existing owners from potential abuses/discomfort caused by incompatibilities between the pre-existing and proposed function. (e.g., a building is built to be used for concerts around a building used for personal purposes, office buildings or educational purposes – in general quiet activities).

International research shows that in Austria and Germany, for example, the challenging of a building permit does not have a suspensive effect on the permit itself. In addition, due to the exposure to abuse, i.e., the raising of unreasonable objections by neighbours to delay the project, it is worth noting that the Austrian law was changed in January 2015 and is now limited to instances where the neighbour is directly affected by the building project.

#### *Recommendation*

We recommend keeping the obligation to request the neighbours' approval in the cases described above. However, for those situations where the investor does not obtain the neighbours' approval, he should still be able to apply for the building permit. It is then up to the local authority to decide, taking account (but not being bound by) the neighbour's opinion.

## 2.3. Mining

### *Description of the legislative framework*

Mining activities in Romania include prospecting, exploration, development, exploitation, preparation/processing, concentration, commercialisation of mining products, conservation and closure of mines, including work related to restoration and rehabilitation of the environment. The authority responsible in the field of mineral resources is the National Authority for Mineral Resources.

The right to perform mining activities is granted to an investor through:

- ***exploration licences*** – granted for identification of the deposits, their quantitative and qualitative assessment and determining the technical and economic exploring conditions;
- ***exploitation licences or permits*** – granted for all activities performed underground and/or above ground for the extraction and processing of mineral resources; and
- ***prospecting licences or permits*** – granted for all studies and surface operations carried out to identify the existence of the possible accumulation of mineral resources.

Interested undertakings or the authority responsible can take the initiative for commencing the process for conceding rights for prospecting, exploring or exploiting. Concession rights are granted following a competition where the interested entities have to demonstrate their technical and financial capabilities.

### *Prolongation of a mining licence*

According to Article 20 of Law No. 85/2003 on mines, an exploitation licence can be granted for up to 20 years and may be extended for consecutive periods of a maximum of five (5) years each, without a maximum number of extensions foreseen by the legislation.

Possible harm to competition comes from the fact that, without foreseeing a maximum duration in time for the exploitation licence, other undertakings could be prevented from entering the market for an infinite time.

The lawmaker's objective is to ensure the continuity of investment. Mining requires large investments. The holder of the licence who discovered a deposit of mineral resources is carrying out mining activities at its own risk and cost. If the discovery is very significant it may require a long period of production until the mineral resources are depleted and investment costs are amortised.

In order to avoid preventing other interested undertakings from entering the market and in order to ensure predictability, we recommend amending the legislation and stipulating a maximum number of prolongations that can be granted by the authorities responsible before a new competition for awarding the licences has to take place.

### *Foreign entities performing mining activities in Romania*

Mining activities may be carried out by Romanian companies, which are registered according to the law and are specialised and certified to perform mining operations. Foreign companies may also be granted mining permits and licences. However, according to Article 23 of Law No. 85/2003, the foreign company which has obtained the right to perform mining activities, must set up and maintain a subsidiary in Romania for the entire duration of the concession within ninety (90) days of the date when the licence entered into effect.

The harm of this provision to competition resides in the fact that additional administrative barriers are created for foreign undertakings when they have to open a subsidiary in Romania.

The lawmaker`s objective is that mining activities are large operations which must be monitored on a daily basis. Also, proper communication between the state and the investor should be ensured. However, the interdiction is not justified from a fiscal point of view, as neither a subsidiary, nor a branch is sufficient to declare a permanent establishment with the fiscal authorities.

In order to reduce additional administrative barriers for current and potential investors, we recommend amending the provision to allow any type of representation of foreign entities in Romania, not necessarily a subsidiary.

### *Financial guarantees when performing mining activities*

At the end of the mining process, all mining operations must include activities for closure and post-closure (e.g., greening activities). In order to ensure that those obligations under the permit are fulfilled, undertakings performing mining activities have to establish a financial guarantee.

According to Articles 6 and 8 of Order No. 202/2881/2348/2013 of the National Agency for Mineral Resources, undertakings performing mining activities that involve closure and post-closure activities with a values below RON 4 000 000 (as estimated at the moment when the mining permit was granted) must establish a financial guarantee which can be provided exclusively in the form of a bank deposit. No other form of guarantee is accepted, such as a bank letter of guarantee or an insurance policy. The amount of the guarantee shall be put into an account established by the National Agency for Mineral Resources (ANRM).

The harm to competition is that a high volume of liquidities is blocked for those subject to this obligation, considering that only a bank deposit is accepted for performing the specific activities mentioned despite other forms of guarantees being available. This is likely to discriminate against small companies.

The provision is in line with EC Directive 2006/21 concerning the management of waste from extractive industries and with EC Decision 335/2009 on technical guidelines for the establishment of the financial guarantee. Directive 2006/21 foresees under Article 14 that the competent authority shall, prior to the commencement of any mining operations, require a financial guarantee (e.g., in the form of a financial deposit, including industry-sponsored mutual guarantee funds) or equivalent, in accordance with procedures to be decided by the EU Member States, ensuring that all the obligations under the permit will be fulfilled, including those relating to closure and post-closure of the waste facility.

We recommend amending the legislation in order to allow all legal types of guarantees (bank deposit, guarantee letter, insurance policies) to allow small companies to access the market.

### *Maximum price for gravel and sand*

#### *Description of the obstacle*

The maximum prices for sand and gravel[44] are set based on provisions of GEO No. 36/2001 regarding regulated prices and tariffs, confirmed by the Competition Office (original name).

The maximum price for sand and gravel products is set separately for each producer and adjusted yearly based on the consumer price index. Maximum prices are only set for raw materials and do not cover materials mixed with other products used in construction.

At the end of 2014 there were 731 companies registered in Romania with the primary NACE[45] code 8.1.2 "Operation of gravel and sand pits; mining of clays and kaolin", of which 489 were active, with a total turnover[46] in 2014 of EUR 190.8 mln equivalent. We identified 759[47] active licences and permits for sand and rock exploitation in Romania (a company can have more than one permit or licence for several exploitation sites). On average, there are 19 exploitation sites per county.

Sand and gravel are also traded on the commodities market, thus establishing a transparent price.

There is currently a project on the agenda of the parliament to eliminate the maximum price for sand and rock.[48] By the date of release of this report, the project had not yet been voted upon.

#### *Harm to competition*

Maximum prices for rock and sand create the risk of having all producers align to the maximum price, thus creating a horizontal effect.

#### *Policy maker's objective*

According to the Ministry of Public Finance[49] local monopolies can occur through the heterogeneous dispersion of undertakings producing sand and gravel. In addition, this category of products has a significant impact on the cost of public works.

We undertook an international comparison in order to identify price regulations relating to sand and rock products but did not find any price regulations affecting rock and sand products in other EU Member States.

*Recommendation*

We recommend abolishing the maximum price for sand and gravel. Price caps can only be justified in exceptional cases and when there is evidence that an organisation is exploiting its market power. The analysis presented in Annex 2.A3 below shows that such a situation does not exist in Romania.

## 2.4. Environmental law

In addition to the revised legislation relevant to the construction field, we identified a number of provisions in environmental law that affect companies across sectors, including companies in the construction sector. The issues here mostly arise from a lack of clear national guidelines and rules, especially with regard to the wide discretion granted to environmental authorities (i.e., environmental territorial authorities subordinated to the National Environmental Protection Agency – NEPA) in the authorisation process of economic operators subject to the industrial emissions legislation. Often, the wide discretion seems to be the result of an improper transposition of European directives, i.e., the text of some directives was adopted into national law more or less identically, without specifying important terms and notions.

### *Unguided discretion when imposing stricter authorisation conditions for economic operators in the field of industrial emissions*

*Description of the obstacle*

Directive 2010/75 of the European Parliament and of the Council on industrial emissions[50] was transposed into the national legislation through Law No. 278/2013 on industrial emissions. Directive 2010/75 defines the concept of BAT conclusions ("best available techniques conclusions") containing the best available techniques, their description, information to assess their applicability, the emission levels associated with the best available techniques, associated monitoring, associated consumption levels and, where appropriate, relevant site remediation measures for certain fields involving industrial emissions.

BAT conclusions introduce a minimum binding standard for the EU Member States. According to Directive 2010/75, Member States may establish rules under which their national competent authorities may set stricter permit conditions than those described in the BAT conclusions. Article 14 of Law No. 278/2013 expressly provides the possibility that the competent authority may impose permit conditions which are stricter than those described in the BAT conclusions. However, the law does contain rules to be followed by the competent authorities when imposing such stricter conditions. Thus, it seems that authorities have unguided discretion to decide on a case-by-case basis.

*Harm to competition*

Due to a lack of clear guidelines and a predetermined set of rules adopted at the national level for when the competent authority may impose authorisation conditions stricter than the conditions resulting from BAT conclusions, the risk arises of market foreclosure and discrimination among market participants.

*Recommendation*

The national legislation should provide objective and transparent criteria for determining the situations in which the competent authority may impose stricter permit conditions than the conditions resulting from BAT conclusions.

### *Legitimate interest to challenge decisions of the competent authority in the field of industrial emissions*

*Description of the obstacle*

Annex 4 of Law No. 278/2013 on industrial emissions, transposing Directive 2010/75, establishes rules regarding the obligation of the environmental authorities to make available to the public a wide range of information and data during the authorisation process of an economic operator. Article 25 of the same law provides that any interested third party having a "legitimate interest" may appeal the decisions, omissions, or any other acts of the competent authority in the field of industrial emissions. However, the law does not define "legitimate interest".

*Harm to competition*

Failing to establish specific examples of what constitutes a legitimate interest of a third party in the field of industrial emissions gives the authority and the relevant courts of law wide discretion in appreciating the legitimacy of claims of third parties.

*Policy maker's objective*

Directive 2010/75 states expressly that Member States must establish what constitutes a sufficient interest and breach of a right in the relevant field to allow the affected third party to challenge decisions, omissions, or any other acts of the competent authority.

*Recommendation*

The lawmaker should issue clear guidelines with examples stating when a third party has a legitimate interest in challenging a decision regarding industrial emissions.

### *Restrictive emission limits for certain air pollutants depending on the geographical area*

*Description of the obstacle*

According to Article 57 par. 3 of Law No. 104/2011 on ambient air quality, in the areas where emissions in the air for certain pollutants exceed the thresholds contained in the legislation in force, the environmental authority will impose more restrictive emission limits than those previously existing "for these pollutants", based on studies assessing their environmental impact.

*Harm to competition*

The wording of this provision is unclear concerning the subjects of the new emission limits for "these pollutants", with two possible interpretations. One would be that the more restrictive conditions are imposed only on new pollutants. Another possible interpretation would be that more restrictive conditions may also be imposed on old pollutants (in this case, the thresholds contained in the environmental authorisation of the economic operators may also be modified).

*Recommendation*

The national legislation should be amended in order to clarify how and to what type of pollutants the restriction applies.

### *Unclear criteria with respect to the procedure of the environmental impact of certain projects*

*Description of obstacle*

Order No. 863/2002 on the approval of methodological guidelines applicable to the framework procedure for evaluating environmental impact does not provide clear criteria to be followed by the environmental authority when deciding to initiate the evaluation procedure in case of projects with a potential impact on the environment.

After the economic operator submits certain data and information regarding its project to the environmental authority, the competent authority has to decide whether the project will go to the evaluation procedure or not. In order to take such a decision, the authority fills in a control list consisting of prepared questions based on the data provided by the economic operator. The possible answers for the economic operator are "Yes", "No", "Not applicable" or "Unclear". Then the authority decides if the project must go to the evaluation procedure or not. The legislation does not provide clear criteria to be followed by the authority when taking such a decision. Order No. 863/2002 establishes that even a single "Yes" answer in the control list could trigger the decision to submit the project for further evaluation.

*Harm to competition*

Failing to provide clear and objective criteria for the authorities to follow in the screening stage triggers the risk of discrimination and possible abuse by the authority when deciding which projects should be further evaluated. Those operators subject to the evaluation procedure need to allocate supplementary time resources and this further evaluation might create additional costs.

*Recommendation*

The procedure for evaluating the environmental impact should be amended to include clear criteria for the authority when deciding which projects to further evaluate. It should also provide a minimum threshold for determining when an evaluation is mandatory. It might also be helpful to publish the decisions of the competent authority for each project on its website in order to create transparency and predictability for the undertakings active on the market.

## 2.5. Public procurement

### *Public procurement in Romania*

In Romania, public procurement is mainly regulated by Government Emergency Ordinance No. 34/2006 on the awarding of public procurement contracts, public works concession contracts and concession of services (GEO No. 34/2006). GEO No. 34/2006 transposed the provision of Directive 2004/17/EC co-ordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC on the co-ordination of procedures for the awarding of public works contracts, public supply contracts and public service contracts (former EU Directives on public procurement). Besides GEO No. 34/2006, secondary legislation regarding

procurement is also applicable (e.g., Government Emergency Ordinance No. 54/2006 on the regime of public assets concession contracts) and relevant provisions in other construction framework laws (e.g., Law No. 50/1991 authorising the execution of construction works and Government Emergency Ordinance No. 18/2009 for increasing the energy performance of housing blocks).

In 2014, in order to simplify the public procurement procedures and to make them more transparent and flexible, three new EU directives for the reform of the public procurement system were adopted: Directive 2014/23/EU on the awarding of concession contracts, Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.[51] Romania is currently in the process of transposing the new EU directives. The enactment will be made through four new bills, regulating classical procurement, sectoral procurement, concessions and appeal procedures. These bills have recently been adopted by the Senate and were sent for approval to the Chamber of Deputies (the decision-making chamber of the parliament). The bills are available on the Chamber of Deputies' website.[52]

While the following analysis focusses on identifying problems within the legislation in force, it also deals with the provisions of new drafts of public procurement legislation, as some of the identified issues would be resolved by the enactment of these new bills.

Generally speaking, public procurement in Romania is in line with the EU framework legislation. However, national authorities face serious practical problems, including corruption, as detailed below. According to the Transparency International Corruption Perceptions Index, on a scale from 0 to 100, (0 being highly corrupted and 100 very clean) Romania averaged a score of 46 for the year 2015 in terms of public perception relating to the corruption level in general and it was the 58$^{th}$ ranked country (out of 168 participant countries) for perceived transparency. Romania has one of the lowest scores among EU Member States (tied with Greece).

According to a report prepared by the Romanian Academic Society (RAS) in 2016, one of the major problems of public procurement in Romania is the allocation of public contracts to certain companies who benefit from governmental favouritism. This study showed that for the period between 2007 and 2013, one agreement out of seven was granted to companies that have formally donated money to one or more political parties.

Romania is taking steps to improve the environment in public procurement. While legislative measures have already been taken in order to ensure more transparency during the procurement procedure and to block the awarding of contracts to preferred companies, the Romanian Competition Council (RCC) is actively involved in national efforts to fight procurement fraud. As of the date of this report (March 2016), a proposed bill regarding conflict of interest rules for civil servants in public procurement was adopted by the Chamber of Deputies and sent for approval to the Senate. This bill is available on the Chamber of Deputies' website.[53] In addition, in March 2016, GEO No. 34/2006 was amended in the sense that the contracting authorities are now obliged to use electronic means for carrying out procurement procedures in at least 60% of cases for the year of 2016 (the threshold for 2017 is at least 80%, while starting with 2018, the use of electronic means becomes completely mandatory). The introduction of electronic means will also increase the possibility of monitoring public agreements after their awarding as the related addenda will also be publicly available. Currently, not all addenda to initial agreements are published in SEAP (electronic database as defined in the Economic overview).

Fighting bid rigging is a priority for the RCC. Bid rigging qualifies as an anti-competitive practice, which is prohibited and sanctioned by Competition Law No. 21/1996. The OECD has published various materials on collusion and bid rigging, including *Guidelines for Fighting bid rigging in Public Procurement* (2009) and *Recommendations on Fighting Bid Rigging in Public Procurement* (2012).

The issues identified upon review of the legislation and following consultation with market participants are presented below.

### *Limitation of the number of participants*

As shown in the Economic overview above, according to the European Commission's Single Market Scoreboard, the overall performance of the Romanian public procurement system is rated as below average. One of the reasons for that was bidder participation, and especially the high numbers of tenders with only one bidder. According to the report prepared by the RAS in 2016, mentioned above, for the period between 2007 and 2013, public tenders with a single participant took place in 21.4% of the cases. This means that one public contract out of five has been granted to the sole participant of the tendering process.

A limited number of participants in public procedures affects competition between market participants and, as a consequence, prices on the market and the quality of the work/services/supply provided.

In the revised legislation, we identified certain provisions which, applied discretionary by the contracting authorities, might be the cause for the limited number of participants in public tenders. For example, the contracting authorities may restrict access to economic operators by imposing certain participation conditions (such as prior experience) on a case-by-case basis. Another example is the practice of setting the deadlines for submitting the tenders by the contracting authorities at the minimum threshold provided by the law. Some market participants claim they are too short, particularly in the case of more complex projects. Although these issues are not linked to the legal provisions in force but to the practices of the contracting authority, this is possibly due to the unguided powers granted to contracting authorities. In all these cases our recommendation is to draft guidelines to give market participants and contracting authorities a sufficient level of predictability and transparency with respect to the application of legal provisions.

### *Estimates of the benefits if particular restrictions identified below are lifted (quantitative analysis)*

We performed a quantitative analysis to investigate possible relationships between various features of procurement procedures and the outcomes of these procedures as indicated in Annex 2.A1. The regression analyses were run on a number of variables constructed from a set of completed procurement procedures meeting predefined criteria. The results suggest that there is more competition where participants submit more offers (or more offers are accepted by the public authority) as this leads to a larger discount of the award price from the original estimated price. Also, a larger contract value and more days available for preparing bids are correlated with a higher number of offers submitted. By extrapolating the results of the analysis to all construction procedures in 2014, and accepting a number of assumptions, it is estimated that the total savings resulting from a decreased award price can amount to approximately EUR 418 mln by stimulating, on average, one additional acceptable bid in construction procurement procedures. Similarly, two additional offers could yield approximately EUR 871 mln in savings.

### *Situations in which the contracting authority starts negotiations without prior publication of a participation notice*

**Description of the obstacle.** According to Article 122 letter c) of GEO No. 34/2006, the contracting authority may start negotiations for the tender procedure without the prior publication of a participation notice in cases of extreme urgency, resulting from unforeseeable situations which cannot be the result of misconduct of the contracting authority. Moreover, in cases of force majeure or duly justified cases, the contracting authority may order the beginning of the works/services in parallel with the initiation of the negotiation, without the prior publication of a participation notice procedure (i.e., before the execution of the procurement contract).

This provision is similarly contained in the newly-proposed public procurement legislation under Article 104 par. 1 and par. 4 of the bill regulating classical procurement.

**Harm to competition.** Considering that the notions of "extreme urgency" and "duly justified cases" are not properly defined in legislation, the contracting authorities have broad power to decide, on a case-by-case basis, when to apply the exception (thus avoiding the publication of the participation notice). Following discussions with market participants, it is our understanding that, in practice, the contracting authorities use the lack of definitions in order to avoid procurement even in cases where, in reality, the situation provoking the application of the exception does not result from an unforeseeable situation.

**Policy maker's objective.** The objective of the provision is to eliminate bureaucratic procedures and to reduce waiting time in cases of extreme urgency and resulting from unforeseeable situations. This is in line with Art. 32 of Directive 2014/24. According to the National Agency for Public Procurement (ANAP), there are some materials containing guidance for contracting authorities to apply this provision. There is a document published on ANAP website[54] regarding the general applicability of Article 122, mentioned above, but it does not provide adequate instructions or concrete examples for contracting authorities and market participants as regards the application of these exceptional situations.

**Recommendation.** We recommend one of the following options:

- The legislation (and the new proposed legislation) should define more clearly the notions of "extreme urgency" and "duly justified cases" to mitigate and restrain the discretionary power of the contracting authorities.
- Draft guidelines with examples of situations which may be considered as "extreme urgency" or "duly justified cases", based on European and national case law and practical experiences from the past. Such guidelines would give procurement authorities and market participants predictability with respect to the application of these provisions. Ensure that such materials are published on ANAP's website and applied in practice by all contracting authorities.

### *Time limits for submission of offers*

**Description of the obstacle.** The Romanian public procurement legislation currently in force provides various deadlines for the tender procedures (e.g., minimum time limit for submission of the participation request, for sending the invitation request, for submission of offers). For example,[55] for an open procedure, the minimum term for submission of offers is 20 days/52 days, depending on the estimated value of the agreement. Though these are

minimum deadlines, in practice they are often applied by the Romanian contracting authorities as fixed terms without considering the complexity of each project. These deadlines, if strictly applied in practice, may lead to potential impediments for economic operators in submitting sound offers, especially for undertakings participating in more complex projects or for small companies. Also, following discussions with market participants, we understand that there are offers submitted within this timeframe which are of low quality.

The newly-proposed public procurement legislation establishes even shorter minimum terms than the current ones, in accordance with Directive 2014/24.[56] For example, according to Directive 2014/24.[57] the minimum term for an open procedure was reduced to 35 days (by comparison, the term is to 52 days according to the legislation in force), a term which can be even further shortened in certain instances by up to 20 days to a minimum of 15 days.

**Harm to competition.** Since in practice the contracting authorities frequently use minimum terms as fixed ones rather than establishing appropriate terms considering the specifics of each project, many economic operators may be prevented from submitting sound offers for more complex projects. If the contracting authorities used longer deadlines when necessary, more offers could be submitted. Thus, the competition between economic operators would intensify, prices would drop and/or the quality of the works performed would improve.

**Policy maker's objective.** The deadlines prescribed by the law are minimum periods to be respected by the contracting authority, which may be extended, depending on the complexity of the contract and the time required for drawing up and submitting bids. According to ANAP, considering the multitude of public procedures undertaken annually and the particularities of the documentation for each tender, it is difficult to implement generally applicable rules when setting the deadlines.

**Recommendation.** We recommend drafting instructions giving practical examples (taken both from national and international practice) for contracting authorities to show how deadlines should be set in accordance with the complexity of the contract and the project. These instructions should be a useful tool for contracting authorities in further setting such deadlines.

### *Limitation of participants in the awarding procedure based on experience*

**Description of the obstacle.** According to Article 188 of GEO No. 34/2006, for certain public procurement agreements, the contracting authority may request that economic operators submit proof of their prior professional experience in the last three years (for supply and service agreements) or in the last five years (for works agreements). The contracting authorises may request professional experience as a condition of participation considering the nature and complexity of the public agreement. Thus, the contracting authorities are free to decide whether to request professional experience or not on a case-by-case basis.

**Harm to competition.** Discretionary power is granted to contracting authorities which are allowed to request proof of professional experience, on a case-by-case basis, depending on the complexity of the public agreements. Due to a lack of any guidance when taking the decision as to whether to request proof of professional experience or not, the contracting

authorities decide on a case-by-case basis when to apply the provisions. Therefore, contracting authorities might take different decisions in similar situations. This may qualify as a barrier to entry onto the market and leads to an unpredictable business environment for private investors.

**Policy makers' objective.** The purpose of the provision is to ensure the proper experience of the bidders and to diminish the risk of non-fulfilment or inappropriate execution of the contract. The provision is in line with Annex XII of Directive 2014/24.

**Recommendation.** Guidelines should be published to give market participants and contracting authorities a sufficient level of predictability and transparency with respect to the situations in which contracting authorities may require proof of professional experience. According to ANAP, they are currently working on drafting instructions regarding requests for proof of professional experience.

### *Non-application of procedures under GEO No. 34/2006 for contracting authorities located outside Romania*

**Description of the obstacle.** The general thresholds provided by GEO No. 34/2006 are as follows:

- For supply and servicing agreements below EUR 30 000 the contracting authority has no obligation to apply a public procedure; (for works agreements, the threshold is EUR 100 000).
- For supply and servicing agreements above EUR 30 000 and below EUR 130 000, the contracting authority has the obligation to apply a public procedure, including calls for tenders; (for works agreements the range is between EUR 100 000 and EUR 5 000 000).
- For supply and servicing agreements above EUR 130 000, the contracting authority has the obligation to apply a public procedure, excluding calls for tenders; (for works agreements the threshold is EUR 5 000 000)

As an exception to the above, the public procurement procedure is not applicable for "structures of the contracting authority functioning outside Romania" (including undertakings which qualify as contracting authorities because they are state owned) when the value of the public procurement agreement is lower than: a) EUR 130 000 for a supply agreement; b) EUR 130 000 for a servicing agreement; and c) EUR 5 000 000 for a works agreement.

This exception might allow the following scenario: a state-owned company which qualifies as a contracting authority requires the performance of services (which are carried out exclusively on the territory of Romania) through a subsidiary set up in another state. In such a case the general public procurement procedures under GEO No. 34/2006 would not be applicable.

The procedure for performing works outside the territory of Romania is not governed by European directives but needs to be established at the national level.

However, GEO No. 34/2006 does not provide clear criteria to be applied by the "structures of the contracting authority functioning outside Romania" when awarding an agreement without applying a public tender, such as conditions to be met by the economic operators (i.e., qualification, reputation, experience, or guidelines for the contracting authorities to be followed when choosing the economic operator). GEO No. 34/2006 solely

provides very general principles to be followed (e.g., non-discrimination, equal treatment for the participants, transparency).

In a similar manner, the same procedure is also provided in the new proposed public procurement legislation. While the current procedure governed by GEO No. 34/2006 solely provides general principles to be followed when awarding contracts below the aforementioned thresholds, the new proposed public procurement legislation expressly states that below the thresholds (i.e., when the public procedures are not applicable), methodological norms (which have not been issued yet) will further establish rules covering general principles such as transparency or equality. It remains to be seen whether this issue will be properly addressed and resolved in the new legislation, considering that at the date of writing of this report, the methodological norms have not yet been elaborated.

**Harm to competition.** State-owned companies qualify as contracting authorities under national legislation even if their market activities are similar to other private undertakings. In situations where the objective of the agreement concluded by a contracting authority located outside Romania (supply, service, or works) is to be carried out exclusively on the territory of Romania, this provision is likely to cause discrimination between economic operators in terms of costs and timeline. Undertakings that do not have a subsidiary abroad are obliged to follow the procurement procedure under GEO No. 34/2006 when exceeding the general thresholds (EUR 30 000 for a supply or servicing agreement and EUR 100 000 for a works agreement) or applying the procedure of a request for offers. However, undertakings with a subsidiary abroad can purchase the work/services if the value of the agreement is under EUR 130 000 (for a supply or servicing agreement) or EUR 5 000 000 (for a works agreement) through that subsidiary, thus avoiding the application of GEO No. 34/2006.

**Policy maker's objective.** The exception is motivated by the difficulty of carrying out a request for an offer outside national territory.

**Recommendation.** The national legislation should be amended, so that the same thresholds apply in all situations involving public money, including to contracting authorities located outside Romania, when the objective of the procedure is the acquisition of works and/or services to be delivered within Romania.

### *Addenda*

The need to conclude addenda usually comes from faults of the contracting authority in estimating the requirements of the works, or is the result of unforeseeable circumstances which incur additional costs.

In 2013, the RCC undertook a sector inquiry in the construction market of roads and highways. During this inquiry, the RCC also investigated the importance of addenda. According to its final report, for 96 contracts of road construction and services works 203 addenda were concluded in the period between June 2010 and June 2011, out of which 23 were modified in terms of value. Of the 23 contracts with a modified value, for 9 the value increased by between 10% and 40%; for 8 the value increased by almost 50%; and for 2 of them the value increased by more than 50%. Prior to 2011, the limit for concluding addenda was 50% of the initial value of the agreement. The contracts examined by the RCC were from this period.

According to Article 122 of GEO No. 34/2006, after awarding a public agreement the contracting authority may conclude an addendum to the agreement with the winner of the

procedure having as its objective the modification of the price of the agreement up to 20% of the initial value, subject to certain conditions. Addenda can be concluded following direct negotiations between the authority and the economic operator, without an obligation to apply an additional public procurement procedure. However, if the value of the addenda is more than 20% of the initial value of the agreement, the contracting authority has the obligation to award the addenda only through a public procurement procedure.

National rules regarding the conclusion of addenda contained in the national legislation seem to be clear and, at least in theory, do not leave room for abuse. The small derogation allowed (concluding addenda without a public procedure if the value of the addenda is less than 20% of the initial value) seems fair and can be easily justified by the need to complete the public contract in a timely manner without incurring significant delays for such small amendments.

#### *Derogation as regards addenda in case of intervention works to enhance the performance of buildings.*

**Description of the obstacle.** According to Article 15 of the methodological norms of Emergency Ordinance No. 18/2009 for increasing energy performance of housing blocks, the contracting authority and the winner of the awarding procedure may conclude addenda to the agreements if the value of the addenda does not exceed the value of the initial agreement by more than 10%. This provision derogates from general procurement procedure rules, according to which additional works/services could be awarded directly to the initial winner without an additional public procedure if the value of the additional works does not exceed 20% of its initial value.

**Harm to competition.** The derogation from the general public procurement legislation may lead to delays in executing the work.

**Policy maker's objective.** We did not find a reason why the threshold is 10% instead of the usual 20%.

**Recommendation.** This derogation should be abolished. Awarding of agreements in the field of intervention works to enhance the energy performance of residential buildings should be governed exclusively by GEO No. 34/2006.

#### *Unusually low price*

The issue of abnormally low tenders (hereinafter referred to as ALTs) is widely recognised as a major problem in public procurement (OECD, 2015). At the European level, Directive 2014/24 puts an explicit obligation on contracting authorities in Member States to ask the bidders to explain the price or costs contained in a tender in situations where tenders "appear to be abnormally low in relation to the works, goods or services". The EU framework provides guidance as to which elements of a tender may be subject to further inquiry. For example, the contracting authority may request further explanations regarding the economics of the manufacturing process, of the services provided or of the construction method, the technical solutions chosen, or the originality of the work, supplies or services.[58] However, the EU framework does provide further indications for determining the basis upon which a tender may "appear" abnormally low.

The reasons bidders submit ALTs may vary, depending, for example, on the fact that each of them might have a different quality of information at the bidding stage. Another reason might be uncertainty about the components of the overall cost of serving an agreement, since the contractor may find out that the "true" cost of performing the contract differs from its initial estimate, especially if the bid was submitted on the basis of a forecast that was too optimistic – the "winner's curse" (OECD, 2015).

#### *Description of the obstacle*

GEO No. 34/2006 establishes that an offer is classified as having an unusually low price if the price contained in the offer is lower than 80%, excluding VAT, of the estimated value of the agreement. In this case, the contracting authority has the obligation to request further information (including, for example, information on prices, stocks, salary, and organisation) and clarifications from the economic operator. Upon consultation with market operators, it is our understanding that in practice the contracting authorities do not challenge the justifications received from market participants and do not reject ALTs.

According to newly-proposed legislation in the field of public procurement, the contracting authority will reject an ALT only when the proof submitted by the economic operators does not justify the low price level/proposed costs, taking into consideration the clarifications offered during the investigation. However, the new legislation does not provide any criteria for rejection of a bid and no threshold is provided under which the offer is presumed to be abnormally low (Directive 2014/24, similarly, does not provide such thresholds).

#### *Harm to competition*

Considering that in practice the contracting authorities do not reject the justifications and are still awarding the project to the bidder offering the lowest price, this may facilitate price dumping. Companies might win with non-sustainable offers which cannot be implemented or will require amendments to the contract later on.

#### *Policy maker's objective*

This current practice of the contracting authorities may be the result of a lack of specific and objective criteria to justify the rejection of an offer. Authorities might also fear a potential challenge of the rejection decision by an economic operator.

#### *Recommendation*

The national legislation should be amended to provide the contracting authorities with clear criteria and examples of when to reject an offer based on a lack of justification of an abnormally low price. The objective of the proposed recommendation is to allow contracting authorities to reject an offer due to a greatly underestimated price. Such offers are unlikely to cover the costs necessary and thus in practice are unlikely to be implemented.

### *Subcontracting*

#### *Description of obstacle*

According to Article 225 letter a) of GEO No. 34/2006, the contracting authority may impose on the concessionaire the obligation to subcontract 30% of the value of the concession agreement for public works to a third party. The legislation does not provide for the following clarifications: i) if the contracting authority can impose such an obligation in

the situation where the company can perform the work by itself and ii) if the company itself decides who will be the third party for the subcontract work or services or whether such third parties are imposed by the contracting authority.

No similar provision has been identified in the newly-proposed legislation in the field of public procurement.

*Harm to competition*

The unclear wording of the legislation grants to the contracting authority an arbitrary power as regards the request for subcontracting 30% of the value of the agreement. This may prejudice economic operators that have the capabilities to provide the service or perform the work themselves. Additionally, in cases when the authority determines who will be the third party, the economic operator is not be free to choose its subcontractor. However, upon discussions with market participants, we understand that there have been no situations where the contracting authorities have imposed a third party.

*Policy maker's objective*

The provision transposes Article 60 from Directive 2004/18/CE. The objective of this provision is to allow small and medium-sized enterprises access to public works concession agreements.

*Recommendation*

Considering that the new proposed legislation in the field of public procurement does not provide a similar restriction, and provided that it is enacted as such, we make no further recommendation.

***Other critical provisions***

We identified several additional issues in general construction law that had an impact on public procurement procedures. These provisions identified often set derogations from the general tender procedure. Our recommendation is to abolish them and to apply the normal tender procedure.

*Exception with respect to concession agreement of land which is to be used by the concessionaire to build houses for people under the age of 35*

**Description of the obstacle.** A concession is an agreement according to which a natural or legal person can obtain a right to exploit a good owned by the state in exchange of a fee. Generally, under Law No. 50/1991, the concession of land belonging to the state should be conducted through a public tender. However, according to Article 15 letter c) of Law No. 50/1991, no public tender procedure is required for concession of land which is to be used by the concessionaire to build houses for young people under the age of 35.

**Harm to competition.** This provision is likely to create advantages for real estate developers building houses to be sold/rented to young people as opposed to other real estate developers. Large and valuable areas can be leased to developers without any public tender procedure. There is a risk of discrimination, corruption, concession and under-pricing while providing no guarantee that the real estate developers will pass on their cost savings to the young people.

**Policy maker's objective.** The objective of this provision resides in a social policy meant to encourage real estate developers to build houses which will subsequently be sold/rented to young people under the age of 35.

**Recommendation.** This provision should be abolished and the tender procedure should be introduced as indicated under Law No. 50/1991.

### *Exception with respect to concession agreement of land which is used by the initial owner of a building for extending the existing building on nearby land*

**Description of the obstacle.** Article 15 letter e) sets another exception to the rule according to which the concession under Law No. 50/1990 is made through a public tender procedure. No public procurement procedure is foreseen in order to lease private terrain owned by public authorities if they are to be used by the initial owner of a building for extending the existing building on nearby land. For example, an undertaking owning a building may ask for a concession on an adjacent land belonging to public authorities for extending the existing construction.

**Harm to competition.** An undertaking wanting to prevent a competitor from developing its business might buy/lease property around the land owned by the competitor and then concede the nearby land directly from the public authority.

The public entity might concede the adjacent land at a lower price compared to the price which would have been paid in case a public procedure applied. There is also a certain risk for corruption, as in all cases in which a derogation from tender procedure is permitted without solid grounds.

**Policy maker's objective.** The objective of this provision is to allow an existing company to expand on nearby land.

**Recommendation.** We identified two possible options in order to remedy the issue described above:

- One option is to abolish this provision and apply the tender procedure as indicated under Law No. 50/1991. This avoids lease under pricing and granting of preferential rights.
- A second option is to grant the owner of the existing building a special pre-emption right and to match the best offer under the tender procedure. In this case, only if a new participant is offering a higher price than the neighbour, should the new participant win the tender.

### *Restricted access to information regarding tender procedures for land in private ownership of the state*

**Description of the obstacle.** According to Article 16 of Law No. 50/1991 regarding authorisation of construction works execution, information regarding tender procedures for land in the private ownership of the state or of the municipality is to be disclosed by the city hall only by publishing it at its headquarters and in two major newspapers 20 days prior to the procedure. No reference is made to the requirement to publish the information online or to use other means of communication.

**Harm to competition.** Currently the information is available only through local communication means so that undertakings located outside the city may not have access

to such information and might not be aware of future tender procedures. Thus, the number of potential bidders might be reduced.

**Policy maker's objective.** Tender procedures were duly publicised at the time of enactment of the legal provision. However, traditional communication channels have changed, making newspapers and notice boards less used/relevant as communication channels.

**Recommendation.** This provision should be amended in order to extend it to other means of communication, including the online environment (including the city hall's web site, where possible).

### *Restriction with respect to the commercial relationship between general contractors and subcontractors*

**Description of the obstacle.** According to Article 12 of Emergency Ordinance No. 84/18.09.2003 for the establishment of the National company for highways and roads in Romania, for the execution of works contracts covering construction, rehabilitation, expansion or modernisation of roads (and also the execution of addenda to such contracts), the general contractor must constitute a pledge in favour of its subcontractors or suppliers having as object any amounts due by the National Company for Highways and National Roads in Romania ("CNADR") to the general contractor. The amounts to be recovered by subcontractors or suppliers consist of the value of the works/services they have provided to the general contractor. No other form of guarantee is allowed (such as a bank guarantee).

**Harm to competition.** This provision interferes with commercial contracts between general contractors and subcontractors who may in practice use different commercial measures in order to protect their interests. In addition, the measure of not allowing insurance policies as a form of guarantee is seen by the business community as an excessive financial guarantee in certain cases.

**Policy maker's objective.** The objective of the provision is to protect subcontractors and suppliers from delivering works/goods and not being paid for them. The pledge established by the general contractor would confer on the subcontractors the same assurances as those received by the general contractor. Setting a pledge in favour of the subcontractors covering the sums owed by CNADR to the general contractor gives the subcontractors certainty that they will receive the amounts the general contractor owes them under their contractual relationship.

**Recommendation.** Keep the provision as it is in order to ensure that the work of the subcontractor is guaranteed. Additionally, the provision should be amended to allow all types of commercial guarantee instruments to be used in the commercial relationship between general constructors and their subcontractors.

### *Awarding criterion in the field of intervention works on buildings with seismic risk*

**Description of the obstacle.** Intervention works in buildings with a seismic risk are carried out by state authorities based on a technical solution issued by a designer. During the public procurement procedure for drafting technical solutions, according to Article 83 of the Methodological Norms for the application of Government Ordinance No. 20/1994 on

measures to mitigate the seismic risk of existing buildings, the criterion of the lowest price should be used exclusively. Also, according to Article 55 of the same enactment, the same criterion is to be used during the public procedure for the acquisition of technical expertise concerning the buildings. Thus, the second criterion under the procurement legislation, the economically most advantageous bid, is automatically excluded.

**Harm to competition.** In accordance with European Legislation, the national framework legislation on public procurement provides two criteria when awarding a public procurement agreement: the lowest price and the criterion of the economically most advantageous tender. The provision limiting the criterion solely to the lowest price derogates from this generally applicable legal regime. For example, operators who have new technology and who would be able to make the economically most advantageous offer are at a disadvantage. The provision is also likely to affect the quality of the performance, as the economic operators would look to utilise cheaper solutions in order to cut costs, which might not be appropriate when it comes to seismic risks.

**Policy maker's objective.** Considering that the costs are supported by public resources, the state wanted to limit the financial effort of the contracting authority.

**Recommendation.** This provision should be amended to allow both the criteria that are foreseen by general public procurement legislation.

### *Notes*

1. For instance taking into consideration close interdependencies between players along the construction industry value and supply chains and also vertically integrated companies.
2. A large share of companies and most of the larger ones generally feature diversification of their activities and are required by the Registry of Commerce and other relevant authorities and regulations to identify their main activity NACE code as well as to list all other secondary NACE codes for their diversified operations. This leads to a situation where companies may have several divisions, each contributing significantly to the overall results of the company, while it is not possible to match the contribution/weight of all NACE codes into the company's activity or total revenue. This is because financial results of companies are generally attributed to the main NACE code of the company.
3. The following NACE codes are considered as part of the construction sector: F4211 Construction of roads and motorways, F4212 Construction of railways and underground railways, F4213 Construction of bridges and tunnels, F4221 Construction of utility projects for fluids, F4222 Construction of utility projects for electricity and telecommunications, F4291 Construction of water projects, F4299 Construction of other civil engineering projects n.e.c.
4. The following NACE codes are considered as part of the construction materials sector: B0811 Quarrying of ornamental and building stone, limestone, gypsum, chalk and slate, B0812 Operation of gravel and sand pits; mining of clays and kaolin, C1621 Manufacture of veneer sheets and wood-based panels, C1622 Manufacture of assembled parquet floors, C1623 Manufacture of other builders' carpentry and joinery, C2030 Manufacture of paints, varnishes and similar coatings, printing ink and mastics, C2311 Manufacture of flat glass, C2331 Manufacture of ceramic tiles and flags, C2332 Manufacture of bricks, tiles and construction products, in baked clay, C2351 Manufacture of cement, C2352 Manufacture of lime and plaster, C2361 Manufacture of concrete products for construction purposes, C2362 Manufacture of plaster products for construction purposes, C2363 Manufacture of ready-mixed concrete, C2364 Manufacture of mortars, C2365 Manufacture of fibre cement, C2369 Manufacture of other articles of concrete, plaster and cement.
5. *www.mdrap.ro/en/ministerul/prezentare*.
6. *www.cnadnr.ro/pagina.php?idg=49*.
7. *www.isc-web.ro/*.

8. *www.mmediu.ro/*.
9. *www.ctpc.ro/*.
10. *www.namr.ro/prezentare-anrm/atributii/*.
11. Government Emergency Ordinance (GEO) No. 20/1994.
12. The Social Dialogue Commission is composed of: 1) representatives of the ***Ministry of Regional Development and Public Administration***; 2) representatives of ***employers' associations*** (such as the General Union of Romanian Industrialists (UGIR), the National Council of Small and Medium Sized Private Enterprises in Romania (CNIPMMR), the Employers' Confederation Concordia); 3) representatives of ***trade unions*** (such as the National Confederation of Free Trade Unions of Romania (CNSLR Fratia), the National Trade Union Bloc (BNS), the National Trade Union Confederation Cartel ALFA, the Democratic Trade Union Confederation of Romania (CSDR), the National Trade Union Confederation – Meridian); 4) representatives of ***associative structures of local public administration authorities*** (the National Union of County Councils of Romania (UNCJR), the Romanian Municipalities Association (AMR), the Association of Romanian Towns (AOR), the Association of Romanian Communes (ACoR)); 5) a representative of the ***Ministry of Labor, Family and Social Protection of Romania.***
13. *www.asro.ro/engleza2005/default_eng.html*.
14. Top companies in terms of turnover from 2014.
15. Only companies with their main NACE code corresponding to construction of roads and railways were included in this ranking. Other major construction companies which have participated and were selected in procurement processes for major roads and railways projects, which have primary NACE codes such as F 41 Construction of buildings are not included in the ranking, but they should be taken into consideration while looking at the market. Such companies include: STRABAG SRL, SPEDITION UMB, ASTALDI - branch Romania Bucharest, EURO COSNTRUCT TRADING 98, BOG'ART, VEGA 93.
16. According to ANAF data.
17. Top companies in terms of turnover from 2014.
18. Top companies in terms of turnover from 2014.
19. Considering the NACE codes mentioned in Chapter 2.1.1 "Definition of the relevant sectors and areas of investigation".
20. According to Eurostat data.
21. According to Eurostat data.
22. According to Eurostat data.
23. According to Eurostat data.
24. Between 2006 and 2015, GEO no. 34/2006 was amended and supplemented by a total of 20 acts. Currently, GEO no. 34/2006 includes procurement chapters of the utilities and concessions sector, separate chapters on the remedies system and the applicable penalties and offenses in the field. In terms of scope, GEO no. 34/2006 regulates the procurement above and below the thresholds for publication in the Official Journal of the European Union.
25. *http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm*.
26. The indicators set out in the Single Market Scoreboard reflect how the different Member States are performing in key aspects of public procurement. While they offer a simplified picture, they nevertheless show basic aspects of countries' procurement markets. All indicators are based on notices published in the Tenders Electronic Daily (TED) database under directives 2004/17/EC and 2004/18/EC. The overall performance is a weighted average of the three performance indicators. Triple weight is given to both the bidder participation and accessibility indicators, as compared to the procedural efficiency indicator (normalized to 0 – 100%). Scores above 90% are marked green, while those between 90% and 80% are marked yellow and those below 80% are marked red.

    "Performance" measures the extent to which purchasers obtain good value for money. The indicators – bidder participation, accessibility and efficiency – measure important influences on public procurement performance in a way that is transparent, readily comprehensible and comparable.
27. National Strategy on Public Procurement elaborated by the Romanian Ministry of Finance in the context of the transposition of the new EU Directives on Public Procurement, published on 31/07/2015 on *www.mfinante.ro/proiecteachizitii.html?&pagina=acasa*.

28. CNSC Activity report for 2014, page 6, *www.cnsc.ro/raport-de-activitate/*.
29. Constitutional Court Decision no. 5/15th of January 2015.
30. Romanian public procurement in the construction sector. Corruption risks and particularistic links, *http://anticorrp.eu/publications/report-on-romania/*.
31. Romanian public procurement in the construction sector. Corruption risks and particularistic links, page 13, *http://anticorrp.eu/publications/report-on-romania/*.
32. Bucharest Municipality Local Council Decision no. 66/2006, regarding the approval of the norms for ensuring a minimum number of parking places for new constructions and decorations authorised on the territory of Bucharest Municipality and of the prospects necessary for a proper functioning of the thoroughfares, *http://acteinterne.pmb.ro/legis/acteinterne/acte_int/afisint.php?f=16937*.
33. Brasov Municipality Local Council Decision no. 927/2006 regarding the approval of the Regulation for assigning parking places from the residential parking lots established within the city.

    *www.brasovcity.ro/documente/public/regulamente/parcare/Regulament%20de%20atribuire%20a%20locurilor%20de%20parcare.pdf*.
34. Cluj-Napoca Municipality Local Council Decision no. 25/2010, regarding the approval of the regulation for tenancy of terrain for parking places, garages or awnings situated on the public or private domain of the Municipality *www.primariaclujnapoca.ro/doc/administratie/Regulament%20serviciu%20parcari.pdf*.
35. Pitesti Municipality Local Council Decision no. 185/2012 regarding the approval of the regulation for assigning parking places in residential parking lots in the city *www.primariapitesti.ro/portal/arges/pitesti/portal.nsf/All/FC4F3327FDCF862CC2257AD00050201F/$FILE/HCL%20185-privind%20aprobarea%20Regulamentului%20pentru%20atribuirea%20in%20folosinta%20a%20locurilor%20de%20parcare%20situate%20in%20parcarile%20de%20resedinta%20amenajate%20in%20Municipiul%20Pitesti.pdf*.
36. No official records could be identified concerning the exact number of parking places subject to the exception mentioned under the legislation.
37. See Order no. 119/2014 for the approval of Norms of hygiene and public sanitation regarding the living environment of the population.
38. An urbanistic plan is a document regulating land planning and development of localities. The zonal urbanistic plan regulates in detail the urbanistic development of an area inside a locality (thus covering all functions: housing, services, production, circulation, green spaces, public institutions, etc.).
39. The coefficient of terrain usage is the ratio between the built surface and the surface of the parcel of land included in the reference territorial unit.
40. The information was updated on 23 May 2014. Available at: *www.ctpc.ro/bdsni.html*.
41. Available at: *www.ctpc.ro/bdsni.html*.
42. *www.sgg.ro/index.php?politici_publice_documente*.
43. *www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=14945*.
44. Description of the Department for state aid, unfair practices and regulated prices, *http://discutii.mfinante.ro/static/10/Mfp/rof2013/4_9_674_2013.pdf*.
45. The NACE Code is a pan-European classification system which groups organisations according to their business activities.
46. Source: ANAF *www.anaf.ro/indicatori/indfinanciari.html*, Deloitte calculations.
47. Source: ANRM *www.namr.ro/resurse-minerale/licentepermise-active/* (accessed 22 February 2016), Deloitte calculations.
48. PL-x nr. 522/2015, Draft law to repeal a position of the Annex to Government Emergency Ordinance No. 36/2001 on the regulated prices and tariffs that are established with the approval of the Competition Office (Proiect de Lege pentru abrogarea unei poziţii din anexa la Ordonanţa de urgenţă a Guvernului nr.36/2001 privind regimul preţurilor şi tarifelor reglementate, care se stabilesc cu avizul Oficiului Concurenţei) *www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=14645*, accessed on 9 March 2016.
49. Point of view of the Romanian government regarding various legislative initiatives, *www.cdep.ro/proiecte/2015/500/20/2/12%20PVG%2026%2010%202015.pdf*.

50. Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

51. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; 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; and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

52. *www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=15471*, *www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=15472*, *www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=15473*, *www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=15474*.

53. *www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=15159*.

54. *www.anrmap.ro/web/public/puncte-de-vedere/-/asset_publisher/nVxyj1ceeqMD/content/cand-poate-fi-aplicata-procedura-de-negociere-fara-publicare-prealabila-a-unui-anunt-de-participare-ce-se-intampla-daca-necesitatea-achizitionarii-ser?redirect=http%3A%2F%2F www.anrmap.ro%2Fweb%2Fpublic%2Fpuncte-de-vedere%3Fp_p_id%3D101_INSTANCE_nVxyj1ceeqMD%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D1*.

55. GEO No. 34/2006 provides with different deadlines for the same procedure depending on the estimated value of the contracts. (e.g., as stated above, the minimum term of an open procedure is currently 20 days for contracts below the thresholds and 52 days for contracts above the thresholds – for which the participation notice is published in the Official Journal of the European Union).

56. The terms provided in Directive 2014/24 are applicable only for public contracts with an estimated value over certain thresholds. Under these thresholds, the Member States are free to decide the terms and deadlines.

57. Article 27 of Directive 2014/24.

58. Article 69 par. 2 of Directive 2014/24.

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use SEAP back in 2007. The number of users has gradually increased and, by the end of 2014, 14 721 contracting authorities were registered in SEAP (up from 9 591 in 2007)."

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# ANNEX 2.A1

## *Public procurement: Number of submitted/accepted offers*

The key objective of the quantitative analysis for the various issues identified in relation to public procurement procedures for construction works is to investigate possible relationships between various features of procurement procedures and the outcomes of these procedures.

### Method and indicators

Information regarding the procurement procedures was manually extracted from the SEAP[1] system in order to build the input database for the analysis. Approximately 50 procedures were identified and relevant data was extracted for these procedures.

***Sample criteria:***

- tender procedure announcement between 1 January 2013 and 31 December 2014
- only works contracts
- CPV[2] code corresponding to road construction works (45233120-6)
- open tender procedure type
- tender procedure finalised
- contract value registered in SEAP system
- excluded works related to sidewalks, urban furniture, etc.

***Indicators:***

- estimated value of the agreement in Romanian leu (RON)
- number of offers submitted
- number of suitable offers submitted
- final price of the winning bid
- days available for preparing documentation and submitting bid
- discount of the winning price from the original estimate (% winning price/estimated price)

The main method used is linear regression analysis investigating the relationship between the constructed variables.

Outliers are identified for each variable based on maximum and minimum cut-off values determined using a rule. Any values over or below two standard deviations from the

mean are considered to be outliers and are excluded from each indicator pair used in the analysis. Overall, 10 procurement procedures from the 50 identified have at least one outlier and the actual number of data points used in the analysis varies between 44 and 48 depending on the outliers present in the dependent and independent variables defined in each case.

## Regression framework and hypotheses

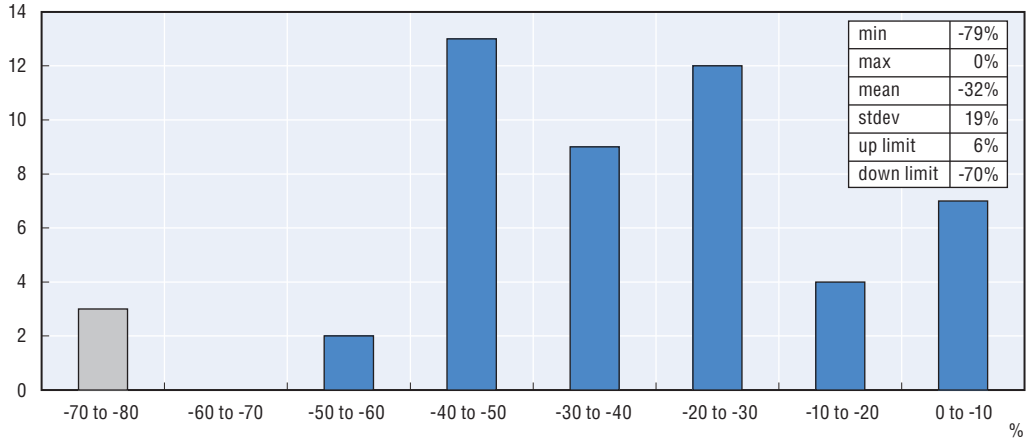
The following hypotheses were formulated:

- There should be a positive relationship between number of days given to submit offers and number of offers submitted (more time to prepare offers = more competition).
- There should be a positive relationship between number of days given to submit offers and number of offers accepted (more time to prepare offers = more competition).
- There should be a positive relationship between offers submitted and award price discount compared to initial price estimate (more competition = lower price)
- There should be a positive relationship between offers accepted and award price discount compared to initial price estimate (more competition = lower price)
- A higher estimated contract value results in more competition and thus a larger price discount (larger value = more competition = lower price).

## Descriptive statistics

Descriptive statistics and the frequency distribution of values for the main variables used are presented below. Identified outliers are coloured in orange.

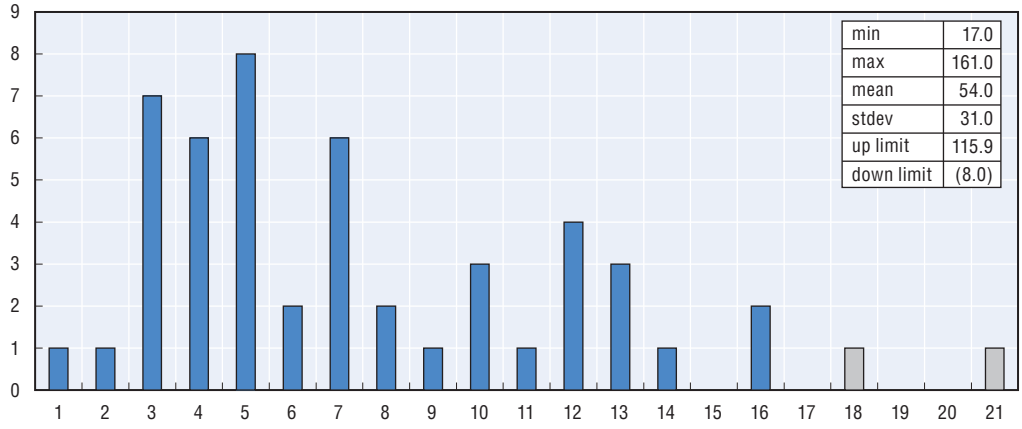
Figure 2.A1.1. **Discount of award price compared to estimate price (%)**




*Source:* Data extracted from *www.e-licitatie.ro/*, Deloitte Analysis.

StatLink http://dx.doi.org/10.1787/888933361322

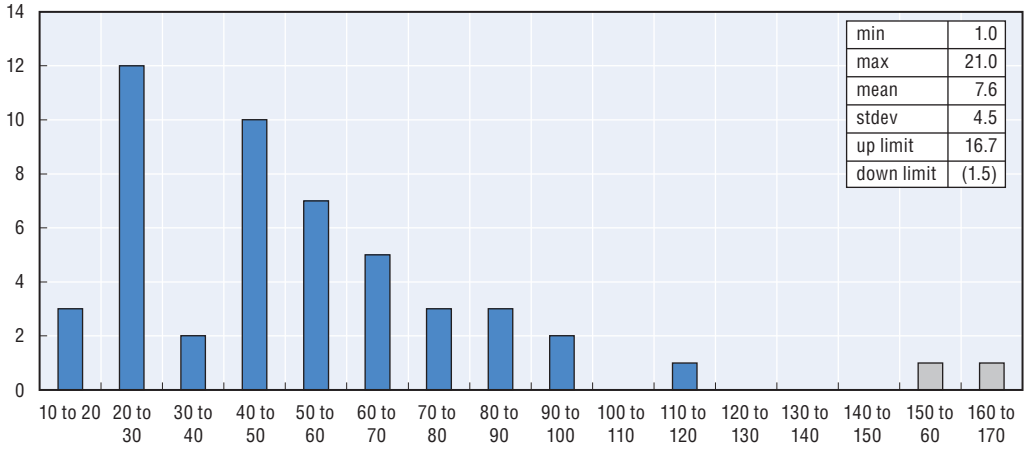
Figure 2.A1.2. **Term for submitting offers (days)**




*Source:* Data extracted from *https://www.e-licitatie.ro/*, Deloitte Analysis

StatLink http://dx.doi.org/10.1787/888933361333

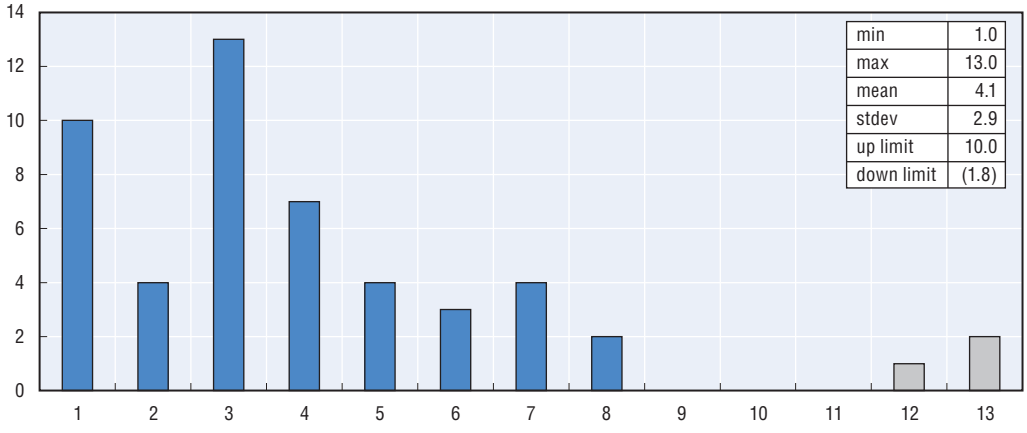
Figure 2.A1.3. **Number of offers submitted**




*Source:* Data extracted from *www.e-licitatie.ro/*, Deloitte Analysis.

StatLink http://dx.doi.org/10.1787/888933361348

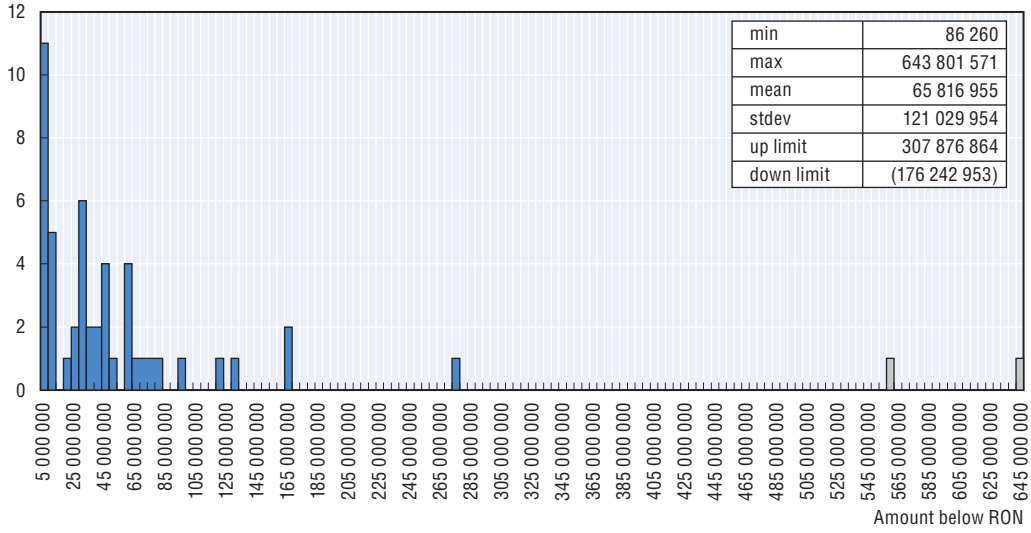
Figure 2.A1.4. **Number of offers accepted**




*Source:* Data extracted from *www.e-licitatie.ro/*, Deloitte Analysis.

StatLink http://dx.doi.org/10.1787/888933361352

Figure 2.A1.5. **Estimated value of the contract in RON**




*Source:* Data extracted from *www.e-licitatie.ro/*, Deloitte Analysis.

StatLink http://dx.doi.org/10.1787/888933361360

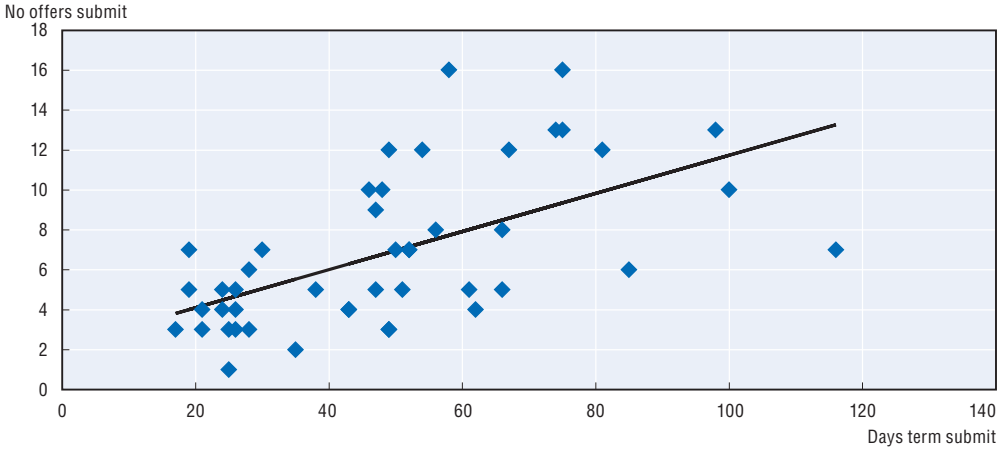
## Results

The estimated value of the contract is correlated with the number of offers submitted, the number of offers accepted and the days available for submitting offers. Furthermore, the estimated value of the contract in the sample exhibits Skewness and Kurtosis[3] and is not close to a normal distribution. Considering this, the value of the contract cannot be used to control for the anticipating effect of higher value contracts (more competition, more time to prepare bids, more offers submitted and accepted); the relationship between the variables are be investigated separately but care should be exercised in interpreting the results.

## Results

- More days available to submit offers results in a higher number of offers being submitted (for every extra day available to submit offers, 0.095 additional offers are submitted) and explains 34.6% of the variation (N = 46).
- A higher estimated contract value results in more offers submitted but does not result in more offers accepted or an improvement in the quality (% accepted from those submitted) and explains 16.7% of the variation of offers submitted (N = 46).
- A higher number of offers submitted results in a larger discount of the final award price compared to the estimated price (for every additional offer submitted, a further 2.1% discount is observed) and explains 28.1% of the variation (N = 45).
- A higher number of offers accepted results in a larger discount of the final award price compared to the estimated price (for every additional offer accepted, a further 4.4% discount is observed) and explains 34% of the variation (N = 44)
- The number of days available to submit offers does not result in a higher number of offers accepted.
- The estimated value of the contract does not result in a larger discount of the award price.

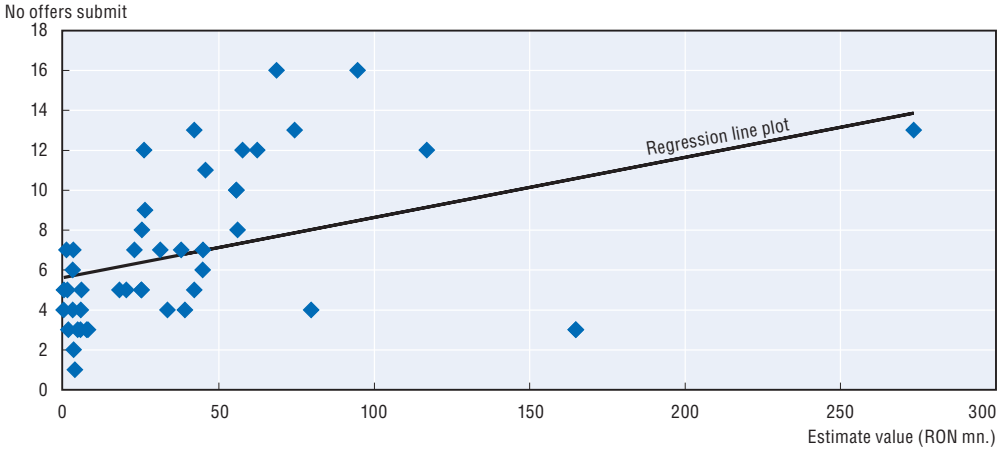
Figure 2.A1.6. **Terms for submitting offers – offers submitted**




*Source:* Deloitte Analysis.

StatLink http://dx.doi.org/10.1787/888933361377

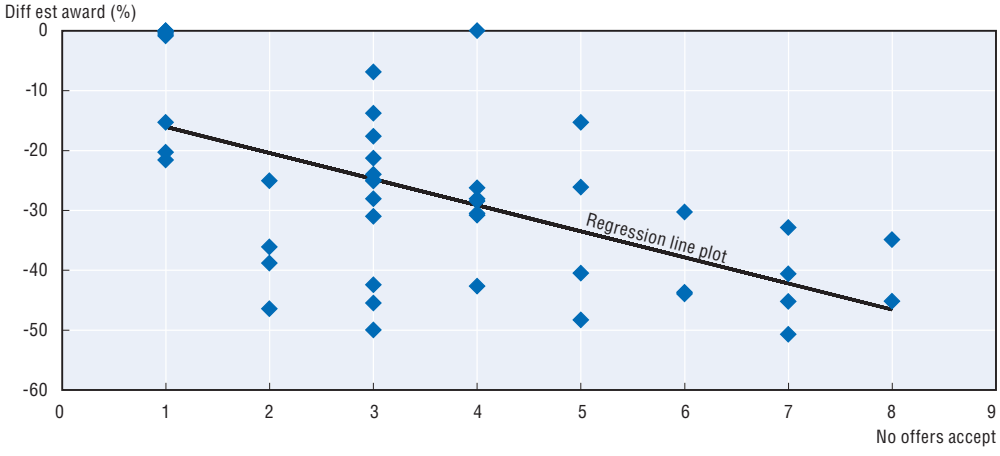
Figure 2.A1.7. **Estimated contract value – offers submitted**




*Source:* Deloitte Analysis.

StatLink http://dx.doi.org/10.1787/888933361384

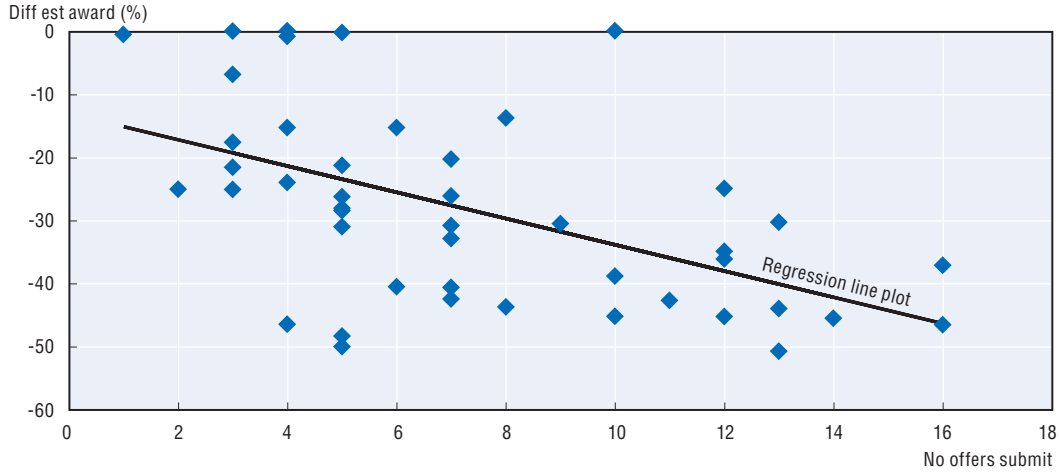
Figure 2.A1.8. **Offers accepted – price discount**




*Source:* Deloitte Analysis.

StatLink http://dx.doi.org/10.1787/888933361392

Figure 2.A1.9. **Offers submitted – price discount**




*Source:* Deloitte Analysis.

StatLink http://dx.doi.org/10.1787/888933361403

## Conclusion

- More competition in the form of more offers submitted and more offers accepted does lead to a larger discount of the award price from the original estimated price. This is especially true for offers accepted by the contracting authority.
- A larger contract value and more days available for preparing bids do lead to a higher number of offers submitted but do not lead to a higher number of offers accepted.

## Consumer benefits

Having predicted that for each additional accepted offer in a public procurement procedure a higher price discount can be obtained and assuming that the benefit of the lower awarded price is transmitted to the final consumers, consumer benefits are estimated using the following formula:

$$CB = \left(\rho + \frac{1}{2}|\epsilon|\rho^2\right)R_r$$

where:

– CB: standard measure of consumer harm

– ρ:percentage change in price related to restriction

– R: sector revenue

– |∈|: absolute value of elasticity of demand

As the absolute value of elasticity of demand is unknown, this index is assumed to take the value of 2. In this case, the consumer benefits formula can be simplified as follows:

$$CB = \left(\rho + \rho^2\right)R_r$$

For estimating the consumer benefits several assumptions are made. First, the effect of additional accepted offers on the award price discount for roads sample is the same as for the entire volume of public procurement in construction. In this case we can calculate the consumer benefit for both the public procurement procedures regarding road construction and any other public procurement procedure in the construction industry.

Moreover, the yearly volume of road related public procurement is estimated by dividing the sum of the contracted value of the procedures included in the sample by two, as the sample included both 2013 and 2014 procedures.

Moreover, the consumer benefits are calculated in four separate cases, by taking into consideration the cases of both one and two additional accepted offers, and road construction procedures and total construction procurement procedures. In the four cases the input data used is the following:

Table 2.A1.1. **Estimated consumer benefit components for one and two additional acceptable offers**

| | One additional accepted offer | | Two additional accepted offers | |
|---|---|---|---|---|
| | Road construction procedures | Total construction procedures | Road construction procedures | Total construction procedures |
| $\rho$[1] | 4.40% | 4.40% | 8.80% | 8.80% |
| $R^2$[2] | 150 581 229 | 9 100 000 000 | 150 581 229 | 9 100 000 000 |

1. Estimated from the regression analysis for one additional offer, multiplied by two for two additional offers.
2. In EUR, calculated as a sum of the contracted value included in the sample for road construction procedures and taken from the Romanian Academic Society Report for value of total construction procedures (Romanian public procurement in the construction sector. Corruption risks and particularistic links, *http://anticorrp.eu/publications/report-on-romania*).

*Source:* Deloitte Analysis.

The estimated benefits per year using the input data from the table presented above are the following:

Table 2.A1.2. **Estimated consumer benefits per year (2014) in EUR**

| | | Procrement procedures included in sample (N = 50) | Total construction procedures |
|---|---|---|---|
| **Additional offers** | 1 | 6 917 099 | 418 017 600 |
| | 2 | 14 417 249 | 871 270 400 |

*Source:* Deloitte Analysis.

### *Notes*

1. Electronic Public Tender System
2. Common Procurement Vocabulary (for public procurement in the European Union)
3. Skewness is a measure of symmetry, or more precisely, the lack of symmetry. A distribution, or data set, is symmetric if it looks the same to the left and right of the center point. Kurtosis is a measure of whether the data are heavy-tailed or light-tailed relative to a normal distribution.

# ANNEX 2.A2

# *Parking places*

## Decision No. 525/1996 for approving the general urbanism regulation, Art. 33 of Annex 1.

When requesting a building permit for a construction which, through its purpose requires parking places, the building permit can only be obtained when the parking places are placed outside the public area. Exceptionally, the public area can be used for the necessary parking places should the local public authorities agree.

The **key objective** of the quantitative analysis of the issue is to estimate the value of the advantage or benefit of building owners being offered public spaces by local public authorities according to the identified exception in comparison to the building owners who are required to build parking spaces according to the general applicable regulations in order to obtain the building permit.

To estimate this benefit, a **case study** focussing on a number of parking projects in key cities of Romania is presented. In the first step, an estimated average cost of building one parking place excluding the cost of land is calculated by dividing the estimated average capital expenditure of a number of parking projects identified (excluding the estimated cost of land for the project) by the average parking capacity of these projects. In the second step, the estimated price of land is added to the estimated cost of building a parking place in order to quantify the total advantage/benefit obtained per parking space in key cities.

## Assumptions

The main **assumptions** that are considered refer to aspects such as expropriation versus buying the land, scope of the new building for which the building permit is required, and the desired quality of the parking places to be built. First, the cost of buying the land for construction is considered to be equivalent to the cost of expropriation. In case of private investors that build new parking places to comply with the requirement for obtaining a building permit, the correspondent cost of expropriation is the same as for buying land for construction. For the purpose of this study, these two costs are considered to be equivalent, lowering the risk of lack of comparability between investments made by public authorities in building parking places and the ones made by public investors. Second, construction costs are considered to be equivalent regardless of the scope of building of the parking places. Even if the building for which the building permit is required is to be an office building, a commercial building, etc.; the final purpose is not considered to be an influential factor on the cost of building a parking place. Third, the objective of the analysis is to quantify the cost of fulfilling the requirement to build parking places

regardless of the quality of those parking places. Moreover, the cost of building a parking place is influenced only by the number of storeys and the cost of the land; all other costs that make up the total cost of a parking place are considered to be identical regardless of factors such as location. Lastly, we consider the cost of building a parking place on the ground by a private investor to be equivalent to those built by public authorities.

## Cost of a parking space excluding land

The costs of building parking places vary based on a number of factors such as the cost of land, number of levels above or underground, location where the facility is to be built (city and location within the city), whether it is a purpose built parking facility or a parking section integrated into a larger real estate project, etc. In this analysis, we decided that the best approach to estimating the cost of building a parking space is to investigate the cost of underground public parking projects since a large number of public and private parking projects are built underground. Also, the estimated cost of land (where available, whether an estimated cost of acquiring the land or an assumed value of expropriations required) was excluded from the cost calculation in order to make the costs comparable. This is because the large variation in the cost of land can often make underground or overground parking spaces built on multiple levels cheaper compared to building simple parking spaces on the ground.

A differentiation will be made between building a parking space with several floors, and building the same number of parking places on the ground (ground level). The cost of building the parking place on land (ground level) are calculated using the costs spent by Bucharest's District 3 City Hall on building parking places on streets.

Several underground parking projects in Bucharest were used. The source of data is the Bucharest City Hall, Parking strategy in Bucharest Municipality. The main characteristics of the parking places are shown in Table 2.A2.1 and Table 2.A2.2.

Table 2.A2.1. **Projects to build underground parking places with 2 levels**

| Location | Investment cost (EUR) | Number of parking places | Cost / parking place (EUR) |
|---|---|---|---|
| Baneasa Esplanade Railway Station | 1 336 704 | 100 | 13 367 |
| Dorobanti Square | 3 467 374 | 360 | 9 632 |
| Walter Maracineanu Square | 1 805 097 | 276 | 6 540 |
| | | ***AVERAGE*** | ***9 846*** |

*Source:* Deloitte Analysis.

Table 2.A2.2. **Projects to build underground parking places with 3 levels**

| Location | Investment cost (EUR) | Number of parking places | Cost / parking place (EUR) |
|---|---|---|---|
| Free Press Square | 5 745 695 | 1 633 | 3 518 |
| Charles de Gaulle Square | 15 625 111 | 831 | 18 803 |
| Alba Iulia Square | 18 528 146 | 2 190 | 8 460 |
| | | **AVERAGE** | **10 261** |

*Source:* Deloitte Analysis.

The average values for building one parking place (for each case: 2 or 3 levels underground) are used as a **cost per parking place excluding land**. Therefore, the cost per parking place excluding land for an underground parking with 2 floors is EUR 9 846 and the cost per parking place excluding land for an underground parking with 3 floors is EUR 10 261.

Assuming that the parking is built on land (ground level), the costs per parking place, without taking into consideration the cost of land, are considered to be equal to the estimated cost of Bucharest's District 3 City Hall project to build public parking places on public roads. In this case, the cost per parking place is calculated through the following formula:

$$\text{cost per parking place excluding land} = \frac{\text{total amount invested in parking places on land by Bucharest's District 3 City Hall}}{\text{total number of parking places built}}$$

$$= \frac{35350000\ EUR\ (1)}{34508} = EUR\,1024\ \text{per parking place}$$

(1) *www.gandul.info/financiar/parcarea-pe-familie-in-bucuresti-30-000-de-euro-948292*.

## Cost of land

The cost of land differs by city and by area within the city. A report published by Colliers in 2011 estimates the average price per square metre ($m^2$) of building land in the main Romanian cities, by differentiating between central, semi-central and peripheral areas in each city. According to Colliers, the division of cities between the abovementioned categories are the following:

Table 2.A2.3. **Division of cities by category (Colliers)**

| Primary | Secondary | Tertiary |
|---|---|---|
| **Brasov** | Bacau | Alba Iulia |
| Cluj Napoca | Galati | Botosani |
| Constanta | Iasi | Focsani |
| **Craiova** | Ploiesti | Piatra Neamt |
| **Timisoara** | Sibiu | Targu Jiu |

*Source:* Colliers (2011), *Romania Retail Market Analysis*, Colliers International.

The cost of land per parking place is added to the cost of land without parking places to calculate the total cost of a parking place in each situation (area/city). The cost of land per each area in Bucharest is provided by Colliers (2015)*Romania Market Review*. Ranges of cost of land per each area in each city by Colliers 2011 *Romania Retail Market Analysis*, and the mean value of the range is used. For comparability purposes, the cost of land used is the one in 2010, the same year for which the study case data is provided.

Table 2.A2.4. **Cost of land (2010)**

| cost of land per $m^2$ (EUR) | Central | Semi-central | Peripheral |
|---|---|---|---|
| **Bucharest** | 2 000 | 700 | 200 |
| **Primary (Brasov, etc.** | 450 | 300 | 125 |
| **Secondary** | 375 | 225 | 100 |
| **Tertiary** | 250 | 150 | 67.5 |

*Source:* Colliers (2015), *Romania Market Review* and Colliers (2011), *Romania Retail Market Analysis*, Colliers International.

## Cost of a parking place including land

It is considered that each parking place has a dimension of 24 $m^2$. Each parking place in Romania must have around 20 $m^2$, to which an additional 20% is added as land that is necessary for accessing the parking place (20 $m^2$*1.2 = 24 $m^2$ per parking place).

In the case of a parking garage on several floors, the cost of the land is distributed over the number of floors, resulting in a lower cost of land per parking place. Therefore, the cost of land per parking place is calculated by the following formula:

$$cost\ of\ land\ per\ parking\ place(ground\ floor) = land\ per\ parking\ place * cost\ of\ land\ per\ sqm$$

$$cost\ of\ land\ per\ parking\ place\ (X\ floors) = \frac{cost\ of\ land\ per\ parking\ place(ground\ floor)}{X\ floors}$$

where X represents the number of floors, in our case 2 or 3; land per parking place is 24 $m^2$ and the cost of land per $m^2$ is, as shown in Table 2.A2.4 above, differing by each area/city.

The estimated cost per parking place is calculated as a sum between the cost of land per parking place and cost of the parking place without land (which is EUR 1 024 if the parking is on the ground floor, EUR 9 846, if the parking has 2 floors and EUR 10 261 if the parking has 3 floors).

The total cost per parking place resulting from the calculations above is presented below (together with its two main components: cost per parking place without land and cost of land per parking place).

Table 2.A2.5. **Cost of parking place with and without land costs**

| | | Central | | | Semi-central | | | Peripheral | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | ground floor | 2 floors | 3 floors | ground floor | 2 floors | 3 floors | ground floor | 2 floors | 3 floors |
| **Bucharest** | **Total cost per parking place** | **49 024** | **33 846** | **26 261** | **17 824** | **18 246** | **15 861** | **5 824** | **12 246** | **11 861** |
| | cost per parking place without land | 1 024 | 9 846 | 10 261 | 1 024 | 9 846 | 10 261 | 1 024 | 9 846 | 10 261 |
| | cost of land per parking place | 48 000 | 24 000 | 16 000 | 16 800 | 8 400 | 5 600 | 4 800 | 2 400 | 1 600 |
| **Primary** (Brasov, Cluj Napoca, Consţanta etc.) | **Total cost per parking place** | **11 824** | **15 246** | **13 861** | **8 224** | **13 446** | **12 661** | **4 024** | **11 346** | **11 261** |
| | cost per parking place without land | 1 024 | 9 846 | 10 261 | 1 024 | 9 846 | 10 261 | 1 024 | 9 846 | 10 261 |
| | cost of land per parking place | 10 800 | 5 400 | 3 600 | 7 200 | 3 600 | 2 400 | 3 000 | 1 500 | 1 000 |
| **Secondary** (Bacau, Galati, Iasi etc.) | **Total cost per parking place** | **10 024** | **14 346** | **13 261** | **6 424** | **12 546** | **12 061** | **3 424** | **11 046** | **11 061** |
| | cost per parking place without land | 1 024 | 9 846 | 10 261 | 1 024 | 9 846 | 10 261 | 1 024 | 9 846 | 10 261 |
| | cost of land per parking place | 9 000 | 4 500 | 3 000 | 5 400 | 2 700 | 1 800 | 2 400 | 1 200 | 800 |
| **Tertiary** (Alba Iulia, Botosani, Focsani etc.) | **Total cost per parking place** | **7 024** | **12 846** | **12 261** | **4 624** | **11 646** | **11 461** | **2 644** | **10 656** | **10 801** |
| | cost per parking place without land | 1 024 | 9 846 | 10 261 | 1 024 | 9 846 | 10 261 | 1 024 | 9 846 | 10 261 |
| | cost of land per parking place | 6 000 | 3 000 | 2 000 | 3 600 | 1 800 | 1 200 | 1 620 | 810 | 540 |

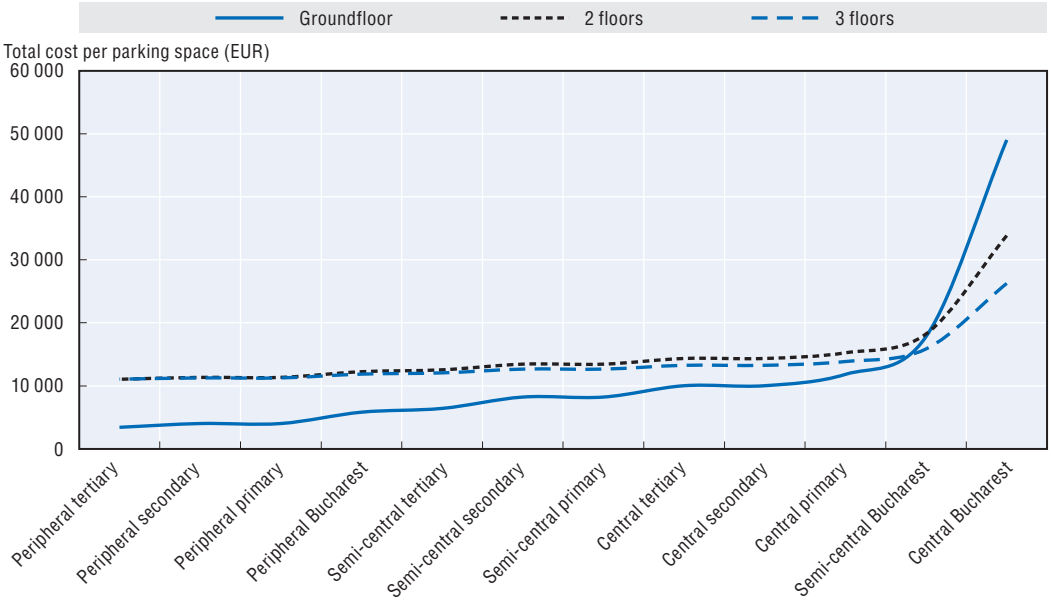
*Source:* Deloitte calculations.

It is also worth noting that the cost of building a parking place including land is generally lower for parking spaces built on the ground/alongside public roads. However, in certain areas such as Bucharest semi-central or Bucharest Central it can be much more efficient to build underground or overground parking on multiple levels to dilute the exceptionally high cost of land in these areas.

## Conclusion

The main conclusion that can be drawn from the analysis is that the cost of each parking space differs from area to area and from city to city. The main factor influencing these differences is the cost of land. Therefore, in most central areas (except for the tertiary cities) the cost of building a parking space overground is lower than building it at ground level, as opposed to the peripheral areas. The range of costs per parking place (also including the cost of land) is between EUR 2 644 (peripheral areas in tertiary cities) and

Figure 2.A2.1. **Influence of number of building levels and price of land on total cost per parking place**




*Source:* Deloitte calculations.

StatLink http://dx.doi.org/10.1787/888933361411

EUR 49 024 (in central Bucharest). However, on average, the cost per parking place is EUR 11 574 for the ground floor option, EUR 15 121 for the two-floor underground parking option and EUR 13 777 for the three-floor option for an underground parking place.

The implication of the analysis in the issue identified is that the cost per parking place calculated in each scenario is equivalent to the cost advantage/benefit of a private investor for each parking place granted from the local public authority through the exception identified.

# ANNEX 2.A3

# *Regulated prices of sand and rock products*

## Objective

Sand and rock products are subject to price ceilings which are set individually for producers by the Ministry of Finance and are indexed annually based on the Consumer Price Index. The framework legislation on which sand and rock products are based are assigned price caps following the argument that price caps should be set for products in markets featuring "natural monopolies".

Based on generally accepted economic theory, a price ceiling is a maximum price limit which can be set either below or above the free market equilibrium price. In case the price ceiling is set below the equilibrium price where supply and demand match for a certain product or product category, the price is "bound" by the ceiling, i.e. the price ceiling keeps the price below the equilibrium. If the price ceiling is set above the equilibrium price then the price is not "bound" by the ceiling and can generally stay below the ceiling.

Binding price ceilings can keep the price permanently at a lower level than the equilibrium price, while non-binding ceilings can allow a certain level of competition in the market but can also prevent local or temporary price increases due to local monopolies or special circumstances. (In such a case the price ceiling becomes binding in a certain area and for a certain amount of time.)

Natural monopolies describe a situation where a monopoly emerges in a certain industry due to its high operating costs and the investment required, leaving smaller players unable to compete.

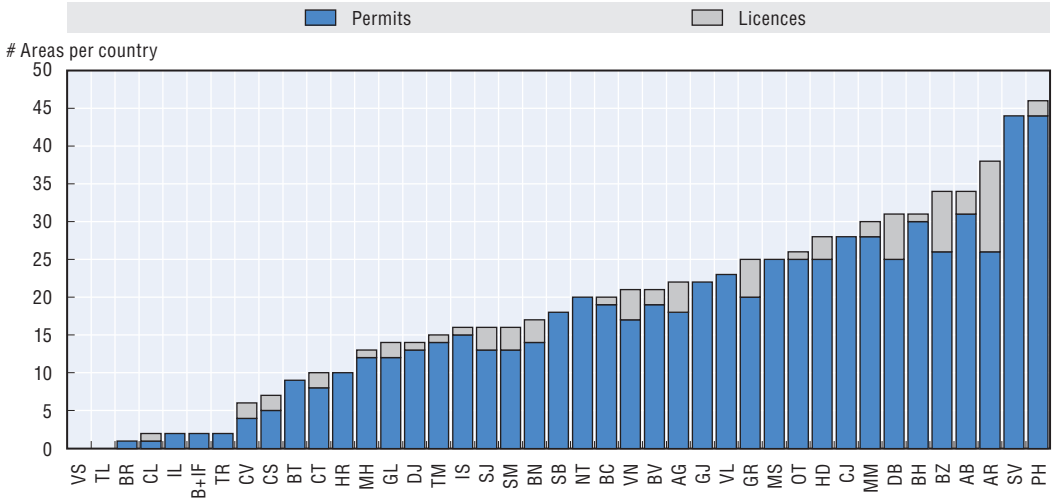
The objective of the analysis regarding sand and rock products is to explore the binding or non-binding nature of the price ceilings set in Romania. This is done by benchmarking prices and investigating qualitative market features.

## Producer overview and concentration

At the end of 2014 there were 731 companies registered in Romania (489 active) with the primary NACE code[1] 8.1.2 "Operation of gravel and sand pits; mining of clays and kaolin" with a total turnover in 2014 of EUR 190.8 $m^2$ equivalent.

Producer concentration is also considered because price ceilings can have a binding effect limited in time and area, therefore providing price protection at local level. We identified 759[3] active licences and permits for sand and rock exploitation in Romania (licences and permits identifying exploitation sites; a company can have more than one permit or licence for several exploitation sites) with an average of approximately 19 sites per county. There is only one

Figure 2.A3.1. **Sand and rock active licences and permits**




*Source:* National Agency for Mineral Resources (ANRM), *www.namr.ro/resurse-minerale/licentepermise-active/*, Deloitte Calculations.

StatLink http://dx.doi.org/10.1787/888933361425

county with a single sand and rock exploitation site while two others have none, suggesting that in these areas there may be lower competition between producers.

The figure provides an overview of counties where there is a significantly lower number of sand and rock exploitation sites than the national average of 19, suggesting that in these areas there may be lower competition between producers. However only one county has a sngle sand and rock exploitation site while two others have none.

## Data collection

Data on actual market prices were collected from a number of sources for one basic product category (natural sand, 0-4 mm grain):

- Prices offered by Romanian producers of sand and rock producers (most recently available, desk research) which are subject to price ceilings – 6 prices.[4]
- Prices at the Romanian Commodities Exchange which should not be subject to the price ceilings (2015 prices, desk research) – 10 prices.[5]
- Prices offered by producers of sand and rock producers in Poland, Czech Republic and Moldova (most recently available, desk research) – 12 prices.[6]

## Assumptions and limitations

An effort was made to identify most recent prices and prices for comparable products, however some differences were observed in the nature of the sand product (source, grain size). It is assumed that the sand products identified are comparable.

In Romania different price ceilings are set for sand and rock products while the price benchmark only focusses on one product category for which data could be collected. Care should be exercised in generalising the conclusions to all sand and rock product categories.

A legislation scan to identify price regulations relating to sand and rock products in EU Member States was performed. No other price regulation affecting rock and sand products directly was identified and it is assumed that no such regulation exists in the European

Union except in Romania. Price comparability may be hindered by local regulations, taxes (excep VAT) and royalties.

Aggregated financial and business statistics of companies classified under NACE code 8.1.2 "Operation of gravel and sand pits; mining of clays and kaolin" provide a general view of the sector. However, there is no complete overlap with the "relevant market" due to a number of factors:

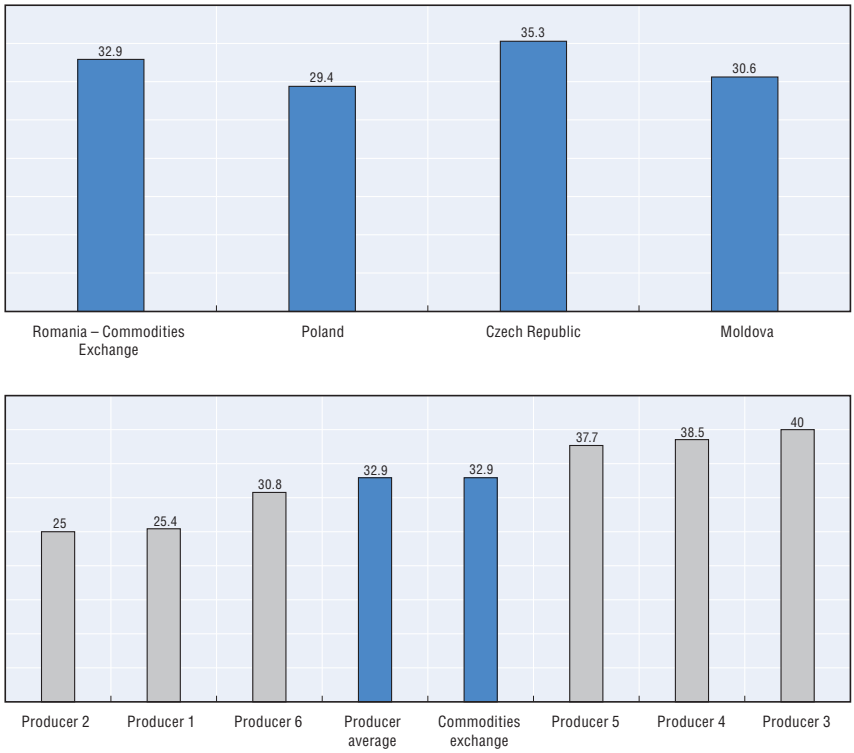
- Aggregated data takes into consideration companies with their primary NACE code 8.1.2, however sand and gravel is also produced as a secondary activity by other companies, especially in the case where sand and rock products are inputs for other value added products such as autoclaved aerated concrete (AAC) or concrete.
- The price ceiling applies to sand and rock products whereas the NACE code 8.1.2 also takes into consideration additional related construction materials such as clay and kaolin.

## Price benchmark

The prices collected were for one product category (natural sand for construction ranging from 0 to 4 mm grain size), sold in bulk (either by ton or cubic metre, converted to tonnes for comparability), excluding transportation costs[7] and VAT. The prices were converted into RON using the exchange rate as of 3 February 2016.

The average prices for each price source is presented below:

Figure 2.A3.2. **Average price of sand 0-4 mm (Romanian producers and Commodities Exchange, RON equivalent)**




*Source:* As detailed in data collection section, Deloitte analysis.

StatLink http://dx.doi.org/10.1787/888933361431

## Results

Assuming that the price ceiling had a binding effect on the prices offered by sand and rock producers in Romania, it is expected that: 1) prices offered by producers should be lower than prices at the Commodities Exchange and 2) prices offered by producers and at the Commodities Exchange in Romania should be lower than in other countries in the region. Benchmarked average prices show that the price of the sand product analysed is very similar in Romania (producers vs. Commodities Exchange) and also between countries in the region, suggesting that the price is not bound or not substantially bound by the ceiling.

## Conclusions

The price benchmark performed suggests that overall the price of sand products in Romania is not bound by the ceiling. It is however possible that the price is bound in certain areas and for certain amounts of time due to the highly local nature of the market, especially in areas with a low number of producers.

It is also expected, with price ceilings set below the equilibrium, for certain features of the market to be exhibited, e.g. shortages due to reduced supply and suppliers forming long-term relationships with preferred customers. While we have not found evidence of these, the features of the market should be further investigated in order to test these features at the local level, especially in cases where the maximum price set is below the prices of goods traded at the Commodities Exchange.

Despite the lack of evidence of the binding effect of the price cap, it is obvious that in most counties there is a relatively high number of sand and rock producers with an average number of exploitation sites of 19 per county. Only one county has a single exploitation site licence or permit and two have none. Natural monopolies in the sand and rock producers market are therefore a rare occurrence and the need for a national price cap mechanism cannot be supported to protect against these cases. A comprehensive analysis at the local level may reveal genuine local monopolies where price caps may be justified, but price caps at the national level are not supported by the current geographic distribution of over 700 companies active in the sector.

### *Notes*

1. The NACE Code is a pan-European classification system which groups organisations according to their business activities.
2. ANAF, *www.anaf.ro/indicatori/indfinanciari.html*, Deloitte calculations.
3. ANRM, *www.namr.ro/resurse-minerale/licentepermise-active/* (accessed 22 February 2016), Deloitte calculations.
4. *www.geiger.ro*, *www.viarock.ro*, *malidcom.ro*, *www.betonix.ro*, *www.preturibeton.ro*, *www.transportnisip-balastru.ro* (accessed on 3 February 2016).
5. *www.brm.ro/licitatii/preturi-de-tranzactionare/* (accessed on 3 February 2016).
6. *www.siegl.cz*, *www.a-cervenka.cz*, *www.miroslavsmid.cz*, *http://makler.md*, *http://construct.md*, *http://fmc.md*, *www.cennik-budowlany.pl*, *www.jft.com.pl*, *olx.pl*, *www.jatech.pl*, *www.kzek.pl*, *www.piasekbudowlany.pl* (accessed on 3 February 2016).
7. Transportation costs are not regulated and therefore there is a risk of price collusion indirectly increasing the price of sand and rock products while the baseline price remains below the price cap.