**ROUMANIE / ROMANIA**

**OVERSIGHT AND LITIGATION OF PUBLIC CONTRACTS**

**IN ROMANIAN ADMINISTRATIVE LAW**

By

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1. - Introduction

In Romania, public contracts are not all regulated in a single law. Thus, public procurement as well as the public works and services concessions are regulated by the Emergency Government Ordinance[[1]](#footnote-1) (hereinafter referred to as EGO) no.34/2006, whilst provisions regarding the public-private partnership are laid down in Law no.178/2010 (subsequently amended) and the rules for the concession on public goods are provided by EGO no.54/2006.

Special laws provide for procedures only with regard to the public-private partnership, public procurement, and public works and services concessions. As regards the concession of public goods, the law provides that provisions of the general law on judicial review shall be applicable. All the above-mentioned contracts are administrative (public) contracts.

The chapter analyses the provisions on the oversight and litigation of public procurement contracts and public works and concession contracts, but we will also cover the specificities brought by the legal provisions regarding the public private partnership and the concessions of public goods. We will also refer to the new Draft Law for the regulation of remedies in public procurement and concessions (hereinafter referred to as “the Remedies Draft Law”), which will enter the adoption phase in the Parliament soon.

The Remedies Draft Law was adopted in the context of the mandatory transposition of the new public procurement directives[[2]](#footnote-2). Even though the remedies directives[[3]](#footnote-3) were not amended or replaced at the EU level, the Romanian legislator chose not only to transpose the new directives, but to adopt a new law on the remedies as well.

Public procurement as well as the other types of administrative (public) contracts are supervised by certain bodies, whose mission is to ascertain the compliance of the awarding procedure of the contract with the legislation in place. The Oversight bodies are of administrative and financial nature. Not all of these bodies are in oversight of the entire procedure, because some of them control only the award phase and others have the responsibility to control both the pre-contractual phase, the legality of the contract and its performance.

Thus, acts issued by the Contracting Authority during the pre-contractual phase are open to challenge in front of administrative-jurisdictional and judicial bodies. As regards the period after the conclusion of the contract, the courts are competent to hear the cases regarding the legal actions for damages caused within the awarding procedure and for the performance of the contract, the annulment, rescission or unilateral termination of the contract. Some of the Alternative Dispute Resolution means are also available for the public contracts.

1. - Oversight exercised over public contracts

The most important Romanian authority of administrative Oversight in the field of public procurement and public works and services concessions is the National Agency for Public Procurement (hereinafter referred to as NAPP).

This Agency, whose structure and functions are regulated by EGO no.13/2015[[4]](#footnote-4), took the responsibilities, the activity and the personal from the National Authority for Regulating and Monitoring the Public Procurement, from the Unit for Coordination and Verification of the Public Procurement within the Public Finance Ministry and from the sections for public procurements′ verification. NAPP (as successor of the National Authority for Regulating and Monitoring the Public Procurement) is entitled to evaluate, before the submission for publication of the invitation/announcement to participate, the compliance of the tender documentation with the public procurement legislation. The specifications and descriptive documentation do not fall under this evaluation[[5]](#footnote-5). NAPP, upon the evaluation, gives permission to the Contracting Authority for initiating the tender procedure or informs the same Authority about the noncompliance of the documentation with the legislation. NAPP must deliver the result of its evaluation, one way or another, in a period of 10 days from the date of lodging the documentation in SEAP[[6]](#footnote-6). If NAPP finds that the documentation is noncompliant with the legislation, the Contracting Authority must do the necessary amendments and re-publish the documentation in SEAP. From the date of republishing, NAPP must evaluate the amended documentation within 3 days. NAPP also controls the publication in SEAP of every contract notice issued by the Contracting Authorities [[7]](#footnote-7). In this respect, NAPP can reject the publication of the notice or erratum based only on the existence of certain errors or omissions. The errors are those information or requests, within the contract notice issued for publication in SEAP, that are not real or do not comply with legal provisions in the field of public procurement.

Nevertheless, NAPP is responsible not only for the overseeing the publication of contract notices in SEAP, but also the publication of those notices in the Official Journal of the European Union (OJEU), when this publication is requested by the law[[8]](#footnote-8). NAPP is also invested with the power to authorize the persons who will investigate misdemeanours to the public procurement legislation and the enforcement of the sanctions. As regards the public-private partnerships, NAPP has the right, according to article 40 of the Law no.178/2010, to request in front of the courts the annulment of these contracts if it detects infringements of the law.

Another Authority with specific responsibilities in the field of control on public contracts is the Romanian Court of Auditors. The control performed by this authority is of financial nature. The Court[[9]](#footnote-9) is responsible for the control over the establishment, the management and the expenditure of the financial resources of the state and of the public sector. The responsibilities of the Court of Auditors in controlling the formation and the performance of the public procurement contracts were set out by the Regulation approved by the Decision no.155/2014 of the Court of Auditors′ Plenum[[10]](#footnote-10). According to the article 40, letters d3.1-d3.5, in the field of public procurement, the external public auditors will follow, mainly, the objectives regarding the planning of public procurement, the initiation of the awarding procedure, the performance of the procedure, the termination of the procedure and the management of the public procurement contract. These provisions are unlawful[[11]](#footnote-11), because they were issued by the Court of auditors through one of its own regulations, and do not have a source in the provisions of the law

The National Strategy for the Public Procurement, approved by the Romanian Government′s Decision no.901/2015[[12]](#footnote-12), provides that in the interest of remedying the existing overlaps between different institutions, the current *ex post* Oversight, performed by NAPP, will be replaced with the audit performed by the Court of Auditors (or the Audit Authority, for the EU financed projects). The acts issued by the Court of Auditors can be challenged before the courts, based on the provisions of the General law on judicial review no 554/2004, and the competent court to hear the case is the tribunal, - the Highest Court of Cassation and Justice has settled this matter after a series of contradictory judgements[[13]](#footnote-13).

With regard to public-private partnerships, Oversight responsibilities are entrusted also with the Department for Infrastructure Projects and Foreign Investment. This Department is organized and operates in accordance with the provisions of the Government Decision no. 536/2014 (as amended by the Government Decision no.22/2015), as a specialized body of the central public administration, with legal personality, within the apparatus of the Government, funded by the budget of the General Secretariat of the Government. The Department coordinates and monitors the development of the public-private partnership projects. In this scope, the Department shall notify the NAPP if there are any suspicions of unlawfulness of the public-private partnership contract. For this purpose, the Department verifies every selection notice or any other documentation issued by the public partner for publication in SEAP and in OJEU. The Department has also the obligation to monitor the fulfillment of the remedial measures decided by the National Council for Solving Complaints (the public procurement review body).

There is no public authority with specific tasks as regards the prevention and fight against corruption in public contracts. However, The National Agency for Integrity (generally known as “ANI”) is the public authority with duties in preventing and fighting against the conflict of interest in the public sector, including the award and performance of the public contracts. This authority does not oversee the procedure of awarding the contract, but is entitled to find and investigate the instances of conflict of interests that occurred in the awarding procedure or during the performance of the public contract.

In Romania, the conflict of interests is the most common form of corruption in public contracts. It occurs when the personal interest, direct or indirect, of the public servant goes against the public interest, affecting or having the potential to influence his/her independence and impartiality in making decisions or completing his/her duties on time and with objectivity. The conflict of interests can arise at both the level of the contracting authorities and of the economic operators[[14]](#footnote-14). The conclusion of the contract in breach of the legal provisions regarding the conflict of interest results in the nullity of the public contract. The winning tenderer/economic operator (once the public procurement contract is signed and its execution starts) cannot hire in the following 12-months with the aim of carrying out the public procurement contract, a natural or legal person who has been involved in the verification of candidates/evaluation of tenders (article 70 of EGO no.34/2006).

The acts by which the ANI establishes the conflict of interest in public contracts, can be challenged by the affected persons in courts, based on the provisions of the General Law on Judicial Review (Law no.554/2004). The competent judicial court to hear these type of cases is either the appellate court in whose jurisdiction the claimant lives or the appellate court in whose jurisdiction the premises of the authority issuing the act (ANI) are located (in this case Bucharest Appellate Court). The choice between the competent courts belongs to the claimant. The judgment of the appellate court can be challenged by recourse, in front of the High Court of Cassation and Justice.

EGO no.34/2006 contains specific provisions meant to insure the principle of fair competition in public contracts, both in the awarding phase and subsequently, in the contract’s performance. Economic operators who are affected by unfair competition, have the right to address the Competition Council and demand an investigation. The Competition Council is an autonomous administrative body aimed at protecting and stimulating competition in order to ensure a normal competitive environment, with a view towards the consumers’ interests. Competition Council’s role has two major dimensions: a corrective dimension – restoring and maintaining a normal competitive environment and a preventive dimension – monitoring markets and observing the behavior of the actors participating in such markets. In the field of public contracts (especially public procurement), the Competition Council has the duty to find the possible anti-competition agreements (Cartels) between bid-rigging undertakings. The Competition Council is empowered to impose fines for the infringement of the law, to order the ceasing of the anticompetitive practices and to impose special conditions or any other necessary measures.

In order to facilitate the findings of and the fight against the bid-rigging agreements a “Bid-Rigging Module” was set up in 2010 by the Government. It is composed of several institutions (the Competition Council, the National Agency for Public Procurement, the National Council for Solving Complaints, the Control Office of the Prime-Minister, the Court of Auditors, the Public Ministry – the Prosecutor’s Office attached to the High Court of Cassation and Justice, the Department for the Fight against Fraud)[[15]](#footnote-15). This Module aims at the insurance of a normal competition environment on the public procurement market, by the means of institutional cooperation and quick exchange of information, at an experts’ level, in order to identify the bid rigging.

1. - The litigation

The provisions regarding litigation in public procurement are included in the law on public procurement (EGO no.34/2006). The litigation is subjective in nature as it is based on the harm of the legal rights or legitimate interests belonging to the legal or natural persons[[16]](#footnote-16).

* 1. *- Administrative review*

Those affected by acts issued by contracting authorities during the award procedure have a choice between an administrative appeal to the specialized review body for public procurement (CNSC) and an action in court.

The administrative-jurisdictional review body is the National Council for Solving Complaints (hereinafter referred to as the Council). The Council is independent from any other structure, body or authority with regard to its decisions. Starting in January 1st, 2007, the Council gained the status of legal person and thus Romania addressed the problem regarding the independence of the Council, which has been raised by the European Commission on several occasions. Through the approval Law of EGO no. 76/2010, the independence of the Council was further strengthened: if previously the law stated that the Council functioned within the institutional framework of the General Secretariat of the Government, currently all references to such dependence are eliminated from the law[[17]](#footnote-17).

The Remedies Draft Law aims at maintaining and strengthening the independence of the Council, providing that the Council, in its activity, and the councillors, in the resolution of the complaints, are independent of any interference of other institutions or authorities and that they should only abide by the law. The institutional role of the Council will grow, according to the Remedies Draft Law’s provisions. Thus, article 43 of the Draft Law sets out the right of the Council to propose draft regulations relating to public procurement and to give its opinion on the drafts regulations proposed by other public authorities and institutions in the same field.

The activity of the Council is reflected in its annual Reports of activity, published on its own Internet page (*www.cnsc.ro*). Among others, these Reports comprise statistics of the complaints solved by the Council. Legal standing in front of the Council, as complainant, has any person who claims to have been affected in his own legal rights or legitimate interests by an act of the contracting authority or a breach of public procurement legal provisions. Before addressing the Council, the complainant has to send notification to the contracting authority. The absence of the notification is not an impediment to address the Council, it has only the role of informing the contracting authority and to give it the opportunity to remedy the unlawfulness. As regards public-private partnerships, the Law no.178/2010 provides for similar rules regarding the legal standing and the notification of the public partner, (articles 28 and 28^2).

The importance of this prior notification is strengthened by the Remedies Draft Law. According to its provisions, notification is mandatory and its absence makes the court action inadmissible. Conversely, the notification gives the contracting authority (or the public partner, in the case of public-private partnership) the right, according to article 256^1 of EGO no.34/2006 and, respectively, article 28^2 par.3 and 4 of Law no.178/2010, to suspend or revoke the act, and the obligation to notify this measure within one working day. The acts issued during the public procurement procedure are revocable regardless of their effects[[18]](#footnote-18).

The mandatory nature of the appeal to the Council has raised constitutionality issues, as according to the Constitution administrative jurisdictions in Romania are optional (article 21 par.4 of the Constitution). The issue has been settled by the Romanian Constitutional Court, which interpreted EGO no.34/2006 in the light of the Romanian constitutional provisions. The Constitutional Court, by its Decision no.248/2012[[19]](#footnote-19), held that this legal provision must be interpreted so that the complainant has the right to choose between administrative-jurisdictional path and the judicial one.

The claimant is thus free to choose between the Council and the court of law (the competent court in the first instance is the tribunal). If the harmed person chooses to lodge the complaint with the Council, he must do so within 5 or 10 days from the moment he knew of the existence of the harmful act issued by the contracting authority. The law in force does not expressly regulate the situation when the harmed person addresses simultaneously the Council and the court. However, the Draft Remedy Law presumes that by lodging the same complaint with the court, the claimant renounces the administrative (quasi-judicial) procedure. Once the complaint has been registered at the Council and the complainant did not withdraw it, the Contracting Authority cannot conclude the contract until the delivery of the Council’s decision.

Another debated issue refers to the legal status of the Council – although according to the law it is an administrative jurisdictional (quasi-judicial) body, in practice it tends to behave more like a court of law. Some aspects that lead to this conclusion are analysed below:

- In situations when it received a complaint that was not within the boundaries of its competence the Council has declined its competence in favor of the court. Such an action is considered incompatible with the legal nature of the Council, which should have rejected the complaint as inadmissible. The decline of competence is a procedure reserved for courts of law.

- The Council has no standing in court actions brought against its decisions, a feature similar to that of a court. This is a unique situation in the Romanian legislation, as other administrative jurisdictions are part of the legal action brought against their decisions. This provision establishes an exceptional status for the Council. We believe that there were practical considerations justifying this measure – the Council has to be part in court proceedings all over the country since the recourse against its decisions is filled with the Court of Appeal in whose jurisdiction the contracting authority is located. Nevertheless, the legal fundament for this approach is missing.

The Council’s proceedings for solving complaints must be conducted with the observance of principles of legality, celerity, adversarial character and the right to defence[[20]](#footnote-20). The Council solves the complaints in panels formed by three councillors, of which at least the chairman of the panel must be Bachelor of Laws. The councillors must have an experience of at least 9 years in the fields of law, economics or technics before they are being assigned by the decision of the Romanian Prime minister. The proceedings in front of the Council are, in principle, written (article 275 par.5), but the parties can demand to be heard by the Council, without prejudice to the legal deadlines. The Remedies Draft Law maintains the written nature of the proceedings, but provides for that the parties shall be heard only if the Council considers it necessary. In order to solve the complaint, the Council has the right to request explanations from the parties, to take evidence and to request any relevant data or documents. The complaint can be dismissed as inadmissible if the complainant does not complement it with the missing elements, when the Council requests so. If there are complaints regarding the same procurement procedure, pending in front of the Council at the same time, they will be joined by the Council[[21]](#footnote-21). The other participants in the procedure are free to join the complaint, by their own motion.

The Council can decide the stay of the procurement procedure, by decision, which can be challenged in court within 5 days from the date of the receipt. After receiving a complaint, the Council needs to deliver its decision within 10 or 20 days. Before assessing the case on its merits, the Council will review it in light of several exceptions (such as tardiness, lack of standing, lack of object, lack of competence on the behalf of the Council etc.) which can lead to the dismissal of the complaint. When the decision of the Council is based on exceptions, the deadline for reaching a decision is 10 days. If the case was assessed on its merits, the deadline is 20 days.

If the Council decides to amend or to eliminate some of the technical specifications, the Contracting Authority has the right to annul the awarding procedure. When the Council, in the process of analysing the tender documentation, finds that there are other breaches, apart from the ones invoked in the complaint, it can only notify the NAPP (the former National Authority for Regulating and Monitoring Public Procurement), who is in charge with the administrative oversight on public procurement, as already shown above. In case of public-private partnership, if the same situation occurs, the Council has to notify the Department for Infrastructure Projects and Foreign Investment, according to article 28^15 par.3 of Law no.178/2010.

The Council cannot decide to award the contract to a certain economic operator or private investor (article 278 par.9 of EGO no.34/2006 – for public procurement and article 28^15 par.9 of Law no.178/2010 – for public-private partnership). Although the provision of the law which states that the Council cannot award the contract to a certain tenderer is very clear, the issue is more complex. Apart from some cases where the Council has decided that a certain offer is not conforming and thus ordered the resuming of the award procedure without the rejected offer, the Council has refused constantly to go beyond the annulment of decisions of the contracting authority and to establish the winning offer or to award the contract. The main argument used refers to the provisions of EGO no. 34/2006 (article 200) and the subsidiary legislation of implementation (Governmental Decision no. 925/2006, article 72 par. 2), which state that the authority competent to award the contract by establishing the winning offer is the contracting authority. However, the question here is whether the contracting authority is the only competent authority to do that? At a closer look, both provisions invoked by the Council and by some courts refer to the power of the contracting authority to decide, or to the obligation to decide in a certain time frame, but they are not clear whether this power is exclusive or not, when transposed into the context of the review phase. In other words, the power to decide the winning offer and to award the contract is evidently exclusive in the administrative phase, but is it still exclusive in the review phase? From this arises the question whether the Council or the court can establish the winning offer and then award the contract, or at least establish the winning offer. The principle of separation of powers can be invoked when talking about courts, but not when the Council is involved.

After delivering its decision, the Council shall provide for the reasoning and send the reasoned decision to the parties within 3 days. The Council’s reasoned decision shall be published in SEAP, by the means of the Contracting Authority. If the Council decides that measures regarding the remedying of an act are necessary, then NAPP or, for the public-private partnership, the Department for Infrastructure Draft Laws and Foreign Investment, is notified and has the obligation to monitor the way in which the contracting authority or, respectively, the public partner proceeds to carry out this obligation. The decision of the Council is mandatory for the contracting authority/public partner. A public procurement/public-private partnership contract awarded in disregard of the Council’s decision is nullified. In the judicial practice has been even stated that the Council’s decision has the authority of *res judicata[[22]](#footnote-22)*. The Contracting Authority/Public Partner should be penalized by a civil fine, if it does not obey to the remedy measures decided by the Council.

The courts have stated that the *non reformatio in pejus* principle does not apply in proceedings before the Council[[23]](#footnote-23). The conclusion is in accordance with the general opinion of the doctrine, that administrative procedures do not confer such protection[[24]](#footnote-24).

Against the decision of the Council, the tenderer can lodge a complaint with the Appellate Court in whose jurisdiction the premises of the contracting authority are located. This provision had suffered several subsequent modifications. In the initial version of EGO no. 34/2006, a complaint against the decision of the Council had to be lodged with the Council which was responsible for forwarding it to the court within 3 days after the expiration of the 10 days deadline for lodging this complaint. Following a decision by the Constitutional Court, in 2008 the law (EGO no. 143/2008) allowed the complainants to lodge the complaint with either the Council or the court. Currently, the law expressly states that the complaint needs to be lodged with the court (EGO no. 19/2009). In practice however, this last modification generates delays in the court proceedings because the Council, which could be unaware of a court action, does not send the dossier of the case in time for the first hearing.

If the Appellate Court declares the complaint admissible, it modifies the decision of the Council by ruling: the annulment, total or partial, of an act of the contracting authority; it can request the contracting authority to issues an act; it can require the contracting authority to fulfill any obligation related to the award documentation or the award procedure; or any other measures necessary to remedy breaches of the public procurement legislation. If the Council has rejected a complaint as inadmissible on the grounds of an exception (tardiness, lack of standing, lack of object etc.) the Appellate Court, in the case of admitting the complaint, will annul the decision of the Council and will solve the complaint on its merits.

The review performed by the Council should be a costless option for claimant, if we take into account the constitutional provisions that require administrative jurisdictions to be free of charge and optional. However, the access to the remedies system became costly as of July 2, 2010. This occurred in the context of legislative changes triggered by the abuse of the legal provisions in this field by those tenderers who were not selected in the award procedures. Thus, the remedies system has become a tool for delaying the conclusion and/or the execution of the contract. An amendment to the Public Procurement law established the right of the contracting authority to retain certain amounts from the participation guarantee paid by the complainant, if the complaint was dismissed by the Council. This legislative measure was replaced, as of June 30, 2014, by a new one: the *good conduct guarantee*,[[25]](#footnote-25) as a precondition for introducing a complaint on the legality of a procurement procedure.

Thus, the complainant is obliged to lodge a guarantee for the duration between the date of lodging the complaint and the date of the final decision of the Council or of the court. The contracting authority had the obligation to retain the guarantee of good conduct if the complaint is rejected by the Council or the court. Basically, the law instituted a presumption of abusive complaint if the complaint was rejected. The guarantee amounts to 1% of the estimated value of the public procurement contract up to a maximum of 100,000 EUR.

The European Commission questioned the Romanian Government about the introduction of this good conduct guarantee, in December 2014, within the Case EU PILOT 7189/14/MARK, in order to assess the compliance of this legal provisions with the relevant EU law provisions, namely the Directives 89/665/CE and 92/13/CE. With regard to the compliance of the good conduct guarantee with the EU Law, two Romanian courts (the Appellate Court Oradea and the Appellate Court Bucharest) referred to the Court of Justice of the European Union requests for preliminary rulings in cases C-439/14 (Star Storage) and C-488/14 (Max Boegl). The joinder of these two cases has been ordered by a decision of the President of the C.J.E.U., issued in December 2014. The joined cases are still pending before the European Court of Justice.

At the same time, the Romanian Constitutional Court had to deal with several exceptions of unconstitutionality regarding the provisions that are regulating the good conduct guarantee.

The first decision issued by the Court on this matter was the Decision no.5/2015. In this decision, the Constitutional Court held that the provisions regarding *the good conduct guarantee* are unconstitutional because the courts and the Council do not have the right to rule on the restitution of the good conduct guarantee if they are rejecting the complaint.

Moreover, the Court held that the unconditional retention of the good conduct guarantee by the Contracting Authority in case of dismissal of the complaint, regardless of the fault of the complainant, is contrary to the general principle of good faith. The Constitutional Court held that if in the cases when the complaint or the judicial action is granted by the Council or the court, the Contracting Authority is constrained to return the good conduct guarantee to the complainant, the same solution should be adopted in case of dismissal of the complaint, if there is no indication of the abusive character of the complaint. Therewith, the Court considered that the *unconditional* right of the Contracting Authority to retain the guarantee when the complaint is dismissed does not comply with the provisions of article 21 par.1 (regulating the right to access to justice) and article 44 (regulating the right to private property) of the Constitution.

However, the overall existence of the guarantee was considered to be constitutional. Thus, the free access to the administrative jurisdictions is not infringed by the imposition of the good conduct guarantee, because there is not any tax or guarantee that is to be made in revenue to the state or local budget as a cost for the administrative-jurisdictional procedure. The guarantee is meant to assure the adequate and non-abusive exercise of the procedural rights. The second decision on the constitutionality of the provisions regulating the good conduct guarantee was delivered by the Constitutional Court on November 4th, 2015[[26]](#footnote-26). The Court decided, based on the same reasoning as in the Decision no.5/2015, that article 271^1 par. (5) of EGO no.34/2006 is also unconstitutional with regard of the obligation to pay the good conduct guarantee, unconditionally, to the Contracting Authority, at the first request, if the complaint is being dismissed[[27]](#footnote-27).

It must be noted that, in the case of public-private partnership, the law provides for the investor/complainant’s obligation to constitute the participation guarantee (article 18 par.22 of Law no.178/2010) and the public partner’s right to retain a part of this guarantee in case of complaint’s dismissal (article 28^16 par.1 of Law no.178/2010). This provision has not yet been challenged as being unconstitutional.

* 1. *- The Judicial Review*

The public procurement/public-private partnership can be subject for legal actions before the national courts in two different situations: (i) when a judicial complaint against the decision of the Council is lodged and (ii) when the litigation regards the performance, nullity, annulment, rescission or unilateral termination of the contract. It must be noted that, in all cases, the court can decide within the claim limits only and, thus, cannot award something that was not requested by the parties. Notwithstanding, the court has an active role, and can raise for the discussion of the parties any legal or factual issue with regard to the case.

A first instance is, therefore, when the harmed person lodges a complaint with the Council. In this case, against the decision of the Council, any of the parties in the procedure developed in front of the Council can lodge a complaint with the Appellate Court in whose jurisdiction the premises of the contracting authority are located. Against this legal provision, several pleas of unconstitutionality were raised regarding the limitation of free access to justice and the absence of a first instance court – the Council is not a real court but an administrative jurisdictional (quasi-judicial) body. The Constitutional Court ruled that administrative review in general is constitutional and it does not act as a limitation to the free access to justice since it is elective and free of charge. The aggrieved claimant has in addition the liberty to choose between an administrative review procedure and a court action. In a subsequent decision, the Court ruled that the principle of free access to justice should be interpreted in the sense that no group or social category can be excluded from the exercise of procedural rights. It is allowed however by the Constitution to establish by law special procedural rules and specific means for the exercise of procedural rights. Therefore, free access to justice does not mean access to all judicial bodies and to all jurisdiction tiers.

There is also a special competence, in favour of the Appellate Court of Bucharest, for the complaints lodged against the Council’s decisions regarding the procedures for awarding services and/or works related to transport infrastructure of national interest, as defined by the laws in force. The Council does not have any legal standing in front of the Court, except for the cases when the fines applied by the Council are contested.

It is still subject to debate and a source of conflicting judicial decisions whether the tenderers who were not involved in the review before the Council have standing in a court action lodged against a decision of the Council. Several cases have ruled that the court proceedings intended to review the decision of the Council have to be carried out between the contracting authority and the claimant, as in the case of the proceedings before the Council[[28]](#footnote-28). Nevertheless, it was argued that these tenderers could have standing in court against the decision of the Council, provided that this decision is aggrieving their rights or interests. There is no legal obligation for the Council to summon the winner of the award procedure, as long as the proceedings are between the complainant and the contracting authority. This issue may be, in the future, subject to one of the means set out by the law[[29]](#footnote-29) in order to achieve the unification of the judicial practice: the *recourse in the interest of the law* or the *preliminary judgment solving legal issues*. It must be noted that in the Remedies Draft Law this issue is settled (article 29 par.2) in the sense that the procedural context developed in front of the Council shall not be changed.

The complainant has to pay a judicial stamp tax, in an amount established by the article 285^1 of EGO no.34/2006, namely 50% of the amounts set out for the legal actions regarding the performance of the contract and the damages.

The complaints lodged against the Council’s decisions are resolved by the Appellate Courts, within their units for administrative and fiscal litigation, in panels composed of three judges.

In duly justified cases, in order to prevent imminent damage, the Court may order, upon the request of the interested party, the suspension of the performance of the contract. The court decides to suspend the performance of the contract only after taking into consideration its possible consequences on all categories of interests that could be harmed, including the public interest. The court has the discretion not to order the measure of suspension if its negative consequences could outweigh its benefits. Nevertheless, the decision to not suspend the execution of the contract shall not prejudice any rights of the person who submitted the request.

The Resolution issued by the Court may be appealed separately, within 5 days since the notification. If the Court admits the complaint it modifies the Council's decision and orders, upon the case, the annulment of the act issued by the Contracting Authority/Public Partner, the issuance of an act by the Contracting Authority/Public Partner, the fulfillment of an obligation by the Contracting Authority/Public Partner, including the elimination of any discriminating technical, economic or financial specifications from the contract notice/participation invitation, from the tender documentation, or from other documents issued in connection with the awarding procedure or any other measures necessary to remedy violations of the legal provisions on public procurement.

The Court may also dismiss the complaint and maintain the Council's decision. The judgment of the Court is final. The reasoned Judgment of the Appellate Court shall be served to the NAPP in a timeframe of 15 days, in order to be published in SEAP (the electronic public procurement portal).

As regards the proceedings before the court, they are common for both the judicial complaint against the Council’s decision and the actions lodged with the tribunal[[30]](#footnote-30).

The second instance occurs when the legal dispute regards the performance of the contract, the nullity, annulment, rescission or unilateral termination of the contract, as well as the liability for damages caused within the awarding procedure. The legal action, in these cases, shall be lodged with the Tribunal in whose jurisdiction the premises of the contracting authority are located. The damages may be claimed only separately and if they are consequences of an act of the contracting authority, they shall be awarded only after the annulment of the act.

For all the above-mentioned actions, lodged directly with the court, the law provides for the amount of the mandatory judicial stamp duty. This amount is to be established based on the estimated value of the contract, provided the action is rateable, and it is fixed if the action is non-rateable. The maximum amount of the stamp is RON 2.200 (approximately EUR 495) – the biggest amount applicable to actions that have a monetary value - and the minimum is RON 4 (approximately EUR 0.9) – applicable to actions without monetary value.

One main principle of the proceedings is the speediness and in this respect the law establishes short time frames between the hearings (20 days for the first hearing and 10 days for the next ones). The presence of the legally summoned party at the hearing is not mandatory and the court can deliver its judgment based on the assessment of the case file. If the parties are present, they shall be heard by the court.

The Tribunal can decide the suspension of the contract′s performance, when there is doubt regarding the legality of the challenged act and there is a danger of a serious imminent damage for the interested person. The suspension will be decided by a reasoned resolution of the Court, after the summoning of the parties. The Tribunal, before deciding the suspension, needs to perform a test, by assessing the public interest against the private interests of the parties. Having regard of the lack of criteria, the performance of the test is at the discretion of the Tribunal. There is no indication whether the public interest should prevail or not when assessing the negative consequences against the possible benefits, and the law does not state whether public interest can be looked at as having the same weight as private interests. The only specification regards the interdiction to affect other rights of the person concerned. The consequences of the interim measures cannot outweigh their foreseen benefits. The pre-eminence of the public interest is one of the core principles applicable in the public procurement contracts, according to the general Law on judicial review no.554/2004, art.8 par.3.

The Tribunal′s Resolution of suspension can be appealed, separately, in front of the Appellate Court, within a time frame of 5 days starting from the day it was served to the party. Unlike the Council, who can only rule the annulment of decisions issued in the award procedure up to the conclusion of the contract, the Tribunal can decide on the ineffectiveness of the contract. It must be pointed out that the Romanian legislator does not use the term ”ineffectiveness”. The Remedies Directive, when translated into Romanian, used the concept ”without legal effects” for ineffectiveness, whilst EGO no. 76/2010 (amending EGO no 34/2006), transposing the Remedies Directive, uses the term “nullity”. Consequently, in the Romanian law, the concept of ineffectiveness and nullity overlap.

The instances of nullity provided for in EGO no.34/2006 and Law no.178/2010 are the following:

- the contracting authority awarded the contract without complying with the obligations regarding the publication of a notice or invitation to participate;

- there was an infringement of the provisions regarding the standstill period[[31]](#footnote-31), if this infringement had deprived the tenderer/private investor applying for review of the possibility to pursue pre-contractual remedies, where such an infringement is combined with an infringement of other public procurement/public-private partnership provisions, if the infringement has affected the chances of the tenderer applying for review to obtain the contract.

There are also instances of nullity provided for only by EGO no.34/2006. These are the following:

- the Contracting Authority did not comply with the legal provisions regarding the procedure of reopening the competition and the obligation of transparency within the dynamic purchasing system;

- the contract was concluded in breach of the minimum requirements set by the contracting authority in the tender documentation or, even though these requirements were met, the contract was concluded by the Contracting Authority with the acceptance of less favourable conditions than those comprised in the technical and/or financial winning offer;

- the Contracting Authority seeks to obtain the execution of works, services or goods which would make that contract a public procurement one, but the Contracting Authority concludes a different type of contract (e.g. land concession), in breach of the public procurement legislation;

- the conclusion of the contract was made with a breach of the legal provisions regarding the conflict of interest – the public procurement legislation states that any family relations between representatives of the tenderer (his associates, subcontractors, shareholders etc.) and executive representatives within the contracting authority are forbidden. If such a situation had occurred, the tenderer should have been excluded from the award procedure and the lack of exclusion generates the ineffectiveness of the contract;

- if the contractor hires, for the purpose of the contract′s performance, natural or legal persons that were involved in the process of verification/evaluation of the tenders, within a time frame of 12 months from the beginning of the contract, it shall be deemed void for immoral cause.

Typically, the ineffectiveness operates, in the Romanian legislation, *ex tunc*. The law also states circumstances under which ineffectiveness is replaced by alternative penalties (*ex nunc*). The reason for doing this is the existence of imperative reasons concerning public interest. The judicial court has the discretion to determine what constitutes imperative reasons. The law only mentions the economic interests regarding the capacity of the contract to generate effects, which can be considered as an imperative reason, only if the absence of these effects would produce disproportionate consequences. In addition, the law details several economic consequences which cannot be considered imperative reasons: delay costs in the execution of the contract; costs related to the initiation of a new award procedure; costs generated by the change of the economic operator which will execute the contract; costs related to the legal obligations generated by the absence of the effects of the contract.

The alternative measures are set out in art.278^10 par.2 of EGO no.34/2006 – for public procurement, and in article 28^31 par.2 of Law no.178/2010 – for public-private partnerships, as follows: limitation of the effects of the contract by shortening its execution period and/or a fine for the contracting authority between 2%-15% of the value of the contract, the exact percentage being established by reference to the possibility to limit the effects of the contract (the smaller the possibility to limit them, the bigger the fine). The judicial court, when ruling for alternative penalties, needs to make sure that they are efficient, proportionate, and discouraging for the contracting authorities. The alternative penalty of a fine for the contracting authority also applies to all cases where ineffectiveness cannot have a retroactive effect (*ex tunc*), because the termination of the contractual obligations already executed is impossible.

The Romanian legislation, following the Remedies Directive, presuming the good faith of the contracting authorities, excludes the penalty of the ineffectiveness of the contract in cases where the contract has been introduced by the Contracting Authority in the category of contracts for which a participation announcement is not necessary provided that some transparency measures were taken and the standstill period was complied with voluntarily.

With regard to the standing in a legal action regarding ineffectiveness, the rule is that such standing applies to any economic operator or person concerned by the award procedure and/or the contract.

The court can perform the interpretation of the contract, provided the object of the action requires it. This usually occurs when the object of the action regards the performance of the public contract. Although the law does not provide for special rules of interpretation of the public contracts, the interpretation of these contracts is subject to the same rules as the commercial and private contracts concluded by the public administration. The only difference consists in the rule provided for by the Law no.554/2004 (art.8 par.3), namely the subordination of the principle of contractual freedom to the principle of the public interest’s priority. The general rules for the interpretation of contracts are provided for by the Civil Code[[32]](#footnote-32), in articles 1266-1269. These rules are applied in practice, to the disputes regarding public contracts, in the light of the above-mentioned subordination of the contractual freedom to the public interest. The rules provided for in the Civil Code are applied to public contracts based on the principle of general application of the Civil Code, set out in article 3 of the Code.

The Civil Code consecrates, for the interpretation of contracts, the principles of parties’ common will, systematic interpretation and *in dubio pro reo*. The good faith in performing the contract is also protected.

The judgment brought by the tribunal can be challenged before the Appellate Court. According to the interpretation given by the High Court of Cassation in its Decision no.20/5 October 2015[[33]](#footnote-33), the judicial remedy is the recourse not the appeal, even though the law sets out the appeal as the remedy in this case, mainly because the appeal is not a compatible remedy in the Romanian administrative litigation. We are of the contrary opinion and consider that, in the actual circumstances the appeal is compatible with the procedure of administrative litigation, one of the arguments being the option of the legislator itself[[34]](#footnote-34).

As to the publicity of court judgements, only the judgments delivered by the courts when solving the complaints against the decisions of the Council are published in SEAP (the electronic public procurement portal). Other judgments of the judicial courts are not published in one place only. They can be found sporadic on the Internet pages of the Appellate Courts (mostly within the E-justice portal, *http://portal.just.ro*) and in the collections of judicial decisions, published by courts or by scholars.

When the awarding procedure or the performance of the contract are affected by fraud, corruption or other felonies, the criminal courts are competent to establish the criminal liability and apply the penalties. Within the criminal trial, a civil action can be exercised by a harmed person. This person can request the criminal court to order compensation for the damages suffered as a result of the felony committed and, if possible, the *restitutio in integrum*, including the annulment of the public contract. The civil action can be, also, exercised separately. It must be noted that one of the ancillary penalties that can be applied by the criminal court, according to the provisions of article 143 of the Criminal Code[[35]](#footnote-35), is the ban on taking part in public procurement tenders, which implies the prohibition for the legal person, found guilty for fraud, corruption or any other felony in or related to the public procurement award procedure, to participate, either directly or indirectly, in the procedures for the awarding of public contracts, provided by law.

1. - Alternative Dispute Resolution
	1. - *Arbitration*

Among the possible ADR means, the only one that is mentioned in the Romanian legislation explicitly for the public procurement is the arbitration. According to article 288^1 of EGO no.34/2006, the parties can establish that the litigation regarding the performance of the contract is to be settled by arbitration. As regards the public-private partnership, Law no.178/2010 does not provide for a similar specification.

Therefore, the law explicitly establishes the arbitrability of the litigation regarding public procurement contracts and the public works and services concessions. The special law does not contain any further provisions as to how this alternative dispute resolution shall work effectively. We must refer then back to the general law: the arbitration is regulated by the Civil Procedure Code[[36]](#footnote-36), in articles 541-621. According to article 542 par.2 and 3 of the Code, on the one hand, the State and the public authority can conclude arbitration agreements provided that they are authorised by law or by international conventions which Romania is part of and, on the other hand, the public law legal persons which have in their activity object the economic activities, can conclude arbitration agreements, with the exception of the cases when the law or their act of functioning provides the contrary.

Consequently, having regard that the law (art.288^1 of EGO no.34/2006) provides the possibility of the parties (including, therefore, the contracting authority, either public authorities or legal persons) to conclude arbitration agreements for the settlement of the disputes in public contracts, the arbitrability of those disputes is beyond any doubt.

Arbitration is defined by article 541 par.1 of the Civil Procedure Code as being an alternative jurisdiction having a private nature*. There is* institutionalised arbitration and non-institutionalised one. The procedure of arbitration for disputes deriving from public contracts is the common procedure, set out in the Civil Procedure Code. There is no special procedure of arbitration for the public contracts. The conclusion of the arbitration agreement excludes the competence of the courts for that dispute.

In the institutionalised arbitration, the arbitrators are, usually, elected from a facultative list, proposed by the arbitration institution. If the parties do not agree on the identity of the arbitrators or superarbitrators, the president of the institutionalised arbitration is the one to decide on this issue, except for the case when the procedural rules or the parties establish otherwise.

In the case of the non-institutionalised arbitration, the arbitrators are nominated, revoked or replaced according to the arbitration agreement and they are independent and impartial. If the parties do not agree on the nomination of the arbitrators, they can demand to the court to make the nomination. The competence in this regard belongs to the tribunal in whose jurisdiction the arbitration takes place. Therewith, the tribunal has the competence to nominate the super-arbitrator, when the arbitrators fail to do it. The tribunal has to deliver its judgment in a time frame of 10 days from its notification.

The rules of the arbitration hearing can be established by the parties and those rules shall be completed with the rules provided by the Civil Procedure Code. As regards the institutionalised arbitration, the rules are usually established by the institution, and is considered that, by electing an institutionalised arbitration, the parties agree with the rules established by that institution. There is no obligation to publish the arbitration awards regarding public contracts.

The arbitration award can be challenged before the appellate court in whose jurisdiction the arbitration took place, by the instrumentality of an annulment action, within a time frame of a month from the date of the arbitration award′s notification. According to article 612 of the Civil Procedure Code, the court can decide, on the request of the party, the suspension of the arbitration award′s enforcement. The Court will hear the annulment action in a panel composed by a single judge. If the Court decides to admit the action, it will annul the arbitration award and: will send the dispute to the competent court (if the dispute was not arbitrable, the arbitration tribunal heard the dispute in the absence of an arbitration agreement or if the agreement was void or inoperable, but also if the award was delivered after the expiration of the six moth time-frame, set out by the law for the duration of the arbitration); will send the dispute back to the arbitration tribunal in all the other cases, provided that at least one of the parties demands it or, if not, the court will solve the dispute on its merits.

The judgment delivered by the Appellate Court can be challenged by recourse, in front of the High Court of Cassation and Justice. The arbitration award, when it becomes definitive, shall be enforced like a judgment of a court.

The Civil Procedure Code regulates distinctly the international arbitration, in articles 1110-1133 (Title IV of the Seventh Book).

* 1. *– Mediation*

Mediation is not explicitly provided for by the law as an alternative dispute resolution for the public contracts. The general Romanian municipal law in the field of mediation is Law no.196/2006[[37]](#footnote-37). According to article 2 par.5 of this law, the parties of a contract can insert a mediation clause or conclude a mediation agreement, if the contract regards disposable rights.

The disputes regarding public contracts are not mentioned by the law (art.60^1 of Law no.192/2006) among the litigation in which the proof of the parties’ participation to the informative session with regard to the proceedings and the advantages of the mediation is mandatory. In practice, the mediation in disputes regarding public contracts has not yet been used in Romania, mostly because of the public authorities’ reluctance and of the unclear wording of the law in this respect. The reluctance from the contracting authorities regarding the use of such tools in practice is caused by the fact that they are fearful of the controls conducted by the Court of Auditors, which does not encourage such practices. This happens in light of potential abuses by the contracting authorities.

* 1. *- Conciliation*

As for the conciliation, there is a great dispute on whether this alternative dispute resolution is available in public contracts. The general Law on judicial review (Law no.554/2004) sent the parties of the public contracts to conciliation regulated by the former Civil Procedure Code for commercial contracts. Nowadays, however, after the New Civil Procedure Code entered into force this reference remained in the Law no.554/2004, but the new Code does not contain any provisions regarding the conciliation for the public or commercial contracts.

According to the Minutes of the meeting of the Superior Council of Magistracy’s representatives with the presidents of the administrative and fiscal litigation units within the High Court of Cassation and the appellate courts, that took place in October, 23-24, 2014[[38]](#footnote-38), it has been considered that, in the actual situation, the conciliation remains mandatory in the administrative contracts, based on the provisions of article 7 par.1 of Law no.554/2004, the mere mailing between the parties being enough for this procedure of conciliation to be fulfilled and the applicable time frames will be those provided by law for the prior complaint in the judicial administrative review.

The conclusion recorded in the Minutes is not mandatory for the national courts, but it is meant to ease the unification of the judicial practice and is to be expected that this interpretation of the law will be seriously taken in consideration by the courts and, therefore, can constitute a reference point in the future. Notwithstanding, the legislative intervention to settle this issue and to provide for the time frames and the conditions of the conciliation in public contracts is more than necessary.

1. - Summarising considerations

The main public contracts in Romanian law are public procurement contracts, concessions and the public private partnership. The *ex-ante* administrative control of the public contracts is performed by a specialized agency, the National Agency of Public Procurement, and the ex post administrative oversight is shared by the agency with the Court of auditors. Review mechanisms include administrative appeal to a specialized review body (the Council) and/or access to courts. Generally, the main remedy mechanism used in the case of public contracts is the appeal to the Council, and fewer cases reach the court.

Up to the conclusion of the contract, the remedies available are the suspension of the award procedure, the annulment of the award procedure or of acts of the contracting authority, as well as other remedial measures, and damages. With the exception of damages, both the Council and the courts can grant these remedies, with the mention that tenderers need to go first before the Council, which acts as a mandatory first instance review body. Because the automatic suspension no longer operates, the remedy most often granted by the Council is the annulment of the award procedure.

After the conclusion of the contract, the courts are the only review bodies that can grant remedies and they have many remedies at hand: suspension of the execution of the contract, ineffectiveness, alternative sanctions, and damages. With the exception of damages, all the other remedies that can be granted are new (introduced in 2010).

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2. 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 Text with EEA relevance; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance; 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 Text with EEA relevance (all published in the Official Journal of the European Union L94/28.03.2014). [↑](#footnote-ref-2)
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4. Published in the Romanian Official Gazette, part I, no.362 on May 26th, 2015. [↑](#footnote-ref-4)
5. EGO no.34/2006, article 33^1. [↑](#footnote-ref-5)
6. „SEAP” stands for the Electronic System for Public Procurement. The internet address of this System is: www.e-licitatie.ro. [↑](#footnote-ref-6)
7. Article 49 of EGO no.34/2006. [↑](#footnote-ref-7)
8. Article 55 par.2 of EGO 34/2006 provides that the publication in the Official Journal of the European Union is mandatory in the following situations: the contracting authority belongs to one of the categories provided by article 8, letters a)-c) – public central, regional or local authorities/institutions, any other entity placed under the supervision of or financed by a public authority/institution or an association of contracting authorities -, and the estimated value of the contract to be awarded is equal to or greater than EUR 130.000; the contracting authority belongs to one of the categories mentioned in article 8, letter d) or e) – public or private undertakings acting in the sector of utilities -, and the estimated value of the contract to be awarded is equal to or greater than EUR 400.000; the estimated value of the contract to be awarded is equal to or greater than EUR 5.000.000.pon the yet been published.ainapresentmergency ordinancessue an act, the recognition of the his respect [↑](#footnote-ref-8)
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21. Article 273 par.1 of EGO no.34/2006 and, for public-private partnership, article 28^9 par.1 of Law no.178/2010. [↑](#footnote-ref-21)
22. See Judgment no.2369/7 June 2012, in D.-D. SERBAN, “*Jurisprudenta comentata in materia achizitiilor publice*” [Case Law in Public Procurement], volume IV, Hamangiu, Bucharest, 2014, p.107. [↑](#footnote-ref-22)
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