

Final report: Methods to reduce the number of review procedures in public procurement in Romania – review of the draft public procurement remedies law

Analysis and options as to functions to reduce the number of abusive bid protests



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The World Bank is supporting the Romanian Prime Minister's Office (PMO) in implementing good governance measures in order to enhance efficiency in the public sector. For these purposes, a central Delivery Unit was established in 2014 by Prime Minister's Decision. The DU working group comprises the key stakeholders in the Romanian public procurement field. The Delivery Unit aims at defining political priorities in four key areas of the public sector in cooperation with the PMO. One of these areas is public procurement.

Romanian stakeholders are fully aware that an effective remedy system, which is also known as a 'challenge' or 'bid protest' system, in public procurement is a key element for a robust public procurement framework. The Romanian government, however considers the number of bid protests to be too high. Importantly, it is argued that "frivolous" or "abusive" bid protests are very common in Romania and that economic operators frequently try to delay the conclusion of a contract by misusing the bid protest system.

This report aims at helping the Romanian government to better understand the problem of too high a number of bid protests, including "frivolous" or "abusive" bid protests in Romania as well as to help it make a decision on what measures it wishes to take to keep the number of bid protests at an appropriate level.

ABBREVIATIONS AND ACRONYMS

2014 EU PPD	Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014
ANRMAP	Romanian National Authority for Regulating and Monitoring Public Procurement
EU RD	Directive 89/665/EEC, which covers the public sector; and directive 92/13/EEC, which covers the utilities sector, as amended by Directive 2007/66/EC.
DU	Delivery Unit
EC	European Commission
ECJ	European Court of Justice
EU	European Union
EU PPD	Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004
GCG	Good Conduct Guarantee
GEO 34/2006	Romanian Government Emergency Ordinance no. 34 of 2006 regarding the award of public procurement contracts, of public works concession contracts and of services concession contracts as well as Government Decision 1660/2006 regarding the approval of the application norms for public procurement
NAPP	National Authority for Public Procurement
PMO	Romanian Prime Minister's Office
NCSC	National Council for Solving Complaints
UNCAC	United Nation Convention against Corruption
UNCITRAL ML	UNCITRAL Model Law on Public Procurement
UCVAP	Unit for Coordinating and Verifying Public Procurement (in Romania)

1. Executive Summary

- (1) It is impossible, in any public procurement system, to rule out the possibility that the number of bid protests includes (a few) “abusive” or “frivolous” bid protests. Even if there is a small number of “abusive” or “frivolous” bid protests, it is not clear if and how these “abusive” or “frivolous” bid protests should be sanctioned.

Importantly, it is likely that a new layer of litigation would be needed to assess whether or not a bid protest was filed in bad faith. It is likely that this new layer of litigation would slow down the entire review process whereas the main objective should be to resolve protests as promptly as possible.

The costs of the few “abusive” or “frivolous” bid protests a remedy system in public procurement may generate are always outweighed by the benefits of transparency, accountability and the protection of the integrity of the public procurement system as a whole.

- (2) Importantly, a large number of complaints does not necessarily entail abuse by economic operators; rather it is an indicator of the lack of capacity in the public procurement system. In particular, a high success rate shows that the structural causes of the complaints were not tackled efficiently. At the very least, a delay in the procurement process caused by an unlawful decision on the part of the government entity should not be blamed on the protestor or the entire public procurement system. Moreover, a justified bid protest can be seen as an important tool to remedy unlawful tender processes and to reach legal compliance in public procurement processes.
- (3) Ultimately, the common goal of both contracting authorities conducting tender procedures and economic operators competing for government contracts should be to make bid protests as unnecessary as possible. This can be best achieved by applying a holistic approach, because a multitude of improvements in the procurement system can mitigate the number of bid protests. Important tools to reduce the number of bid protests include
- (i) rebalancing resources across the procurement work force;
 - (ii) standardization of procurement processes;
 - (iii) transparency by providing sufficient information to potential protestors;
 - (iv) clear provisions as to which decisions or actions of contracting authorities are subject to a bid protest;
 - (v) a mandatory request for reconsideration to the procuring entity before turning to the independent review body;
 - (vi) reasonable (or no) costs for filing bid protests;
 - (vii) a timely resolution of bid protests;
 - (viii) predictability of case law; and
 - (ix) an effective fight against corruption in public procurement.
- (4) The draft remedies law introduces various important features and mechanisms aimed at building a more efficient remedies system in public procurement and, at the same time, reducing the likeliness of bid protests. This must be assessed as encouraging. Positive features include

- (i) the removal of the Good Conduct Guarantee and therefore fee access to the remedies system before the NCSC;
 - (ii) the right for economic operators to access certain documents of the procurement file before filing a request for reconsideration or a complaint;
 - (iii) a mandatory request for reconsideration to the procuring entity before turning to the independent review body (if this does not lead to an inappropriate delay in the procurement process); and
 - (iv) measures on the unification of administrative and judicial practice (uniformity of case law and practice between the NCSC and the court).
- (5)** However, even these rules need to be further improved, as they leave room for interpretation and contain arguably procedural loopholes that may be exploited by both bidders and contracting authorities and lead to non-consistent case law. Issues in the draft remedies law to be addressed include
- (i) A clear provision on the scope of application;
 - (ii) A clear provision on which decisions or actions of contracting authorities are subject to a bid protest (e.g. a clarification issues by the contracting authority);
 - (iii) A clear provision on the elements of the complaint;
 - (iv) A clear provision on remedies against illegal direct awards;
 - (v) A clear provision on suspensive effect;
 - (vi) A clear provision on time limits to solve complaints;
 - (vii) A clear provision on the right of the NCSC to prosecute *ex officio*; and
 - (viii) A clear provision on the relation between the NCSC and the court.
- (6)** There is a complicated system of (high) court fees according to the draft remedies law. The most important concerns raised by the three types of court fees are:
- (i) the court fees imposed for filing complaints with the court and challenges are high (these fees are not equivalent to the ones provided for similar administrative cases and they potentially represent a barrier to the remedies system for bidders, especially for SMEs);
 - (ii) the bond for interim measures to be paid by bidders in court proceedings is substantial and such bond is not provided for at all for the suspension of other administrative acts under the Romanian Law on Administrative Litigations¹
 - (iii) the system of court fees is quite complicated and difficult to understand and thus might lead to misunderstandings of the law by both bidders and contracting authorities.

¹ Law no. 554/2004 concerning administrative litigation.

It might be argued that the level of the court fees does actually constitute a barrier to the access to courts and render exercise of public procurement judicial review rights excessively difficult, in the case that an aggrieved bidder has plausible reasons not to file the complaint with the NCSC (the complaint in front of NCSC would be free of charge). However, in this respect the decision of the ECJ C-61/2015 dated 6 October 2015 must be kept in mind according to which court fees to be paid for bringing an action in administrative proceedings relating to public procurement, which do not exceed 2% of the value of the contract concerned, are in line with EU public procurement law.

- (7)** Importantly, the high number of bid protests in Romania and particularly the high rate of successful bid protests (around 35%) indicate systematic vulnerabilities of the public procurement system in Romania. Therefore, and as stated above, a holistic approach in order to mitigate the number of bid protests is suggested. Many of the instruments mentioned above in item 3 need to be addressed outside the remedies system (e.g. rebalancing resources across the procurement workforce or the standardization of procurement processes).

2. Introduction

2.1 The World Bank (“*Bank*”) is providing advisory services to the Romanian Prime Minister’s Office (“*PMO*”) to strengthen policy making and implementation through increasing the effectiveness of the delivery system and establishing a central Delivery Unit (DU). The overall objective of the World Bank’s engagement is to support the Romanian PMO in embedding results-oriented practices in the public sector through the establishment of a delivery system coordinated by a central DU to help achieve selected priority policy outcomes. The DU is aimed at directly supporting the PM in the delivery of his political priorities in four areas, one of which is **public procurement**.

2.2 Romanian stakeholders are fully aware that in public procurement an effective remedy system, which is also known as a ‘challenge’ or ‘bid protest’ system, is a key element for a robust public procurement framework.

These systems typically allow a bidder to challenge a procurement decision, in (a) a challenge before the procuring agency, (b) a challenge before an independent agency (typically one with special expertise in procurement), and/or (c) a lawsuit in a court. While the names vary, the systems are remarkably similar, in part because the common guiding documents – the EU Public Procurement Directives (“*EU PPD*”), the UNCITRAL model procurement law (“*UNCITRAL ML*”) and the WTO Government Procurement Agreement, for example – call for very similar systems. The UN Convention Against Corruption (“*UNCAC*”) calls for a bid challenge system under Article 9, but does not specify how that system should be structured.

2.3 An effective review mechanism has several purposes: Most importantly, it allows stakeholders (including competitors) to monitor compliance with the applicable rules and to enforce them when necessary. It allows enforcement of public procurement regulations in cases where procuring entities (either intentionally or unintentionally) fail to comply with public procurement law.

2.4 Romanian stakeholders identified the improvement of the Romanian remedies system in public procurement as a key factor to increase transparency, objectivity and efficiency in procurement processes.

2.5 The number of bid protests in Romania, as compared to other EU Member States, is very substantial. For instance, the number of challenges filed before the National Council for Solving Complaints (“*NCSC*”) increased significantly between 2006 and 2010 with more than 8,000 bid protests in 2010. Recently, the number of bid protests decreased considerably: during January and December 2014, the number of complaints submitted by the economic operators and recorded with the NCSC reached 3,753.² This is still a rather high number compared to other EU Member States.

2.6 It is argued by the Romanian government that “frivolous” or “abusive” bid protests are very common in Romania and that “frivolous” or “abusive” bid protests are one of the main reasons why the number of bid protests in Romania is comparably high. It is claimed that economic operators frequently try to delay the conclusion of a contract by misusing the bid protest system (e.g. by challenging certain decisions within the same tender procedure, knowing their inability to fulfill the tendered public contract).³

² Comparing the development of total number of complaints submitted in 2014 to that of 2013, there was a significant decrease of 34.6%. This decrease (in the second half of 2014 as compared to the same period of the previous year) can be explained by the introduction of GCG. See “Activity Report 2014”, The National Council For Solving Complaints.

³ Frivolous bid protests are often aimed at exploiting the remedies mechanism to hamper competition. While legitimate remedies in public procurement test the integrity of the procurement process, frivolous or abusive bid protests only test the litigious will of the government and successful contractors. See Tsai, Targeting frivolous bid protests by revisiting the competition in contracting

- 2.7 Because of the high number of bid protests in Romania, and especially because of the high number of allegedly abusive bid protests, the Romanian Government introduced various changes to its public procurement framework in June 2014.
- 2.8 The recent introduction of the “Good Conduct Guarantee” (“GCG”) has raised many concerns and was criticized by numerous Romanian stakeholders⁴. Importantly, it was argued that the GCG – which is 1% of the estimated value of the contract and limited to a maximum of EUR 100,000 – is not in line with the Romanian Constitution.⁵ In fact, more than 15 complainants invoked the exception of non-constitutionality of certain aspects of the GCG. The first complaint was admitted⁶ on January 15, 2015. Indeed, the Constitutional Court declared the provision allowing contracting authorities to automatically withhold the GCG unconstitutional (if the complaint is dismissed or withdrawn, the contracting authority will retain the good conduct guarantee).⁷ Furthermore, the Bucharest Court of Appeal referred certain aspects with regard to the GCG to the European Court of Justice (“ECJ”). The decision of the ECJ is still pending.

act’s automatic stay provision, *Journal of Contract Management*, 2015, 125.

⁴ In June 2014, the Romanian Government enacted Emergency Ordinance no. 51/2014 amending the Government Emergency Ordinance no. 34/2006 on the awarding of public contracts, public works concession contracts, and services concession contracts (GEO no. 34/2006). According to the new provisions, in order to protect contracting authorities from complainants’ misbehavior, both the complaint and the appeal must be accompanied, under the sanction of rejection, by the proof that a good conduct guarantee was constituted for the entire period between the date the complaint/appeal is filed and the date on which the decision of the NCSC/the court becomes definitive. The whole amount of the guarantee (1% of the estimated value of the contract and limited to a maximum of 100,000 Euro) had to be retained by the contracting authority, if the claim is dismissed or withdrawn. GEO no. 51/2014 also repealed the old provisions according to which contracting authorities had to retain an amount of the participation guarantee submitted by tenderers if the complaints were rejected. These amounts were calculated differently depending on the contract’s estimated value and would not generally exceed 5,000 Euro. Hence, the amount of the GCG is considerably higher than the value retained from the participation guarantee under the old provisions. See “The Good Conduct Guarantee” by Angelica ROSU, *Official Journal of Romania*, no 486 of June 30, 2014 or VassLawyers “Sign the European commission complaint regarding the abusive introduction of the good conduct guarantee in public procurement procedures” or „Fraud complaints in Romania face €100,000 bill” by EurActiv Romania.

⁵ The GCG must be valid for at least 90 days and can be extended for as long as necessary until the bid protest is decided. The GCG must be provided in the form of a bank guarantee, insurance policy or direct payment in favor of the contracting authority. The GCG will be returned in case the bid protest is granted and enforced in case the bid protest is denied.

⁶ Decision no. 5 of January 15 2015 of the Constitutional Court of Romania published in the Romanian Official Journal no. 188, on 19th of March 2015.

⁷ Decision no. 5/15 January 2015 of the Constitutional Court. In this decision the Constitutional Court ruled on the unconstitutionality of art. 271² (1) and (2) of GEO regarding the obligation of the contracting authority to withhold the GCG if the claim is rejected by the Council/the court or if the claimant waives the claim. According to the Court’s reasoning, the obligation of the contracting authority to withhold the GCG violates the free access to justice provided for by art. 21(1) of the Romanian Constitution, by discouraging the claimant to file a complaint/claim, given that any rejection of the complaint/claim gets converted *de plano* into a sanction for a misconduct. At the same time, the Court stated that GEO establishes a real sanction for the person who, for the purpose of defending legitimate interests, challenges an act of the contracting authority before the NCSC or the court, without a competent authority establishing first the abusive character of such a claim/complaint. The decision of the Constitutional Court is final and binding. Hence, at present both the claim and the complaint still have to be accompanied, under the sanction of rejection, by the proof that a GCG was constituted. However, if the claim is dismissed or withdrawn by the claimant, the contracting authority can no longer automatically retain the GCG.

Moreover, a complaint was filed with the European Commission⁸ (“EC”), invoking the infringement of EU legislation, especially of art. 1 of the Remedies Directives (“EU-RD”)⁹ that “require Member States to provide remedies for enforcing most European Union rules which are: effective; and no less favorable than those available in that Member State for breaches of similar domestic rules”¹⁰. In December 2014, the EC requested further information from Romania on the “excessive guarantee of good conduct”, as “the measure could be held to be disproportionate and go beyond what is necessary to achieve the proposed objective, namely to limit the abusive complaints”.¹¹

- 2.9** On July 22, 2015 the draft of the “Law on remedies and means of appeal in public procurement concessions contract awarding and on the organization and operation of the National Council for Solving Complaints” (“Draft-RL”) was published on the website of the Romanian National Procurement Agency. This draft of the new remedies law in public procurement was subject to public consultations, but the consultation period was criticized by several Romanian stakeholders as of being too short.

The Draft-RL as well as comments received are currently being discussed among the Romanian government and other relevant stakeholders. It is our understanding that the Draft-RL should be adopted in the Romanian Parliament either still in 2015 or early in 2016.

⁸ File no. 7189/14/MARK entitled “Remedies in public procurement –excessive guarantee of good conduct”.

⁹ Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395/33 and Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L 76/14

¹⁰ *EU Procurement Law*, M34143 Book 4, University of Nottingham School of Law, by Sue Arrowsmith.

¹¹ Information Request regarding Case EU PILOT 7189/14/MARK – Excessive Guarantee of good conduct, European Commission Directorate General Internal Market and Services, Bruxelles, 2 December 2014, [here](#).

3. Primary Objectives of this Report

3.1 In this context, the World Bank is seeking support from an international consultant to provide specialized advisory services, to conduct an analysis and provide functional options for the above-mentioned problem of too many bid protests, including frivolous bid protests, in Romania, with a particular focus on the various means available to reduce the number of bid protests as well as to mitigate such abusive bid protests. The consultant will review the Draft-RL and conduct a comparative analysis with international best practice in this area, with a special focus on the remedies systems of selected EU Member States. The analysis will pay special attention to different existing mechanisms for reducing the number of bid protests, including “frivolous” or “abusive” complaints, without limiting the rights of aggrieved bidders to file complaints. The outcome of the assignment will help the Romanian Government to make a decision on its preferred concept and initiate the implementation thereof as agreed in the Procurement Strategy.

3.2 The report is divided into the following chapters:

- Background information on the Romanian remedy system in public procurement (see item 0);
- General remarks on how to best deal with abusive bid protests including a comparative analysis with international best practice in this area (see item 5);
- General measures to keep the number of bid protests low including a comparative analysis with international best practice in this area (see item 0);
- Comments on the Draft-RL and its potential to reduce the number of bid protests (see item 7);

4. Background information on the Romanian remedy system¹²

4.1 Public procurement in Romania is primarily regulated by Government Emergency Ordinance no. 34/2006 (“GEO”) on the awarding of public procurement contracts, works concession contracts and services concession contracts. From 2006 to 2015, GEO was subject to 20 amendments and modifications. In addition to the GEO, a set of secondary legislation (e.g. on operational aspects of procurement procedures related to the classic, utilities sector or for concessions directives and e–procurement¹³) and a relatively large number of acts pertaining to tertiary legislation have been adopted.

4.2 With respect to the Romanian remedy system in force, Romanian public procurement legislation provides basically for the following remedies:

- A complaint, generally lodged with the NCSC (National Council for Solving Complaints)¹⁴, an independent body with administrative and judicial functions, and
- An appeal against the decision on the complaint,¹⁵ filed with the courts of appeal.¹⁶

4.3 Since 2006, when Romania transposed the EU PPD including the EU RD, the remedies system has been a hot public topic. As with each year more and more complaints were filed with the NCSC (in 2010, approx. 8000), contracting authorities have struggled to cope with the long contract award timelines, a problem which has impacted heavily, especially on the absorption of European funds.

To this end, the public debate has frequently focused on “abusive” or “frivolous” complaints, whereas it was argued that these “abusive” or “frivolous” complaints are the primary reason for the delays of public projects, despite the fact that more than 30% of complaints were successful.¹⁷

Thus, the Romanian Government subsequently amended the relevant legislation, with the alleged aim of reducing “abusive” complaints and accelerating public procurement procedures in general. One of the main measures in this respect was the introduction of – as mentioned above – the GCG in 2014. From July 2014 to March 2015, contracting authorities had the obligation to retain the whole GCG when the complaint was dismissed or withdrawn. Since March 2015, economic operators have had the obligation to submit the GCG together with the complaint, but contracting authorities do not any longer have the right to automatically retain the GCG when the complaint is dismissed or withdrawn.

¹² Iulia Vass, Dissertation for degree of Master of Laws (LLM) *HIGH REMEDIES COSTS IN CEE MEMBER STATES: ASSESSMENT OF COMPLIANCE WITH THE EU LEGISLATION AND THE NEED FOR REFORM*, The University of Nottingham School of Law, LLM in in Public Procurement Law and Policy, September 2015.

¹³ Secondary legislation also addresses the functioning of organizations that are part of the Romanian public procurement system.

¹⁴ Art. 255-256 of GEO no. 34/2006.

¹⁵ Art. 281 of GEO no. 34/2006.

¹⁶ More information on the Romanian remedies system is available in the Chapter on Romania, by Iulia Vass and Bianca Bello, in *The International Comparative Legal Guide to Public Procurement 2015*, Global Legal Group.

¹⁷ Information Request regarding Case EU PILOT 7189/14/MARK – Excessive Guarantee of good conduct, European Commission Directorate General Internal Market and Services, Bruxelles, 2 December 2014, [here](#).

It is without any doubt that due to the introduction of the GCG – which involves the risk of losing a significant amount of money corresponding to generally 1% of the contract volume – the number of complaints filed with the NCSC decreased dramatically in 2014. Compared to the same period in 2013, the number of bid protests decreased by 60%¹⁸, while the acceptance rate is only 2% higher as compared to 2013.¹⁹

5. How to best deal with abusive bid protests – General remarks

- 5.1** Typically, only a small number of (hundred-thousands of) procurement procedures conducted every year is protested by economic operators and thus subject to review. The rate of procurement procedures challenged compared to procurement procedures conducted without challenge in a country is usually in the range of a few percent (e.g. 1-2%) only.

Comparing the number of national review procedures with the total number of procurement procedures carried out in the EU Member States, most of the EU Member States have a ratio in the lower single digits (e.g. Cyprus: 1%, Poland 1.4%, Lithuania and Malta 3%, Estonia 4.2%, Finland 4.9%, Czech Republic 5%,) while in the remaining EU Member States, where such data are available, the percentages are still below 20% (e.g. Hungary, Romania, Slovakia 13%, Latvia 14%, Bulgaria 16%, Sweden 19%). The average for these countries is 8.5%.²⁰

Importantly, a large number of complaints does not necessarily entail abuse by economic operators; rather it is an indicator of the lack of capacity in the public procurement system. In particular, a high success rate shows that the structural causes of the complaints were not tackled efficiently.

- 5.2** The common goal for both contracting authorities conducting tender procedures as well as for economic operators competing for government contracts should be to make bid protests as unnecessary as possible. This can be best achieved by applying a holistic approach in order to make the entire public procurement system as efficient as possible. Experience shows that there are various important tools to reduce the likeliness of bid protests (see in detail item 0 below). It is thus suggested that the effective implementation of these tools be supported to reduce the likelihood of bid protests.
- 5.3** The negative consequences of unjustified bid protests – including “abusive” or “frivolous” bid protests – should, obviously, be kept as small as possible. An important tool in this respect is keeping the duration of the review procedure short. To this end, it is important that the review body resolves bid protests in a prompt manner.

In this respect, it is frequently argued that economic operators misuse the bid protest system when an economic operator has lost a procurement procedure for a follow-on contract. In this case it is argued that the economic operator uses the bid protest mechanism to delay a new contract award in order to continue work during the period needed by the review procedure.²¹ The author is not aware of any data supporting this allegation, in particular that any bid protest was completely without merit.

¹⁸ EC Information Request: “Following the introduction of GEO 51/2014, a sharp decrease in the number of complaints can be noticed (617 complaints from July to September 2014, compared to 1516 complaints for the same period in 2013, resulting in approximately a 60% decrease rate).”

¹⁹ EC Information Request: “The acceptance rate for 2014 is slightly higher than for the same period in 2013 (37% vs. 35%)”; see [here](#).

²⁰ COMMISSION STAFF WORKING DOCUMENT - Annual Public Procurement Implementation Review 2012, Brussels, 9.10.2012 SWD(2012) 342 final, that can be downloaded [here](#).

²¹ Gordon, *Bid Protest: The Costs are Real, But the Benefits Outweigh Them*, 42:3 Pub. Contract L.J., 2013.

- 5.4** If the bid protest is sustained (i.e. if the bid protest was correct), there is adequate justification for the bid protest because the decision challenged violated applicable procurement rules.

According to the data of various EU Member States, the success rate of complainants in review procedures amounts to approximately 33%, i.e. one third of the total number of bid protests are justified. For instance, the success rate of bid protests in Cyprus is 32%; in Germany above 20%; Spain 24%, Malta 29%, Poland 26%, Sweden 31%).²² The success rate in Romania amounts to 31% and is thus comparable with numerous other EU Member States.

- 5.5** At the very least, a delay in the procurement process caused by an unlawful decision on the part of the government entity should not be blamed on the protestor or the entire public procurement system. Moreover, a justified bid protest can be seen as an important tool to remedy unlawful tender processes and to reach legal compliance in public procurement processes.²³

- 5.6** If the bid protest is not sustained (i.e. if the bid protest was not justified), the protestor will have to bear the negative consequences such as having to cover costs associated with the bid protest (i.e. costs of filing and pursuing the bid protest, including attorney fees, "court fee", etc). In practice, however, it is very rare that contracting authorities or economic operators ask for legal costs associated with the bid protest, at least in front of the NCSC.

- 5.7** It is impossible, in any public procurement system, to rule out the possibility that the number of bid protests includes (a few) "abusive" or "frivolous" bid protests. Even if there is a small number of "abusive" or "frivolous" bid protests, it is not clear if and how these "abusive" or "frivolous" bid protests should be sanctioned.

Importantly, it is likely that a new layer of litigation would be needed to assess whether or not a bid protest was filed in bad faith. It is likely that this new layer of litigation would slow down the entire review process whereas the main objective should be to resolve protests as promptly as possible.

The costs of the few "abusive" or "frivolous" bid protests a remedy system in public procurement may generate are always outweighed by the benefits of transparency, accountability and the protection of the integrity of the public procurement system as a whole.

²² COMMISSION STAFF WORKING DOCUMENT - Annual Public Procurement Implementation Review 2012, Brussels, 9.10.2012 SWD(2012) 342 final, that can be downloaded [here](#).

²³ As Xinglin underlines, "Suppliers have the strongest incentive to oversee the operation of the procurement process and are perhaps best placed to detect and redress violations in a timely manner; and supplier remedies also provide a general incentive for compliance." See Z. Xinglin, "Forum for Review by Suppliers in Public Procurement: An Analysis and Assessment of the Models in International Instruments" (2009) 18 PPLR 201.

6. General measures to keep the number of bid protests low based on comparative analysis with international best practice

6.1 Introduction

- 6.1.1** An effective remedy system in public procurement is a key element for a robust public procurement framework. It gives economic operators the right to challenge decisions by the contracting authority which they consider are not in compliance with the applicable public procurement rules. A challenge thus arises because the economic operator wishing to participate or participating in a public tender perceives an error in the decision-making process of the procuring entity. *“A key characteristic of an effective challenging mechanism is that it strikes the appropriate balance between, on the one hand, the need to preserve the interest of suppliers and contractors and the integrity of the procurement process and, on the other hand, the need to limit disruption of the procurement process”*.²⁴

An effective remedy system therefore has many advantages. Importantly, an effective remedy system – including case law – discourages actions knowingly in breach of the law. On the one hand, if clear legislation as well as (uniform) case law exists, a contracting authority will typically render its decision in line with the law. And furthermore, a bidder will typically not challenge a decision by the contracting authority if he knows that he is unlikely to succeed with this due to legislation and/or case law which does not support his arguments. Furthermore, an effective remedy system fosters public confidence in the public procurement system as a whole. It also fosters confidence among economic operators, and therefore may lead to more participation in public tenders, thus increasing competition. Experience also shows that an effective bid protest system may help to stop procurement officers awarding a contract to a (favored) firm due to improper reasons since the procurement officers will be aware of the risk of a successful bid protest.²⁵

- 6.1.2** One might argue that bid protests also involve disadvantages, particularly the costs of protests which include the resources expended by the NCSC (or the court) and by the contracting authorities in responding to the bid protest as well as delays in the procurement process. This is particularly true when the bid protest is legitimate, i.e. sustained.

However, experience shows that the advantages by far outweigh the potential disadvantages bid protests might have. Independently of this, an effective remedy system is not optional for Romania. It is required by the EU PPD and the GPA as well as UNCAC. Moreover, a public procurement framework without an effective remedy system is often considered “toothless”.

- 6.1.3** The reason for a high number of bid protests is not typically the misuse of the remedies system by government contractors. It is simply the right of every economic operator to turn to an independent review body, which will then verify whether a decision by the procuring entity was made in conformity with applicable rules. Importantly, the fact that a bid protest was dismissed does not mean that this protest was “abusive” or “frivolous”. Therefore, a high number of bid protests is not negative *per se*. Understandably, contracting authorities might see bid protests sustained by the NCSC in a more critical manner given that the NCSC sheds light on the contracting authority’s approach on how procurement procedures are conducted.

²⁴ Guide to Enactment of the UNCITRAL Model Law on Public Procurement, page 300 available here.

²⁵ Gordon, *Bid Protest: The Costs are Real, But the Benefits Outweigh Them*, 42:3 Pub. Contract L.J., 2013.

6.1.4 Ultimately, the common goal for both contracting authorities conducting tender procedures as well as for economic operators competing for government contracts should be to make bid protests as unnecessary as possible. This can be best achieved by applying a holistic approach because a multitude of improvements in the procurement system can mitigate the number of bid protests. Such improvements include the following:

6.2 Rebalancing resources across the procurement workforce

6.2.1 Bid protests often proliferate as a result of the way the government does business. Public procurement is highly complex and fast changing. Experience shows that, in particular for smaller procuring entities like small municipalities, conducting public procurement procedures in full compliance with legislation and (fast-developing) case law is very challenging.

6.2.2 Rebalancing resources across the procurement workforce at the level of the government – by hiring and training better qualified staff to efficiently manage the procurement – decreases the likelihood of bid protests. An economic operator typically files a bid protest because it perceives an error in the decision-making process of the contracting authority. If there are no errors, there are typically less reasons for an economic operator to file a bid protest. It is thus essential to assist procurement officers particularly in

- drafting tender documents including:
 - qualification criteria (minimum and selection criteria): suitability to pursue the professional activity, for instance existence of the necessary trade licenses; economic and financial standing, for instance minimum revenues; technical and/or professional capability, for instance reference projects, technical equipment; and sound personnel standing (e.g. non-existence of grounds for exclusion like tax arrears, conviction for corruption, etc.);
 - award criteria: quality, technical merit; design; environmental characteristics; organization, qualification and experience of staff assigned to performing the contract; etc.;
 - technical specifications;
 - volume structures in case of framework agreements;
- answering requests for clarifications;
- conducting bid opening sessions;
- conducting negotiations;
- evaluating bids according to (precluded) tender requirements, particularly award criteria; and
- drafting decisions, including decisions to exclude a bidder; decisions not to admit a bidder to the second stage of a tender procedures; award decisions, etc.;

in line with the applicable public procurement rules.

6.2.3 The procurement workforce must understand the subject matter of the procurement as well as its requirements. Tender requirements need to remain clear and simple. This is particularly challenging when it comes to qualification and award criteria. However, the more complex tender requirements are, the more opportunities for protestable errors.

6.3 Standardization of procurement processes

- 6.3.1** The standardization of procurement processes may reduce the number of bid protests since it creates predictability for both bidders as well as contracting authorities. Standardized procurement processes typically reduce the opportunities for protestable errors.
- 6.3.2** In this respect, standard bidding documents including standard contract provisions have proven to be very useful (e.g. standard bidding document to be used within one group of entities – e.g. all ministries, within one region or within the entire country).
- 6.3.3** Another form of standardization is a system of pre-approved suppliers (e.g. a list of approved suppliers according to the EU PPD). Such a list of approved suppliers leads in particular to the following advantages regarding standardization: (i) facilitation of standardization of qualification criteria (in particular as to the technical capability) due to development of a standardized pre-qualification questionnaire for applications and for assessment of applicants' suitability in cooperation with relevant stakeholders (e.g. professional associations); (ii) standardization of qualification criteria due to standardized works categories and works classes; and (iii) promotion of use of objective criteria (thus decreased risk of corruption or discrimination), (iv) reduced risk that the winning bidder is not capable of performing the tendered contract, and (v) reduced number of complaints related to the qualification stage.
- 6.3.4** Closely connected with the issue of standardization is the implementation of a central purchasing body. A central purchasing body would in particular bring advantages in terms of capacity (a central purchasing body typically provides the expertise and capacity that many contracting authorities lack) and certainty (centralized purchasing bodies typically provide certainty to contracting authorities, in particular as to legal, technical, economic and contractual aspects, thereby also reducing the risk of complaints).²⁶

6.4 Costs for filing bid protests

- 6.4.1** EU public procurement law imposes no obligation on the EU Member States to require economic operators to pay a fee in order that a bid protest is heard by an independent body.

In general, there is considerable debate on whether the obligation to pay a fee as a condition that a bid protest is heard is appropriate. In particular, there is considerable debate as to whether such fee is the right tool to achieve the objective of reducing the number of bid protests, and, at the same time, increasing efficiency in the public procurement process as such.

In this respect, it must be kept in mind that bid protests are an important feature of an effective public procurement system. Essentially, bid protests should not be discouraged but instead tools should be implemented that make it unnecessary for economic operators to file bid protests. In any case, a fee must not lead to a limitation of access to justice for economic operators which could impede the exercise of their rights by protestors according to the EU-RD as well as the EU PPD. Importantly, a fee for protestors should not lead to less competition, e.g., because economic operators decide not to participate in public tender procedures any more due to the (high) fee. Importantly, with respect to fees, the ECJ issued a (highly) relevant decision very recently. In this decision it was held that "court fees to be paid for bringing an action in administrative proceedings relating to public procurement, which do not exceed 2% of the value of the contract concerned" are in line with EU public procurement law.²⁷

²⁶ However, central purchasing bodies can also involve disadvantages, for instance potential disadvantages for SMEs or the risk of standardized purchases that do not meet the contracting authority's specific requirements.

²⁷ ECJ C-61/14 *Orizzonte Salute*.

Furthermore, competition is a key factor for governments (and their citizens) to achieve best value-for-money. Importantly, real competition only ensues in the absence of collusive tendering, which represents one of the most prominent examples of corruption in public procurement.

6.4.2 Even though many EU Member States do not require a fee to be paid by protestors, there are other EU Member States that impose legal fees for protestors.

In fact, the approach of requesting protestors to pay a fee has become a trend during the past years, especially in Central and Eastern European and Baltic countries. What these have in common is that upon implementing the EU public procurement legislation, as a precondition for EU accession, the number of complaints increased rapidly. The national authorities were thus faced with considerably delays of public projects.²⁸

While this trend concerns mainly CEE and Baltic countries, other EU Member States also impose fees for protestors. These fees can be flat fees (e.g. Denmark, Lithuania), a percentage of the contract value (e.g. Estonia, Germany, the Czech Republic or **Romania**) or a scale of fees depending on the contract value (e.g. Netherlands, Estonia).²⁹ Austria, for instance, differentiates between the estimated contract volume, the contract type (supply, services or work contracts) and the procurement method (direct award, tender procedures with prior publication) when fixing the fee (between EUR 308 and EUR 36,936).³⁰

In some countries these costs are not returned to successful complainants (e.g. Poland³¹, Estonia³², Lithuania³³), while in other countries costs are returned in full or in part (e.g. Austria, Hungary³⁴, Denmark³⁵, Malta³⁶, Slovakia³⁷, the Czech Republic³⁸ and Romania).³⁹

²⁸ Iulia Vass, Dissertation for degree of Master of Laws (LLM) *HIGH REMEDIES COSTS IN CEE MEMBER STATES: ASSESSMENT OF COMPLIANCE WITH THE EU LEGISLATION AND THE NEED FOR REFORM*, The University of Nottingham School of Law, LLM in in Public Procurement Law and Policy, September 2015.

²⁹ Presentation on Public Procurement Review and Remedies in the Member States of the EU, by Prof. Dr. Martin Trybus, Birmingham Law School, Ankara 26-27 February 2008, that can be downloaded [here](#).

³⁰ Iulia Vass, Dissertation for degree of Master of Laws (LLM) *HIGH REMEDIES COSTS IN CEE MEMBER STATES: ASSESSMENT OF COMPLIANCE WITH THE EU LEGISLATION AND THE NEED FOR REFORM*, The University of Nottingham School of Law, LLM in in Public Procurement Law and Policy, September 2015.

³¹ In Poland the fees for lodging a complaint amount to between 7,500 PLN and 20,000 PLN (EUR 1,787 – EUR 4,767) and the fees for lodging an appeal are 5 times the fees for the complaint. It is interesting to note that until 2014 the latter fee was 5% of the value of the contract and could go up to the staggering amount of PLN 5,000,000 (EUR 1,191,850). This provision was however found unconstitutional in April 2014. More detailed information is available in the Poland Chapter of the International Comparative Legal Guide to Public Procurement 2015, by Aleksandra Matwiejko-Demusiak and Jarosław Kruk, available [here](#), as well as in the Legal Protection Measures under Public Procurement Law Practical Guidebook, available [here](#).

³² In Estonia, a state fee shall be paid in the event of submission of an appeal and an application for compensation of loss to the Appeals Committee. More information is available in the Summary of answers given to survey on remedies, published by the Public Procurement Network, in 2012, available [here](#).

³³ In Lithuania the flat fee for submitting a complaint is LTL 1000 (approx. EUR 290); this is not returned to complainants. Ibid.

³⁴ In Hungary, complaints are subject to the payment of an administrative service fee of 1% of the estimated value of the contract, but not more than HUF 25,000,000 (approx. EUR 82,030). However, if an infringement of public procurement legislation is found, the part of the administrative service fee paid exceeding HUF 200,000 (ca. EUR 656) shall be refunded to the applicant. Ibid.

³⁵ In Denmark, the fee of DKK 10,000 (approx. EUR 1,344) that must accompany a complaint shall be refunded not only when the competent authority rules wholly or partly in favor of the complainant, but also if a complaint is dismissed. Ibid.

³⁶ In Malta, the automatic fee may be refunded if the complaint is upheld. Ibid.

³⁷ In Slovakia, the fee is charged if the complaint has been without grounds only. Ibid.

³⁸ In the Czech Republic, on filing the complaint, the petitioner shall pay to the bank account of the Office a deposit amounting to 1% of the petitioner's tender price, however, not less than CZK 50,000 (approx. EUR 2,000) and not more than CZK 2,000,000 (approx. EUR 80,000). This deposit shall be refunded to the successful petitioner, together with interest accrued.

³⁹ Iulia Vass, Dissertation for degree of Master of Laws (LLM) *HIGH REMEDIES COSTS IN CEE MEMBER STATES: ASSESSMENT OF COMPLIANCE WITH THE EU LEGISLATION AND THE NEED FOR REFORM*, The University of Nottingham School of Law, LLM in in Public Procurement Law and Policy, September 2015.

6.5 Increasing transparency by providing sufficient information

- 6.5.1** Economic operators often file a bid protest because there is a perception of bias. Furthermore, it is often the case that a bidder simply does not know if the procurement process was conducted in line with the applicable public procurement rules based on the information disclosed by the contracting authority. This inadequate information and distrust is often a reason why a decision or action of the contracting authority is challenged. However, the likeliness of a bid protest could be reduced if the contracting authority provided sufficient information.
- 6.5.2** To this end, unsuccessful contractors must be informed straightforwardly, thoroughly and understandably why they were excluded from a tender procedure or why they lost a contract. This is why the EU PPD require that even the decision issued by the procuring entity (e.g. the award decision) must include detailed information. Typically the letters to unsuccessful bidders must include (i) the award criteria, (ii) the name of the successful bidder(s), (iii) the score of the recipient, (iv) the score of the successful bidder(s), (v) details of the reason for the decision, including the characteristics and relative advantages of the successful tender; and (vi) confirmation of the date before which the contracting authority will not enter into the contract or framework agreement (i.e., the date after the end of the standstill period).
- 6.5.3** In any event, contracting authorities should not misuse aspects of confidentiality and non-disclosure of business secrets in order not to inform economic operators why they were excluded from a tender procedure or why they lost a contract.
- 6.5.4** Economic operators must also have access to the procurement file in case of a bid protest. Access to the records is particularly important for the verification of the compliance of submitted requests for participation/bids of competitors with tender documents; and the application by the contracting authority of a non-discriminatory approach when examining the different requests for participation/bids.

Therefore, the prohibition of access (to certain records) is principally only justified for the protection of trade and business secrets (principle of proportionality). A protestor is thus generally entitled to inspect and comment on the evidence and observations submitted to the review bodies. A restriction of the protestors' access to the procurement file is only allowed insofar as necessary to protect the business secrets of the protestors' competitors.

6.6 Request for reconsideration

- 6.6.1** Different jurisdictions allow or require that an economic operator presents an application for reconsideration to the contracting authority before turning to an independent review body. This request for reconsideration allows the contracting authority to correct a defective procedure (e.g. to modify a specification in the tender document). Typically, a request for clarification is not available when the contract has already entered into force.

A request for reconsideration could therefore facilitate a swift and simple remedy on the level of the procuring entity and avoid burdening a court or special public procurement review body. Only if an applicant is dissatisfied with the decision of the procuring entity (i.e. not to reconsider), would it thereafter commence proceedings before the independent body.

- 6.6.2** A request for reconsideration may thus often help to remedy an (unintentional) error of which the contracting authority was not aware. Experience in other EU countries, however, shows that contracting authorities sometimes ignore a request for reconsideration and are sometimes hesitant to change their own decisions.

6.6.3 Especially given Romania's status as an EU Member State it is essential to note that a mandatory application for review to a conciliation commission – before turning to an independent body – was held to be in breach of EU public procurement law in one EU Member County. In 2012 the Austrian Highest Administrative Court decided that an application for review to a conciliation commission can only be provided for as an option for economic operators, and not a mandatory step in the challenge process. In this respect, the Austrian court referred to two cases of the ECJ, C-410/01, Fritsch, Chiari & Partner and C-230/02, Grossmann Air Service, whereas in the case ECJ, C-410/01 it was held that it is the *“inevitable conclusion [...] that making access to the review procedures provided for by Directive 89/665 [the “old” public procurement remedies directive] conditional on prior application to a conciliation commission [...] is contrary to that directive’s objective of speed and effectiveness.*⁴⁰

6.6.4 Importantly, it is the EU RD, however, that explicitly foresees the possibility that EU Member States implement a request for reconsideration to the contracting authority before turning to an independent review body. In this respect, article 1(5) Directive 2007/66/EC explicitly sets forth the following *“Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.”*⁴¹

6.6.5 Therefore, only the mandatory application for review to a conciliation commission but not the mandatory application for review to the contracting authority seems to violate EU public procurement law; a request for reconsideration to the contracting authority, in the view of the author, is thus permitted from an EU legal perspective.

6.7 Decisions or actions of the contracting authority subject to challenges

6.7.1 Different jurisdictions sometimes distinguish between decisions and actions of the contracting authority subject to review. Typically, an economic operator may apply for review of any decision taken by the contracting authority in the procurement process. However, some jurisdictions introduced a system of contestable and non-contestable decisions, including a preclusive effect: To this end, only certain decisions of a procuring entity may be challenged (e.g. the tender documents; the non-admittance to second stage of a tender procedure; the award decision or the cancellation notice). Some decisions cannot be separately challenged but need to be challenged with the next separately contestable decision (e.g. the decision to extend the deadline for bid submission could not be separately contested). This is, for instance, the case in Austria. The Austrian public procurement law defines contestable decisions of a contracting authority depending on the type of procurement procedures. For instance

- in case of an open procedure, the following decisions are subject to challenge: the tender documents, other specific determinations during the time before the bidding deadline; the decision to exclude a bidder; the decision to cancel a tender procedure; and the award decision.⁴²

⁴⁰ In this case the ECJ also decided the following: *“In the light of the above, the answer to be given to the questions referred for a preliminary ruling is that Article 1(3) of Directive 89/665 precludes an undertaking which has participated in a public procurement procedure from being considered as having lost its interest in obtaining that contract on the ground that, before bringing a review procedure under that directive, it failed to apply to a conciliation commission, such as the B-VKK established by the BVergG.”*

⁴¹ The EU RD with respect to a request for reconsideration also require that the *“Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review [...]”* and that the suspension *“[...] shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.”*

⁴² See article 2 (16) lit a), sub. lit aa) of the Austrian public procurement law.

- in case of a negotiated procedure with prior publication, the following decisions are subject to challenge: the tender documents (the call to submit a request for participation); the non-admittance for participation; the call to submit a bid; other specific determinations during the negotiation phase, or during the bidding decision; the decision to exclude a bidder; the decision to cancel a tender procedure; and the award decision.⁴³

This concept of contestable vs. non-contestable decisions is then linked with the concept of preclusive effect. Preclusive effect means that a certain decision by a contracting authority can only be challenged by a certain deadline. In the event that such decision is not successfully challenged, it is deemed effective and becomes final and absolute; any not successfully challenged defect "heals". The most common example in this respect is that an economic operator cannot (successfully) argue that an award decision is unlawful because it is based on unlawful tender documents. In this case it would have been necessary to challenge the tender documents in the first place. If, for instance, a requirement in the tender document (for instance minimum criteria) is discriminatory or not justified it still needs to be applied by the contracting authority in the event that it was not (successfully) challenged) and thus declared unlawful by the independent review body.

- 6.7.2** Importantly, it must be clear for economic operators which decisions of the contracting authorities can be challenged and which decisions not. Practical experience in several jurisdictions shows that it is, for instance, not always clear if a response to a request for clarification submitted by an economic operator (i.e. a clarification issued by the contracting authority) is subject to review. Practical experience in several jurisdictions also shows that it is not always clear if a perceived error regarding the tender document can still be invoked after the deadline for challenging the tender documents, in particular at the stage of the award decision.

Furthermore, it is often unclear how to deal with the failure of the procuring entity to issue a decision, e.g. if the failure to issue an award decision or to cancel the tender procedure can be challenged as well.

- 6.7.3** A clear definition of decisions taken by the contracting authority in the procurement process which are subject to review increases predictability and the likelihood of fewer bid protests.

It is also likely that an economic operator will refrain from challenging a decision that excludes it from a tender procedure or awards the contract to another operator if this decision is based on tender documents and if this economic operator understands that it would have been necessary to (successfully) challenge the tender documents in due time in the first place.

- 6.7.4** The introduction of the idea of contestable and non-contestable decisions in connection with a preclusive effect seems to be an appropriate tool to keep the number of bid protest at a reasonable level, as the case of Austria demonstrates.

6.8 Need for a timely resolution of procurement disputes

- 6.8.1** Bid protests must be decided in a timely fashion. The reason for this is the need to limit disruption of the procurement process as well as to preserve the interest of economic operators. Bid protests typically trigger a stay of the tender procedure, i.e., the challenged tender procedure is suspended until the review body decides on the case. Suspension might be granted automatically or upon request of the protestor. To this end, it is important that the review body decides in a timely fashion since the stay typically ends because the review body has dismissed the case (the stay also ends if the protestor has withdrawn the protest).

⁴³ See article 2 (16) lit a), sub. lit dd) of the Austrian public procurement law.

If a protest is sustained, the corrective action will generally delay the progress of the procurement considerably since the contracting authority is required to re-do at least a part of the procurement procedure (e.g. if tender documents must be modified or an award decision must be re-issued).

6.8.2 The EU RD does not require EU Member States to decide bid protests within a certain deadline. However, remedies must be rapid. A comparison of different EU Member States shows that most of the review bodies give their decisions after between one and three months.⁴⁴ Romania is particularly rapid when it comes to deciding bid protests: in Romania decisions issued by the NCSC are given after 20 days, with the possibility of a 10-day extension. Courts take in average between one and three months to solve complaints and challenges.

6.8.3 According to case law in different EU Member States, a diligent contracting authority must always take a delay caused by (possible) bid protests into account when scheduling a procurement procedure. This will typically require the contracting authority to allow for one or two challenges during a tender procedure (e.g. a review procedure regarding tender documents and a review procedure regarding the award decision). If review bodies are, for instance, required to decide on a bid protest within 30 days, this will typically require the contracting authority to calculate a delay of at least 30 to 60 days when setting up the timetable for a particular tender procedure.

6.9 Predictability of case law

6.9.1 Decided bid protests must typically be published. The publication of case law has various advantages, particularly, that decisions bring guidance to contracting authorities and economic operators as well as attorneys representing these parties.

6.9.2 Importantly, the case law of public procurement review bodies typically leads to predictability. A bidder – sometimes represented by a specialized attorney – who follows bid protest decisions knows how a review body will decide on a particular issue. This predictability may have an impact on the number of challenges: The number of bid protests may be reduced if bidders know the likelihood of the outcome of a complaint; if a bidder knows that it is rather unlikely to win a bid protest based on settled case law – and this bidder has to bear the costs associated with bid protests – then it is also rather unlikely that this bidder will still decide to file a bid protest.

6.9.3 In this respect, the existence of uniform jurisprudence is essential. This is true within any individual review body but also between different review bodies (e.g. if there is both a specialized public procurement review body and a court). To this end, review bodies/courts often adopt internal regulations to ensure consistency between panels.

6.9.4 Practical experience shows that in the case of divergent case law, bidders often make an attempt and challenge a decision of a contracting authority; their aim is to “try” and see if the bid protest is sustained.

6.9.5 Another important aspect with respect to the predictability of case law is the training of relevant staff at the level of the review body. In the case of courts which do not exclusively deal with public procurement issues, good practice suggests the establishment of specialized panels for public procurement.

6.9.6 Predictability of case law in public procurement is therefore an essential tool to keep the number of bid protests at a reasonable level.

⁴⁴ COMMISSION STAFF WORKING DOCUMENT - Annual Public Procurement Implementation Review 2012, Brussels, 9.10.2012 SWD(2012) 342 final, that can be downloaded [here](#).

6.10 Fighting corruption

- 6.10.1** Various studies suggest that inefficient public procurement processes as well as corruption in public procurement may potentially lead to an average of 10-25% in losses of a public contract's value. The volume and complexity of any particular procurement process play an important role when it comes to inefficiencies and corruption in the public procurement process. Larger procurement processes are often most vulnerable, as bribes are frequently demanded and paid as a percentage of the public contract's value.
- 6.10.2** Importantly, audits, surveys and studies relating to Romania indicate that "*the Romanian national public procurement system is hampered by numerous irregularities, conflicts of interest and high corruption risk.*"⁴⁵ Various studies suggest that inefficient public procurement processes as well as corruption in public procurement may potentially lead to an average of 10-25% in losses of a public contract's value. Applying this percentage to the total amount of government spending on public contracts in Romania⁴⁶, it is clear that hundreds of millions of Euros are lost to inefficiencies and corruption in public procurement every year in Romania alone.
- 6.10.3** Bid protests are an important instrument to achieve integrity in public procurement and thus to fight corruption in public procurement. It is generally known that one of the fundamental obstacles in combating fraud and corruption in public procurement is the sheer difficulty of detecting wrongdoings. Moreover, corruption in public procurement is particularly characterized by its clandestine nature.

Bid protests often help to uncover corruption in public procurement, e.g. by addressing technical specifications or minimum criteria tailored to a particular bidder in return for a bribe; or a direct award without any transparency of competition in return for a bribe, etc.⁴⁷ This is why Article 9(1)(d) of UNCAC requires that an appropriate system of procurement include an "*effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established*" in article 9(1) of UNCAC are not followed.

The fight against corruption in public procurement is therefore an essential tool to keep the number of bid protests at a reasonable level.

⁴⁵ See European Commission, COM(2014) 38 final.

⁴⁶ Public procurement in Romania amounts to approximately EUR 17 billion per year.

⁴⁷ See UNCAC, Guidebook on anti-corruption in public procurement and the management of public finances: Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption available here.

7. Comments on the Romanian draft remedies law and its potential to reduce the number of bid protests

7.1 Introduction

7.1.1 The below includes selected issues (i.e. a non-exhaustive list of issues) in the Draft-RL and comments on its potential to reduce the number of bid protests. In this respect, it has to be stressed that the review of the Draft-RL was undertaken from an international public procurement perspective only. Sections of the Draft-RL which do not relate to the potential reduction of bid protests – e.g. chapter V, Section 1 on the Organization and Operation of NCSC as well as chapter IV on means of appeal against decisions of NCSC – are in principle not included in this report. Importantly, the below basically does not include any assessment of whether or not the Draft-RL, including its provisions, are in line with applicable Romanian law. Furthermore, it must be stressed that the below review of selected issues is based on an English translation of the Draft-RL; therefore, it is likely that some aspects have been “lost in translation”.

7.1.2 Importantly, as explained in detail above, the high number of bid protests in Romania and particularly the high rate of successful bid protests (around 35%) indicate systematic vulnerabilities of the public procurement system in Romania. Therefore, a holistic approach in order to mitigate the number of bid protests is suggested. As mentioned, many of the instruments explained above need to be addressed outside the remedies system (e.g. rebalancing resources across the procurement workforce or the standardization of procurement processes). Therefore, the below concentrates on selected tools included in the Draft-RL, which have the potential to reduce the number of bid protests.

7.2 Scope of application of the Draft-RL

7.2.1 According to the Draft-RL, the Draft-RL “*regulates the means of appeal and the settlement procedure thereof, through administrative-jurisdictional or judicial proceedings, with regard to the awarding of public procurement an concessions contracts though a procedure stipulated in the related legislation, and also the organization and operation of*” NCSC.

7.2.2 It is suggested to clarify the scope of application of the Draft-RL, in particular, the meaning of “with regard to the awarding of public procurement”. This might, arguably, need to be addressed in the related public procurement legislation, i.e. not the Draft-RL.

Importantly, it should be made clear that (illegal) direct awards as well as the establishment of framework agreements (as well as the call-off from a framework agreement) are also subject to review (one might argue that these do not fall under the concept of “awarding of public procurement”). It should be guaranteed that an alleged illegal direct award – e.g. a direct award to a company with a volume above the statutory thresholds for direct awards (e.g. a direct award of EUR 190,000 for a supply contract) as well as an (alleged) illegal negotiated procedures with only one bidder without prior publication are subject to review according to the Draft-RL. Otherwise, there is the risk that contracting authorities and/or economic operators exploit a legal gap. Economic operators must have the right to ask for efficient review of an (intended) direct award or (intendent) negotiated procedure with only one bidder without prior publication.

7.2.3 Furthermore, it should be clarified if tender procedures below the EU-thresholds are also subject to review according to the Draft-RL (e.g. do “simplified procedures” also fall under the scope of the Draft-RL.). This is particularly important since – as statistics indicate –the number of procurement procedures below EU threshold is particularly high and, aggregated, constitute a major portion of the entire public procurement volume in Romania.

7.3 Decisions or actions of the contracting authority subject to challenges

7.3.1 According to the Draft-RL, any decisions or actions or failure to take an action by the contracting authority may be subject to a challenge. The definition of an “act of the Contracting Authority” (art. 3(1)c) of the Draft-RL) that can be challenged by aggrieved bidders is very general: “*any administrative act or administrative operation that generates or is likely to generate legal effects, the failure to observe an obligation stipulated by the relevant legislation within the legal time-limit, the omission or refusal to issue an act or to conduct an operation, in relation to or within the awarding procedure*”.

In this respect, the legislator might consider specifying which decisions can be subject to a challenge. This approach is, for instance, applied in Austria (see item 6.7 above). For example, it would be important to clarify whether bidders should file complaints against a request for clarification considered abusive, e.g. going beyond the tender documentation, or should simply wait for the communication regarding the result of the procedure (in such a case, the complaint might be considered late and rejected *de plano*). Such clarification is essential, in light of the divergent case law on the possibility for filing complaints against requests for clarifications issued by contracting authorities: in some cases,⁴⁸ the NCSC has ruled that a bidder is obliged to answer the request for clarification despite the fact that the bidder filed a complaint against the respective request, while in other cases⁴⁹ the NCSC has ruled that the bidder is bound by the obligation to answer the request for clarification only to the extent that the bidder does not file a complaint against it.

7.4 Fees for filing a bid protest

7.4.1 Fees for procedures before the NCSC

7.4.1.1 The Draft-RL removed the provisions on the GCG with respect to the NCSC. The Draft-RL explicitly stipulates that “*Complaints submitted through administrative-jurisdictional proceedings shall be free of charge*”.⁵⁰

Therefore, and compared to the current situation with respect to the GCG, economic operators would not have the obligation to submit the GCG together with the complaint under the Draft-RL. Moreover, the bid protest filed with the NCSC would be basically free of charge.⁵¹ With respect to the criticized GCG, see items 2.8 and 4.3 above.

7.4.2 As mentioned above, EU public procurement law imposes no obligation on the EU Member States to require economic operators to pay a fee in order that a bid protest is heard by an independent body. By removing the obligation to pay the GCG, Romania is in line with other EU Member States that do not require a fee to be paid by protestors. As also mentioned, some other EU Member States impose (reasonable) legal fees for protestors.

7.4.3 Fees for procedures before a court

7.4.3.1 Types of court fees

⁴⁸ E.g. NCSC Decision no. 3656/C8/3396,4046 as of 11.10.2013.

⁴⁹ E.g. NCSC Decision published in BO2013_0368.

⁵⁰ Art. 10(4) of the Draft-RL.

⁵¹ The protestor, for instance, would, however, need to cover costs for an attorney, if any.

The Draft-RL introduced different court fees (as noted above, economic operators have the right to file a protest with the NCSC or a court). Hence, economic operators that turn to the court – instead of the NCSC – would be required to pay a fee. In total, the Draft-RL suggests introducing several types of court fees:

- *Stamp duty for filing complaints with a court of law (not with the NCSC):*⁵² the value of the stamp duty is 450 RON for applications that cannot be assessed in monetary terms, while the ones that can be assessed in monetary terms shall be calculated as follows:
 - up to RON 450,000 inclusively - 2% of the contract value;
 - between RON 450,001 and RON 4,500,000 inclusively - RON 9,000 + 0.2% of what exceeds RON 450,001;
 - between RON 4,500,001 and RON 45,000,000 inclusively - RON 18,000 + 0.02% of what exceeds RON 4,500,001;
 - between RON 45,000,001 and RON 450,000,000 inclusively - RON 27,000 + 0.002% of what exceeds RON 42,000,001;
 - between RON 450,000,001 and RON 4,500,000,000 inclusively - RON 36,000 + 0.0002% of what exceeds RON 450,000,001;
 - more than RON 4,500,000,001 - RON 45,000 + 0.00002% of anything that exceeds RON 4,500,000,001;
- *Stamp duty for filing challenges against the NCSC or court decisions at the courts of law:*⁵³ the stamp duty is 50% of the stamp duty stipulated for filing complaints in a court of law; petitions filed by contracting authorities are exempt from payment of the stamp duty;
- *Bond for interim measures requested before courts of law: both during judicial finding on complaints and during appeals filed against council and court decisions*⁵⁴: the bond will have to be established by economic operators when requesting the suspension of the award procedure and/or performance of the contract; its value is 2% of the estimated value of the contract, but not more than EUR 50,000 for products/services contracts and EUR 200,000 for works contracts; the bond shall be returned when the suspension request is rejected and, if upheld, only if the contracting authority does not request payment of compensation within 30 days after the petition is settled by final ruling or after cessation of suspension effects.

7.4.3.2 Do the court fees violate EU procurement law?⁵⁵

As the GCG was already found (partly) non-constitutional and the EU underlined with respect to the GCG that “*the measure could be held to be disproportionate and go beyond what is necessary to achieve the proposed objective, namely to limit the abusive complaints*”, it is suggested that it be compared to the suggested court fee according to the Draft-RL from an EU public procurement law perspective (as well as from a Romanian constitutional perspective).⁵⁶

⁵² Art. 49 of the Draft-RL.

⁵³ Art. 33 and art. 49(4) of the Draft-RL.

⁵⁴ Art. 30 and art. 46(3) of the Draft-RL.

⁵⁵ Iulia Vass, Dissertation for degree of Master of Laws (LLM) *HIGH REMEDIES COSTS IN CEE MEMBER STATES: ASSESSMENT OF COMPLIANCE WITH THE EU LEGISLATION AND THE NEED FOR REFORM*, The University of Nottingham School of Law, LLM in in Public Procurement Law and Policy, September 2015.

⁵⁶ Iulia Vass, Dissertation for degree of Master of Laws (LLM) *HIGH REMEDIES COSTS IN CEE MEMBER STATES: ASSESSMENT OF COMPLIANCE WITH THE EU LEGISLATION AND THE NEED FOR REFORM*, The University of Nottingham School of Law, LLM in in Public Procurement Law and Policy, September 2015.

Art. 1 of the EU-RD lays down three of the most important principles that national remedies systems must strictly comply with: the principle of effectiveness⁵⁷, the principle of free access to remedies⁵⁸ and the principle of comparability⁵⁹; furthermore, it is important to guarantee that such court fees comply with the EU PPD that aim to facilitate the participation of SMEs in public procurement (see particularly ECJ case law *Fabricom*⁶⁰, *Francovich*⁶¹, *Combinatie Spijker*⁶², *Telaustria*⁶³, *Varec*⁶⁴, and *SECAP*⁶⁵).

As underlined in the ECJ case *Fabricom*⁶⁶, EU Member States shall ensure that the review procedures are available to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. Hence it can be argued that, under EU law, high litigation costs may infringe these principles, as the remedies are not practically available to those lacking the necessary financial resources. As the EU underlined, “*from the point of view of an aggrieved bidder, a review system may be considered attractive if it delivers quality judgments quickly and at a low cost*” (emphasis added).⁶⁷

It is, in the view of the author, not entirely clear if the principle of effectiveness and access to justice is infringed by the court fees for filing complaints suggested according to the Draft-RD, as protesters do have the possibility to file complaints at the NCSC free of charge. On the one hand, economic operators would have free access to administrative jurisdictional remedies in public procurement. On the other hand, it might be argued that access to court is limited by the extremely high court fees. The test proposed by the advocate general *Jaaskinen*⁶⁸ seems to be particularly relevant in this respect: “*Council Directive 89/665/EEC of 21 December 1989 [...], interpreted in the light of Article 47 of the Charter of Fundamental Rights of the European Union and the principles of equivalence and effectiveness, does not preclude provisions of national law which set out a scale of standard court fees applicable only in administrative proceedings relating to public procurement provided that the level of the court fee does not constitute a barrier to the access to a court or render exercise of public procurement judicial review rights excessively difficult*” (emphasis added). In light of this opinion, it might be argued that the level of the court fees does actually constitute a barrier to the access to courts and render exercise of public procurement judicial review rights excessively difficult, in the case that an aggrieved bidder has plausible reasons not to file the complaint with the NCSC.

Moreover, it could be argued that the court fees violate the principle of comparability, since court fees for public procurement disputes are much higher than the court fees for filing complaints against any other administrative acts or measures (e.g. maximum 300 RON for filing a complaint against an administrative act⁶⁹ and 100 RON for filing the appeal⁷⁰).

⁵⁷ Art. 1(1) of Directives 89/665/CEE and 92/13/CEE (EU-RD).

⁵⁸ Art. 1(3) of Directives 89/665/CEE and 92/13/CEE (EU-RD).

⁵⁹ Art. 1(2) of Directives 89/665/CEE and 92/13/CEE (EU-RD).

⁶⁰ Joined Cases C-21/03 and C-34/03, *Fabricom v État Belge* [2005] ECR I-1559.

⁶¹ Cases C-6/90 and C-9/90, *Francovich and Bonfazi v Italy* [1991] ECR I-5357.

⁶² Case C-568/08, *Combinatie Spijker Infrabouw v Provincie Drenthe* [2010] ECR I-12655.

⁶³ Case C-324/98, *Telaustria Verlags GmbH v Telekom Austria* [2000] E.C.R. I-10745.

⁶⁴ Case C-450/06 *Varec SA v Belgium* [2008] ECR I-581.

⁶⁵ Joined Cases C-147/06 and C-148/06, *SECAP and Santorso v Comune di Torino (“SECAP”)* [2008] ECRI-3565.

⁶⁶ Joined Cases C-21/03 and C-34/03, *Fabricom v État Belge* [2005] ECR I-1559.

⁶⁷ COMMISSION STAFF WORKING DOCUMENT - Annual Public Procurement Implementation Review 2012, Brussels, 9.10.2012 SWD(2012) 342 final, that can be downloaded [here](#).

⁶⁸ See Opinion of advocate general in ECJ C-61/14 *Jaaskinen*.

⁶⁹ Art. 17 para. (2) of Law no.554/2004 and art. 16 of GEO no. 80/2013.

⁷⁰ Art. 17 para. (2) of Law no. 554/2004 and art. 24 para. (2) of GEO no. 80/2013.

We are not in a position to pass definitive judgment in this respect, particularly, in the light of the pending complaint with respect to the GCG before the ECJ, as well as with several cases pending on court fees. However, in light of the case ECJ C-61/14⁷¹ issued in October 2015 according to which “court fees to be paid for bringing an action in administrative proceedings relating to public procurement, which do not exceed 2% of the value of the contract concerned” are in line with EU public procurement law, it seems not unlikely that the court fees according to the Draft-RL are in line with EU public procurement law (and this despite case ECJ C-61/14 refers to administrative proceedings and not “civil court” proceedings).

7.4.3.3 *Do the court fees violate Romanian law?*

As mentioned above, the review of the Draft-RL was undertaken from international public procurement perspective only. However, the following may be noted as a comment:

According to art. 21(4) of the Romanian Constitution, administrative special jurisdictions are optional and free of charge. It follows from the Draft-RL that the special jurisdiction of the NCSC is facultative, as the Draft-RL stipulates *expressis verbis* that aggrieved bidders may also bring proceedings before a court. The remedy proceedings before the NCSC, according to the Draft-RL, are free of charge, as there is no fee or guarantee that needs to be paid/established for filing complaints.

It might be argued, however, that the (high) court fees imposed for bringing proceedings before the court infringe the free access to justice right provided for by art. 21(1) of the Romanian Constitution. According to this provision, “every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests”. It might be argued that the Draft-RL’s provisions on remedies pursued before the court restrict the exercise of this right through (high) court fees imposed on aggrieved bidders.

However, such interpretation is, in the view of the author, unlikely to be upheld by the Constitutional Court of Romania, in light of its Decision no. 5/2015 regarding the GCG. In this case, the court ruled that the obligation to deposit the GCG complies with art. 21 para. (1) and (2) of the Romanian Constitution, given that free access to justice means that any person may refer to the courts if they believe their rights, freedoms or legitimate interests have been violated, not that this access cannot be subject to any conditions. According to the Constitutional Court, the legislator has the power to determine the rules of conduct before the courts in light of the constitutional provisions contained in art. 126 para. (2), according to which “*jurisdiction of the courts and legal proceedings are provided only by law*”. The Court thus concluded that the provisions establishing the obligation to file the complaint together with the GCG regulate the specific procedural rules on public procurement remedies, without being regarded as a restriction of the right of access to justice. This Decision is in line with the previous case law of the Constitutional Court on various court fees, in which it consistently underlined that justice does not have to be free of charge.⁷²

7.4.3.4 *Differences between the GCG and the court fees for filing complaints*

The most important differences between the GCG and the court fees for filing complaints are as follows:

⁷¹ ECJ C-61/14 *Orizzonte Salute*.

⁷² See Decision no. 722/2011 on the exception of unconstitutionality of art. 3 letter a) of Law no. 146/1997 on judicial stamp duties; Decision no. 1072/2010 on the exception of unconstitutionality of Law no. 146/1997 on judicial stamp duties; Decision no. 109/2011 on the exception of unconstitutionality of Law no. 146/1997 on judicial stamp duties.

- the *court* fee shall be paid only for filing complaints with the court, while the complaint filed with the NCSC is free of charge;
- the costs of the court fee for filing complaints is higher than the value of the GCG; while the value of the GCG is 1% of the estimated value of the contract (with cap fees established at EUR 25,000 for products and services and at EUR 100,000 for works), the value of the court fee starts from 2% of the contract value and, depending on the estimated value of the contract, it can be higher than EUR 100,000 for any type of contracts (e.g. for contracts above EUR 1 billion);
- the court fee shall not be automatically returned to the economic operator if the complaint is successful, but it can be requested that it be paid by the contracting authority as legal costs; however, if the complaint is only partially upheld, the reimbursement shall merely be proportionate; the GCG is automatically returned if the complaint is totally or partially upheld and, in light of the Constitutional Court Decision, even when the complaint is rejected or withdrawn;
- for the GCG, guarantee instruments issued by banking or insurance companies may be used; the court fee must be effectively paid upon the submission of the complaint or by the deadline imposed by the court; nevertheless, for the court fee there are certain facilities available depending upon the economic situation of the claimant⁷³ (e.g. instalment payments/diminished fee); and
- whilst the GCG, if retained, shall be part of the budget of the contracting authority, the court fee remains part of the State's budget.

7.4.3.5 *Amount of court fees compared to status quo*

Furthermore, it must be mentioned that the court fees to be paid for filing challenges against both NCSC and court decisions according to the Draft-RL, as described above, are considerably higher than the fees set out by the legislation currently in force.⁷⁴

7.4.4 *Unclear provision as to assessment in monetary terms*

While the Romanian High Court has decided that challenges filed against council decisions cannot be assessed in monetary terms, art. 49 of the Draft-RL remains very unclear on which complaints and challenges can be assessed in monetary terms and which not.

Moreover, it is important to underline that, while the costs for the GCG are to be paid only once (when filing the complaint), the court fees must be paid both for filing the complaint with a court (art. 49 of the DRL) and for filing the challenge (50% of the fees provided for by art. 49 of the DRL).

7.4.5 *Bond for interim measures as a new concept under Romanian public procurement law*

It must be stressed that the bond for interim measures would be a new concept under Romanian public procurement law.

⁷³ Art. 49(6) of the Draft-RL.

⁷⁴ 2 RON; see art. 287¹⁷ GEO and the High Court Decision no. 2/2015.

Economic operators would be required to bear the costs for this bond (that can be deposited in cash, as financial instruments or as a guarantee) when requesting the suspension of the awarding procedure and/or performance of the contract both during judicial settlement of complaints and during settlement of challenges filed against court or NCSC decisions (not when filing the complaint with the NCSC). The legal framework currently in force provides for no similar costs for interim measures.

7.4.6 Unlikelihood that complaints are filed with the court

7.4.6.1 Due to the fact that under the Draft-RL bid protests filed with the NCSC do not involve a fee, whereas, in contrast, bid protests filed with the court involve considerable fees it is, in the view of the author, rather unlikely that aggrieved bidders will turn to the court for dispute resolution.

7.4.6.2 If this assumption is true, it is likely that courts will not issue many decisions in the area of public procurement law. This could be an important factor when trying to ensure uniform case law between the NCSC and the court of first instance.

7.5 Request for reconsideration

7.5.1 The Draft-RL provides for a mandatory request for reconsideration with the contracting authority.⁷⁵ An economic operator will thus be required to present an application for reconsideration to the contracting authority before turning to an independent review body.

7.5.2 It is argued that such a mandatory request for reconsideration could be a positive tool for reducing the number of complaints in Romania. However, this will require the contracting authority to be willing to and to be capable of correcting a defective procedure (e.g. modify a specification in the tender document). Contracting authorities acting in good faith will likely be willing to remedy alleged infringements in a swift and simple manner. This could make complaints to the NCSC or judicial procedures for settling complaints unnecessary. However, if the contracting authority is not willing or not capable of correcting a defective procedure (e.g. just ignores a request for reconsideration) then these will lead to a delay in the procurement process.

7.5.3 Article 6 and 7 of the Draft-RL could be further clarified as follows:

- Are the deadlines in Art 6 Draft-RL in line with the deadlines for filing a complaint? Must applications for reconsideration of the tender documents be submitted prior to the deadline for presenting submissions?
- Art 6(9) is not entirely clear, in particular whether contracting authorities have the obligation to both publish both the measures in SEAP and to communicate them to the involved bidders as well.
- It should be discussed whether, if the application is to be dismissed, the procuring entity shall in addition advise the applicant of the reasons for its decision;

7.5.4 Furthermore, it should be made clear that a request for reconsideration made to the contracting authority does not involve any fee to be paid by the applicant.

7.6 Right to access information

⁷⁵ Art. 6 and 7 of the Draft-RL.

- 7.6.1** Article 10(5)-(6) of the Draft-RL grants economic operators the right to access certain procedural documents. Furthermore, this article includes pecuniary sanctions if the contracting authority does not provide this information.

It is considered that this provision will have positive effects with respect to a potential reduction of bid protestors. It is not unlikely that the number of complaints will be diminished by the right of bidders to access certain procedural documents (the report on the awarding procedure and the non-confidential information from technical and financial proposals) before filing a prior notification or complaint.⁷⁶ Thus, this measure is positive progress, as some bidders file unsubstantiated complaints, simply with the expectation that they will discover irregularities/non-conformities of the winning tender within the procurement procedure documentation that can be accessed before the NCSC (e.g. unjustified abnormally low prices).

However, with respect to the pecuniary sanctions under 10(6) of the Draft-RL, it is not entirely clear why this sanction relates to the failure to give access to the report of the awarding procedure only, but not also to other documents in the procurement file (e.g. the technical/financial proposals).

- 7.6.2** According to Article 20(3) of the Draft-RL, all additional complaint grounds presented by the parties through written or verbal conclusions or any additional clarifications regarding the complaint submitted after the legal time-limit for submission shall be rejected. This provision is likely intended to clarify the divergent case law on the issue of additional reasons invoked by bidders upon analyzing the public procurement file before the NCSC, in accordance with article 274 para. (4) GEO. In some cases, these additional reasons submitted by way of written conclusions were rejected as late or inadmissible,⁷⁷ while in other cases, such reasons were deemed admissible, having been ruled upon on their merits by the council and/or the courts.⁷⁸

In this respect it is not entirely clear why protestors should be prohibited from clarifying arguments included in the bid protest. Typically, a protestor will wait for the answer to the complaint and then submit a further written brief responding to the contracting authority's answer.

The success of the provision regarding access to documents according to Article 20 of the Draft-RL seems also to be limited by the general right of bidders to declare their technical/financial information submitted to the contracting authority to be confidential. It seems that there is no obligation to duly justify/prove the necessity for such a measure as compared to the situation regarding access to documents before the NCSC as stipulated in article 18(1) of the Draft-RL.

7.7 Suspensive effect

- 7.7.1** Article 21 of the Draft-RL regulates the suspension of the tender procedure and stipulates that *"For true and just cause and in order to prevent an imminent loss, upon the request of the interested person, within 3 days of receipt of the request, the Council may decide to suspend the awarding procedure or to enforce any decision made by the Contracting Authority, until the complaint is solved"*.

- 7.7.2** It is not entirely clear from the wording of Article 21 of the Draft-RL if the request for suspensive effect can only be submitted after the bid protest. In particular, it is not clear if it would be permissible to submit the request for suspensive effect together with the bid protest.

⁷⁶ Art. 10(5) and 10(6) of the Draft-RL.

⁷⁷ E.g. NCSC Decision no. 1878/C1/2092 as of 23 June 2014, Bucharest Court of Appeal Decision no. 2320 as of 27 May 2013.

⁷⁸ E.g. NCSC Decision no. 3723/C8/3904, 3928, 2938 as of 17 October 2013, Bucharest Court of Appeal Decision no. 580 as of 11 February 2013.

7.7.3 Article 21 of the Draft-RL does not contain the (minimum) elements of the request for suspensive effect according to article 10 of the Draft-RL. Including explicit language in article 21 or referring to article 10 of the Draft-RL in this respect should be considered.

7.7.4 Importantly, it is not clear from the language of article 21 of the Draft-RL that the contracting authority is prohibited from entering into the contract until the NCSC has decided on the request for suspensive effect. This would allow the contracting authority simply to conclude the contract whenever a bid protest is filed. However, article 9(4) of the Draft-RL indicates that the complaint has automatic suspensive effect on the conclusion of contract until it is settled.

It is understood that the NCSC shall decide on the request for suspension “*within 3 days of receipt of the request*”. Typically, the review body has the obligation to immediately notify the contracting authority about a request for suspensive effect and to prohibit the contracting authority from concluding the contract; cancelling the tender procedure; or opening bids, until the review body has decided on the request for suspensive effect. This is, for instance, the case in Austria. This issue could be addressed.

7.7.5 Furthermore, the deadline for the NCSC to decide on the request for suspension is not entirely clear from article 21 of the Draft-RL.

7.8 Time limits to solve complaints

7.8.1 Article 22 of the Draft-RL stipulates that the NCSC shall decide complaints in principle within 20 days after receipt of the procurement file and of other documents required.

In this respect, it must be noted that Romania is particularly rapid when it comes to deciding on bid protests as compared to other EU Member States.

7.8.2 With respect to article 22 of the Draft-RL, it is not entirely clear what happens if the procurement file (or other required document) is not submitted by the contracting authority at all or if there is delay in the forwarding of the procurement file (or other required document).

Therefore, it is suggested that the time for the decision deadline starts to run on the day the protest was received by the review body.

7.8.3 In this respect it should also be noted that article 17(2) stipulates that “*Subject to the fine stipulated under the art. 19 Para. 5, the Contracting Authority has the obligation to submit to the Council within the time-limit indicated in Para. (1) a copy of the public procurement or concession case file and proof of service to the complainant of its opinion and of any other supporting documents, [...]*”. However, it seems that article 19(5) of the Draft-RL does not include any fine. This issue must be addressed.

7.9 Right of the NCSC to prosecute *ex officio*

7.9.1 Article 23(3) of the Draft-RL stipulates that the NCSC has the obligation to notify ANRMAP if it considers that “*apart from the acts challenged by the complainant, there are other acts that infringe the provision of the public procurement or concession law which were not referred to in the complaint*”.

7.9.2 In this respect, several aspects are not clear. First, the consequences of such notification to ANRMAP are not clear (is the bid protest suspended?). It seems that ANRMAP would be responsible for *ex post* control with the right to apply fines.

Secondly, it is not clear if article 23(3) of the Draft-RL would render a preclusive effect, if any under Romanian procurement law, ineffective. As mentioned, preclusive effect means that a certain decision of a contracting authority can only be challenged by a certain deadline. In the event that such decision is not successfully challenged, it is deemed effective and becomes final and absolute; any defect not successfully challenged "heals". It is thus, for instance, unclear from article 23(3) of the Draft-RL what would happen if NCSC considered a specification in the tender documents to be in breach of public procurement law although the tender documents were not challenged by any economic operator. Arguably, such argument would be rejected *de plano* as being late according to article 8 of the Draft-RL on time limits for filing complaints. However, this is not clear from the language of article 23 of the Draft-RL. This issue could be addressed.

7.10 Measures to speed-up the remedy process

7.10.1 Article 27(4), article 32 and article. 48 of the Draft-RL include various positive procedural measures to accelerate the remedy process.

7.10.2 Specifically, the Draft-RL includes the obligation to send the challenge filed against a decision of the NCSC to the NCSC ⁷⁹ as well (so that the NCSC can immediately send the file to the competent court), and the obligation of the court to adopt a ruling within a maximum of 5 days and to draft the rationale for the ruling within 7 days from its issuing.⁸⁰

7.11 Remedies against illegal direct awards

7.11.1 Direct awards constitute a major departure from the fundamental principles of transparency and competition. This is why the ECJ has called illegal direct awards of contracts "*the most serious breach of Community law in the field of public procurement*"⁸¹. To this end, the EU-RD requires EU Member States to consider a contract resulting from an illegal direct award in principle ineffective.

7.11.2 Under the EU-RD there are three grounds for ineffectiveness:

- where a contract is awarded without prior publication of an OJEU contract notice (in circumstances where prior publication was required);
- where a contract is entered into in breach of the standstill period, automatic injunction or court order depriving the challenger of pre-contractual remedies and where there is also an additional breach of the procurement rules (other than the rules on standstill periods and remedies) which has affected the chances of the challenger winning the contract; and
- where call-off contracts above the relevant EU financial threshold are awarded (without running a standstill period) following a mini-competition under a framework agreement or dynamic purchasing system and where the mini-competition rules (or rules for awarding specific contracts) have been breached.

7.11.3 Article 55-57 of the Draft-RL seem not to clearly transpose the requirements set out in the EU-RD.

⁷⁹ Art. 27(4) of the Draft-RL

⁸⁰ Art. 32 and art. 48 of the Draft-RL

⁸¹ See ECJ C-26/03 *Stadt Halle*.

In particular, article 55 of the Draft-RL includes reasons for (partial) ineffectiveness which seem to be based on EU directive 2014/24/EC (“2014 EU-PPD”), i.e. the new EU public procurement directive.

Various grounds to mandatorily cancel a contract already concluded (arg: “*shall declare*”) arguably seem to be too strict. For instance, according to article 55(2)(d) of the Draft-RL, a contract shall be declared ineffective if the contractor does not comply with “the qualification and selection criteria and/or the evaluation factors”. However, it might be, in exceptional circumstances, that this non-compliance is not substantial within the meaning of ECJ case law. Importantly, it might be that this “non-compliance” would have had no influence on the outcome of the procedure. In the majority of cases, however, non-compliance should lead to *de plano* disqualification from the procedure based on the fundamental principle of equal treatment and transparency.

- 7.11.4 Furthermore, it is not clear if article 56(1)(a) of the Draft-RL refers to the voluntary ex ante transparency according to the EU-RD.
- 7.11.5 Importantly, article 56(1)(b) of the Draft-RL refers to the “award notice” whereas article 56(1)(a) refers to the “contract conclusion”. It is submitted that both references should refer to the “contract conclusion”. This issue could be addressed.
- 7.11.6 Importantly, the Draft-RL should include clear deadlines for challenging (illegal) direct awards and (illegal) negotiated procedures with only one company without prior publication. This should be the case for both scenarios: the scenario when the award has not yet been made but a competitor anticipates an illegal award and the scenario where a contacting authority already entered into an illegal procurement contract.

7.12 The measures on the unification of administrative and jurisdictional practice

- 7.12.1 Article 58-62 of the Draft-RL include various provisions with respect to the unification of administrative and jurisdictional practice. These measures relate to
 - the NCSC’s case law and include: monthly meetings regarding different rulings on similar cases; the possibility for the NCSC plenary to adopt binding decisions on certain issues in order to unify its administrative–jurisdictional practice; the unitary enforcement of the legislation should become an assessment criterion for the NCSC members performance appraisal; and it should be possible for the NCSC plenary to introduce additional measures designed to ensure unitary practice by the NCSC;
 - the courts’ case law and include: quarterly seminars organized by the NCSC with judges and specialists from the National Authority for Public Procurement, the possibility for the NCSC and NAPP to notify the Court of Appeal of Bucharest when they find different approaches in terms of final court rulings for similar cases (so that the High Court of Cassation and Justice may initiate the procedure to rule on matters settled discrepantly by the Courts), as well as to request the court that issued divergent rulings on the same issue to provide an opinion on the predictability of the interpretation of legal provisions.
- 7.12.2 The suggested measures under Article 58-62 of the Draft-RL are likely to contribute to uniform jurisprudence in the area of public procurement in Romania. This predictability may have a direct impact on the number of challenges since the number of bid protests may be reduced if bidders know the likelihood of the outcome of a complaint due to being able to refer to uniform case law from different public procurement review bodies.

In this respect, it should also be noted that certain communication obligations are specified for communication between the NCSC, NPPA and the courts whenever they find solutions that are not unitary. The NCSC also has a legislative initiative right (via NPPA) when it finds deficiencies in the legislation which lead to divergent interpretations and non-unitary practices.

7.12.3 Ultimately, the practical impact of the measures regarding uniformity of case law in the public procurement arena will depend to a large extent on the inter-institutional cooperation and on the good will of all parties involved.

7.13 Other provisions in the Draft-RL which arguably require clarification

7.13.1 Clarification as to who has the right to file a complaint

7.13.1.1 Article 2(1) of the Draft-RL stipulates that “*any person who considers having had any legitimate right or interest harmed by any act of the Contracting Authority, issued in non-observance of the related legal provisions or by failing to solve a request within the legal time-limit*” has the power to file a complaint.

7.13.1.2 It is suggested this language be harmonized with the language of the EU-RD according to which review procedures are available “*to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement*”.

This is also true with respect to article 3(1) of the Draft-RL.

7.13.2 Right of consortia to file a bid protest

7.13.2.1 Article 2 (2) of the Draft-RL stipulates that any member of an association may lodge a complaint. It follows from this provision that it is not necessary that all members of a consortium agree to challenge a decision of the contracting authority.

7.13.2.2 The issue of the power to bring a complaint in the case of a group of economic operators is primarily subject to Romanian law.

In this respect, it should, however, be noted that, for instance, in Austria all members of a consortium must agree to file a complaint. A bid protest filed only by some of the consortium members would be rejected by the review body according to Austrian case law.⁸²

7.13.2.3 However, one could argue that the approach suggested in article 2(2) of the Draft-RL is less bureaucratic, in particular since it might be difficult in practice to obtain a power of attorney when the leader of the consortium is a foreign company and the member of consortium that engages this attorney has its registered seat in Romania.

7.13.3 Relation between the NCSC and the court

7.13.3.1 Article 4(2)-(3) of the Draft-RL stipulates if a complaint “*on the same topic*” is filed with both the NCSC and the court, it is the court that shall be responsible to hear the bid protest. It is also set forth that in this case the protester is not obliged to pay the stamp duty according to article 49(1) and (2).

⁸² See case of the Austrian Highest Administrative Court VwGH 30.6.2004, 2002/04/0011.

7.13.3.2 First, the meaning of “same topic” is not entirely clear in this respect. This could be read as meaning that “same topic” refers to the same challenged decision of the contracting authority. However, it does not seem definite, for instance, that if an economic operator has challenged the tender documents of a given tender procedure before the court, that another economic operator challenging the same tender documents before the NCSC is now referred to the court as well. This provision could therefore (indirectly) limit an economic operator’s right to choose the legal forum for a dispute.

7.13.3.3 Furthermore, an economic operator could try to circumvent having to pay the (high) stamp duty specified by article 49 of the Draft-RL by filing a complaint with the NCSC and the same complaint a few days later with the court. In this case, the court would be responsible to decide the bid protest but the protestor would arguably not be required to pay the stamp duty according to article 49 of the Draft-RL. It is not entirely clear if this is the intention of the Romanian legislator.

In addition, it is not clear what applies if the economic operator which files the complaint with the court does not pay the court fee. As there is no exception from the obligation to send the file from the NCSC to the court, this could be exploited by economic operators who want to go to the court without paying the court fee.

7.13.4 Elements of the complaint

7.13.4.1 Article 10(1) of the Draft-RL stipulates that any “*complainant approach shall indicate a domicile in Romania to deliver information on the settlement of the complaint*”.

First, it could be argued that such a requirement is not necessary since information could easily be distributed by electronic means (e.g. email, fax); see also article 15(5) of the Draft-RL. Furthermore, it could be argued that this requirement (indirectly or directly) discriminates against economic operators with registered business seats outside Romania; this could arguably violate EU (public procurement) law. This issue could be addressed.

7.13.4.2 Typically, a protestor must prove a legitimate interest and prove a threat of damage (arg: “*at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement*”) with respect to a particular tendered contract. Furthermore, typically a protestor must include the decision he is challenging (e.g. the tender documents or the award decision) and furnish particulars to prove that the bid protest was filed within the deadline for filing bid protests.

Including this in article 10(1) of the Draft-RL, i.e. making the proof of a legitimate interest⁸³; the proof of threatened damage; the designation of the challenged decision and particulars to prove the timely submission of the bid protest a mandatory element of a bid protest, should be considered. Arguably, the designation of the challenged decision is already covered by article 10(3) of the Draft-RL which requires submission of “*a copy of the challenged document*” together with the bid protest.

7.13.5 Publication of complaint

Article 15(2) of the Draft-RL stipulates that the contracting authority must publish the complaint.

It is not clear if the contracting authority must only publish the fact that a complaint was filed or actually publish a copy of the complaint.

⁸³ See Article 23(5) of the Draft-RL.

7.13.6 *Differentiation between contract and framework agreement*

Article 55 of the Draft-RL differentiates between a public procurement contract (and a concession contract) and a framework agreement. This is the right approach since, from a legal standpoint, a framework agreement is typically not qualified as a contract.

Therefore, it is recommended that this differentiation be reflected throughout the entire Draft-RL.