RESHAPING THE EUROPEANISATION: A NEW ROMANIAN TRANSPOSITION OF THE OLD EUROPEAN DIRECTIVES ON REMEDIES IN PUBLIC PROCUREMENT

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Abstract

This article looks at the new transposition of the old European Directives on remedies in public procurement, performed by the Romanian legislature in 2016. The article emphasises the novelties and the clarifications brought by the new Law and describes the remedies and appeals available to the tenderers or to other persons allegedly aggrieved by acts issued by the contracting authority within the public procurement procedures or with regard to the conclusion or the execution of the contract. The remedies and appeals are better structured and regulated within the new Law than in the old one and the delineations between them are clearer. The new Law keeps in place the administrative-jurisdictional way of challenging the acts of the contracting authority (one of the specificities of the Romanian system, although administrative bodies of review in this field exist also, under different shapes, in another 13 EU Member States), but makes clearer some of the old provisions with regard to the proceedings. The claimant may choose the judicial avenue for the complaint instead of the administrative-jurisdictional one, which is optional and free of charge according to the Romanian Constitution. The judicial complaint and the judicial actions regarding the damages, annulment, nullity, rescission and cancellation of the contract, as well as the interim measures, are looked at in the article. An absolute novelty brought by the new Law and which will be also looked at in the article is the provision of specific means for the unification of administrative and judicial practice in this field. In the end, the article contains a section of brief conclusions.

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1. Introduction

The concept of Europeanisation is no longer a novelty in the EU legal environment. This concept is most often associated with the transposition of the European directives in the national legal order of the member states. Among the most important EU directives in place are the ones regulating the field of public procurement, both in terms of substantive and procedural law.

Recently, in the context of mandatory transposition of the new EU directives on public contracts[1] in the national law, the Romanian legislature took the opportunity to also enact a new law on remedies in this field - Law No 101/2016[2].

[1] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance (all published in the *Official Journal of the European Union* No L 94/28.03.2014).

[2] Law No 101/2016 was published in the *Romanian Official Gazette* No 393 on the 23rd of May 2016 and entered into force on the 26th of May 2016. Subsequently, the Law has been substantially amended and supplemented, in December 2017, only about a year and a half after its entrance into force, by Emergency

This enactment was not only opportune, but also necessary, having regard to the fact that the previous law on public contracts[3], which also regulated the remedies in a distinct chapter, has been repealed as a result of the transposition of the 2014 Directives. Moreover, due to successive amendments and unconstitutionality decisions, the previous remedies section of the law was in a real need of an update.

Consequently, now Romania has four different laws in the field of public contracts: one with regard to classic procurement, one for the utilities procurement, one for the concessions and the said law on remedies.

The new remedies law[4] performs a new transposition of the old EU Directives on remedies[5]; this new transposition replaces the old one, embedded in EGO 34/2006, and also includes the additional improvements brought in the case-law developed by the ECJ[6] and the Romanian Constitutional Court in this field.

The Law accomplishes a complete transposition of what in the doctrine are called the pillars[7] of remedy mechanisms, set out by the old, but still up-to-date Remedies Directives. In this context, it must be noted that recently the European Commission (EC,

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Government Ordinance (EGO, hereinafter) No 107/2017 (published in the *Romanian Official Gazette* No 1022 of 22 December 2017).

[3] Emergency Government Ordinance (EGO, hereinafter) no 34/2006. For a detailed assessment of these old procedural provisions, see D. Dragos, B. Neamtu, R. Veliscu, *Remedies in Public Procurement in Romania*, in S. Treumer, F. Lichére (eds), *Enforcement of the EU Public Procurement Rules* (2011), 159.

[4] Hereinafter referred to as "the Law".

[5] Council Directive 89/665/EEC of 21 December 1989 (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) and Council Directive 92/13/EEC of 25 February 1992 (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), both amended by Directive 2007/66/EC of the European Parliament and of the Council and by Directive 2014/23/EU of the European Parliament and of the Council.

[6] ECJ will be the abbreviation used when referring to the European Court of Justice, as a generic name designating the Court of Justice of the European Communities, later turned into the Court of Justice of the European Union.

[7] See S. Torricelli, *Uniformité et particularisme dans les transpositions nationales du droit européen des procédures de recours*, in L. Folliot-Lalliot, S. Torricelli (eds.), *Contrôles et contentieux des contrats publics – Oversight and Challenges of Public Contracts* (2018), 476.

hereinafter) concluded that the Remedies Directives, in particular the amendments introduced by Directive 2007/66/EC, largely meet their objectives in an effective and efficient way although it has not been possible to quantify the concrete extent of their cost/benefits. The EC also considered that even if specific concerns are reported in some Member States, they usually stem from national measures and not from the Remedies Directives themselves, but in general qualitative terms the benefits of the Remedies Directives outweigh their costs and they remain relevant and continue to bring EU added value.[8] In the doctrine, though, there were expressed also opinions in the sense that, on the contrary, the Remedies Directives are in acute need of clarifications[9].

In terms of transposition, the Law provides for effective mechanisms that ensure the access of the aggrieved person to an independent administrative body and to the judicial courts in order to seek protection of their rights and legitimate interests. Therewith, the Law ensures the celerity of the procedures in front of the administrative-jurisdictional body and of the courts, by setting out short time limits. The Law also provides for effective *interim measures* that may be taken by the administrative body and by the courts. The right to damages is also regulated, by the Law, as an effective right of the aggrieved persons. The Law also contain provisions with regard to standstill period and ineffectiveness.

In the following sections, the provisions of the Law will be looked at in detail, and also references shall be made to the case-law of the national courts and of the National Council for Solving Complaints, in order to emphasize how the provisions of the Law have been perceived in practice.

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[8] For these conclusions and the reasoning behind them see the Report No COM/2017/028 final from the Commission to the European Parliament and the Council on the effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning review procedures in the area of public procurement, published at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2017:28:FIN (last accessed 19 July 2017).

[9] See, e.g., for a very interesting and detailed reasoning of such an opinion: A. Sanchez-Graells, *If it ain't broke, don't fix it? EU requirements of administrative oversight and judicial protection for public contracts*", in L. Folliot-Lalliot, S. Torricelli (eds.), cit. at 7, 495-534.

2. Scope of the Law and Types of Remedies

The Law applies to the remedies in relation to the award of public procurement contracts, sectorial (utilities) contracts and concessions. It regulates the prior notification addressed to the contracting authority (administrative appeal), the administrative-jurisdictional review (addressed to the administrative review body) and the judicial procedures of solving complaints, but also the organization and the rules governing the functioning of the administrative review body, as well as the rules for unifying the jurisprudence.

As a general rule, any person - regardless of their nationality (meaning even non-EU nationals) - allegedly harmed in their right or legitimate interest by an act of the contracting authority or by the fact that their application has not been solved within legal deadlines, may request the annulment of the act, the recognition of their rights or legitimate interests, or the obligation of the contracting authority to issue an act or to take remedy measures.

The concept of „person allegedly harmed" comprises any economic operator having or having had an *interest* in obtaining a public contract and who has been, or risks being harmed by an alleged infringement[10]. This provision has to be read in conjunction with the previous one, so that only the persons aggrieved in their rights or interests have standing in front of the jurisdictional bodies.

EGO No 107/2017 amended the text of the Law, among others, by adding the definition of "the person having or having had an interest in obtaining a public contract". According to this definition, a person is considered as having or having had an interest in the procedure when they have not been yet definitively excluded from that procedure.

In a recent judgment, the Brasov Court of Appeals - Chamber of Administrative and Tax Litigation[11] maintained that a complainant who did not submit a tender in the award procedure and neither did challenge the technical and financial specifications cannot be considered a person aggrieved by the act of the

[10] This provision has, basically, the same wording as Article 1 paragraph 3 of both Council Directive 89/665/EEC and Council Directive 92/13/EEC.
[11] Judgment No 230/07.03.2017.

contracting authority which declared the winning tender admissible. The facts in this case were somehow similar to those in case C-230/02 (Grossman Air Service), where the European Court of Justice rendered its Judgment[12] on 12th of February 2004 (ECLI:EU:C:2004:93), maintaining that Articles 1(3) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989, as amended by Council Directive 92/50/EEC of 18 June 1992, "must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded".

According to the Law, the aggrieved persons have access to three types of remedies in order to defend their rights and/or legitimate interests: (i) a complaint, that may be lodged either with an administrative review body or with the court, which means that the complainant has the right of going "forum shopping"; (ii) a court action which may seek the award of damages, as well as the performance, annulment, rescission and cancellation of the contract; (iii) a special court action seeking the declaration of absolute nullity of the contract.

Before resorting to any of the above-mentioned redress mechanisms, the allegedly harmed person has the obligation of lodging a *prior notification* with the contracting authority. The Law also provides for *interim measures* consisting of suspension of the award procedure or of the performance of the contract.

It has to be mentioned that the Law is applicable only to the requests, complaints and petitions filed after its entry into force, which means cases pending at the time of its entry into force follow the old rules[13].

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[12] For more on this Judgment, see C.H. Bovis, *EU Public Procurement Law*, 2nd Ed. (2012), 222-223.

[13] In this respect, see D.M. Sparios, *Aplicarea în timp a Legii nr.101/2016 privind remediile și căile de atac în achizițiile publice* ("Temporal Applicability of Law No 101/2016 on Remedies and Appeals in Public Procurement"), published on the legal website "Juridice.ro", on the 2nd of June 2016.

3. The Administrative Appeal (Prior Notification)

Before going in front of the court or of the review body, the aggrieved persons must exhaust the administrative remedies by filing a notification to the contracting authority[14]. This prior notification is a precondition for the admissibility of a complaint in front of the review body or of the court[15] and it must be lodged with the contracting authority within 10 or, respectively, 5 days, depending on the value of the contract – below or above the EU thresholds.

The national courts[16] have been stressed that an answer to a request of clarifications filed by the complainant, who also stated that in case of rejection of their tender it shall represent a prior notification, cannot be considered to be a prior notification, because it does not meet the legal requirements.

The duty of the harmed person to lodge a prior notification is a novelty brought in the Romanian domestic legislation by the new Law, even though it has been envisaged in the remedies Directive[17] since 1989. Thus, by regulating the prior notification, the new Law accomplishes a better transposition of the Directive. The objective of these new provisions is to increase the responsibility of the contracting authorities with regard to their obligation of observing the principles of the public contracts' award procedures and to allow these authorities to remedy any possible infringements without the intervention of the courts. In practice, though, the contracting authorities often seem to not have understood this objective and, thus, treat the prior notification as a mere formality, by not answering to it, or giving evasive responses.

According to the Law, the contracting authority has to deliver an answer to the prior notification in 3 days from its receipt, but if the intention of the authority is to take measures of remedy, this must be mentioned in the delivered answer and then

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[14] Article 6 paragraph 1 of the Law No 101/2016.

[15] Alba Iulia Court of Appeals - Judgment No 7 on 16th of January 2017; Iasi Court of Appeal – Judgment No 852 on 27th of September 2016; Pitesti Court of Appeals – Judgment No 1383/R on the 7th of October 2016.

[16] For instance: Pitesti Court of Appeals – Judgment No 1483/R on the 1st of November 2016.

[17] This possibility is set out in Article 1 paragraph 3, final part of Directive 89/665/EEC.

the authority will have another time limit of 7 days to implement the measures.

The effect of prior notifications is the suspension *ope legis* of the right to conclude the contract. This suspension will not cease before the fulfilment of a time limit of 10 days (when the estimated value of the contract is above or equals the thresholds for the mandatory publication of the notice in OJEU) or 5 days (when the estimated value is below the thresholds), and the review body may again suspend the procedure further. If the contract is divided into lots, the suspension of the right to conclude the contract regards only the lots subjected by the notification. If the contract is concluded within the duration of the suspension, the sanction shall be the *ineffectiveness* of that contract.

4. The Complaint

As already mentioned above, the allegedly harmed person may go forum shopping, having the right to choose between two competent review bodies: an administrative body with administrative-jurisdictional prerogatives, i.e. the National Council for Solving Complaints (the Council, hereinafter) and judicial bodies, namely the courts.

4.1. The Administrative-Jurisdictional Complaint

The administrative-jurisdictional procedure is carried out in front of the Council. This administrative body[18], with quasi-judicial prerogatives, solves the complaints in panels of 3 specialists in law, economics or in a technical field, but at least the president or a member of each panel should have a degree in law.

Three kinds of situations give legal standing in front of the Council.

The first one is where the person is allegedly harmed by the answer received from the contracting authority to the prior notification. A second kind of situation is where the person is allegedly aggrieved by the fact of not receiving any answer, and the third one is where the person is allegedly harmed by the remedial measures adopted by the contracting authority.

[18] For details about the Council and its members, see § 4.2 below.

The subject matter of the complaint may be the request of the annulment of an act issued by the contracting authority, as well as the obligation of the authority to issue an act, or to adopt remedial measures. The complainant may also request the recognition of the alleged right or legitimate interest.

The time limit for lodging the complaint is 10 or 5 days, depending on the estimated value of the contract (10 days if the value equals or exceeds the thresholds for mandatory publication of the contract notice in OJEU and 5 days if the value is lower than the thresholds).

The complainant must serve the complaint to the contracting authority as well, so that the latter has (again) the possibility to adopt remedial measures. These measures have to be acknowledged to the complainant in maximum a working day of their adoption. If the contracting authority does not adopt remedial measures or the measures adopted are not accepted by the complainant, the procedure is carried on.

The proceedings carried out in front of the Council shall respect the principles of lawfulness, swiftness, adversarial proceedings, right to defence, impartiality and administrative-jurisdictional independence. In order to ensure a unified practice, the Law provides for that all complaints lodged within the same awarding procedure shall be solved by a unique panel in the stage before the date for opening of tenders, and another unique panel in the stage after this date.

It has been maintained in the judicial practice[19] that the right of the parties to submit written conclusions does not imply that on this avenue may be raised new critics on lawfulness, other than those already shown in the complaint. It has been reasoned further that to accept this possibility means to accept the opportunity of raising new grounds on unlawfulness after the deadline for lodging the complaint has expired, which is not acceptable.

The complaints to the Council are more numerous than those addressed to the courts: the administrative-jurisdictional way is preferred by tenderers because of their swiftness - there is a time limit for the Council to solve the complaint within 20 days from the receipt of the file (with the possibility of extension with

[19] Oradea Court of Appeals – Judgment No 2213/CA on 26th of October 2016

another 10 days), whereas court proceedings last longer. The failure of the panel members to observe the time limit set out for solving complaints shall be considered a disciplinary offence. The complainants also prefer to address the Council because the administrative-jurisdictional proceedings are free of charge, whilst if they address the courts they have to pay a court fee. It must be also said here that, although the Council is a relatively young institution, the preference of the complainants in addressing this administrative-jurisdictional body indisputably indicates a constantly increasing confidence of the public in the professionalism of the councillors.

Provided that the Council decides the amendment or the removal of certain technical specifications of the award documentation, the contracting authority shall annul the awarding procedure only if no other remedial measure is available or if the measure would affect the principles of the law on public procurement, sectoral procurement or concessions. If the Council allows the complaint and orders remedial measures, it shall establish also the time limit for the implementation of those measures, incumbent on the contracting authority. This time limit may not be shorter than the one set out for challenging the Council's decision.

The Council may not, upon its own initiative, annul or investigate the lawfulness of acts other than the ones challenged. If the Council detects the existence of such acts, it shall notify the National Agency for Public Procurement (ANAP, hereinafter) or the Court of Auditors and transmit them all the relevant data and documents. Therewith, the Council must also notify the contracting authority about the presumed law infringement.

In its practice[20], the Council maintained that a request to decide that the complainant's tender fulfils all qualification requirements is inadmissible, and the Council cannot replace the Evaluation Committee in its prerogatives.

When the Council allows the complaint and considers that remedial measures cannot be adopted, it shall decide the annulment of the award procedure. The Law expressly provides

[20] Decision of the Council No 1318/C8/1393 on the 29th of June 2016. The decision remained final, as a result of dismissal of the appeal by Bacau Court of Appeals.

that the Council may not decide the award of the contract to a certain economic operator and that it has the obligation to provide a clear and unequivocal reasoning of its decisions.

The reasoned decision shall be served on the parties within 3 days from rendering and published on the internet page of the Council[21] and in the Official Bulletin, without any reference to the identification data of the parties. If the Council ordered remedial measures, the decision shall be delivered also to ANAP, by electronic means. The decision shall be published by the contracting authority in SEAP, within 5 days from the service, without any reference to the information declared confidential by the economic operator in their tender.

The decisions of the Council are mandatory for the parties and they may be corrected, clarified or completed at the parties' request. The contract concluded disregarding the decision is stricken with absolute nullity.

When one of the parties is not satisfied with the decision of the Council, they have the right to appeal this decision for reasons regarding the lack of lawfulness and of thoroughness, within 10 days from the receipt of that decision. In the judicial practice[22] it has been maintained that if the appeal is not filed within the above-mentioned time limit, it shall be annulled as being tardy.

The appeal filed against the decision of the Council is called petition. Within this avenue of appeal, the framework established in front of the Council cannot be changed and neither can be the parties nor the subject matter of the litigation. The Law expressly provides that the Council does not have *locus standi* in front of the court. In its petition, the petitioner cannot raise any other critics over the contracting authority's act than those already shown in the complaint before the Council.

It must be stressed that, although the ECJ, interpreting the provisions of Article 2(8) of Directive 89/665, maintained that these provisions do not require the Member States to provide, also for contracting authorities, a right to seek judicial review of the decisions of non-judicial bodies responsible for review procedures concerning the award of public contracts, but also they do not prevent the Member States from providing, in their legal systems,

[21] www.cnsc.ro.

[22] Craiova Court of Appeals – Judgment No 2720 on 28th of September 2016.

such a review procedure in favour of contracting authorities[23], the Law provides for the right of the contracting authority to challenge the decision of the Council. Moreover, the Law provides for an exemption of the contracting authority from the duty to pay the court fee (Art 36 par. 3 of the Law).

The competent courts to adjudicate on the petition are the courts of appeals – chambers for administrative and fiscal litigation - under whose territorial jurisdiction the premises of the contracting authority are located, in panels specialised in public procurement, composed of three judges. There is an exception that regards the proceedings subjecting the award procedures for services and/or works related to the infrastructure in national interest. In this case, the competence to adjudicate on the petition belongs exclusively to the Bucharest Court of Appeals - chamber for administrative and fiscal litigation.

The petition must be submitted directly to the competent Court and notified to the Council, the latter having the obligation to send the file of the case to the Court within 3 days from the receipt of the petition. The petitioner has the duty of also serving the petition to the other parties involved in the proceedings followed before the Council and of submitting the proof of this service, before the first hearing.

The submission of the statement of defence is mandatory and it must be lodged with the Court and served to the petitioner, by the defendant, within 5 days from the receipt of petition. The failure to submit the statement of defence shall entail loss of the right to propose evidence and to raise exceptions, save the public interest exceptions. It is not possible to propose new evidence, except for the new documents. The latter may be submitted, under the sanction of losing that right, at the same time with petition or statement of defence, at the latest.

The petition shall be settled on an emergency basis and with priority, within 45 days from the legal seizure of the Court. If the Court admits the petition, it shall amend the decision of the Council and decide, as applicable: (i) the annulment of the act issued by the contracting authority, partially or totally: (ii) the compelling of the contracting authority to issue an act; (iii) the

[23] See, in this respect, the Judgment of 21 October 2010, delivered by the Court in case C-570/08.

fulfilment of a duty by the contracting authority, including the cancelation of any technical, economic or financial specifications from the contract notice, from the award documentation or from any other documents issued in relation with the award procedure; (iv) any other measures necessary to remedy the infringements of the law on public procurement, sectoral procurement or concessions.

If the Council has settled the complaint on an exception, and the Court allowed the petition, the latter shall rescind the decision of the Council and retry the case on its merits.

Where the Court allows the petition, it modifies the decision of the Council and finds that the act of the contracting authority infringed the law on public procurement, sectoral procurement or concessions and that the contract has been concluded before the service of the Council's decision, the Court shall proceed upon the rules applicable to the cases of contract nullity[24] .

Whenever the Council analysed only a part of the reasons of the complaint, and the Court considers the petition sustainable, the latter shall retry the case on its merits, analysing also the reasons disregarded by the Council.

The Court may also dismiss the petition, on merits or on exceptions.

The petitioner may waive its petition, according to the provisions of the Civil procedure code. In this respect, the judicial practice[25] has maintained that the claimant, in this procedure, may waive its petition, according to the provisions of Article 406 paragraph 1 of the Civil procedure code, and the court, in this case, shall take note of the waiver.

In all circumstances, the judgment of the Court shall be delivered immediately but, in justified circumstances, the delivery may be postponed for 5 days. The judgment of the Court is final, meaning that it cannot be challenged neither by appeal, nor by extraordinary avenues of appeal, such as „the challenge for annulment" or „the revision".

[24] These rules will be looked at in another section.

[25] Iasi Court of Appeals, Judgment No 949 of 12th of October 2016.

The said extraordinary avenues of appeal are provided for in the Civil Procedure Code[26]. Law No 101/2016 provides that it must be read in conjunction with the provisions of the Civil Procedure Code, as well as with the provisions of the Civil Code[27] and of the Law on administrative litigation[28], to the extent that those provisions are not contradictory.

The judgment delivered on the petition cannot be subject to those avenues of appeal because the petition is a *sui generis* avenue of appeal subjecting the decision issued by the Council. In this regard, Craiova Court of Appeals maintained in a Judgment[29] that the petition represents a specific avenue of appeal, available only with regard to the public procurement procedures and, therefore, the judgment rendered by the competent Court with regard to such a petition cannot be subject to the extraordinary avenue of appeal called „challenge for annulment", because it was not delivered in a regular appeal, as Article 503 paragraph 2 of the Civil Procedure Code requires.

As regards this extraordinary avenue of appeal, the difference in treatment between the administrative-jurisdictional procedure and the judicial procedure of the complaint might represent a problem because within the latter the challenge for annulment is admissible against the judgment of the court with regard to the appeal filed against the sentence rendered by the tribunal on the judicial complaint (as we shall see in section 4.3).

This means that those who choose the administrative-jurisdictional avenue may be in a less advantaged position than those choosing the judicial way, in respect to the exceptional avenues of appeal available to them.

[26] The Romanian new Civil Procedure Code has been approved by Law No 134/2010 and entered into force on the 15th of February 2013.

[27] Approved by Law No 287/2009 and entered into force on the 1st of October 2011.

[28] Law No 554/2004, published in the Romanian Official Gazette No 1154 on the 7th of December 2004, and entered into force on the 5th of January 2005, successively amended and complemented since.

[29] Judgment No 2640/19.09.2016.

4.2. The Council and the Statute of the Councillors

Romania is one of the 14 Member States[30] that have given the prerogative of reviewing the procurement procedures to an administrative body.

According to the Law, the Council has legal personality and in its activity is only subject to the law. As regards its decisions, the Council is independent and free of any subordination to other public authority or institution. The Council shall be managed by the President, who shall be elected from the members with a seniority of at least nine years in the field of law, for a period of three years[31], by secret ballot in the plenum of the Council, with an absolute majority of the members' votes. The President represents the Council, fulfils the role of principal authorising officer and has the obligation to present an annual activity report to the Parliament by no later than 31 March for the previous year. The Parliament may only evaluate the administrative and organizational activity of the Council.

According to the Law, the Council has the right to initiate legislative projects in its area of activity, and also to endorse the legislative projects initiated by other public authorities or institutions.

The Council has 36 members (councillors, hereinafter) and at least half of them shall be Bachelor of Law, with a seniority of at least 9 years in the legal field. The selection of the councillors shall be subject of a competitive procedure, their professional competence and good reputation being verified. The period of being councillor shall be considered seniority in the relevant specialty.

The councillors are forbidden: to carry out commercial activities; to possess the capacity of associate or member of the management or control bodies within civil or commercial societies; to be members of economic interest groups; to be enrolled in political parties or to participate in activities of political nature; to occupy/carry out any public or private position/activity, except for teaching positions or activities,

[30] The other 13 States are: Bulgaria, Cyprus, the Czech Republic, Germany, Denmark, Estonia, Spain, Croatia, Hungary, Malta, Poland, Slovenia and Slovakia (see, in this respect, the Report No COM/2017/028 final from the Commission to the European Parliament and the Council, cit. at 4).

[31] With the possibility of renewing their mandate one single time.

scientific research, literary and artistic creation; to carry out any other professional or consultancy activities.

Withal, the councillors shall not be entitled to participate in the settlement of a complaint if they find themselves in one of the following situations: they, their spouse, ascendants or descendants have any interest in the settlement of the complaint; any of the parties is their spouse, relative or affine up to fourth degree; they are or were involved in a criminal trial against any of the parties up to 5 years before the settlement of the case; they have spoken out publicly with regard to the complaint they are solving; it is found that they have received from any of the parties goods, premises of goods or other material advantages. The disregard of these incompatibilities shall be sanctioned with the nullity of the decision taken by the panel comprising the incompatible councillor. The nullity shall be found by the court of appeals that adjudicates on the petition against that decision.

The fact that most of the incompatibilities of the councillors, mentioned above, are similar with those applicable to judges according to their statute[32], together with the independence guarantees of the councillors with regard to their activity of solving complaints, provided for by the Law, justifies the conclusion that the councillors' statute is very close to that of the judges.

4.3. The Judicial Complaint

If the complainant chooses the judicial avenue, they shall lodge the complaint with the tribunal under whose territorial jurisdiction the premises of the contracting authority are located.

The complaint shall be adjudicated by the chamber for administrative and fiscal litigation of the tribunal, in panels specialised in public procurement (composed of one judge), on an emergency basis and with priority, within 45 days from the legal seizure of the tribunal.

Locus standi in front of the tribunal has the person allegedly harmed by the answer received from the contracting authority to the prior notification, or by the fact of not receiving any answer, as

[32] The statute of the judges and prosecutors is Regulated by Law No 303/2004, republished in the Romanian Official Gazette No 826 of 13 September 2005, subsequently amended and supplemented.

well as any other person allegedly harmed by the remedial measures adopted by the contracting authority. Hence, in this regard there is no difference to the administrative-jurisdictional complaint.

In front of the Tribunal, the parties shall be summoned according to the proceedings applicable to urgent litigation, and the defendant must receive a copy of the complaint and of the supporting documents. In the judicial procedure of solving complaints, the provisions of Article 200 of the Civil Procedure Code[33] are not applicable, because of the urgency of the procedure.

The first hearing shall be in 20 days from the registration of the complaint. The subsequent hearings may not exceed 45 days from the seizure of the Tribunal.

The defendant has the duty to file the statement of defence within 3 working days from the receipt of the complaint, under the sanction of losing the right to propose new evidence and to raise exceptions. The statement of defence filed by the defendant shall be immediately delivered to the complainant.

The judgment of the tribunal shall be rendered immediately but, in justified circumstances, the delivery may be postponed for 5 days. The reasoned judgment shall be written no later than 7 days since its return and shall be communicated immediately to the parties.

The party discontented with the Judgment of the Tribunal may appeal it to the hierarchically superior court, namely the Court of Appeals, within 10 days from the receipt. Appeals shall be adjudicated by the Courts of Appeals - chambers for administrative and fiscal litigation, in panels specialised for public procurement litigation. If the appeal is accepted, the appellate court shall retry the case on the merits, at all events.

The judgment rendered by the appellate court may be subject to extraordinary avenues of appeal, such as the challenge for annulment or the revision, this being one of the differences

[33] These provisions establish a written procedure that has to be followed before the first hearing in front of a judicial court takes place. The aim of such a procedure is to ensure that before the first hearing session all the involved parties have been informed about the other party's allegations or defences and that the court has all the necessary data to produce the evidence, if necessary, and adjudicate the case.

between the administrative-jurisdictional procedure and the judicial procedure of the complaint.

Another important difference between the procedures regarding the administrative-jurisdictional complaint, on one hand, and the judicial complaint, on the other hand, regards the taxes that are owed.

Thus, whilst there is no charge for the complaint lodged with the Council, as regards the judicial complaint the Law provides for the duty, incumbent to the complainant, of paying a court fee of EUR 100 (RON 450). This fact makes the judicial complaint a more expensive avenue than the administrative-jurisdictional complaint, this being one of the determinant factors for the complainant to choose, almost at all events, the administrative jurisdiction. The imposition of such court fees, though, complies with the provisions of the Remedies Directives, as they were already interpreted by the ECJ[34].

The national legislature did not impose a tax for the administrative-jurisdictional complaint, because the Romanian Constitution expressly provides, in its Article 21 paragraph 4, that the administrative jurisdictions shall be optional and free of any charge[35].

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[34] See, e.g., the Judgment of 6 October 2015, rendered by the Court in case C-61/14, *Orizzonte Salute*.

[35] For a short period of time (10th of July 2014 – 25th of May 2016), the complainants who submitted the complaint to the Council had the duty to pay a deposit, called „*good conduct guarantee*", with variable amount depending on the estimated value of the contract at stake. Those provisions were declared partially unconstitutional by the Romanian Constitutional Court (Decisions No 5 of 15th of January 2015 and No 750 of 4th of November 2015), which mainly held that the good conduct guarantee must not be subject to the automatic and unconditional retention by the contracting authority, but must be refunded to the applicant whatever the outcome of the action. The Court of Justice of the European Union has been also seized with preliminary questions regarding the good conduct guarantee, questions referred by two Romanian Courts, namely Bucharest Court of Appeals and Oradea Court of Appeals (joined cases C-439/14 and C-488/14). The Court of Justice answered to the questions in its Judgment of 15th of September 2016 (ECLI:EU:C:2016:688), and maintained that the EU applicable Law does not preclude national legislation, such as that at issue in the main proceedings, which makes the admissibility of any action against an act of the contracting authority subject to the obligation for the applicant to constitute a good conduct guarantee that it provides to the contracting authority, if that guarantee must be refunded to the applicant

The petition filed against the decision of the Council and the appeal filed against the sentence rendered by the Tribunal are also chargeable. The petitioner and the appellant shall be charged with a fee amounting 50% of the fee applicable to the judicial complaint.

5. Judicial Actions

Apart from the complaints, the Law also provides for the possibility of the harmed persons to file judicial claims subjecting the award of damages, as well as the performance, annulment, nullity, rescission and cancellation of the contract.

The Law provides for two types of procedures, one for the actions regarding the award of damages, the performance, annulment, rescission and cancellation of the contract, and the other one regarding the declaration of absolute nullity of the contract.

We will look at these two types of judicial actions in turn, but not before noting that in Article 53 paragraph 1 of the Law is set out a common rule for all the judicial actions, namely that these actions shall be adjudicated by the divisions for administrative and fiscal litigations of the tribunals under whose territorial jurisdiction the premises of the contracting authority are located, in panels specialised for public procurement litigation.

5.1. Actions for Damages, Annulment, Rescission and Cancellation of the Contract

The Law provides that the actions regarding damages for infringements in the award procedure, as well as the actions subjecting the performance, annulment, rescission or cancellation of the contract, shall be adjudicated according to the same rules of procedure applicable to the judicial complaint.

Notwithstanding, in contrast to the judicial complaint, in these procedures the defendant has the right to file a counterclaim, within the same time limit they dispose of for filing the statement of defence.

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whatever the outcome of the action. In the new legislation on public procurement substantive and procedural law the good conduct guarantee is no more provided.

The judgment of the tribunal shall be rendered immediately but, in justified circumstances, the delivery may be postponed for 5 days. The reasoned judgment shall be written within no later than 7 days since its return and shall be communicated immediately to the parties.

The Judgment rendered by the Tribunal may be appealed in front of the Court of Appeals, within 10 days from the receipt. The appellate court shall rule on the appeal in a panel specialised in public procurement litigation, on an emergency basis and with priority, within 30 days from the legal seizure of the court.

The filing of the appeal suspends the execution of the appealed judgment. If the appeal is accepted, the appellate court shall retry the case on the merits, at all events.

The judicial action filed to the Tribunal is chargeable to court fees of a variable amount, depending on whether the complaint has or has not a pecuniary value. The complaints which do not have a pecuniary value shall be charged with a flat fee of Euro 100 (RON[36] 450), whilst the complaints with pecuniary value shall be charged differently, depending on the estimated value of the contract, with variable fees starting from Euro 2 000 (RON 9 000) - for estimated values below or equal to Euro 100 000 -, until above Euro 10 000 (RON 45 000) – for estimated values above Euro 1 000 000. The effort of determining the pecuniary or non-pecuniary nature of the action is not an issue, having regard that the damages and the value of the contract whose performance, rescission or termination is requested are, at all events, quantified or quantifiable.

As regards the appeal filed against the judgment of the Tribunal, the Law does not provide for specific rules for the calculation of the court fee. Thus, I am of the opinion that the general provisions regarding court fees[37] are applicable. According to these general provisions, if the appealed judgment is criticized on the grounds of infringement or misapplication of the law, the court fee amounts to RON 100 (approx. Euro 23) in case of non-pecuniary actions and to 50% of the contested sum, but not

[36] The Romanian official currency.

[37] These are the provisions of the Emergency Government Ordinance No 80/2013 on the court fees, published in the Romanian Official Gazette No 392 of 29th of June 2013, subsequently amended and complemented.

less than RON 100, in case of pecuniary actions. If the appealed judgment is criticized on other grounds, provided for expressly in the Civil procedure code (mostly for procedural mistakes of the first instance), the court fee shall amount to RON 100, at all events.

The Law provides that the appeals filed by the contracting authorities against the Judgments rendered on judicial complaints are exempted from the duty to pay the court fee. The other parties may request for exemptions, reductions or scheduling of the court fees, in certain conditions, provided by the law regarding the court fees.

The damages for the loss represented by the expenses for drawing up the tender or for participation in the award procedure may be granted to the harmed person only if they provide evidence of the loss, of the infringement of the public procurement law, and of the fact that they would have had a real chance of winning the contract at stake if there was not the said infringement. At the EU level, although the burden of proof with regard to the fact that the economic operator was genuinely a tenderer who had a serious chance of winning the contract is considered by the EC itself[38] as being a real hindrance for the aggrieved persons in obtaining the damages, it was kept in the provisions of the Directives and, thus, taken as such in the legislations of the Member States. Nevertheless, the doctrine[39] puts forward a different theory, namely that damages claims are not perceived as claimable, and so the reluctance of aggrieved bidders to engage in damages claims stems from a doctrinal problem rather than reasons founded in the behaviour of firms. The cited author also maintains that the fact that there are few damages claims could be a result of the difficulty in bringing damages claims, rather than an indicator for the superfluous nature thereof, and also that the doctrinal problem seems to be that damages claims have remained what they were over 20 years ago, as described by the Commission: a mere theoretical possibility.

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[38] See *Commission staff working document - Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts {COM(2006) 195} - Impact assessment report – Remedies in the field of public procurement* (SEC/2006/0557).

[39] See H. Schebesta, *Damages in EU Public Procurement Law* (2016), 29.

The damages caused by an illegal act of the contracting authority or by the fact that the application has not been solved within legal deadlines may be granted only after the annulment of the infringing act or after other remedial measures have been taken by the contracting authority.

The Law expressly provides for the arbitration as a means of alternative dispute resolution with regard to the interpretation, conclusion, performance, modification and termination of the contracts. The arbitration is, in fact, the only mean of alternative dispute resolution provided for by the Law, as a possibility recognized to the parties of a public contract[40]. The Law, however, does not provide for procedural rules with regard to arbitration, therefore the common rules of arbitration, provided for in the Civil Procedure Code, shall be applicable.

5.2. Nullity of the Contract

The declaration of absolute nullity of a public contract or of an additional act may be requested by any interested person, if it was concluded without the observance of the legal requirements provided for in the public procurement, sectoral procurement or concession law.

There are certain reasons for the declaration of absolute nullity and restoring of the previous status, expressly and limitative provided by the Law. These reasons are: (i) the award of the contract by the contracting authority without the observance of the duties to publish the contract notice; (ii) the concluded contract is of other type than public procurement or concession, despite the fact that the works, services or goods wanted by the contracting authority fall under the legislation regarding public procurement, sectoral procurement or concessions of works or services; (iii) the contract/additional act has been concluded in less favourable conditions than those provided for in the technical and/or financial proposals within the winning tender; (iv) the inobservance of the qualification and selection criteria and/or of the factors of evaluation set out in the contract notice which were

[40] For a complete analysis of the available means of ADR in Romania, for the disputes deriving from public procurement procedures, see D.C. Dragoș, D.M. Sparios, *Oversight and Litigation of Public Contracts in Romanian Administrative Law*, in L. Folliot-Lalliot, S. Torricelli (eds.), cit. at 7, 218-221.

taken into consideration in order to establish the winning tender, provided that this leads to the alteration of the result of the procedure, by the means of annulling or dissimulating the competitive advantages; (v) the contract was concluded before the receipt of the decision solving the complaint issued by the Council or by the court, or the inobservance of this decision.

The court may, by exception, take alternative measures if imperative reasons of general interest request the preservation of the effects of the contract. These alternative measures shall be: (i) limitation of the of the effects of the contract by reducing its term of execution; (ii) enforcement of a fine to the contracting authority, amounting between 2% and 15% of the contract value, this amount being inversely proportional with the possibility to limit the effects of the contract. The alternative measures applied by the court must be efficient, proportionate and discouraging.

The Law expressly provides that the awarding of damages does not represent an alternative measure.

If the standstill provisions are not observed, the court shall decide, after considering all the relevant aspects, to declare the absolute nullity of the contract/additional act or, as applicable, to enforce alternative measures.

The standstill period shall not be shorter than:

(i) 11 days from the next day after the transmission of the award decision to the interested bidders, if the estimated value of the public procurement or concession procedure equals or exceeds the thresholds for the mandatory publication of the contract notices in the Official Journal of the European Union;

(ii) 6 days from the next day after the transmission of the award decision to the interested bidders, if the estimated value of the public procurement or concession procedure is below the said thresholds.

When the contracting authority uses means of communications, other than electronic, the standstill periods shall be increased by 5 days.

The observance of standstill periods is optional if the legislation does not provide for the compulsoriness of publishing a contract notice, or if the contract will be concluded with an economic operator that has been the only bidder and there are no other operators involved in the procedure. The standstill period is also optional if the procedure regards the award of a contract

subsequent to a framework agreement or if the award is the result of a dynamic purchasing system.

The action for the declaration of absolute nullity shall be adjudicated by the divisions for administrative and fiscal litigation within the tribunals under whose territorial jurisdiction the premises of the claimant or of the defendant are located, on an emergency basis and with priority.

The Judgment rendered by the Tribunal may be appealed to the Court of Appeals, within 30 days from the receipt. The time limitation of 30 days set out for the appeal in this procedure is the longest of all the time limitations for an appeal, provided for by the Law.

The appellate court shall rule on the appeal in a panel specialised in public procurement litigation, on an emergency basis and with priority, within 30 days from the legal seizure of the court.

The Judgment deciding the admission of the action for the declaration of absolute nullity and for the restoring of the previous status has the force of an enforceable title. This title must be executed by the head of the contracting authority. ANAP must be notified by the contracting authority with regard to the measures taken for the enforcement of the final judgment.

6. Interim Measures

In order to prevent possible further damage to the interests concerned, the Law provides for the possibility of launching *interim measures.*

The Council may decide the suspension of the award procedure, upon the request of the interested person, in well justified circumstances and for the prevention of further imminent damage. The Council must render its decision within 3 days from the receipt of the request.

The claimant shall serve their request also to the contracting authority, by the same means of communication used for communicating with the Council. The contracting authority shall submit, forthwith, their point of view to the Council. The failure of the contracting authority to submit the point of view shall not prevent the settlement of the request.

In solving the request, the Council shall take into account

the probable consequences of the measures for all interests likely to be harmed, as well as the public interest.

The Council renders a resolution[41] upon the request of suspension. This resolution may be appealed, separately, in front of the court to whom also belongs the competence of adjudicating the petition (court of appeals under whose territorial jurisdiction the premises of the contracting authority are located or the Bucharest Court of Appeals, as applicable).

The Court may decide the suspension of the award procedure and/or of the performance of the contract until the adjudication of the petition, in well justified circumstances and in order to prevent further imminent damages. The suspension may be decided by the court upon the request filed by the interested party. The court shall render a resolution on the request of suspension. The resolution is final.

The court shall adjudicate on the request taking into account the probable consequences of the measure for all interests likely to be harmed, as well as the public interest.

In order to have its request adjudicated, the claimant must pay a guarantee whose amount depends on the estimated or the established value of the contract[42].

Thus, the amount of the guarantee shall be:

- 2% of the *estimated* value of the contract but not more than RON 35.000 (approx. Euro 7.777) or 2% of the contract's *established* value but not more than RON 88.000 (approx. Euro 19.555), if the reference value is lower than the thresholds set out for the compulsory publication of the contract notice in the Official Journal of the European Union;

- 2% of the *estimated* value of the contract but not more than RON 220.000 (approx. Euro 48.888) or 2% of the contract's *established* value but not more than RON 880.000 (approx. Euro 195.555), if the reference value equals or exceeds the thresholds set out for the compulsory publication of the contract notice in the

[41] According to the Law, the Council renders, in the exercise of its prerogatives, decisions and resolutions.

[42] The guarantee shall be calculated, therefore, according to the estimated value of the contract if the contract has not yet been concluded and the suspension of the award procedure is requested, and according to the established value of the contract, if this contract has been already concluded and the suspension of its performance is sought.

Official Journal of the European Union.

As maintained in the judicial practice[43], in case of failure to pay the guarantee, the request for suspension shall be dismissed.

In case of an award procedure regarding a framework agreement the amount of the guarantee will be calculated with reference to the estimated value of the biggest subsequent contract to be awarded under that agreement.

If the claimant demands it and the contracting authority agrees, the guarantee may also consist in financial instruments which can be payment instruments or in bringing a guarantor.

Those who paid the guarantee in cash may request the replacement of the paid amount with other goods or with a guarantor.

The guarantee shall be returned, by request, after the Judgment rendered on the petition is final or after the effects of the suspension ceased. The guarantee shall only be returned after 30 days from the final judgment if the contracting authority did not request for the due damages until the end of this limitation period or, as applicable, since the effects of the suspension ceased. The guarantee shall be returned immediately if the contracting authority expressly declares that it does not seek damages from the claimant.

Upon the request to return the guarantee, the court shall adjudicate by the means of a resolution, after summoning the parties. The resolution rendered by the court may be appealed at the hierarchically superior court. The filing of the appeal suspends the execution of the appealed judgment.

In the judicial complaint, the Court may decide the suspension of the award procedure, until the final adjudication on the case. The suspension may be granted only in well justified circumstances and in order to prevent further imminent damages. The Court may adjudicate on the request of suspension by the instrumentality of a reasoned resolution, which may be subject to appeal within 5 days from the receipt. The provisions regarding the payment of a guarantee by the claimant, mentioned above, are applicable.

The suspension of the performance of the contract may be requested also in the procedure followed in front of the tribunal,

[43] Brasov Court of Appeals – Judgment No 864/R on 8th of November 2016.

subjecting requests for damages, performance, annulment, nullity, rescission or cancellation of contracts.

This suspension may also be granted only in well justified circumstances and in order to prevent further imminent damages. All the procedural rules applicable in case of suspension granted within the procedure regarding the judicial complaint are applicable.

In the judicial practice[44] has been maintained that is inadmissible to claim the suspension of the performance of the contract by the avenue of a Court Order, which is an avenue provided for in the Civil procedure code for emergency procedures in order to decide *interim measures*, as long as the Law provides for a specific procedure for the suspension of the performance of the contract and, according to the principle *specialia generalibus derogant*, the specific provisions shall be applicable with priority.

7. Unification of Practice

Apart from the general means for the unification of judicial practice, regulated in the Civil procedure code[45], the Law provides

[44] Oradea Court of Appeals – Judgment No 7 on 9th of March 2017.

[45] The Romanian Civil procedure code regulates two mechanisms for the unification of judicial practice:
(i) the appeal in the interest of the law, which shall be addressed to the High Court of Cassation and Justice by the Prosecutor General of the Prosecutor's Office attached to the High Court of Review and Justice, *ex officio* or based on the request of the Minister of Justice, the management board of the High Court of Review and Justice or the management boards of the Courts of Appeals, as well as the Romanian Ombudsman, in order for the High Court to rule on legal issues settled differently by the courts of law;
(ii) the referral to the High Court of Review and Justice for a preliminary ruling to settle legal issues is another mean for unifying the judicial practice, which may be used by the judicial panels of the High Court of Review and Justice, the Courts of Appeals or the Tribunals, entrusted with the adjudication of a case as a court of last resort, if they find that there is a legal issue whose clarification is paramount for the settlement on the merits of the respective case and about which the High Court of Review and Justice has not issued any decision in a preliminary ruling or in an appeal in the interest of the law and which is not the subject of a pending appeal in the interest of the law.
These two mechanisms for the unification of judicial practice may be used also in public contracts litigation.

for specific mechanisms, especially for the unification of practice at the administrative-jurisdictional level.

The members of the Council shall meet monthly in order to discuss the legal issues which generated conflicting resolution in similar cases, as well as the application and interpretation of newly adopted regulations.

Moreover, the Council shall organise half-yearly meetings of its members with judges within judicial courts, specialists within ANAP or other experts, which may contribute to the unification of the administrative-jurisdictional practice.

The president or the management board of the Council may convoke the Plenum of the Council, in order to adopt a resolution for the unification of the administrative-jurisdictional practice. The resolutions of the Plenum shall be adopted by the absolute majority if its members.

The unitary application of the public procurement, sectoral procurement and concessions law represents a criterion for the professional evaluation of the Council members.

The Plenum may, also, adopt additional mechanisms for the unification of practice within the Council.

ANAP shall inform the Council and the courts whenever it detects the existence of conflicting resolutions in litigation regarding public procurement, sectoral procurement and concessions. In the same time, the Council may notify ANAP whenever detects deficiencies of the legislation regarding the public procurement, sectoral procurement or concessions.

ANAP may also be notified upon the deficiencies of the legislation by the allegedly harmed person. The measures that may be taken by ANAP must not affect the *res judicata* of the Council's decisions and of the courts' judgments.

If the Council finds that there are different approaches in final judgments of the courts in similar cases, it shall inform the Court of Appeals of Bucharest, in order to analyse the opportunity of triggering the procedure in front of the High Court to settle legal issues.

If the conflicting judicial decisions come from the same court, the Council may request a point of view upon the predictability of the interpretation of the legal provisions by that court.

8. Conclusions

The new Romanian Law on remedies and appeals in public contracts litigation has made a better transposition in the domestic legal order of the Directives on remedies and appeals.

This Law brings certain novelties and more clarity.

The main novelty is that remedies and appeals benefit of a regulation in one single, dedicated law, unlike in the old regulation, which only contained provisions regarding the remedies and appeals in one single chapter of the law on public contracts.

Another novelty brought by the new Law is represented by the regulation of the prior notification, set out as a mandatory prerequisite requirement before the seizure of the review bodies, in line with the provisions of Article 1 paragraph 3, final part of Directive 89/665/EEC.

Another important progress over the old law is the detailed regulation of the judicial complaint. In the old law the possibility to lodge the complaint also with the court was merely stated, but the procedure was not regulated, as it is in the new law.

In the new Law, we do not find anymore the good conduct guarantee, which gave rise, under the old law, to numerous discussions and also exceptions of unconstitutionality, references to the Court of Justice of the European Union for preliminary rulings[46] and it has even given the European Commission the reason to begin an investigation over it, in order to analyse the necessity of triggering the infringement procedure[47].

Even though we do not have the good conduct guarantee anymore, it seems that the costs of the procedure have remained high, especially when we talk about the judicial actions with pecuniary value. It should be highlighted the fact that the procedure in front of the Council is free of any tax, because according to the Constitution of Romania (Article 21 paragraph 4) the administrative jurisdictions are optional and free of charge. This makes the procedure of complaint in front of the Council more attractive to the claimants than the judicial one.

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[46] See Judgment rendered by ECJ in joined cases C-439/14 and 488/14 (ECLI:EU:C:2016:688)

[47] Under the EU Pilot 7189/14/MARK dossier.

Another important novelty brought by the new Law is the explicit reference to the specialised panels of judges that shall adjudicate on the petitions, judicial actions and appeals. In the old law these specialised panels were not mentioned. I am of the opinion that only the explicit reference to these specialised panels is not enough, a more attentive training on this field for judges dealing with this kind of litigation being also necessary.

The prerogatives attributed to the Council with regard to the unification of practice and improvement of legislation represent another novelty brought by the new Law. These prerogatives transform the Council in one of the main actors within this field, having the possibility of influencing even the judicial practice, by the instrumentality of common meetings of its members with judges from the judicial courts and by references to the Bucharest Court of Appeal regarding conflicting judicial decisions.

As regards the surplus of clarity brought by the new law, this resides in a more detailed regulation of remedies and appeals in public contracts litigation and in a better patterning of the provisions.

The structure of the new law allows a better and faster identification of the remedies and avenues of appeal open to the interested persons.

Considering the preceding, we may look at the new law as to a big step forward of the Romanian domestic legal order in the field of remedies and appeals regarding public contracts, even though there are some provisions that already gave rise to contradictions in practice and within the scholarship, contradictions that, however, may be solved using the existing legal mechanisms.