

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN THE FIELD OF PUBLIC PROCUREMENT: BETWEEN EFFECTIVENESS AND CONSTITUTIONALITY*

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Abstract

The article discusses the new developments in the public procurement system triggered by the empowerment of the National Council for Solving Administrative Disputes (an administrative body) as the only first instance review body for remedies before the conclusion of public procurement contracts. The legislative development entails discussions regarding the constitutionality of the solution and also about the efficiency of subjecting complainants to an administrative body instead of courts. The conclusion of the study highlights the fact that the search for effectiveness in awarding contracts (mainly for the purpose of spending the structural funds) is pushing the Government towards unconstitutional solutions like the one promoted recently, regardless of the constant probability of such provisions being ousted by the Constitutional Court on the basis of open access to justice principle enshrined in our Constitution.

Keywords: alternative dispute, public procurement, Romania, general administrative appeal, pre-trial procedures.

1. Public procurement legislation

Public procurement in Romania is regulated by Emergency Governmental Ordinance no. 34/2006¹ (with all the subsequent amendments), which transposes the provisions of the EC Directives in this field: Directive 2004/18/EC, Directive 2004/17/EC, Directive 1989/665/EEC, Directive 1992/13/EEC, and Directive 2007/66/EC. Romania has reported the transposition of the amendments to the Remedies Directives by two Emergency Governmental Ordinances (executive decision with the legal force of a law, issued in exceptional and urgent situations – hereafter EGO), EGO no. 19/2009² and EGO no. 72/2009³, further completed with some missing provisions by a new regulation, EGO no. 76/2010.

In the recent years the legislative changes brought with regard to the competent entity to solve complaints up to the conclusion of the contract and the effects associated with lodging such a complaint have been related to the way in which litigation in public procurement (PP) affected the absorption of EU structural funds in Romania. The main problem was related to the fact that litigation in PP, mainly before a court of law, meant delays up to several months (even years) and this impedes upon the absorption process, where deadlines for application/execution/reimbursement are relatively short. This problem has been raised and discussed not only in the expert community in PP but it represents a rather general public policy concern, frequently addressed by various stakeholders⁴. In light of this context, in addition to the already mentioned legislative changes, EGO no. 76/2010 was approved by the Parliament at the very end of 2010, with significant changes regarding the remedies system (Law no. 278/24.12.2010⁵).

2. Review procedure and review bodies – a constant strive to achieve effectiveness?

Legal actions regarding the review of decisions to award public contracts are brought before different review bodies and following a distinct review procedure depending on the stage in the award of the public procurement contract. The changes brought to EGO no. 76/2010 by the approval law mainly regard the review bodies before which a complaint can be lodged up to the conclusion of the contract. Since these latest changes seem to go against the provisions of the Constitution and the jurisprudence

1 Published in the Official Monitor of Romania, Section I, no. 418 from 15.05.2006

2 EGO no. 19/7.03.2009, regarding some measures in the public procurement field, published in the Official Monitor of Romania, no. 156 from 12.03.2009

3 EGO no. 72/17.06.2009, regarding the modification of the Emergency Governmental Ordinance no. 34/2006 on public procurement contracts and concession contracts, published in the Official Monitor of Romania, no. 426 from 23.06.2009

4 Recently it was the president of the state who argued in favor of speediness in court proceedings that involved litigation in PP, when contracts financed through EU structural funds are concerned.

5 Law no. 278/24.12.2010, published in the Official Monitor of Romania no. 898 from 31.12.2010

of the Constitutional Court and since it is likely to have these provisions reinstated in the future, in the following section will be presented both the current situation (as of 31.12.2010) and the previous one. In any case, the interplay between review bodies has taken a central role in the public procurement field in recent years, as it was considered the main influence on the effectiveness of public procurement procedures, so the analysis has to take into account the complexity of this dynamic.

2.1. Pre-trial procedures vs. legal action to courts – a dynamic interplay

The role of the review bodies in the public procurement field has suffered many changes in the last years. The preeminence of pre-trial procedures (administrative appeals) over the procedures conducted by courts seems to be the underlying feature of this legislative dynamic. The central place in this evolving process is played by the National Council for Solving Legal Disputes, a quasi-judicial body with independent status.

Up to 2010, the law allowed complainants to choose between the administrative-judicial path (the National Council for Solving Legal Disputes, hereafter the Council) and the purely judicial one (court of law). The preference of complainants for one of the two review paths was associated with the implied benefits associated with each of them. In the early stages the preference for choosing the Council was justified by the immediate and automatic suspensive effect associated with such an action (for more details see below); more recently, after July 2010, the costs implied by an action before the Council resulted in a slight decrease in the number of actions brought before the Council. Currently, the review by the Council is mandatory.

2.1.1. The National Council for Solving Legal Disputes

The Council is an independent, administrative-judicial (or quasi-judicial) review body, independent from other structures with regard to its decisions. Starting with January 1st 2007, the Council gained the status of legal person and thus Romania addressed the problem regarding the independence of the Council which had been raised by the European Commission in several occasions. Through the approval law of EGO no. 76/2010, the independence of the Council was further strengthened: if previously the law stated that the Council functioned within the institutional framework of the General Secretariat of the Government, currently all references to such dependence are eliminated from the law. The law also makes a more clear distinction between the administrative activity of the Council and its ruling as an administrative-judicial body. The members of the Council are civil servants with a special status, appointed by the prime minister, based on a competitive selection process and the fulfillment of several mandatory requirements regarding previous experience/educational background. They are evaluated (with regard to the administrative and organizational activity of the Council) by a mixed Committee which comprises representatives of the National Authority for Regulating and Monitoring Public Procurement in Romania, of the Romanian Parliament, of the National Agency for Civil Servants and of the Competition Council.

2.1.2. Forum-shopping for a review body (prior to 31.12.2010)

Before 2011, the claimant was free to choose between the Council and the court of law (the competent court in the first instance was the tribunal). However, the law stated that it is forbidden to lodge the same complaint simultaneously with both the Council and the court of law. If this situation occurs, the procedure before the Council was automatically suspended. It was presumed that by lodging the same complaint with the court, the claimant renounces the administrative (quasi-judicial) procedure. Statistics show that during the last years the number of complaints before the Council has increased significantly⁶; incentives for going first before the Council include: speediness and flexibility of the procedure (legal obligation to solve the complaint within 20 days; possibility given to the complainant to specify the object of the complaint after lodging it), presumably lower costs (no need to hire a lawyer, no fees, at least until mid-2010); a general distrust in the judicial system and perception of major delays associated with court litigations (not necessarily in public procurement but in general), and finally but very important, the effect of automatic suspension, associated until 2010 only with the proceedings before the Council (now abrogated). This situation is already changing due to recent legislative modifications, as will be shown further on. In light of these data (which show the preference of tenderers for the Council as a first instance body), it seems odd that the legislator has made the action before the Council mandatory, claiming that otherwise access to EU funds will be blocked by lengthy court proceedings. This needs to be further explained – it is true that a significant number of complainants choose the Council; however, in the case of large infrastructure contracts, the economic operators preferred to go to court. The legislator, when operating the change, was mostly concerned with those tenderers who went before the court with the intention to delay the PP procedures (in many cases, though they could have asked for a speedier litigation, by changing the dates allocated electronically, they opted against it).

Another benefit considered by tenderers while ‘forum shopping’ refers to the suspensive effect of an action before the Council (the suspensive effect evolved from automatic, immediate, and unconditioned by other actions of the contestor in 2006 to an automatic suspension conditioned by the notification of the contracting authority, effective a day before the end of the standstill period in 2009. This was in place until July 2010. The award procedure was thus stopped if for example a tenderer lodged a complaint concerning the award documentation. This provision is currently abrogated – the legal action before the Council no longer stops the contracting authority from continuing the awarding procedures. The interdiction that currently operates refers to the conclusion of the contract prior to the decision of the Council. Another advantage refers to the flexibility of the administrative-judicial review procedure compared to the court one. It allows the tenderers to clarify/modify some of the mandatory elements required by law, including the object of the complaint

6 National Council for Solving Legal Disputes, Statistics

(within five days timeframe, at the request of the Council). In practice, because tenderers have a very short time span for lodging a complaint with the Council, they tend to lodge the complaint only formally, in order to comply with the deadline, but without presenting a solid legal justification of the alleged breach, backed by the required evidence/documents. Thus, the complainant gains two additional benefits from this flexibility: the complaint is not declared inadmissible if some constitutive elements are missing and the Council indicates what is missing and how it should be remedied; second, the tardiness of the complaint as a ground for rejection by the Council is at least postponed with an additional five days.

Aside from having a mandatory review before the Council as of 31.12.2010, the advantages described above are still operating in favor of the tenderers. The only change is that the action can no longer be lodged before a court of law, as an alternative to the Council.

When the complainant decided to go directly to court, the court action was directed against the acts of the contracting authority issued within the award procedure as well as for damages caused during the award procedure. In the absence of an action before the Council, the court of first instance was the Tribunal (established in all 41 counties), the Administrative and Fiscal Law Section. The ruling of the first instance court can be challenged with recourse within a time frame of five days from notification before the Appellate Court, Administrative and Fiscal Law Section if the legal action concerns the award procedure up to conclusion of the contract. If the legal action concerns the execution, nullity, annulment etc. of the contract, the Commercial Law Section of the Appellate Court was the recourse instance.

2.1.3. Review procedure before the Council with the amendments brought by Law no. 278/2010

With the occasion of approval of EGO no. 76/2010 in Parliament (Law no. 278/2010) a mandatory action before the Council was introduced.

The complainant can lodge a contestation before the Council in a timeframe of five or ten days, depending on the value of the contract, from the moment in which the tenderer is notified about any act/action of the contracting authority related to the public procurement procedures. When the tender documentation is published in the Electronic System for Public Procurement, the deadline starts from the day when the tender documentation is published and becomes available online.

After receiving a complaint, the Council needs to issue a decision within 10 or 20 days. Before assessing the case on its merits, the Council will review it in light of several exceptions⁷ (tardiness, lack of standing, lack of object, lack of competence

⁷ Exceptions are procedural means through which, under the provisions of the law, the interested party, the prosecutor or the court of law/review body, raises, without considering the case on its merits, the question of procedural irregularities regarding the composition or the competence of the court, errors concerning the right of the

on the behalf of the Council etc.) which can lead to the rejection of the contestation as being inadmissible. When the decision of the Council is based on exceptions, the deadline for reaching a decision is 10 days. If the case is assessed on its merits, the deadline is 20 days (this can be extended by a maximum of ten days, once, in exceptional cases).

The deadlines within which the parties have to apply for review have to be calculated so as to give preeminence to the party, and not to the Council or the court. Thus, the date when the contestation was presented at the post office is to be considered the date of the contestation, rather than the date when the contestation reaches the Council⁸. In general, the deadlines applicable to public procurement procedures are those provided by the law, regardless of the errors made by the contracting authorities when notifying the participants about them. Thus, the courts have held that different deadlines from those stated in the law are to be disregarded by those interested, even if they were indicated by the contracting authority, because the law takes prevalence over administrative communications⁹.

There were cases when the Council delayed the solving of the contestation beyond the time frame provided by law (now 20 days with a possible extension of 10 days), reaching even to months. The penalties for the delay are only disciplinary, and they are not enforced, so practically there are no incentives to strictly follow the deadlines. The majority of the courts have held that in such cases the decision of the Council cannot be annulled only on the basis of the delay¹⁰. Even a delay of three months was considered to have no impact on the legality of the decision issued by the Council¹¹, although the 'reasonable time frame' principle from the ECHR jurisprudence was invoked. Again, not all courts have the same opinion on the issue: one of them stated that in a case when the annulment came four months after the opening of the offers, during which time the contracting authority had already received some products from the winning bidder, it is not admissible¹². Currently, if the statistics of the Council

party to sue, with the intention to postpone the judgment, to ask to have some documents redrafted, or to reject the case altogether. In our case, the term exception refers to those irregularities discovered by the Council which prevent the case from being judged on its merits.

8 Judgment no. 970/17.09.2008, Alba Iulia Appellate Court, Division for Administrative and Fiscal Matters; Judgment no. 1861/11.09.2008, Bucharest Appellate Court, Division for Administrative and Fiscal Matters.

9 Judgment no. 118/19.01.2009, Bucharest Appellate Court, Division for Administrative and Fiscal Matters; Judgment no. 1975/01.10.2008, Craiova Appellate Court, Division for Administrative and Fiscal Matters.

10 Judgment no. 114/30.01.2008, Ploiești Appellate Court, Division for Administrative and Fiscal Matters

11 Judgment no. 115/30.01.2008, Ploiești Appellate Court, Division for Administrative and Fiscal Matters

12 Judgment no. 2532/06.11.2008, Cluj Appellate Court, Division for Administrative and Fiscal Matters

are accurate, the average time span for solving a decision is approximately 19 days. There is also an evaluation procedure which can lead to disciplinary penalties for the members of the Council.

The decision of the Council may consist in the annulment, total or partial, of an act of the contracting authority; the Council can request the contracting authority to issue an act or it can adopt any other necessary measures for remedying the acts of the contracting authority which affect the award procedure. If the Council in the process of analyzing the tender documentation finds that there are other breaches besides the ones listed in the complaint, it can only notify the National Authority for Regulating and Monitoring Public Procurement (NARMPP is the monitoring body responsible for the entire public procurement system in Romania) as well as the Unit for the Coordination and Monitoring of Public Procurements (UCMPP is a body whose competences slightly overlap with those of NARMPP, functioning within the Ministry of Public Finances). Until 2009, the Council did not have to limit its ruling to the object of the complaint at hand; it was allowed to analyze the award documentation in its entirety and to establish, *ex officio*, its legality. Based on the case law¹³, there were instances when the Council identified significant breaches of the law in the award documentation or procedure, which were not signaled by the tenderer in his complaint. Currently, the Council can only decide whether the contracting authority can continue with the award procedure or it can annul it. The Council cannot however decide to award the contract to a certain tenderer. The exact character of the remedies which can be offered by the Council is not always accurately perceived by the tenderers. In a significant number of complaints examined, the complainants asked the Council to award them the contract as a result of a faulty procedure (real or perceived). Even more, the Council had in some cases ruled a complaint as inadmissible for lack of object if the tenderer, using an inappropriate legal language, complained about the result of the award procedure. The Council interpreted that the complainant requested the Council to award the contract to that specific tenderer. The Appellate Court ruled that the Council should have analyzed the complaint in light of the implicit legal breach, namely the illegality of the evaluation of the tenders and the act of the contracting authority used to award the contract. The Council was considered in breach of the flexibility requirement which allows the complainant to refine his complaint provided that the Council asks it¹⁴. In this case, the court sent the case back to the Council that was required to judge it based on its merit. Currently, the law states that if a court action is brought against a decision of the Council which ruled based on exception

13 Judgment no. 2656/29.11.2008, Bucharest Appellate Court, Division for Administrative and Fiscal Matters; Judgment no. 1030/7.06/2007, Bucharest Appellate Court, Division for Administrative and Fiscal Matters; Judgment no. 1576/16.06/2008, Bucharest Appellate Court, Division for Administrative and Fiscal Matters

14 Judgment no. 214/25.02.2008, Alba Iulia Appellate Court, Division for Administrative and Fiscal Matters

(tardiness, lack of object etc.) and is declared admissible, the court will retain the complaint and solve it on its merits¹⁵.

Though the provision of the law which states that the Council cannot award the contract to a certain tenderer is very clear, the issue is more complex. Apart from some cases where the Council has decided that a certain offer is not conforming and thus ordered the resuming of the award procedure without the rejected offer¹⁶, the Council has refused constantly to go beyond the annulment of decisions of the contracting authority and to establish the winning offer or to award the contract¹⁷. The main argument used refers to the provisions of EGO no. 34/2006 (article 200) and the subsidiary legislation of implementation (Governmental Decision no. 925/2006, article 72 par. 2), which state that the authority competent to award the contract by establishing the winning offer is the contracting authority. However, the question here is whether the contracting authority is the only competent authority to do that? At a closer look, both provisions invoked by the Council and by some courts refer to the power of the contracting authority to decide, or to the obligation to decide in a certain time frame, but they are not clear whether this power is exclusive or not, when transposed into the context of the review phase. In other words, the power to decide the winning offer and to award the contract is evidently exclusive in the administrative phase, but is it still exclusive in the review phase?

This raises the question whether the Council or the court can establish the winning offer and then award the contract, or at least establish the winning offer. The separation of powers principle, as understood in Romanian legal system, prohibits courts to 'step into the shoes' of public authorities and decide the matter themselves. The principle of separation of powers can be invoked when talking about courts, so the answer seems to be negative in the first case, but not when the Council is involved, as the Council is a public authority, belonging to the same branch as the contracting authority, and its decisions can be assessed within the administrative control paradigm.

However, some courts seem to have another take on this matter. In a noteworthy case, the court has 'put itself in the shoes' of the contracting authority, stating that the criteria for the assessment of technical specifications are lacking, therefore the assessment made by each member of the evaluation commission was subjective. Consequently, it granted the maximum score for the contested evaluation criteria to all tenderers, re-ranking the bidders according to the new scores. The court action was rejected in the end because the new ranking did not change the winner of the award procedure,

15 Article 285(2) EGO no. 34/2006 with amendments by EGO no. 76/2010

16 See Judgment no. 2722/03.12.2008, Bucharest Appellate Court, Division for Administrative and Fiscal Matters confirming the decision of the Council, and Judgment no. 318/09.10.2008, Oradea Appellate Court, Division for Administrative and Fiscal Matters, infirming such an approach

17 Judgment no. 2156/29.11.2007, Bucharest Appellate Court, Division for Administrative and Fiscal Matters, confirming the decision of the Council

but the case is interesting in itself, when comes to the extent of the review conducted by the court¹⁸. In a scholarly opinion criticizing this decision, it was argued that the court had no place in re-ranking the list of bidders, because the law does not confer this power upon the courts. The solution to grant all bidders maximum score for the contested criteria is not a solution with fundament in law¹⁹. Nevertheless, the case shows the willingness of some courts to go on a path of effective dispute settlement, looking with the corner of an eye at the principle of separation of powers while at the same time interpreting in a flexible manner the provisions of the law. The case is not unique, as other courts have done the same²⁰. Other courts, on the contrary, have followed a more restrictive approach, refusing to decide which offer is the winning one²¹ or to comparatively evaluate the offers²². Following their argumentation, the court can only require the contracting authority to resume the award procedure from a certain point or start anew. The courts have stated that the *non reformatio in pejus* principle does not apply in proceedings before the Council²³. The conclusion is in accordance with the general opinion of the doctrine, that administrative procedures do not confer such protection (Dragoş, 2009, p. 235).

If the Council decides that measures regarding the remedying of an act are necessary, then NARMPP is notified and has the obligation to monitor the way in which the contracting authority proceeds to carry out this obligation. The decision of the Council is mandatory for the contracting authority. A public procurement contract awarded in disregard of the Council's decision is affected by nullity.

Against the decision of the Council, the tenderer can lodge a complaint with the Appellate Court in whose jurisdiction the premises of the contracting authority are located in. This provision had suffered several subsequent modifications. In the initial version of EGO no. 34/2006, a complaint against the decision of the Council had to be lodged with the Council which was responsible for forwarding it to the court within three days after the expiration of the ten days deadline for lodging this complaint. Following a decision by the Constitutional Court, in 2008 the law (EGO no. 143/2008) allowed the complainants to lodge the complaint with either the Council or the court. Currently, the law expressly states that the complaint needs to be lodged with the

18 Judgment no. 764/13.11.2008, Bacău Appellate Court, Division for Administrative and Fiscal Matters

19 Comment on the Judgment no. 764/13.11.2008, Bacău Appellate Court, Division for Administrative and Fiscal Matters, in Şerban (2009, p. 99)

20 Judgment no. 1066/11.06.2007, Bucharest Appellate Court, Division for Administrative and Fiscal Matters

21 Judgment no. 868/R/18.12.2008, Braşov Appellate Court, Division for Administrative and Fiscal Matters

22 Judgment no. 503/15.03.2007, Bucharest Appellate Court, Division for Administrative and Fiscal Matters

23 Judgment no. 467/16.02.2009, Bucharest Appellate Court, Division for Administrative and Fiscal Matters

court (EGO no. 19/2009). In practice however, this last modification generates delays in the court proceedings because the Council, which could be unaware of a court action, does not send in time for the first hearing, the dossier of the case.

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

2.1.4. Deadlines for lodging a complaint with the Council

As already mentioned, the deadline for lodging an action with the Council, before the conclusion of the contract, is of five or ten days, depending on the value of the contract. The five days deadline is clearly a national one, for contracts below the EU value thresholds. The existence of different national deadlines, shorter than the ones from the EU law, even if they apply to contracts below the threshold, creates confusion among the tenderers.

In an illustrative case, an economic operator lodged a complaint before the Council which was rejected on grounds of tardiness. The complainant then lodged a subsequent court action against the decision of the Council arguing that the decision does not take into consideration the deadlines from the 2004/18/CE and 2007/66/CE Directives, which have preeminence over the national legal provisions. More specifically, the Romanian PP legislation established a shorter deadline for lodging a complaint in the case of contracts under the EU value threshold (five days starting with the next day following notification). The economic operator argued that the ten days deadline from the Directive should apply in this case. The court ruled that the national legislation can establish different conditions for contracts/procurement under the EU value threshold²⁴. This type of litigation is illustrative for a problem that has been identified in relation to PP in Romania. The Romanian legislation, in the process of transposing EU procurement law, makes relatively few distinctions with regard to contracts under and above the EU thresholds. The result is that the EU requirements apply also to low value contracts. This has determined some scholars to label it as ‘excessive’ application of the procurement law (both to under the thresholds contracts and to economic operators other than contracting authorities, including NGOs). With respect to remedies, besides a shorter standstill period, there are no distinct provisions for contracts under the threshold (Filipon, 2010).

²⁴Judgment no. 1920/8.10.2009, Bucharest Appellate Court, Division for Administrative and Fiscal Matters

3. Constitutionality of the administrative-jurisdictional review conducted by the Council. The legal status of the Council

Since the adoption of EGO no. 34 in 2006 the constitutionality of this review was questioned. The Constitution states that administrative jurisdictions have to be elective and free of charge. The constitutionality of the review by the Council was assessed against these two main criteria.

- In the original version of EGO no. 34/2006, the tenderer who was dissatisfied with the decision of the Council, was able to lodge a court action provided that the complaint was lodged with the Council which had the responsibility to send it to the court. This meant that the tenderer was forced to lodge the complaint with the same body which ruled against him, thus having his access to justice limited. This situation resulted in a plea of unconstitutionality raised before an Appellate Court which led to a ruling by the Constitutional Court. The Constitutional Court ruled that the provision discussed above has the potential to limit the right to free access to justice and to due process²⁵; this is because the law required the Council to act as an intermediary between the complainant and the court, without establishing any sanction for the Council provided that it delays the process by not sending the complaint to the court. Following the decision of unconstitutionality, this provision is no longer in place.
- The law establishes that in the cases when the tenderer chooses to lodge his initial complaint with the Council, the Appellate Court is the recourse instance. Against this legal provision, several pleas of unconstitutionality were raised regarding the limitation of free access to justice and the absence of a first instance court – the Council is not a real court but an administrative jurisdictional (quasi-judicial) body. The Constitutional Court ruled that administrative review in general is constitutional and it does not act as a limitation to the free access to justice since it is elective and free of charge. The aggrieved claimant has in addition the liberty to choose between an administrative review procedure and a court action²⁶. In a subsequent decision, the Court ruled that the principle of free access to justice should be interpreted in the sense that no group or social category can be excluded from the exercise of procedural rights. It is allowed however by the Constitution to establish by law special procedural rules and specific means for the exercise of procedural rights. Therefore, free access to justice does not mean access to all judicial bodies and to all jurisdiction tiers²⁷.
- EGO no. 76/2010 introduced penalties for lodging a complaint with the Council which is then rejected – the complainant will lose a portion of the deposit made

25 Constitutional Court of Romania, Decision no. 569/15.05.2008, published in the Official Monitor of Romania no. 537 from 16.07.2008

26 Constitutional Court of Romania, Decision no. 887/16.10.2007 published in the Official Monitor of Romania no. 779 from 16.11.2007

27 Constitutional Court of Romania, Decision no. 230/4.08.2008, published in the Official Monitor of Romania no. 300 from 17.04.2008

with the contracting authority. This contradicts the constitutional principle of having free of charge access to administrative jurisdictions.

- Another constitutionality issue is related to the mandatory character of the review before the Council introduced as of 31.12.2010. This provision clearly violates the provision of the Constitution which states that administrative jurisdictions have to be elective. If in the case discussed above (penalties for losing the case before the Council) it is debatable if access to justice is prohibited (the penalties will be paid only after the ruling and if the tenderer loses the case); in the latter case the situation is clearer and in our opinion it represents a breach of the Constitution.

According to the law, NARMPP can also be considered an actor within the remedies system. Though the institution cannot grant remedies it has an important monitoring role concerning the implementation of the legal decisions that grant remedies to tenderers. It also has legal standing in cases concerning the ineffectiveness of the contracts.

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

- In situations when it received a complaint that was not within the boundaries of its competence the Council has declined its competence in favor of the court. Such an action is considered incompatible with the legal nature of the Council, which should have rejected the complaint as inadmissible. The decline of competence is a procedure reserved for courts of law.
- The Council has no standing in court actions brought against its decisions, a feature similar to that of a court (Șerban, 2008b). This is a unique situation in the Romanian legislation, as other administrative jurisdictions are part of the legal action brought against their decisions. This provision establishes an exceptional status for the Council. We believe that there were practical considerations justifying this measure – the Council has to be part in court proceedings all over the country since the recourse against its decisions is filled with the Court of Appeal in whose jurisdiction the contracting authority is located. Nevertheless, the legal fundament for this approach is missing.

4. Interactions between review bodies

A first situation refers to the dynamic of the interaction between the Council and the courts in the context of the review of the decisions issued by the Council. Especially in the early stages of the activity of the Council, probably because of the lack of expertise and experience of the Council, some of its decisions were stricken down by the courts on grounds of exceeding its competences. The most frequent situation identified by courts regarded the evaluation of tenders and the subsequent

assessment of these tenders as non-compliant with the requirements of the award documentation²⁸. Currently, the activity of the Council is publicly perceived as more trustworthy by the actors involved in the PP process (specialized forums and blogs on PP, economic operators, media etc.). The latest legislative change, which made the review before the Council mandatory, acknowledges this fact. If the decisions of the Council as a first review body will be stricken down by courts, several months later, after the contract was concluded, following the standstill period, we are going to witness an increase in the number of actions for damages. The legislator seems to think that this risk is not worth considering.

In practice, interesting situations occurred concerning the decline of competences by the Council and by the courts. The nature of the Council, considered an administrative jurisdictional (quasi-judicial) body or a special jurisdiction similar to a tribunal in the common law system, has resulted in contrary jurisprudence regarding the possibility to decline the competence to the courts and back. In early cases, the Council had refused to decline its competence to the court, while in others the courts have refused to receive such actions²⁹. Other courts, on the contrary, have held that such decline is admissible³⁰.

In court proceedings against decisions of the Council, the parties can invoke only evidence that was invoked before the Council, as no new evidence is admissible³¹.

In the earlier versions of the PP law, the lack of notification by the tenderer of the contracting authority generated different effects, depending on whether the action was brought before the Council or before the court. The law stated that the tenderer who goes before the Council must notify the contracting authority under the penalty of having his complaint rejected on grounds of tardiness. Thus, some courts have held that such nullity is absolute and can be invoked either before the Council or before the court³², while other courts make distinction between relative nullity and absolute nullity and thus restrict its effects to the proceedings before the Council, considering also the abuse of the contracting authority manifested in the omission to invoke the nullity at this level in order to invoke it later, in court³³.

28 Judgment no. 2775/12.12.2008, Bucharest Appellate Court, Division for Administrative and Fiscal Matters

29 Judgment no. 229/27.02.2008 and no. 230/27.02.2008, Alba Iulia Appellate Court, Division for Administrative and Fiscal Matters

30 Judgment no. 348/11.05.2007, Constanța Appellate Court, Division for Administrative and Fiscal Matters

31 Judgment no. 1616/17.07.2008, Craiova Appellate Court, Division for Administrative and Fiscal Matters

32 Judgment no. 1364/12.06.2008, Craiova Appellate Court, Division for Administrative and Fiscal Matters

33 Judgment no. 1284/28.05.2008, Cluj Appellate Court, Division for Administrative and Fiscal Matters

5. General administrative appeal as a mandatory alternative to the review by the Council?

Until the changes from December 31st 2010, when complainants could choose to go in the first instance either before the Council or before the court, an interesting debate concerning the administrative appeal against acts issued by contracting authorities in public procurement, in cases when the action was lodged directly with the court, was raised. The general Law on judicial review³⁴ provides for a mandatory reconsideration of administrative acts (administrative appeal/appeal in front of public authority) in cases when there are no other prior administrative proceedings imposed by the special legislation (this applies to the proceedings before the Council). Thus, for those who went directly in court in public procurement cases, a formal notification of the contracting authority by which the complainant asks for annulment of the decision or other measures would have been necessary. The lack of such prior appeal makes the court action inadmissible (this was later changed – the lack of such a notification would have no longer prohibited the filing of a court action). Such an interpretation is in line with the provisions of the 2007/66/CE Directive which in article 1(5) states that member states may establish a mandatory review with the contracting authority provided that the use of this action leads to the immediate suspension of the conclusion of the contract. The national courts have also different views on this issue. Some courts argue that the special procedure regulated by the public procurement law is to be understood as excluding the general administrative appeal thus opening up a direct action before the court³⁵; other courts, on the contrary, contend that in cases when the Council is not involved in review, the general administrative appeal to the issuer (the contracting authority) should be exercised³⁶. Moreover, some courts have gone even further, arguing that a review by the Council is inadmissible after the party has exercised the administrative appeal provided by the Law on judicial review³⁷. The solution is debatable, as the jurisdiction of the Council was optional and the administrative appeal is mandatory, so there is no contradiction between the two modes of review, even though they have the same legal nature of administrative proceedings. Following the latest changes – the review before the Council is mandatory –, this issue remains important from a doctrinarian perspective. If the Constitutional Court will strike down the mandatory review, then it will regain its relevance.

For award procedures organized following the public procurement law by choice by entities that are not contracting authorities in the sense of the PP law (falling outside the scope of this law – i.e. NGOs), the Council has no jurisdiction to hear

34 Law no. 554/2004

35 Judgment no. 2954/09.12.2008, Cluj Appellate Court, Division for Administrative and Fiscal Matters

36 Judgment no. 325/02.10.2007, Galați Appellate Court, Division for Administrative and Fiscal Matters

37 Judgment no. 593/13.06.2008, Pitești Appellate Court, Division for Administrative and Fiscal Matters

cases in first instance. The courts have stated that resorting voluntarily to the public procurement provisions does not expand the jurisdiction of the Council to hear such cases³⁸, and that EGO no. 34/2006 regulating the jurisdiction of the Council takes prevalence against the award documentation, which may wrongfully indicate the Council as the review body.

6. Other Alternative Dispute Resolution (ADR) tools available in public procurement

The law creates the framework for the establishment of ADR tools in public procurement. The Government can regulate, by means of decision, the situations and the way in which tenderers and contracting authorities have the right to participate in a conciliation procedure (it applies only during the execution of the contract). Currently there is no such decision in place. Nevertheless, the general Law on judicial review³⁹ sends the parties of the public contracts to conciliation regulated by the Code of civil procedure⁴⁰ for commercial contracts. It is a prior requirement for lodging a court action, so it is mandatory. Moreover, among the ADR tools available there is also the procedure of mediation, regulated in a general manner in Law no. 192/2006 which can be in principle applied to public procurement procedures and contracts as well. Nevertheless, there is reluctance from the contracting authorities regarding the use of such tools in practice, as they are fearful of the controls conducted by the Court of Auditors, which does not encourage such practices. This happens in light of potential abuses by the contracting authorities.

7. Concluding remarks

In Romania, the dynamic relation between courts and other review bodies is a feature of the remedies system in public procurement law since its development based on the implementation of European directives. The prevalence of ADR tools when compared with traditional review performed by courts has its roots in specific problems arising from the need to have a better effectiveness in awarding contracts in the context of structural funds. Nevertheless, the unconstitutionality of the mandatory review performed by the National Council for Solving Legal Disputes, if decided by the Constitutional Court, may hinder again the efforts to speed up award procedures. This perspective poses the question whether making the Council the only first instance review body is the correct solution, instead of speeding up procedures in front of courts and making the Council the chosen alternative of the tenderers, due to certain advantages inherent to administrative appeal procedures.

38 Judgment no. 836/R/09.12.2008, Braşov Appellate Court, Division for Administrative and Fiscal Matters; Judgment no. 1807/05.11.2007 and Judgment no. 1991/15.11.2007, Bucharest Appellate Court, Division for Administrative and Fiscal Matters

39 Law no. 554/2004, article 7 par. 2

40 Article 720¹ of the Code of civil procedure

In the context of a larger research on the effectiveness of ADR tools in administrative law, this case-study illustrates the more and more important role played by alternative review mechanisms in relation to the well-established court system, overloaded with cases and ineffective in providing justice, especially in new democracies.

It should not be overlooked, though, that the background against which these administrative appeal procedures thrive is the current need to access structural funds as quickly as possible. The courts are considered a menace for this process, impeding the absorption process and offering abusive tenderers a chance to delay necessary projects. However, walking on the edge of constitutionality may prove an erroneous policy choice if the Constitutional court does not change its jurisprudence on this matter, with effects that are difficult to assess. And an assessment of the role of ADR tools in administrative matters in other fields than public procurement, not subjected in such a way to the pressure of accessing structural funds, may relieve different conclusions.

From the perspective of the increasing role of administrative appeals and other forms of ADR in administrative justice, nevertheless, the above case-study proves their effectiveness when assessed against court proceedings, making the case for this the importance of the institution in administrative law.

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