The Romanian Experience with Interim Measures and Automatic Suspension[†]

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Abstract

Suspension of an award procedure, pending the review of a complaint lodged by an aggrieved tenderer before an independent review body, is a very important interim measure in procurement remedies. Such measure may prevent an aggrieved tenderer from suffering further damage due to an unlawful act of a contracting authority, affecting the former's chances of being awarded the contract in question. Suspension can also prevent a contracting authority from continuing an award procedure on an unlawful basis that might increase its liability in later litigation concerning the award procedure in question, or the awarded contract. However, depending on the moment when suspension starts (or ends), and on conditions that may trigger it, or otherwise, the practical implications are many folded. This article analyses the Romanian experience with its regulation of the suspension of an award procedure, from an immediate and automatic suspension of the award procedure as a result of lodgement of a complaint, to a non-automatic (voluntary) suspension. The article describes all the stages and shades to which suspension has been going through, from one extreme to the other, within the limits of the applicable EU rules, in just about four years. The article is a "snapshot" of suspension in the Romanian procurement system as at July 2010. Meanwhile, two other amendments to the Romanian procurement law were enacted, and they brought some further changes and clarifications to suspension, and to other procurement remedies issues. However, these amendments do not affect the analysis of the various forms of suspension and their practical implications, which remains fully up to date. In the near future, it is likely that forms of suspension, similar to those analysed by this article, become actual again. The Romanian experience may very well be relevant for other procurement contexts.

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I. Introduction

The objective of this article is two-fold: to provide an outline of the Romanian remedies system in public procurement and, in this background, to analyse four years of Romanian experience with interim measures. While automatic suspension has constantly been in place between 2006 and 2009, its regulation has already been changed a few times in an attempt to enhance the balance between effectiveness of review and efficiency of purchasing, by minimising disruptions to the purchasing process. After 2009, the survival of the automatic suspension has been debatable, and an amendment to the public procurement law issued in July 2010 makes it clear that the Romanian remedies system no longer recognises the automatic suspension of the award procedure as a result of submission of a complaint, except in as far as the review procedure overlaps in time with the stand still periods.

Inevitably, every 'suspension regime' had certain practical advantages and disadvantages, and triggered certain behaviours from various players, and in particular from aggrieved (or allegedly aggrieved) tenderers. In this article we will review the trade-offs involved with every change in the regulation of suspension, and we will seek to draw insights from the Romanian experience to date that may be useful to other procurement systems that have a more limited practice of 'automatic suspension'.

To do this, we will be looking at the relevant legislation, and how it was amended from time to time, at relevant case law, and will place these sources into a practical perspective resulting from the author's involvement in the sector. The legal and socio-legal methods will therefore be blended with personal observation, and with historical and teleological perspectives.

In section II we set the background of the national public procurement system, including the courses of remedial action in procurement. The so called "administrative-judicial" course of action is then extensively examined in section III in as far as automatic suspension is concerned. While automatic suspension was laid at the very heart of this course of action, its regulation and conditions have significantly

changed over time. Further considerations regarding suspension are made with reference to a different course of action—the "purely judicial" action—in section IV. Finally, section V, considers compliance with Directive 2007/66/EC and seeks to draw concluding remarks in connection with the balance or trade-offs between review effectiveness and purchasing efficiency in the regulation of (automatic) suspension.

II. The National Public Procurement Background

The Romanian tradition in public procurement is rather young, with the first regulatory instruments dealing specifically and rigorously with the award of public procurement contracts being enacted in 2001.[1] As in other countries with a Napoleonic legal system, public procurement legislation falls under the administrative branch of law that regulates legal relations in which the State, a government body and, more generally, a public institution is involved. Remedies were available, however under the general administrative litigation procedure,[2] which was a rather long winded judicial process, involving a prior complaint stage with the contracting authority. Time-limits were long, and there was insufficient warranty that remedy could be obtained before a contract was awarded.

Notably, case law was not and is not a source of law in Romania, *i.e.* a judicial decision is only applicable to the specific case in connection with which it was issued and it is not compulsory for other (similar) cases lodged before the issuing Court, or before other Courts.[3] This continues today and will probably continue in the long run, as it is a general principle of Romanian law. While a Judge, or Court, may consider existing case law, they will in general not be bound to do so.

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[1] For example, Government Urgency Ordinance No. 60/2001 regarding public procurement, published in the Official Journal of Romania No. 241/11.05.2001. This act was supplemented by a number of secondary legislation acts.

[2] At the time, the law in force was Law No. 29/1990, published in the Official Journal of Romania No. 122/08.11.1990, as amended. This law was repealed in 2005 when the new Administrative Litigation Law became effective—Law No. 554/2004 published in the Official Journal of Romania No. 1154/07.12.2004.

[3] For example, N. Popa, *Teoria Generala a Dreptului (General Theory of Law)*, All Beck, Bucharest, 2002, pp. 186-188.

A comprehensive public procurement reform—legal and institutional—was undertaken in 2005-2006, under pressure of EU accession scheduled for 2007. Significant effort has been dedicated to harmonising national legislation with the EU directives in the sector and a new procurement law was enacted and entered into force in the summer of 2006.[4] The new procurement law basically incorporated and consolidated the provisions of the EC public procurement directive, EC utilities directive and the two remedies directive in force at that time.[5] The new procurement law also regulated concessions, and it was supplemented by a number of secondary legislation instruments, and by some guidance.

From an institutional point of view, that period also represented a milestone for the procurement system. Two new institutions specifically dealing with public procurement were established: the National Authority for Regulating and Monitoring Public Procurement (NARMPP)—responsible for public procurement policy, monitoring, and legislative proposals;[6] and the National Council for Settlement of Public Procurement Complaints (NCSPPC).[7] While the NARMPP is a Government body, the NCSPPC is an independent, quasi-judicial body, reporting to Parliament, and functioning near to the General Secretariat of the Government. Additionally, a special division was set up within the Ministry of Finance dealing with *ex-ante* controls and specific guidance for selected public procurement award procedures.

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[4] Government Urgency Ordinance No. 34/2006 published in the Official Journal No. 418/15.05.2006, as approved and amended by Law 337/2006 published in the Official Journal of Romania No. 625/20.07.2006. The Procurement Law entered into force on 30 June 2006 was amended many times after that.

[5] The "Procurement Directive" 2004/18/EC; the "Utilities Directive" 2004/17/EC; and the two Remedies Directives in force at the time—89/665/EEC, and 92/13/EEC.

[6] NARMPP was set up via Government Urgency Ordinance No. 74/2005 published in the Official Journal of Romania No. 572/04.07.2005 (amended twice after entering into force).

[7] NCSPPC was set up via article 257 of the Procurement Law.

Remedies were also revolutionised.[8] Stand-still periods were introduced and two procurement-specific courses of action were made available to aggrieved tenderers, as part of administrative litigation, but with very specific features and a derogatory regulation from the regular administrative litigation procedures: the administrative-judicial course (AJ) of action—complaints being reviewed in the first instance by the NCSPPC, with appeals possible before Courts of Appeal; and the "purely judicial" (PJ) course of action—complaints being reviewed in the first instance by a Tribunal, and appeals by Courts of Appeal.

AJ has been a great success, and the ever increasing number of complaints submitted each year to the NCSPPC is testimony of this—for example, over 6000 complaints in 2008.[9] But what were the main elements that made this course of action so attractive to tenderers?

Not surprisingly, mainly: an automatic and immediate suspension of the award procedure upon submission of a complaint, pending a decision regarding that complaint; the quick settlement procedure; an independent review body specialising only in procurement cases; and the lack of any prior complaint procedure with the contracting authority. Basically, any candidate/tenderer or potential tenderer could submit a complaint against an alleged unlawful act of the contracting authority, and would automatically obtain suspension of the award procedure, plus an independent and specialised review of the act challenged.

While the AJ can only be used *before* the conclusion of a contract, only if the complaint is introduced within very short time-limits (5 or 10 days) as provided for by the law, only with a view to obtain cancellation or modification of an unlawful act/decision of the contracting authority, and even though damages cannot be sought or obtained under the AJ, it

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[8] They are regulated under Chapter IX of the Procurement Law, articles 255-292. The specific remedies provisions in the Procurement Law are completed, where necessary, with the more general provisions under the administrative litigation law no. 554/2004 and with the provisions of the Civil procedure Code.

[9] Information available via the NCSPPC's web site www.cnsc.ro.

has to be recognised that AJ meets the main interests of commercial tenderers. They tend to look for an opportunity, and do everything they can to ensure that they have a fair chance of realising that opportunity in an 'even playground'. If that opportunity cannot be realised, they would normally just shift to another opportunity, rather than getting into a long winded and costly litigation with a view to obtain damages (unless special circumstances surround specific cases), which is what the PJ could provide.

In a way, at some point in 2007, the AJ became a victim of his own success with the NCSPPC being tremendously overloaded with cases, some of them abusively lodged, to the point where it was unable to deal in a timely fashion with complaints,[10] as the Government was rather slow in approving an increase in the number of NCSPPC staff. The issue was eventually resolved but it also involved considering and operating a number of legislative amendments, circumstantiating and conditioning the automatic suspension of the award procedure, which is detailed at Section III below.

Under the circumstances, the PJ was and continued to be seriously overshadowed by the AJ. The PJ provided for certain advantages over the AJ, for example: it could be used if a tenderer missed the short time-limits for submitting a complaint under the AJ; it could be used even after a procurement contract has been concluded; it could be used if damages were sought; legal standing was wider, for example, it could include a third party whose rights might have been harmed in connection with a procurement procedure, say the owner of a land to be used for a motorway concession[11] (*i.e.* the complainant need not necessarily be an

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[10] In 2007 the average time for settlement of a case by the NCSPPC was the highest, *i.e.* 45 days, compared for example with 14 days in 2008. Information available via the NCSPPC's web site www.cnsc.ro.

[11] For example, case 6/R of 2006 of the Brasov Court of Appeal, referred to in the manual entitled "Remedies in Public Procurement", Bucharest 2007, p. 75, prepared and published under the EU financed project "Strengthening the Administrative and Managerial Capacity for an Efficient Implementation of the Public Procurement Legislation, Romania", under the auspices of the NARMPP. The section on Romanian remedies was prepared by Andre Bywater and Serban Filipon.

aggrieved *tenderer*); and, wider competence of review courts, for example, they could decide cancellation of a contract. However, because the automatic suspension—conditional or unconditional—did not operate under the PJ, because of the costs involved under the PJ, of the requirement under the PJ for a prior complaint procedure with the contracting authority, and because of the lead times towards settlement, the PJ remained of very limited interest to tenderers. Suspension could be requested and awarded if justified, but it was not automatic under PJ.

In 2007 a twelve month EU-funded project was implemented with a view to "strengthen the administrative and managerial capacity" for an efficient application of the public procurement legislation.[12] A review of the existing legislation was undertaken with a view to assess compliance with the EC directives and case law, and it was found that, with very few and very minor exceptions, the legislation did comply with the '*acquis*'. The AJ was described by a number of international consultants as being 'ahead of the directives', due to the automatic suspension and to the specialised independent body dealing only with procurement cases. Others argued though that the unconditional and immediate automatic suspension had more disadvantages than advantages. Among other activities, significant procurement training was provided to major contracting authorities, the NARMPP and NCSPPC, and two study visits were conducted to the European Commission, the European Court of Justice, and other relevant institutions in Belgium and Luxembourg.

Still, mainly for practical reasons, a number of revisions to the procurement law were passed in 2007, 2008 and 2009. Many of them brought, *inter alia*, amendments to the way in which the automatic suspension operates under the AJ. The two 2009 amendments raised questions over the survival, or otherwise, of the automatic suspension, while the 2010 amendment of the procurement law explicitly abrogates automatic suspension provisions. All these stages and amendments are described, analysed, and considered comparatively below.

[12] For the full title of the project refer to the previous note. The project was implemented by a consortium formed of WYG International Limited, Eversheds and Deloitte Romania, led by WYG. The author of this article acted as project coordinator and as procurement expert on the project.

III. Automatic Suspension under the Administrative-Judicial Course of Action (AJ)

A. *General*

The AJ has already been briefly presented. Basically, it provides aggrieved tenderers with an opportunity to challenge acts of the contracting authority that are considered unlawful (the tender dossier, the specifications, a clarification, the tender opening report, the evaluation report, the award decision, *etc.*), and to have such complaints reviewed very quickly—generally within about 20 days—by an independent body specialising in procurement disputes. AJ can only be used before a procurement contract is concluded, and can only regard the cancellation or amendment of an act.

AJ may eventually result in cancellation of the award procedure in its entirety, however this is not something that aggrieved tenderers have the right (legal standing) to request, it is though something that the NCSPPC has competency to order on its own motion if no other remedy can be applied in order to bring the award procedure back into full legality. Also, AJ requires tenderers to be alert, due to its very tight time limits—for example acts can only be challenged within 5 or 10 days of their issuance, depending on the value of the tender, under pain of the complaint being rejected as lodged late.

What really made AJ attractive to tenderers, apart from the above, is an absolute warranty that the procurement contract in question could not be concluded before the complaint was reviewed independently. This was achieved via the automatic suspension of the award procedure as an automatic effect generated by virtue of the law upon lodging of a complaint. The regulation and practice of automatic suspension has gone through four distinct stages between 2006 and 2009, stages which we call as follows: (i) immediate unconditional automatic suspension; (ii) immediate conditional automatic suspension; (iii) semi delayed automatic suspension (conditional); and (iv) fully delayed automatic suspension (conditional). The 2010 amendment goes further and replaces the automatic suspension (of any kind) with non-automatic suspension.

B. *Immediate Unconditional Automatic Suspension*

In its initial regulation, the procurement law provided for what we call immediate unconditional automatic suspension. This was automatic suspension in its pure form: upon lodging of a complaint with the NCSPPC, the award procedure before the contracting authority was immediately suspended, without any further formalities or conditions, and suspension would continue until the complaint was settled. The award procedure could only be resumed after a decision was issued by the NCSPPC, and the contracting authority was bound by that decision (unless an appeal was further lodged against the NCSPPC decision and the Court of Appeal rejects the NCSPPC decision).

While under article 271 (2) of the procurement law, the complainant had the obligation to submit a copy of the complaint to the contracting authority immediately after submission to the NCSPPC, there was no sanction attached to this obligation in case the complainant failed to meet the obligation. This imperfect regulation led to practical issues.

For example, if the complainant did not submit a copy of the complaint to the contracting authority, in theory the award procedure was suspended but in reality the contracting authority would continue—in good faith—the award procedure. An extreme situation could have been where the contracting authority concluded a contract with a tenderer in good faith, without being aware of a complaint being submitted to the NCSPPC. In theory again, the contract would be null and void, but only a court could settle the case, as this matter would fall out of NCSPPC's competence.

A case of 2006[13] provides for another example. The complainant challenged a condition imposed by the contracting authority that toners to be procured should be from the same firm as the printers (indication of a specific firm), and requested that the specification should be changed to allow for other compatible toners from different firms. Due to a formal error the complainant did not notify the contracting authority about the

[13] Case no. 137/C3/219 of 2006.

complaint— he managed to send the notification to a different institution. The contracting authority continued the award procedure, and only became aware of the complaint during the tender evaluation stage when the NCSPPC asked for the contracting authority's opinion regarding the complaint, as per the NCSPPC's procedure. The contracting authority, of its own motion, decided to cancel the award procedure and informed the NCSPPC accordingly. The NCSPPC had no alternative but to reject the complaint as lacking object because the challenged act (a clarification) had already been cancelled by the contracting authority as part of cancellation of the entire award procedure.

Clearly, immediate and unconditional automatic suspension led to, at least, communication problems. While these could have been avoided by, for example the NCSPPC itself immediately notifying the contracting authority of a complaint being lodged and of the suspension of the award procedure, this option was not pursued, possibly due to the limited resources/capacity within the NCSPPC.

While immediate unconditional automatic suspension prevented contracting authorities from abuses involving continuing the award procedure and awarding a contract before an independent review, it did not in any way prevent economic operators from abusive behaviour, on the contrary, it did invite for it. Here is a simple scenario. A company identifies a number of simultaneous public procurement opportunities and intends to participate in all of them. However, the company finds that it simply does not have sufficient resources or time to deal with all of them. So, why not submit a complaint against one of them, automatic suspension operates, and the submission deadline gets delayed by say about 20 days (possibly the time that was needed to be bought-in to complete the tender)? Rather unethical, we have to admit—clearly against the spirit of the law and good practice—but still not explicitly unlawful. Such behaviour further overloaded the NCSPPC (unnecessarily), created an improper disadvantage over the economic operators that would have been able to fully meet the initial deadline for submission, and over the contracting authority's legitimate interest to procure within a reasonable timetable.

C. *Immediate Conditional Automatic Suspension*

In view of the above considerations alternative regulations were enacted via Government Urgency Ordinance 94/2007 (GUO 94) of October 2007 amending the procurement law.[14]

Under GUO 94 (articles 271 (2) and 277 of the amended procurement law) automatic suspension continued to operate immediately upon lodging of a complaint to the NCSPPC, however the complaint was deemed null and void, and therefore would be rejected, if the complainant failed to submit[15] a copy of the complaint to the contracting authority within 1 day after submission to the NCSPPC. In other words, automatic suspension became conditional on submission of a copy to the contracting authority. Communication issues were thus resolved in some way.

Dealing with abusive submission of complaints by economic operators proved trickier though. New article 256[1] was introduced by GUO 94 providing that the NCSPPC could apply a fine on the complainant, after settlement of the main complaint, and at the request of the contracting authority, in case of abusive submission of complaints. Fines could be up to about EUR 10,000. However, proving an abusive submission of a complaint was clearly not a straight-forward matter, as it involved demonstrating bad faith of the complainant *i.e.* that at the time of submission the complainant was aware that it had no grounds, but submitted the complaint intentionally to generate certain unjust advantages for himself, for example a postponement of the deadline for submission of tenderers. This was not an easy task for the NSCPPC, in particular bearing in mind that the NCSPPC is not a court *per se*, but a quasi-judicial body. On the other hand, EUR 10,000 may not necessarily be a very high price for certain economic operators, if they are to buy time (via suspension) to pursue a multi-million contract. In effect, this

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[14] Published in the Official Journal of Romania No. 676/04.10.2007.

[15] And obtain relevant proof of submission—either a confirmation of receipt with registration number and date, in case of hand deliveries; or post record for submissions via registered mail.

provision did not prove particularly useful as an active measure against abusive complaints already submitted however it might have had a certain preventive effect as a passive measure, discouraging some abusive submissions in the first place.

An additional problem was more and more perceived in connection with immediate automatic suspension, despite the fact that the initial objective of the AJ was to provide for a quick resolution of procurement disputes. This was the fragmentation, and delays, of the procurement processes. While article 273 of the procurement law, as amended, provided for the possibility of the NCSPPC to aggregate more complaints relating to a certain award procedure into a single resolution, this certainly implied that those complaints were submitted more or less at the same time. But here is another simple scenario which shows how submission of various subsequent complaints against the same award procedure (and here we forget about possible abusive complaints) could on the one hand delay the procurement process and, on the other hand, overload the NCSPPC. For example: one potential tenderer submits a complaint against the tender dossier—award procedure is suspended pending a decision; complaint resolved, award procedure resumes—another potential tenderer then submits a complaint regarding a tender clarification issued by the contracting authority—award procedure suspended again, and then eventually resumed; a tenderer then submits a complaint against the tender opening report (*idem*); and another one against the award decision, *etc*.

A simple calculation of aggregated suspension periods in the above scenario would lead to at least three months (in practice it could be more) added to the usual procurement lead times, assuming the NCSPPC rejects all complaints. If, on the contrary, it admits some of them, for example if it finds that the tender dossier included unlawful specification, then the tender dossier will need to be corrected before the award procedure can be resumed, which adds additional delay. Also, if for example, if the NCSPPC finds that the evaluation did not take full account of the published criteria and cancels the evaluation report, evaluation will have to be re-done by the contracting authority, which certainly will take additional time. Meanwhile, the contracting authority's need for services, supplies or works, remains unsatisfied for months.

Some of the delays could well be avoided by increasing the capacity of contracting authorities to proceed all in accordance with the law and good practice. Others though are simply generated by the system without any fault from contracting authorities or other players (see above assumption of all subsequent complaints submitted in good faith and rejected), so additional measures and adjustments had to be sought. As it happens though, such measures resolve certain issues but may generate others...

D. *Semi-Delayed Automatic Suspension*

December 2008 brings new changes to the procurement law via Government Urgency Ordinance 143/2008[16] (GUO 143). The AJ and automatic suspension were also subject to changes. The main objective of this round of changes was to streamline the procurement process in the sense of minimising disruptions and delays generated by the immediate automatic suspension, and in particular by subsequent complaints lodged against the same award procedure.

In a wider perspective, changes were clearly determined by the need to improve the procurement system and provide it with increased flexibility, in order to ensure reasonable levels of public expenditure, including EU financed expenditure, as the preamble of GUO 143 quite clearly stated. Indeed, November 2008, the month preceding the issuance of GUO 143 (possibly the month when it was engineered) emphasised certain shortcomings of the procurement system. The bill had already been rather high, with an important part of the Phare 2006 pre-accession funding failing to be contracted within the programming period, which ended 30 November 2008. Significant funding was therefore lost by Romania. But even higher risks were lying ahead, as the same history may have repeated with the much higher value post-accession funds that were then just starting to be implemented.

Apart from addressing disruptions brought to procurement process by the immediate automatic suspension, GUO 143 also dealt with what

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[16] Published in the Official Journal of Romania no. 805/02.12.2008.

we call "excessive" application of the procurement law, *i.e.* an application of EU directive like procurement procedures to procurements under the EU value thresholds (including rather small procurements), and an extension of the application of the procurement law to procurement conducted by economic operators other than contracting authorities—*i.e.* other than public institutions—for example, by commercial companies carrying out technical assistance projects financed from public funds. Recommendations to raise thresholds for certain procurement procedures, in particular where procurement is conducted by economic operators other than contracting authorities, had been made and implemented previously, but changes brought by GUO 143 changes were quite significant.

Automatic suspension was also significantly changed—it no longer operated immediately upon lodging of a complaint to the NCSPPC. For the purposes of automatic suspension, the procurement process (award procedure) was split into two parts: one starting upon publication of a forecast or procurement notice and ending one day before the deadline for submission of tenders; and a separate one starting upon the deadline for submission of tenders end ending after the award decision but before conclusion of the procurement contract, more precisely one day before the end of the applicable stand-still periods.

The requirement to submit to the contracting authority a copy of the complaint lodged with the NCSPPC subsisted, however, no clear time-limit was provided in the law for this. New article 276[1] was introduced to the procurement law as amended, expressly providing that upon receipt of a copy of the complaint, the contracting authority was entitled to issue corrective measures. If the aggrieved tenderer was satisfied with the corrective measures taken by the contracting authority, he would then be entitled to withdraw his complaint from the NCSPPC. Meanwhile the award procedure was not suspended and it went ahead.

If the contracting authority did not take corrective measures, or if such measures were not considered satisfactory by the complainant, *i.e.* if the complaint was not withdrawn by the complainant, automatic suspension started to operate at the end of the relevant part of the award

procedure: one day before the deadline for submission of tenders, for complaints submitted during the first part of the award procedure (for example, against the tender dossier, or against a clarification issued by the contracting authority); or one day before the end of the applicable stand-still periods, for complaints submitted during the second part of the award procedure (usually, against the evaluation report or the award decision). The NCSPPC started its review exactly when suspension started to operate, and suspension would continue until the case was resolved, irrespective of when the stand-still periods would end.

Should more complaints be submitted against the same award procedure, and during the same part of the said award procedure (for example, by various potential tenderers), the NCSPPC would review them jointly, at the same time, after the end of the relevant part of the award procedure, when automatic suspension started to operate. The NCSPPC would not start to review any complaint before the end of the relevant part of the award procedure and before automatic suspension started to operate, giving the contracting authority an opportunity to resolve the matter itself.

As it can be noticed, this system resolves to some extent the delays brought by subsequent complaints under the immediate automatic suspension system. And, it also releases the pressure of the overload over the NCSPPC by aggregating more subsequent complaints into a single review exercise. Further, it gives contracting authorities the opportunity to resolve themselves, as they go along with the award procedure, some complaints or irregularities addressed by tenderers.

However, the semi-delayed automatic suspension system did not resolve the abusive submission of complaints, for example by tenderers who wish to buy-in additional time for submission of tenders. It did not really make any difference if suspension started immediately upon the lodging of a complaint or at a later time, as long as it started before the deadline for submission of tenders and had the effect of postponing this deadline.

Also, the question of delays to the award procedure was not fully resolved. In some cases the system may have worked out well, however, in others it could prove less than perfect. Here is a simple scenario. A potential tenderer challenges a provision of the tender dossier immediately after its publication. The contracting authority does not take corrective action and the award procedure goes ahead on the basis of that provision and all interested economic operators prepare their tenders accordingly. One day before the deadline for submission of tenders the award procedure is automatically suspended as a result of the previously submitted complaint.

If under this scenario the NCSPPC held that the challenged provision of the tender dossier was indeed unlawful and it ordered that the provision be changed, then additional time would be needed for the contracting authority to amend the tender dossier and publish the change; and tenderers would need to be allowed reasonable time to adjust their offers; if for example, a qualification condition was amended, or specifications were added a "or equivalent" provision, other economic operators may become eligible for the procurement and they would probably need to be offered the full tendering period for submission. Meanwhile, both at the contracting authority's end, and at the tenderers' end, time and resources had been wasted unnecessarily. And most likely, commercial firms would eventually internalise their wasted costs in their financial offers, bringing an additional burden to public funds.

E. *Working Round Automatic Suspension When Programming Periods Mean That Contracts Can Only Be Concluded Before a Certain Date*

When programming periods mean that certain procurement contracts can only be concluded before certain dates under pain of losing financing, submission of a complaint under the AJ, and the automatic suspension, may raise serious issues, in particular if abusive complaints are being submitted.

This was an issue in November 2008, when all contracts under EU Phare 2006 pre-accession funding had to be concluded by 30 November

2008. And it could still be under certain measures of post-accession funding with clearly established contracting time-limits.

Back in late November 2008, a number of award procedures were still ongoing under the Phare 2006 pre-accession programme. For some of them stand-still periods meant that contracts could not be concluded before 30 November—the last day for contracting. For others, complaints submitted to the NCSPPC meant that the award procedure was suspended, and again those contracts could not be concluded.

One option that arose from certain private sector operators wishing to secure those contracts was to conclude the contracts under a suspension clause, an arrangement available and enforceable under the national civil and commercial law. It involved concluding the contract, even during suspension, before 30 November, say on 28, but under a clause that the contract implementation was suspended (none of the parties would provide anything) until a future event would decide the fate of the said contract. The future event could be defined as, say, the result of the review of a complaint—if the complaint was rejected, say on 10 December (and the initial award decision remained therefore valid and final) —then the contract would be considered retrospectively valid as of its date of conclusion. If the complaint was admitted, and therefore the award decision was invalidated, then the contract would be retrospectively set aside, as it has never existed. To the author's knowledge, this course of action has not been pursued. Much depended on the relevant officers who did not appear prepared to assume responsibility for a rather 'creative' arrangement, and in particular for one not explicitly provided for in the procurement legislation.

The darker side of suspension under extreme conditions of time-limits to contracting (*i.e.* under pain of losing financing) could involve economic operators submitting complaints simply to "black-mail" the successful tenderer. Such unethical operators would then propose to the successful tenderers to withdraw their complaint in time (and therefore allow for conclusion of the contract with the successful tenderer), if the successful tenderer promised to sub-contract—"under the table"—a certain part of that awarded contract to the unethical operator. An even

more serious and negative behaviour would be for certain tenderers to threaten the contracting authority itself with complaints—and therefore with losing financing, against which certain officers may then be evaluated—if the contract was not awarded to them.

As it can be noticed, while automatic suspension is generally a means aimed to ensure proper contestability, it could under certain circumstances be turned by unethical operators into a heavy weapons for improper conduct or even corruption.

F. *Fully Delayed Automatic Suspension*

Further amendments to the procurement law are enacted via Government Urgency Ordinance 19/2009[17] (GUO 19) in March 2009. As a side comment, the procurement law, as amended many times became a heavy read. Article numbering is peculiar, for example new articles were added from 287^1 to 287^{17}, and the writing technique becomes rather encrypted, some provisions merely consisting just in references to other provisions. Here is article 277 (3): "Receipt of the complaint by the contracting authority, in connection with which withdrawal was not acknowledged, as per paragraph (2), automatically suspends the award procedure starting with the date when the time-limit provided for at article 205 (1) expires and lasting until the time-limit provided for under article 281 (1), if the interested party has not submitted an appeal to the relevant Court. If the NCSPPC's decision has been appealed, provisions under articles 287^7 and 287^8 remain applicable".

Seeing the "trees" is not necessarily the most straight-forward exercise under the amended procurement law due to its very many and various "leaves", however, we are not put down by the new writing technique—after all, it is the role of legal practitioners or researchers to review, analyse and make sense of legal provisions. A re-numbering of the articles of the procurement law was announced in the June 2009 amendment of the procurement law (referred to at section III (G) below),

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[17] Published in the Official Journal of Romania No. 156/12.03.2009.

and should be operated together with the Parliamentary approval of the said changes, however, as Parliament has not yet completed its consideration, the re-numbering is still awaited.

Believe it or not, article 277 (3) quoted above, encapsulates what we call a fully delayed approach to the way in which automatic suspension operates. The text of that article becomes even more cryptic following additional changes in June 2009, but for clarity reasons we will not get into further details here. Below we 'translate' art. 277 (3) as amended in March 2009 into more comprehensible concepts.

Under the new regime, automatic suspension is further delayed. The award procedure is not split any longer into two parts. Any complaint lodged with the NCSPPC at any stage during the award procedure needs to be copied to the contracting authority who, just as in the case of the semi-delayed system can issue corrective measures.[18] If the complainant finds acceptable the remedial action taken by the contracting authority, he can withdraw his complaint.

If the contracting authority does not issue corrective measures or if these are not deemed satisfactory by the complainant, *i.e.* if the complaint remains valid, automatic suspension only starts one day before the end of the applicable stand-still period for any complaint lodged at any time during the award procedure. Meanwhile the award procedure goes ahead. The NCSPPC only starts reviewing the complaint once the automatic suspension starts (and not before). It will also aggregate all complaints that remained valid and review them jointly.

The fully delayed automatic suspension brings forward the aggregation advantages of the semi-delayed system. And it also resolves

[18] For example, case BO 94/2009, available via NCSPPC's web site www.cnsc.ro. As the contracting authority issued the corrective measures requested by the complainant—*i.e.* cancellation of the evaluation report and re-evaluation of tenders in accordance with published criteria—in effect, the NCSPPC rejects the complaint as lacking object; however, it orders the contracting authority to re-evaluate the tenders accordingly within 15 days.

the issue of abusive submission of complaints to buy-in more tender preparation time. This is so because submission of a complaint before the deadline for submission of tenders does not postpone the said deadline. The award procedure goes ahead as planned, and it is eventually suspended (unless the complaint has been withdrawn in the meanwhile) after tender evaluation, after the award decision, one day before the expiry of the applicable stand-still period (just before conclusion of contract). In effect, article 256[1] of the procurement law incriminating abusive submission of complaints, has been repealed as it became, in most cases, obsolete under the fully delayed system.

However, the fully delayed system exacerbates some of the shortcomings of the semi-delayed system, and in particular because of the late stage when the independent review comes into play, it could more frequently lead to cancellation in whole of an award procedure that might have been saved and corrected under an immediate automatic suspension or a semi-delayed automatic suspension system.

Here is, again, a simple but illustrative scenario. At an early stage of an award procedure, a complainant challenges a particular provision of the tender dossier, say the award criteria which is allegedly unlawful. The contracting authority does not take any corrective measure and, as per the fully delayed automatic suspension, continues the award procedure on the basis of initial tender dossier, receives tenders, evaluates them and makes a decision for contract award. One day before the end of the stand-still period automatic suspension starts and the NCSPPC comes into play. If it holds that, indeed, the award criteria was unlawful, and that the evaluation was based on that unlawful criteria, cancelling the award decision and ordering re-evaluation would not be an option as the re-evaluation would still be based on unlawful criteria. The only option for the NCSPPC under this system may then be to order cancellation of the entire award procedure, which would then have to be re-launched. In an immediate automatic suspension, or semi-delayed automatic suspension system, the NCSPPC would have had a chance to order a change of the award criteria before the evaluation of the tenders and therefore to save the award procedure.

G. *Transition from Automatic Suspension to Non-Automatic Suspension in Complaints before the NCSPPC*

The disadvantages of the fully delayed automatic suspension system (described above) were quickly perceived and the fully delayed automatic suspension system in its pure form was in force only for three months—March to June 2009, until a new amendment of the public procurement act was passed via Government Urgency 72/2009[19] (GUO 72). As the whole range of automatic suspension forms were already tested, and each of them proved to have both advantages and disadvantages in the complex balance between contestability and procurement efficiency, alternative solutions had to be sought. The next logical step was to do away with the automatic suspension and have a go with non-automatic suspension. However, as we will see below, GUO 72 failed to provide a clear line both in connection with the form of suspension and with the moment when the NCSPPC was to start its review.

Clearly, automatic suspension in any form is a tough measure for contracting authorities. Before GUO 72 the NCSPPC had the option to lift the suspension, in cases where public interest required this. However, quite interestingly, under GUO 72, it appears that the lifting of the suspension is no longer an option. It would not only be a peculiar intervention of this act but this provision tended to suggest that the intention of the act was to do away with the concept of automatic suspension. Since there was no automatic suspension, there would be no need to regulate conditions allowing for the automatic suspension to be lifted by the NCSPPC. However, the intentions of the act regarding suspension were pretty much unclear.

The entire wording regarding suspension has become rather inconsistent in the act and difficult to follow using legal logic. At first glance, the way in which suspension operated did not appear to have really changed by comparison to GUO 19 referred to at section III (F) above. The new act—GUO 72—seems to have replaced the word "suspension" (of the award procedure—our note) with an "interdiction

[19] Published in the Official Journal of Romania No. 426/23.06.2009.

of the contracting authority to conclude the contract" before the NCSPPC reviews the complaint, which basically means the same thing under the fully delayed system. Surprisingly though, article 277 (4) stated that "the contract concluded during the *suspension* period will be null". Well, under the new act, this is the first place where the word "suspension" appeared, without being defined anywhere. So, without a historical and teleological interpretation of the law, the new provision could have been at least misleading, if not meaningless.

Other matters are also unclear under GUO 72, for example, the moment when the NCSPPC should start reviewing a complaint. The only implicit indication is to be found in article 274 (1), which states that in order for the NCSPPC to review the complaint, the contracting authority has the obligation to submit the full procurement file to the NCSPPC within 3 working days, *after end of the applicable stand-still period.* However, article 277 (3) in the wording of GUO 72 tended to suggest that the time of completion of the NCSPPC review might actually be—in some cases—prior to the end of the applicable stand-still period. So, how could the NCSPPC complete its review before actually starting it?

This remained an open question for some time and the unclear intentions of the act appear to be confirmed by practice. Discussions with practitioners appear to indicate that in an initial phase after enactment of GUO 72, the NCSPPC followed the fully delayed system, *i.e.* it would only start reviewing the complaint at the end of the stand-still period, when suspension was deemed to commence in the form of an interdiction to conclude the contract pending resolution of the complaint, in accordance with the Remedies Directive 2007/66. However, this interpretation was unable to mitigate the shortcomings of the late review of a case, one of the major disadvantages of the fully delayed system. Under the circumstances, the intention of GUO 72 appears to have been to allow the NCSPPC to review cases earlier than the end of the stand still periods, to mitigate the said shortcomings. A possible scenario is described below and appears to have to been followed in practice under certain cases.

The aggrieved tenderer submits a complaint to both the Contracting Authority and the NCSPPC, as per the procurement law. The Contracting Authority has the option to remedy the situation itself but it decides not to proceed to such resolution. Rather than waiting until the end of the stand still period to submit the procurement file to the NCSPPC (within three days after the end of the stand still periods, as per art. 274), it submits the file prior to the end of stand still periods—say during the tendering period, immediately after receiving a complaint against the tender dossier. Upon receipt of the procurement file the NCSPPC starts reviewing the case, without waiting for the end of the stand still periods. However, GUO 72 did not clarify whether the start of the review by the NCSPPC triggers an automatic suspension of the award procedure or whether suspension is left to the discretion of the Contracting Authority. In any event, the Contracting Authority is unable to conclude the procurement contract before the case is settled by the Contracting Authority.

None of the options above—*i.e.* fully delayed automatic suspension and review, or the possibility of the NCSPPC to start review earlier than the end of stand still periods—were explicitly, clearly, thoroughly and consistently provided for under GUO 72. In a similar article dated February 2010 and submitted for the Procurement Revolution IV Conference held in Nottingham in April 2010, the author noted that the GUO 72 clearly required further and "well deserved" revisions. These revisions were enacted in July 2010 and are described below.

H. *Confirmation of Non-Automatic (Voluntary) Suspension*

After one year's time of theoretical and practical attempts to interpret the intentions of the law, somehow hidden behind convoluted wording, the new amendment to the procurement law enacted via GUO 76/2010[20] clarifies that automatic suspension in any form has been repealed and brings light and legal certainty over a number of issues.

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[20] Published in the Official Journal of Romania No. 453 of 02 July 2010.

Firstly, Article 277 of the procurement law, previously providing for an automatic suspension of the award procedure has been explicitly abrogated. Secondly, new Article 274[1] has been introduced, explicitly providing that following receipt of a complaint, the Contracting Authority can submit the procurement file to the NCSPPC even before the end of the stand still period—if it does not intend to resolve the complaint itself and wishes to rely on the NCSPPC's judgement. The implication is that the NCSPPC does not have to wait until the end of the stand still periods and can start reviewing the complaint immediately upon receipt of the procurement file from the Contracting Authority. Thirdly, Article 256[1] (3) explicitly provides that the receipt of a complaint by the Contracting Authority does not trigger an automatic suspension of the award procedure, but the Contracting Authority can take any remedial measure, including a voluntary suspension of the award procedure.

Basically, the main assumptions underlying the application of the previous amendment (GUO 72) in connection with the manner in which suspension operates are now confirmed by GUO 76. The only peculiarity of the GUO 76 is that, if the Contracting Authority does not decide to suspend the award procedure upon receipt of a complaint and when submitting the procurement file to the NCSPPC, the parties do not appear to have the option of requesting the NCSPPC to award such suspension. While the NCSPPC might order such (voluntary) suspension under Article 278 (2), it appears that such a decision could only be issued as part of its decision on the case—and not before, upon receipt of the file—for example, in order to allow time for the Contracting Authority to revise its tender documentation. However, given that the NCSPPC only deals with complaints submitted before the conclusion of the contract and that the Contracting Authority is unable to conclude a procurement contract before the NCSPPC resolves the case, the matter is highly unlikely to generate any significant practical issues.

In summary, GUO 76 confirms that no automatic suspension of any kind applies to the award procedure under the current Romanian system as of July 2010, except to the point where the review of a procurement complaint overlaps with the stand still periods, and exceeds such stand still periods, in which case the Contracting Authority will

have to refrain from the conclusion of the contract (in other words, automatically suspend the award procedure) until the NCSPPC resolves the case and the appeal period against the decision of the NCSPPC elapses. If an appeal against the NCSPPC is lodged suspension may be extended, and this situation is briefly described at section III (I) below.

GUO 76 clearly tries—in the light of experience to date—to resolve the shortcomings of the fully delayed automatic suspension and those of any other form of automatic suspension by shifting to non-automatic (voluntary) suspension, subject to the limits of the Remedies Directive 66/2007, in order to enhance the balance between procurement efficiency and contestability. It goes even further in the procurement efficiency area by trying to discourage submission of complaints where there are no strong arguments supporting the complaint by imposing penalties if the complainant loses its cases before the NCSPPC, in the form of retention of a part of its tender guarantee, which is to be released to be tenderer in case it submits an appeal against the decision of the NCSPPC and is successful. While the intention may be to prevent abusive complaints, the new provision raises at least two issues. Firstly, award procedures where a tender guarantee is not requested, in which case the provision is irrelevant. Secondly, aggrieved tenderers might refrain from submitting a complaint even if they might have a point to the legality or regularity of the award procedure, in order to avoid the risk of having their tender guarantee retained, or even a cash flow risk (if they lose before the NCSPPC but win in an appeal), which may be relevant in particular during an economic downturn situation as we face today. Clearly, this is a measure meant to enhance procurement efficiency by reducing the number of complaints submitted, but it has to be noticed that under certain circumstances it might affect contestability. As pointed out throughout this paper, maintaining a balance between contestability and procurement efficiency is a complex task, and it is determined by specific circumstances surrounding a particular procurement system at various points in time.

I. *Appeals*

NCSPPC's decisions can be appealed before a relevant Court of Appeal. Suspension of the award procedure continues even after the NCSPPC decision is issued, up until the time-limit (10 days of communication of the NCSPPC decision) for lodging of an appeal. While in very many cases NCSPPC decisions are not appealed,[21] as the NCSPPC is usually recognised as an independent professional review body and respected as such by both contracting authorities and tenderers, some decisions do get appealed. If such an appeal is lodged the Contracting Authority shall not be able to conclude the contract before the deadline for lodging of an appeal against the decision issued by the NCSPPC, under pain of the contract being null.

The Contracting Authority's inability to conclude the contract only operates until the expiry of the appeal time-limit (if the stand still periods have already elapsed). Further suspension of the award procedure (*i.e.* of the contract conclusion) may be requested by the appellant and awarded by the Court, if it deemed appropriate. This can be dealt with by the Court expeditiously and separately from the main proceedings. The suspension of the NCSPPC decision could also be requested by the appellant and granted by the Court if there were sufficient grounds.

IV. The Purely Judicial Course of Action (PJ)

The PJ has also been briefly presented at section II above. This course of action only takes place before Courts. It usually starts in the first instance before a Tribunal, but it can also start in the first instance before of the Bucharest Court of Appeal in case of award procedures concerning transport infrastructure of national interest. Appeals against first instance decisions are usually reviewed by a relevant Court of Appeal. Although the law is silent on appeals against decisions issued in the first instance by the Court of Appeal in case of award procedures concerning the transport infrastructure of national interest, the implication is that such appeals will be reviewed by the Supreme Court.

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[21] As an average, from 2006 to the end of 2009, a percentage 11.14% of the decisions issued by the NCSPPC have been appealed, while 88.86% have not been appealed. Information available via the NCSPPC's web site www.cnsc.ro.

Under the PJ legal standing and competence are wider than under the AJ. However, under GUO 19, GUO 72, and GUO 76, there are many similarities though between the PJ and AJ in connection with protests submitted before the conclusion of a procurement contract for setting aside or amending an act of the contracting authority.

Time-limits for submission of a protest are the same under the PJ and the AJ, under the amended law, a prior complaint procedure with the contracting authority is not required any longer under the PJ (the contracting authority only needs to be informed of the intention to submit protest under the PJ), and the fully delayed automatic suspension is also in place under the PJ, in the sense that the contracting authority having no right to conclude a procurement contract pending settlement of the case by the Court. Further, in particular in the light of GUO 76, the Court does not have to wait until the end of the applicable stand still period and can proceed with the review immediately upon lodging of a protest, if the legal conditions are met.

According to GUO 76, the Court does not appear to have to wait for the Contracting Authority to submit the procurement file in order to start the review proceedings. Once started, procedure before the Court is an expeditious one. There are no specific time limits for completion of the review, such as those that are applicable to the NCSPPC under the AJ, but strict procedural time limits for hearings (or postponement of a hearing, or further hearings) or submission of a response by the defendant, are applicable.

Before March 2009, the PJ against acts issued prior to conclusion of a procurement contract was less attractive in particular because the suspension of the award procedure was not automatic—it could however be requested by the complainant and granted by the Court if it found that there were grounds for this. The previous system did not provide though for a warranty that the procurement contract could not be concluded before the completion of the review.

Under the PJ system, according to GUO 76, the automatic suspension of the award procedure does not apply either, however, under

the PJ (unlike the AJ), the aggrieved tenderer can request and the Court may award, if there are sufficient grounds the suspension of the award procedure under Article 287[7] of the procurement law, even if the Contracting Authority did not take this measure, separately from (and previously to) a review on the merits of the case.

Before March 2009, time-limits for lodging of an action against acts of the contracting authority prior to conclusion of the contract were longer, basically allowing tenderers who missed the tight time limits of the AJ use the PJ. This is not an option after March 2009. Further, before March 2009, PJ was conditioned by a prior complaint full procedure with the contracting authority, and action before a Court could only be lodged if the result of the prior complaint with the contracting authority was unsatisfactory.

Unlike the AJ, the PJ also covers the award of damages, cancellation of a procurement contract, or contractual disputes in connection with a procurement contract. While these are very important areas of procurement remedies, they fall outside the scope of this article. It is worth noting however that under the new amendment (GUO 76), litigation arising from the award procedure is to be dealt with by administrative law sections of courts, while contractual litigation is to be dealt by commercial sections of courts (Article 286(1) of the amended law), unlike the previous regime when all public procurement litigation was dealt with by administrative law sections of courts.

Under GUO 76 appeals lodged against Court decisions issued in the first instance under the PJ, do not automatically suspend the first instance decision (Article 287[16] of the amended law) and do not automatically extend the suspension of the award procedure—if previously granted by the court of first instance—pending the settlement of the appeal. Suspension of the award procedure may be requested and granted by the Court under the administrative litigation law 554/2004, as amended.

Decisions issued in the first instance by the NCSPPC under the AJ, or by a Tribunal under the PJ that are not appealed within the applicable

time-limits remain final. Also final are decisions issued by a Court of Appeal in an appeal, either under the AJ or under the PJ. Final decisions are compulsory, must be executed, and cannot be changed. There is an exception though, introduced by law 262/2007.[22] This regards final decisions taken in breach of community law against which an exceptional appeal may be lodged with the Supreme Court, within certain time-limits.

V. Conclusions

Romania's experience with interim measures and automatic suspension is rather short but, we should say, extremely intensive. Traditionally, the AJ has been far more popular than the PJ. Between 2006 and 2009 the NCSPPC has dealt with over 21,000 complaints and issued over 18,000 decisions.[23] The two main attractions of the AJ were: (i) automatic suspension; and (ii) quick resolution lead times, whose maximum limits were provided for by the law. Average time of settlement per complaint ranged from 28 days in 2006, to 45 days in 2007, to as little as 14 days in 2008, and 19 days in 2009.[24]

Additionally, the NCSPPC generally enjoys respect and trust from both contracting authorities and economic operators, as an independent review body, specialised in procurement. Only about 11.14% of the NCSPPC's decisions were appealed, with a peak of 12.55% in 2008. And further, in average, only 1.65% of the NCSPPC's decisions were rejected by the Courts of Appeal, again with a peak of 2.05% in 2008.

Automatic suspension under the AJ evolved from immediate unconditional (June 2006 - October 2007), to immediate conditional (October 2007 - December 2008), to semi-delayed (December 2008 - March 2009), and to fully delayed (March - June 2009). Following a 'transition' period under GUO 72 (June 2009 - June 2010), automatic suspension was explicitly repealed, meaning that Romania has gone from

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[22] This law amends and supplements the administrative litigation law no. 554/2004. It was published in the Official Journal of Romania No. 510/30.07.2007.

[23] Information available via NCSPPC's web site www.cnsc.ro.

[24] *Idem*.

one end to the other of the suspension spectrum—basically testing more or less all imaginable suspension 'shades' that are allowed by the EU Remedies Directive 2007/66. Within this 'allowed spectrum' Romania practically experienced four forms of automatic suspension, and it is now testing the non-automatic suspension, trying to enhance procurement efficiency and deal with the shortcomings that such efficiency may bring to contestability.

On the other hand, suspension under the PJ has evolved in a different sense. It started from not being automatic at all—*i.e.* it could be granted by the Court if requested and/or justified at any point during the award procedure. Under GUO 19, in view of the requirements of Directive 2007/66, the fully delayed automatic suspension was introduced to the PJ to ensure that the contracting authority could not conclude a contract before the review was completed. However, where necessary, and in order to avoid damage, if requested and justified, the Court may have ordered suspension of the award procedure at any time.

Article 2 (4) of Directive 2007/66 provides that suspension does not need to be automatic, or immediate, except for limited circumstances specified in the Directive, notably in order to prevent conclusion of a contract before an independent review was completed. So, from this point of view, the existing system appears to be consistent with the Directive.

Under article 2 (1) (a) of the Directive, reviewing bodies should have powers "to take, at the earliest opportunity, interim measures with the aim of correcting the alleged infringements, including measures to suspend [...] the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority". It is debatable whether the fully delayed automatic suspension system met the "earliest opportunity" condition, but the new regime under GUO 76 appears to meet this condition as the NCSPPC can now explicitly start its review before the end of the stand still periods. However, NCSPPC's apparent inability under GUO 76 to decide the suspension of the award procedure immediately upon receipt of a complaint (if the Contracting Authority did not take this decision under the AJ), might need to be

further revised, and aligned to the way in which Court may take this decision under the PJ.

Beyond compliance with the applicable EU directives, each EU national system will have to choose among a number of options that will have certain practical implications, and that will be appealing or less appealing to the policy makers at a certain point in time. From immediate unconditional automatic suspension to conditional suspension upon request, there is a wide range of possible arrangements and 'shades'. As we have seen throughout this article, finding the right balance between effectiveness of contestability and efficiency of purchasing may not always be a straight-forward exercise.