"The Good Conduct Guarantee" and other Measures Comprised in GEO no. 51/2014 Amending and Supplementing GEO no. 34/2006

Angelica ROŞU[1]

Abstract: In this study we aimed to analyze the consequences of the introduction by Ordinance No. 51/2014 for amending and supplementing GEO No. 34/2006 concerning the procurement of a new procedural institution, namely the guarantee of good conduct guarantee during the judicial-administrative proceedings and judicial proceedings. In our opinion, however, the new measures introduced by the Act enunciated are able to generate, in equal measure, violating constitutional provisions of EU law, as well as the conventional duty rates (i.e. the norms enshrining the free administrative courts, the right of access to an impartial court, the right to effective remedy discrimination). In addition, we cannot equalize a solution to reject the appeal / complaint and the conclusion that the contractor / economic operator involved in the procedure is due an amount to the authority for its bad faith, the bad faith is not retrievable only in the solution of appeal / lawsuit, as long as through a different interpretation of the same text of the law, the courts solutions give rise to an uneven practice, becoming necessary to demonstrate the proof of bad faith or even serious misconduct in the exercise of procedural rights.

Keywords: good conduct guarantee; effective remedies; inadmissibility; proof of interest; public procurement

1. Introduction

30 June 2014 entered into force GEO no. 51/2014 amending and supplementing Government Emergency Ordinance no. 34/2006 on public procurement.[2] This legislative act could not go unnoticed among theoreticians of law (as it includes an new procedural institution, namely to ensure fulfillment of good conduct obligations during a judicial administrative and judicial procedure), but especially among legal practitioners and especially within business environment, as the

[1]Associate Professor, PhD, "Danubius" University of Galati, Romania. Address: 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author: rosuangelica@univ-danubius.ro.

[2] This legal act was published in the Official Journal of Romania, no. 486 of June 30, 2014.

measures adopted had direct implications on economic operators interested to access a public procurement procedure, as regulated by GEO. 34/2006, and related legal acts.

2. A Legitimate Interest Regarding the Award Procedure

The adoption of these measures contained in GEO no. 51/2014 was justified by the Executive in the explanatory memoranda[1], by the of "a large number of complaints that may affect the efficiency of the National Council for Solving Complaints[2] as well as the need for immediate measures adopting meant to make the procedure for the award of public contracts smoother and to protect contracting authorities against the submission of unfair complaints, thus changing the purpose for which appeals arising in public procurements and the pretext of the existence of negative consequences arising from system failures, and external financing procedure... to extend the procedure award".

From the beginning, we have mention that the existence of circumstances as indicated in the explanatory memoranda is not denied, respectively the delay in the implementation of projects of common interest or delay / stagnation in EU funds absorption.

What we want to emphasize is the fact that economic operators are responsible for these negative consequences and that the institutions and introduction of new sanctions, far from solving the above problems, may generate violations of the provisions of Constitution, EU laws and conventional right and therefore to expose the Romanian state to negative consequences more serious than those se out as the foundation of the legal act adoption.

[1] The Executive has found such the apparition of "disfunctions that cause abnormal delays in the acquisition process and misuse of the provisions of judicial review "; "following the assessment of situations arising in practical implementation of the current legislative framework, it was found the abusive exercise of a right by some economic operators without the capacity of tenderer and without a legitimate interest which, even unable to implement a public contract, have tried to delay the conclusion of contract by repeatedly challenging the award procedure before the National Council for Solving Complaints before the close date for submission of tenders (as there is no penalty for this) or by challenging the Council decision or the judgment of the first instance court".

[2] National Council for Solving Complaints (NCSC) is an independent body with administrative and judicial activity, according to para. (1) of the Treaty. 257 of the Emergency Ordinance no. 34/2006, which has competence in resolving complaints made within the award procedure before the end of the full specialized should therefore be established in accordance with the rules of organization and functioning of the Council.

Therefore, the legislator introduces the Article I Section 2 of GEO no. 51/2014[1] as a formal requirement of judicial administrative complaint to prove the existence of legitimate interest. We consider that the establishment of this requirement is unnecessary and inappropriate and equally incorrect the insertion of the condition of proving legitimate interest in the article governing the mandatory elements that must be included in the appeal.

This requirement is unnecessary because the condition of legitimate interest was already provided as a condition to exercise the procedural path - judicial administrative appeal.

According to Article 270 (1) of GEO no. 34/2006, as amended by GEO no. 51/2014, "*The appeal shall be in writing and must contain the following: (...) d[1]) demonstration of legitimate interest;*" Article 255(1) of GEO no. 34/2006 expressly provides that "*all persons who consider themselves aggrieved in their right or legitimate interest, by an act of the contracting authority, through the infringement of the legal provisions on public procurement, are entitled to request the annulment of the act, the obligation for the contracting authority to issue an act, the recognition of the alleged right or legitimate interest by administratively-jurisdictionally means, under this emergency ordinance*", and par. (2) there of expressly states that it can not acquire the status of the aggrieved person than the economic operator who (lit. a) **has or had a legitimate interest regarding the award procedure**.

Also, we consider that the requirement of proving the existence of legitimate interest was not among those stating the formal requirements of an appeal, as the way in which the evidence of a fact or act, including any condition of exercise of

[1] Article 16 of GEO no. 34/2006 provides: *"(1) (1) In the case when the contracting authority awards a public procurement contract having as object the supply of services as included in Annex 2B, then the obligation to apply this law is mandatory only for the contracts with a greater value than as stipulated in art. 57 paragraph (2) and are limited only to the provisions of articles 35-38 and to the provisions of art. 56 and application throughout the procedure for the award of the principles laid down in art. 2 para. (2). Complaints concerning the procedure for the award of service contracts as included in Annex. 2B, whose value is equal to or greater than that provided for in art. 57 para. (2) shall be settled according to the provisions of chapter. IX.*
(2) In the case when the public procurement contract stipulated by paragraph (1) has as object, besides providing services included in Annex 2B, the supply of services included in Annex 2A, the provisions of paragraph (1) are applicable only if the estimated value of services included in Annex 2B is higher than the estimated value of services included in Annex 2A.
(3) The contracting authority does not have the right to combine, within the same contract, services included both in Annex 2B and Annex 2A, with the purpose to benefit of the provisions of paragraph (1) when it awards the respective public procurement contract".

an action / remedy at law is not a matter of formal nature, but a matter to be debated contradictory[1]; the manner in which the legitimate interest was proved can not be left to the sole discretion of NCCC, without the other parties to the judicial administrative procedure to be able to express an opinion.

Moreover, according to par. (2) of the same article, article 270 of GEO no. 34/2006[2], "*In the case when the Council considers that not all the data provided by paragraph (1) is included in the submitted legal dispute, it will require the person that submitted the legal dispute to supplement it within 3 days. In the case when the person does not respect this, the legal dispute shall be rejected*".

The completion of complaint with the "information" provided in par. (1) cannot relate in any way to the completion of the complaint with "*proving the existence of legitimate interest", especially that letter f) of para. (1) of art. 270 of GEO no. 34/2006 requires the appellant to present "evidence on which the complaint is made, to the extent possible*". Or, the requirement of proof involves by itself the administration of rules of evidence. We note, however, the shortening of the time within the appellant must file the complaint (from 5 days to 3 days - meaning, therefore, that the public procurement procedure became more "fluid" with two days (!!) gained for procedure, as well as the addition made by the Executive, specifying the manner in which the complaint will be rejected, namely that inadmissible in case of noncompliance within the time stated in the obligation imposed by the NCSC.

Beyond the fact that the solution of "rejection" of the complaint for failure to comply with formal requirements was not before this amendment o sanction of this institution[3], it is worth noting that the penalty of rejection of complaint as

[1] Art. 1 para. 2 al GEO no. 51/2014 has the following content: "*2. In Article 270 (1) after the letter d) shall be introduced a new letter, d1), as follows: "d1) to prove the existence of legitimate interest";*.

[2] As amended by Section 3 of Article1, GEO no. 51 of June 28, 2014, published in Official Gazette no. 486 of June 30, 2014.

[3] In terms assimilated to the operation for complaint regulation - similar to those provided by art. 200 of Civil Procedure Code, to which even GEO no. 34/2006 refers by art. 297, that "to the extent that the present law provides otherwise, the provisions of common law will be applied", we consider that the sanction which should become incident is that of **nullity of complaint**, in full compliance with procedural rules. Thus, according to art. 196 C of Civil Procedure Code, "the summons application that does not include the name and forename or, if applicable, the name of any party, the subject of application, its reasons in fact or the signature of the party or its representative **is void**. The provisions of art. 200 are applicable. However, the absence of signature can be covered throughout the proceedings at first instance. If the absence of signature is invoked, the applicant missing at that hearing will have to sign the application no later than the first next hearing, according to subpoena received. The applicant present in court will sign during the hearing of alleged nullity. Any other

inadmissible is inappropriate[1] (Tăbârcă, 2006, p. 185) and unrelated with the "fresh" requirement established, namely the proof on interest, as well as the one relating to art. 278 para. (5) of GEO no. 34/2006.

According to this article, "*The Council may reject the complaint as unfounded, late, without interest (...)*". So, if the Council finds a lack of proof of legitimate interest, the Council will reject the complaint as inadmissible, par. (2) of art. 270 of GEO. 34/2006, although the art. 278 para. (5) of the same law expressly provides that lack interest will lead to the rejection of the complaint due to lack of interest. At this point, we can only express our curiosity on the manner in which CNSC, respectively the courts, will apply the species referred to in the legislation given above.

At the same time, we cannot believe that the legislator, being aware that the prove of a legitimate interest existence is a condition for the admissibility of the action / application, had appreciated that an action/complaint devoid of interest is inadmissible[2] as long as, for example, the name and address of the contracting authority were not mentioned (requirement laid down in lit. b) of art. 270 para. (1) GEO no. 34/2006) or missing signature of the party or the representative of the legal person (lit. g) of art. 270 para. (1) of the GEO no. 34/2006), the sanction being the same, i.e. inadmissibility.

In our opinion, establishing an explicit sanction so severe as to inadmissibility reflects the will of the author of legal act will to establish a potential barrier to the persons potentially harmed by the contracting authorities, and this intent becomes clear from a simple reading of "fresh" and "innovative" institution created by the provisions of art. 271^1 and art. 271^2 of GEO. 34/2006 - as introduced by art. 1 § 34 of Emergency Ordinance no. 51 of June 28, 2014 - which will be commented further below.

irregularity in connection with signing the summons shall be directed by the applicant as provided in par. (2)". There is no reason for which GEO no. 34/2006 should provide otherwise.

[1] If the exception for lack of interest is allowed, the action will be dismissed for lack of interest. In this regard, see Tăbârcă, 2006, p. 185.

[2] Noticing that the appellant does not justify a judicial interest, necessary condition for a natural or legal person to be parties in the lawsuit, as this has no capacity to bring an action,, the appeal filed was rejected as inadmissible, see Decision no. 587/1994, not published, pronounced by the Supreme Court, Commercial Division. The doctrine rightly retained that the reasoning of the decision is objectionable, as the court confuses two conditions of exercise of the action: interest and legal standing. (Tăbârcă, 2006, pp. 171-179, foot note 271)

According to art. 271^1 para. (1), (2) and (3) of GEO no. 34/2006, "in order to protect the contracting authority against the risk of any misconduct, the contester is required to provide a guarantee of good conduct for the entire period between submission of the appeal / request / complaint and the date of the final Council decision / court decision".

Appeal / request / complaint will be rejected if the appellant does not present the evidence of a guarantee instrument provided in par. (1). Guarantee of good conduct is established by bank transfer or by a guarantee instrument issued under the law by a bank or an insurance company and the original shall be filed to the headquarters of Contracting Authority and a copy to the Council or to the court, when submitting the appeal / request / complaint. Therefore, the guarantee of good conduct has been established in order to protect the contracting authority against the risk an eventual misconduct

Misconduct would be, according to art. art. 2711^1 par. (2) GEO no. 34/2006, promoting an appeal rejected by the Council or by the court or the promotion of appeals / complaints waived by the complainant / petitioner.

According to para. 3 of art. 271^2, as introduced by GEO no. 51/2014, the guarantee will not be retained if the complaint will be dismissed as devoid of purpose or if the appellant/applicant waives the complaint/application as a result of remedial measures taken by the contracting authority

In summary, the misconduct is expressed by the fact that the case was solved unfavorably, which entitles the contracting authority to execute the guarantee of good conduct, the amounts received representing revenues for the contracting authority.

This regulation reminds me of times when I was at the beginning of the profession of lawyer and the jokes / gags regarding the profession had a certain flavor. For instance, the older lawyers trying to convince us that you do not tell to your client that he lost the case, but he lost the lawsuit, and at the same time "earned the right to appeal..." We have to realize that the above mentioned legislative situation affects also the right of appeal / complaint.

Although this statement may seem haphazard, there are several arguments that support the idea that, in fact, not the "streamlining" of procedure was the object of concern for the Executive at the time of the Emergency Ordinance no. 51/2014

issuing, but preventing economic operators to exercise their rights enshrined in Constitution[1], at conventional[2] and EU rules[3] level.

In particular, if we were to depart from rules which generally enshrines the effectiveness of access to a fair trial or to a free judicial administrative procedure (art. 21 final sentence of the Romanian Constitution) and guaranteed by the Constitution until the establishment of these rules, we find that the Directive 89/665/EC of the EU Council imposed to Member States the obligation to guarantee increased transparency and non-discrimination[4] and effective remedies[5].

[1] Article 21 of the Romanian Constitution provides: "Every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests. The exercise of this right shall not be restricted by any law. All parties shall be entitled to a fair trial and a solution of their cases within a reasonable term. Administrative special jurisdiction is optional and free of charge".

[2] Article 6 of the European Convention on Human Rights: "every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which will decide on any criminal charge against him, or of his rights and obligations in a suit at law, whether on the merits of any criminal charge against him. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". As regards the article 6 of CEDO on public procurement, see D.D. Şerban, *op. cit*., p. 319 and the practice of the Court of Justice of the European Union cited in reference to the right of free access to court in the matter analyzed.

[3] According to art. 47 of the EU Charter of Fundamental Rights, "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

[4] We find that this measure impacts mainly on the bidders from small and medium enterprises that are not financially prepared to support the risk of jurisdictional or judicial administrative approach.

[5] According to art. 1 of the Directive previously stated: "*Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be ways of reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, art. 2 (7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law".. Member States shall take the measures necessary to ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing the law Community and other national regulations. Member States shall take the necessary measures to ensure that procedures are remedies available under detailed rules which may be established by Member States, at least to any person having or having had an interest in obtaining a particular public supply or a public works contract and who has been or risks being harmed by an alleged infringement. (...)"*

Turning to the conditions relating to the availability and effectiveness of the remedy at lawl, provided that the amount of good conduct guarrantee can reach EUR 100,000, we consider that any comment is superfluous.

We are aware that our statements are subject to criticism, as long as prior to the analyzed legislative changes, the economic operators were required[1] to submit with their bid a tender guarantee in the amount, form and with the period of validity requested.

The role of this engagement was to protect the Contracting Authority against the risk of any misconduct of the bidder throughout the period ran until the conclusion of the public contract[2].

If the Council rejects appeal in its substance, the contracting authority retained from the appellant a certain amount from the participation guarantee in relation to the estimated value of contract, in accordance with the provisions of article 278[1] of GEO no. 34/2006.

At first glance, the possible objections might be well founded as long as the provisions of article 278[1] of GEO no. 34/2006 have been subject to constitutional review, and the Constitutional Court, by four successive decisions[3], held that this text of the law is constitutional.

However, we consider that the considerations underlying these decisions sustain our as meaning the defeat of the constitutional principle regarding the free character of administrative courts.

[1] *In accordance with art. 33 para. (3) b) of Government Decision no. 925/2006 for the approval of the rules of implementation referring to the assignment of public procurement contracts of Government Emergency Ordinance no. 34/2006 on the assignment of public procurement contracts, public works concession contracts and services concession.*

[2] *According to art. 43[1] No. of GED no. 34/2006, the participation guarantee shall be constituted by the offeror in order to protect the contracting authority from the risk of any improper conduct during the whole contract period. The contracting authority shall require the tenderers to establish the participation guarantee in order to participate in the contract award procedure when the present emergency ordinance requires thr publication of a participation notice or invitation. Tender documentation must contain the following information: a) The amount of participation guarantee mentioned in the participation invitation / notice, in a fixed amount not exceeding 2% of the estimated contract value, but not less than the amounts set out in art. 278 ^1 par. (1); b) the validity of participation guarantee will be at least equal to the minimum period of bid validity, the establishment of participation guarantee shall take into consideration the provisions of art. 276 para. (1), as required by the tender documentation.*

[3] Decision no. 282 of 27.03.2012, published in the Official Gazette of Romania no. 317 of 11 May 2012; Decision no. 996 of 22 November 2012, published in Official Gazette no. 60 of 28 January 2013.

Thus, in support of the motivation of Decision no. 282 / 27.03.2012, the Constitutional Court held that "there is no rule stating the existence of a fee and security deposit representing an income to the state budget or the budget of the judicial administrative authority. The Court notes that the gratuity established by the constitutional norm comprised in art. 21 para. (4) aims the absence of any monetary consideration from the person that, choosing the administrative courts, benefits from the service provided by judicial administrative authority. Or, in this respect, the provisions of the criticized ordinance meet the constitutional requirement regarding the non-onerous nature of the judicial administrative proceedings."

According to the amendment of GEO no. 51/2014 regarding the good conduct guarantee, we see that we are in the situation enunciated by the first argument cited above, that "*there is no fee representing an income to the state budget*[1] *or the budget of the judicial administrative authority*," but the economic operator is ineligible for the service rendered by the judicial administrative authority, CNSC rejecting as inadmissible the complaints unaccompanied by the good conduct guarantee. In this circumstance, we are dealing with a violation of constitutional provisions, according to the argument *per a contrario*.

Equally important is the fact that by those rules discriminate not only the entities with low financial potential, as we have shown, but discriminates the bidders themselves in relation with contracting authorities.

Thus, if the contracting authority has violated the public procurement regulations, the party aggrieved by unlawful conduct is required to withstand the rigors of art. 287 of GEO no. 34/2006, respectively to require that the contracting authority to be ordered to compensate the damage by separate action; after annulment in advance or, where appropriate, revocation of the act in question, according to the law, subject proof that injury exists.

Buy the Contracting Authority have nothing else to do but then to await the outcome of judicial administrative proceedings (which, according to legal

[1] However, we may note that, although these amounts are not income to the state budget, these will represent revenues for the contracting authority as defined by the provisions of art. 8 of Ordinance no. 34/2006, especially art. 8 letter a) under which: the contracting authority is any state body or public authority, public institution acting centrally or regionally. Therefore, these amounts are not income to the state budget, but represent revenue for the budget of any state body.

provisions must be completed within 20 days[1] if it is resolved on the merits, and 10 days if solved under an exception) or judicial (which, according to the practice of Romanian courts does not exceed three months - and this is a reasonable time in the matter under review), to get the amounts payable by the economic operator, simply for the mere fact of daring to appreciate that the claims to CNSC or the court are unfounded.

None of the reasons given in the explanatory memoranda of the legal document analyzed does not justify such inequality enshrined in legislation, in reality is about expressing a definite misuse of public power. Otherwise, in many situations, CNSC and the court had upheld in part the appeal/complaint[2]. We note that legal provision for such a situation does not exist. Otherwise, it is difficult to quantify the part for which an appeal or complaint is accepted in order to deduct proportionally the amount of security to be retained.

This may be considered as misconduct for which the economic operator involved in the procedure is obliged to pay an excessive burdensome tax and can not be linked, *de plano*, only by the outcome of the appeal / complaint.

There are enough institutions intended to discipline the procedural conduit of parties. For example, good faith is a principle established by Civil Procedure Code. According to art. 12 of the Civil Procedure Code, "procedural rights must be

[1] According to art. 276 para. (1) of GEO no. 34/2006, „The Council has the obligation to settle the complaint in no more than 20 days from the reception of public procurement file from the contracting authority concerned, respectively within 10 days in case of an exception which prevents analysis of the merits of the appeal, according to art. 278 para. (1). In duly justified cases, the time limit for settling the appeal may be extended once for another 10 days".

[2] See Decision without number and date available on the Internet at the address:
http://www.cnsc.ro/wp-content/uploads/bo/2014/BO2014_1886.pdf;
http://www.cnsc.ro/wp-content/uploads/bo/2014/BO2014_0223.pdf;
http://www.cnsc.ro/wp-content/uploads/bo/2014/BO2014_0732.pdf;
and Civil Decision no. 171 of 4 February 2009 of the Court of Appeal Timisoara which retained „complaint dismissed by the contestor SC E.D. Construction Ltd against the contracting authority ANAR - Direcția Apelor E. and defendants SC T. SRL, SC B. SA si SC E. SA. Admits the complaint made by the contracting authority Direcția Apelor E. **in the sense that partially cancels the Decision no. 2356/C1/23/04.06.2008 issued by the National Council for Solving Complaints regarding only the cancellation ex officio of the awarding of public procurement contract**" decision available on the Internet:
http://www.avocatura.com/speta-130090-contencios-administrativ-si-fiscal--litigiu-privind-achizit.html#. At the same time, the sentence. 935/2014, Section CAF pronounced in File no. 227/2/2014 by which the complaint is admitted, CNSC decision is partially amended, the appeal is granted in part and the procurement procedure is canceled. (http://portal.just.ro/2/SitePages/Dosar.aspx?id_dosar=200000000311030&id_inst=2).

exercised in good faith, according to the purpose for which they were recognized by law without violating the procedural rights of another party.

The party exercising the procedural rights abusively is liable for material and moral damages caused. It may be required by law to pay court fines. The party who fails to fulfill in good faith its obligations under paragraph procedural shall be liable according to para. (2).

In this situation, the abusive exercise of procedural rights entitles to compensation, but must be proven. Such obligations exist under the article 723 of the former Civil Procedure Code[1]. Also, whenever a party is required by law to lodge a security according to article 1063 of Civil Procedure Code, "the security lodged shall be returned upon request after settling by final decision of the lawsuit for which the security was lodged, respectively after the termination of effects of the measure for which it was submitted.

The security shall be released to the depositor to the extent that the person entitled did not made application for payment of the compensation due to the end of a period of 30 days from the date the judgment becomes final or, if applicable, the date of the termination of effects of the measure referred to in para. (1). However, the security shall be released immediately if the interested party expressly declares that is not interesting to oblige the depositor of the security to pay the damage caused by the approval of the measure for which it was submitted.

If the application for which the security was rejected, the court will decide ex officio the return of security. Therefore, if the application for which the security was rejected, the court shall order the return, and in case of the measure is admitted, the return is subject to a claim for damages, the party requesting a part from the security amount *must demonstrate that it is due*.

Moreover, the doctrine has held that the mere exercise of a procedural / of an appeal may be considered abusive in itself[2], assuming the judge to determine when

[1] According to this "the procedural rights must be exercised in good faith and according to the purpose to which they were recognized by law. The party using those rights in an abuse manner is liable for the damages caused".

[2] Thus, it was held that "an error of judgment, mistake of thinking may not automatically lead to the conclusion that the application of summons or the defense is bold and therefore abusive. It is for the judge to determine, based on the facts of the case, whether the application was made under conditions which justify serious mistake or bad faith. "See M. Tabarca, op. cit., p 183. Same author cites A. Fettweis, author that states: "It is the judge's task to find the right balance between conflicting requirements: to ensure access to justice, the use of the remedy of appeal, entirely free defense, but

an application has been promoted in bad faith. In this case, the Executive said there is liability without any fault.

We should not ignore that doing the proceedings, the court is obliged to take into account the decisions on appeals in the interest of law, their particular reason being to clarify the legal issues that have been differently settled by the courts[1].

Also, according to art. 519 Civil Procedure Code[2], the High Court of Cassation and Justice has the power to issue a decision that would give a solution of the question of law principle which was acknowledged.

What we want to emphasize is that we cannot equalize a solution to reject the appeal / complaint and the conclusion that the contractor / economic operator involved in the procedure is due an amount to the authority for its bad faith, the bad faith is not retrievable only in the solution of appeal / lawsuit, as long as through a different interpretation of the same text of the law, the courts solutions give rise to an uneven practice, becoming necessary to demonstrate the proof of bad faith or even serious misconduct in the exercise of procedural rights.

3. Conclusions

The measure adopted is designed to enhance eventual abuses committed by contracting authorities especially that the requirement concerning the security deposit subsists even in challenging tender documentation. This was taken to extend the intention expressed in the forums of decision of to disband CNSC, but still outstanding. The constitutional principle on the free nature of the administrative courts, as well as enshrining free access to a court were clearly violated and the measures adopted have to removed as soon as possible since the effect will be that tenderers will be obliged to refer directly to the European

also to limit initiatives without justification, motivation oppositions desire to delay enforcement of certain obligations determined".

[1] According to art. 514 of Civil Procedure Code, *„to ensure consistent interpretation and application of the law by all courts, the General Prosecutor of the High Court of Cassation and Justice, ex officio or at the request of the Minister of Justice, the College Board of the High Court of Cassation and Justice, colleges of Courts of Appeal and the Ombudsman have the duty to ask the High Court of Cassation and Justice to rule on issues of law that have been solved differently by the courts".*

[2] According to art. 519 of Civil Procedure Code, *„If, during the lawsuit, a panel of judges of the High Court of Cassation and Justice, the Court of Appeal or Court which is hearing the case, find that a question of law, whose explanation depends on solving the merits of the case, it is new and the High Court of Cassation and Justice held nor subject to appeal on points of law pending, may request the High Court of Cassation and Justice to give a ruling to solve the issue of law in principle which was referred".*

Commission, in accordance with art. 258 of the Treaty on the Functioning of the European Union.

4. References

http://www.cnsc.ro/wp-content/uploads/bo/2014/BO2014_0732.pdf Tăbârcă, M. (2006). *Excepțiile în procesul civil / Exceptions in the Civil Trial*. Second edition revised and extended. Bucharest: Universul Juridic.

Government Emergency Ordinance no. 51/2014, published in the Official Journal of Romania no. 486 of June 30, 2014.

Government Emergency Ordinance no. 34/2006, published in the Official Journal of Romania no. 418 of Mai15, 2006.

http://www.avocatura.com/speta-130090-contencios-administrativ-si-fiscal--litigiu-privind-achizit.html#

http://portal.just.ro/2/SitePages/Dosar.aspx?id_dosar=200000000311030&id_inst=2

http://www.cnsc.ro/wp-content/uploads/bo/2014/BO2014_1886.pdf;

http://www.cnsc.ro/wp-content/uploads/bo/2014/BO2014_0223.pdf;