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MINISTERUL AFACERILOR EXTERNE

Agentul Governamental pentru Curtea de Justiție a Uniunii Europene

Nr. K1/1532

09 decembrie 2014



Stimate domnule ministru,

Comisia Europeană (Comisia) a introdus în sistemul EU Pilot o solicitare de informații cu privire la conformitatea *Ordonanței de Urgență a Guvernului nr. 51/2014 pentru modificarea și completarea Ordonanței de Urgență a Guvernului nr. 34/2006 privind atribuirea contractelor de achiziție publică, a contractelor de concesiune de lucrări publice și a contractelor de concesiune de servicii cu prevederile europene incidente, în speță cu Directiva 89/665/CE¹, precum și cu Directiva 92/13/CE² (dosarul EU Pilot 7189/14/MARK).*

În sistemul EU Pilot au fost atașate raportul dosarului și scrisoarea Comisiei care conține detalii privind informațiile solicitate (anexate).

Având în vedere importanța soluționării acestei sesizări și pentru a evita o posibilă declanșare a unei acțiuni în constatarea neîndeplinirii obligațiilor de stat membru, vă adresăm rugămintea de a ne transmite un **răspuns centralizat, care să cuprindă punctele de vedere ale tuturor autorităților competente, până la data de 02 februarie 2014, atât pe cale oficială, cât și pe cale electronică, la următoarea adresă de contact: dal@mae.ro.**

Menționăm că documentația aferentă dosarului EU Pilot a fost transmisă și Autorității Naționale pentru Reglementarea și Monitorizarea Achizițiilor Publice (ANRMAP) și propunem ca răspunsul final ce va fi comunicat COM să fie elaborat, în colaborare, de ANRMAP și MFE, în calitate de co-inițiatori ai *Ordonanței de Urgență a Guvernului nr.51/2014*.

Cu stimă,

Răzvan Horatiu Radu
~~Secretar de stat~~
Agentul Governamental pentru
Curtea de Justiție a Uniunii Europene

Domnului Eugen Orlando Teodorovici
Ministru
Ministerul Fondurilor Europene

¹ privind coordonarea actelor cu putere de lege și a actelor administrative privind aplicarea procedurilor care vizează căile de atac față de atribuirea contractelor de achiziții publice de produse și a contractelor publice de lucrări;

² privind coordonarea actelor cu putere de lege și actelor administrative referitoare la aplicarea normelor comunitare cu privire la procedurile de achiziții publice ale entităților care desfășoară activități în sectoarele apei, energiei, transporturilor și telecomunicațiilor.



European Commission

EU Pilot

03/12/2014

File ref n°:	7189/14/MARK
Member State:	RO
Commission service:	MARK
Issue area:	Internal Market and Services/Public procurement
File nature:	Complaint / Organization

Responsible Filehandler Member State:

File history

- **02/12/2014:** Draft file created by **CHAP** - File transferred from CHAP
- **03/12/2014:** File submitted to Member State in EU PILOT database - **Internal Market and Services**

File status (03/12/2014)

- **File status:** Awaiting acceptance by Member State
- **MS: Target Date:** 11/02/2015 = 70 day(s) left

Title:

- Remedies in Public procurement - excessive guarantee of good conduct

Issue Description:

- **English:** The Commission's services require additional information from Romanian authorities concerning the introduction of a guarantee of good conduct in the context of launching complaints concerning public procurement procedures. Please find more detailed questions in the attached document.

Complainant details

Complainant identity disclosure authorised, ID: 55184

- **Organisation Name**
- **Address** Bd. Dimitrie Pompei 8, et 1
- **Postcode** sector 2
- **Country** ROMANIA
- **Fax**
- **Complainant language** română
- **Contact person** STAR STORAGE S.A.
- **E-mail address** julia.vass@vasslawyers.eu



Bruxelles, 2 December 2014

Subject : Information request regarding Case EU PILOT 7189/14/MARK – Excessive Guarantee of good conduct

Introduction

We are writing regarding a complaint received by the Commission on the Government Emergency Ordinance 51/2014, adopted in June 2014, introducing a good conduct guarantee as precondition for introducing a complaint aiming at contesting the legality of a public procurement procedure.

A complainant aiming at contesting a certain public procurement procedure is obliged to establish a guarantee for the whole duration between the date of lodging the complaint and the date of the final decision of the specialized review body (National Council for Solving Complaints – CNSC) or of the court. The contracting authority has the obligation to retain the guarantee of good conduct if the complaint is rejected by CNSC or the court. In this case the complaint is presumed abusive by law. The guarantee amounts to 1% of the estimated value of the public procurement contract, up to a maximum of 100,000 EUR.

The Romanian authorities maintain that the measures aim at protecting contracting authorities from abusive complaints introduced by economic operators and at accelerating public procurement procedures, especially those involving European funds.

In order to assess the effectiveness, proportionality and regularity of the measures from the EU law perspective, the Commission services need additional information from the Romanian authorities, as indicated below.

The role of CNSC and the evolution of the complaints received since its establishment

Since the creation of CNSC in 2006, a high number of complaints have regularly been introduced against various acts/decisions of contracting authorities. Despite the high number of complaints, CNSC was able to deal with most complaints within the legal framework of 30 days. The practice shows that complainers seem to have a high confidence in CNSC, as the possibility to address a complaint to the courts has rarely been used and few decision been appealed. It seems that CNSC acted as an efficient "filter" and prevented a substantial number of irregularities in public procurement procedures, both in the case of national and of European funded projects.

Overall, since 2006, analysing the data provided by CNSC in its annual reports, more than one third of the total number of complaints treated by CNSC were admitted (the percentage varied along the years between 33-35 %), a comparatively very high rate of success.

In 2013, economic operators lodged 5739 complaints (3406 concerning the result of the procedure and the rest of the complaints the award documentation). According to the officially available statistics for 2013, CNSC admitted 43 % of the complaints on the result of the procedure (1485 out of 3406) and 22 % of the complaints on the tender documentation. In 2013, the figures show that for approximately 2000 public procurement procedures launched or awarded violations or irregularities of national or European public procurement rules have been established.

In terms of value, for 2013, the total estimated amount related to the procedures in respect of which CNSC considered complaints well-founded is around 5 billion EUR, bearing also a risk of financial corrections.

Following the introduction of GEO 51/2004, a sharp decrease in the number of complaints can be noticed (617 complaints from July to September 2014, compared to 1516 complaints for the same period in 2013, resulting in apx. 60% decrease rate). The acceptance rate for 2014 is slightly higher than for the same period in 2013 (37% vs. 35 %, see data provided by CNSC on occasion of the Public procurement working group meeting in Bucharest on 23-24 October 2014).

Analysis of the measure

The objective to prevent abuse of procedural rights by economic operators seems not being supported by statistical evidence.

During July-September 2014, after the introduction of the measure, the rejection and acceptance rates by CNSC (63 % of complaints rejected, 37% admitted) remained similar to previous years. The fact that the measure only lead to a substantial decrease in the number of complaints, while the proportion of rejected complaints remained unchanged, shows that the measure has not produced the results for which it was introduced, i.e. to prevent abusive behaviour of economic operators. The measure might have produced such a result if the proportion of successful complaints had risen sharply. This could support the assumption that the measure might have discouraged potential abusive complaints.

The single fact that the number of complaints has decreased does not allow concluding that the complaints that were not introduced would have been abusive. On the contrary, it supports the suggestion that, only for the 3 months from July to September 2014, about 300 complaints would have been successful and would have allowed the public procurement procedure to be finalised according to the applicable public procurement rules. Failing the control by CNSC these procedures are fraught with irregularities, a fact that might entail significant financial corrections in the future. In this period, according to the information available to the Commission's services, the number of award procedures did not change significantly.

The Commission's services, therefore, estimate that the measure could be held to be disproportionate and go beyond what is necessary to achieve the proposed objective, namely to limit abusive complaints. It also seems to have a general discouraging effect on economic operators. In the end, it could lead to a limitation of access to justice of economic operators which could impede considerably the exercise of the rights conferred upon economic operators by the remedies directives (Directives 89/665/EC and 92/13/EC).

Measures aimed at discouraging abusive or "professional" complaints could have been designed in a way capable of reaching their objective. This presupposes a careful analysis of the categories and numbers of abusive complaints based on sound statistical evidence. Appropriate measure could then genuinely responsabilize complainants and ensure that any penalty is limited to cases of manifest abuse of procedural rights, reflecting an obvious "bad conduct" of economic operators. This could be assessed on a case by case basis and left to the discretion of interpretation of the judge dealing with the case.

Over the years around 35 % of all complaints have been successful, a rate far beyond the one in most other Member States. In view of the Commission's services, this high rate actually reflects existing systemic vulnerabilities of the public procurement system in Romania and the need for urgent serious adjustments. The high number of complaints appears to be a symptom of existing deficiencies, not the consequence of an abuse of procedural rights by economic operators.

Information requested from the Romanian authorities

In light of the above and in order to assess the complaint comprehensively, the Commission requests the following information from the Romanian authorities:

1. Details on the consultations carried out before the adoption of the measure with the review body and other public procurement stakeholders on the opportunity and expected impacts of the measure; the respective opinions expressed, options considered etc.
2. Any prior analysis, study/statistics or any other form of evidence, accurately assessing the real importance in terms of number and value of abusive complaints.
3. A detailed impact assessment conducted before introduction of the measure, especially the evaluation of the risks to deter serious complaints, to have more public procurement procedures managed and contracts awarded in violation of public procurement rules, and to be subject to higher rates of financial corrections
4. In this respect, we also require your assessment of the impact of the previous provisions of Art. 278 of GEO 34/2006 on the prevention of abusive complaints and the reasons and detailed justification accompanied by evidence why you considered this measure insufficient
5. Detailed evaluations of the consequences of the introduction of the measure so far, taking into account especially the remarks above.

Please provide us with detailed assessment accompanied by documentary evidence on all the above points and the measures you intend to take to remedy the situation.

We thank you for your cooperation.

Bogdan STEFAN, case handler, +32 229-56626, Bogdan.Stefan@ec.europa.eu

Katharina VIERLICH, Infringements coordinator, Katharina.Vierlich@ec.europa.eu