

ANALYSIS

**with recommendations on the introduction of
the Procurement Challenge Fee: between the
right to challenge and a fair
and efficient procurement process**

AUTHORS: Vadim ȚURCAN

Diana ENACHI

Chisinau, 2025

INTRODUCTION

Public procurement is an essential area in the efficient functioning of the state and use of public funds. The complaints process plays a key role in ensuring the transparency and fairness of procedures. Different instruments have been implemented in different EU countries to induce economic operators to exercise their right to challenge with good intention and to avoid fraudulent challenges with negative impact on the public procurement process. Practices in other countries show that in EU countries, too, there is a phenomenon of ill-intentioned procurement challenge. According to a [SIGMA/OECD](#) study, a fairly large number of EU countries reported that sometimes the reason why an economic operator lodges a challenge is to obstruct the award of a procurement contract. Looking at EU practices, there are countries that have no fee for submitting a challenge: Belgium, France, Luxembourg, Portugal, Spain. However, there are also countries that have mandatory fees/payments when lodging a contestation: Estonia, Lithuania, Croatia, Denmark, Latvia, Malta, Czech Republic, Romania, Denmark, Latvia, Malta. The provisions on the financial implications in the contestation process vary widely from one country to another depending on the authority, the remedy, the value of the contract, the thresholds set by law, etc.

In the Republic of Moldova, the introduction of a fee (or other form such as a bond, pecuniary guarantee) for filing a challenge is a controversial topic with legal, economic and administrative implications that has been addressed in different contexts in recent years. The topic was addressed during the 2nd meeting of the [National Platform for Public Procurement \(PNAP\)](#), where IDIS experts presented "[Analytical Note: Analysis of unfounded challenges in procurement and solutions to streamline the challenge procedure](#)". The public procurement system in the Republic of Moldova is based on a set of normative provisions stipulated by national legislation.

In the context in which in the Parliament of the Republic of Moldova was registered the [draft no. 91 of 25.03.2025](#) - "*for the amendment of some normative acts (introduction of the state fee for filing appeals*", which provides for the introduction of a state fee for the filing of appeals by economic operators in public procurement procedures, it is necessary to discuss these proposals analyzed in the light of the existing legislative framework. Thus, the draft law proposes to introduce a **fee of 1% of the estimated value of the procurement procedure, but not exceeding 10 000 lei.**

The first attempt to introduce **bail when filing an appeal** was the draft law No. 202 registered in the parliament on 24.08.2021. The authors of the legislative initiative proposed the introduction of the obligation to deposit a pecuniary guarantee in the amount of 1% of the value of the contested lot, but not more than 100 thousand lei. If ANSC rejects the contestation as unfounded, the amount of the guarantee would be transferred to the account of the Public Procurement Agency. And, in case the contestation would be admitted/partially admitted, the amount of the guarantee would be returned to the contestant within 10 working days. The draft provided that the funds would be accrued as revenue to the state budget. Subsequently, through an amendment, it was proposed to amend the draft law and, in particular, to rename it as "payment for contestation" and to reduce its size to 0.5% of the estimated value of the contested lot/lots. At the same time, a minimum ceiling of 5,000 lei and a maximum ceiling of 25,000 lei were proposed. Likewise, it was proposed to change the method of transfer of payment and the institution responsible for collecting the payment being ANSC. The proposed payment refund mechanism provided that the ANSC would partially refund the challenge payment under certain conditions. However, in April 2023, the draft received a negative opinion from the Government and, respectively, was not proposed for consideration in Parliament.

In the following, we will analyze the evolution of complaints according to the most recent statistical data, the appropriateness of introducing a fee for submitting a complaint, as well as the most suitable mechanism for the public procurement system in the Republic of Moldova. The introduction of a fee should be analyzed from the point of view of the extent to which this mechanism, on the one hand, will ensure the reduction of fraudulent challenges and, on the other hand, will not infringe the rights of economic operators to challenge a flawed procurement procedure in order to prevent the award of a procurement contract in violation of the fundamental principles of procurement.

Although it is complicated to categorize a challenge (even one rejected as unfounded by the ANSC) as abusive, we will analyze in detail, both the data on the *evolution of the challenges filed*, as well as the data on the *challenges rejected by the ANSC and the challenges withdrawn by economic operators*. The conclusions will serve as an argument for the adoption of policies to discourage economic operators to challenge maliciously, while ensuring the right to challenge any economic operator interested in obtaining a procurement contract. And, another positive effect in encouraging (reasoned) rebuttals is also their significant contribution to reducing infringements in the procurement process and their remedy by contracting authorities.

RIGHT TO CHALLENGE IN THE LEGAL FRAMEWORK

Within the project "Strengthening Integrity in Public Procurement", implemented by *the Institute for Development and Social Initiatives (IDIS) "Viitorul"*, in collaboration with the *Transparency Partnership (USA)*, the "[Analytical Note: Analysis of unfounded challenges in procurement and solutions to streamline the challenge procedure](#)" was prepared by Diana Enachi and Vadim Turcan, presented at the Meeting no. 2 of the [National Platform for Public Procurement \(NPPP\)](#). The document reveals important issues in the practice of challenges filed by economic operators in public procurement procedures.

According to **Art. (1)** of Law 131/15 on Public Procurement, *any person who has or has had an interest in obtaining a public procurement contract and who considers ~~that~~ in the public procurement procedures an act of the contracting authority has infringed a right recognized by law, as a result of which he has suffered or may suffer prejudice, is entitled to challenge the act.* Therefore, the right to challenge is determined by two conditions: the interest in obtaining the contract and the existence of the right adversely affected.

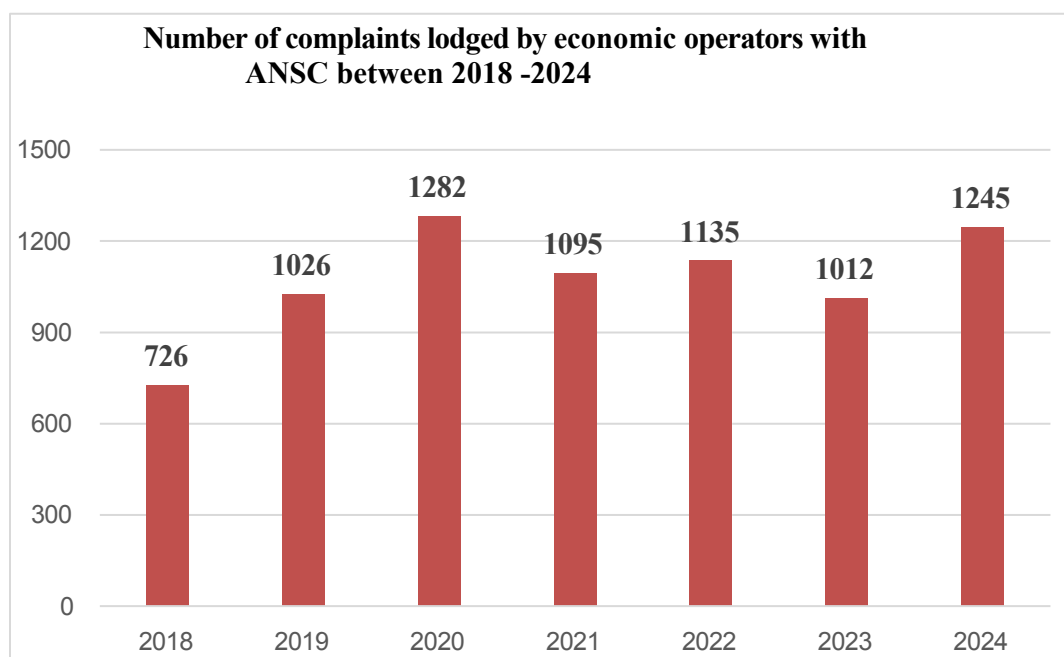
Additionally, Law No. 396/2023 amended Law No. 131/2015 (in force as of January 1, 2024) by Law No. 396/2023, and supplemented **Article 82**. Right to appeal. Thus, paragraph 1¹⁾ provides *"bidders shall be deemed to be interested if they have not been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been deemed lawful by the ANSC or is no longer subject to appeal to the ANSC. Bidders who have not been definitively excluded shall be deemed to be interested in challenging the re-evaluation decision if they have challenged the initial contract award decision/cancellation of the public procurement procedure."* And paragraph 5 provides that the economic operator must exercise in good faith the right provided for in para. (1).

Another relevant rule is contained in **Art. 85 para. (14)** of Law no. 131/2015 which provides that *"In duly justified cases and for the prevention of imminent damage, ANSC, until the merits of the case are resolved, may order, by decision, within 3 days, including at the request of the interested party, the suspension of the public procurement procedure"* as well as in para. (15) of the same article *"For the purposes of the provisions of paragraph (14), the ANSC shall resolve the request for suspension taking into account the consequences of this measure on all categories of interests that may be harmed, including the public interest"*.

ANALYSIS OF APPEALS FILED BETWEEN 2018 AND 2024

In order to formulate some proposals, it is necessary to analyze the trend of lodging appeals by economic operators in public procurement procedures. Analyzing ANSC's performance reports we can deduce that during the 7 years of activity an **average of 1075 contestations per year** have been formulated. **The largest increases in the number of challenges** filed in procurement procedures were recorded in **2020 (25%) and 2024 (23%)**. And the largest **decrease in the number of challenges** was recorded in **2021 (about 14%) and 2023 (about 12%)**.

Figure no. 1 The evolution of the number of appeals submitted by economic operators to the ANSC between 2018 and 2024

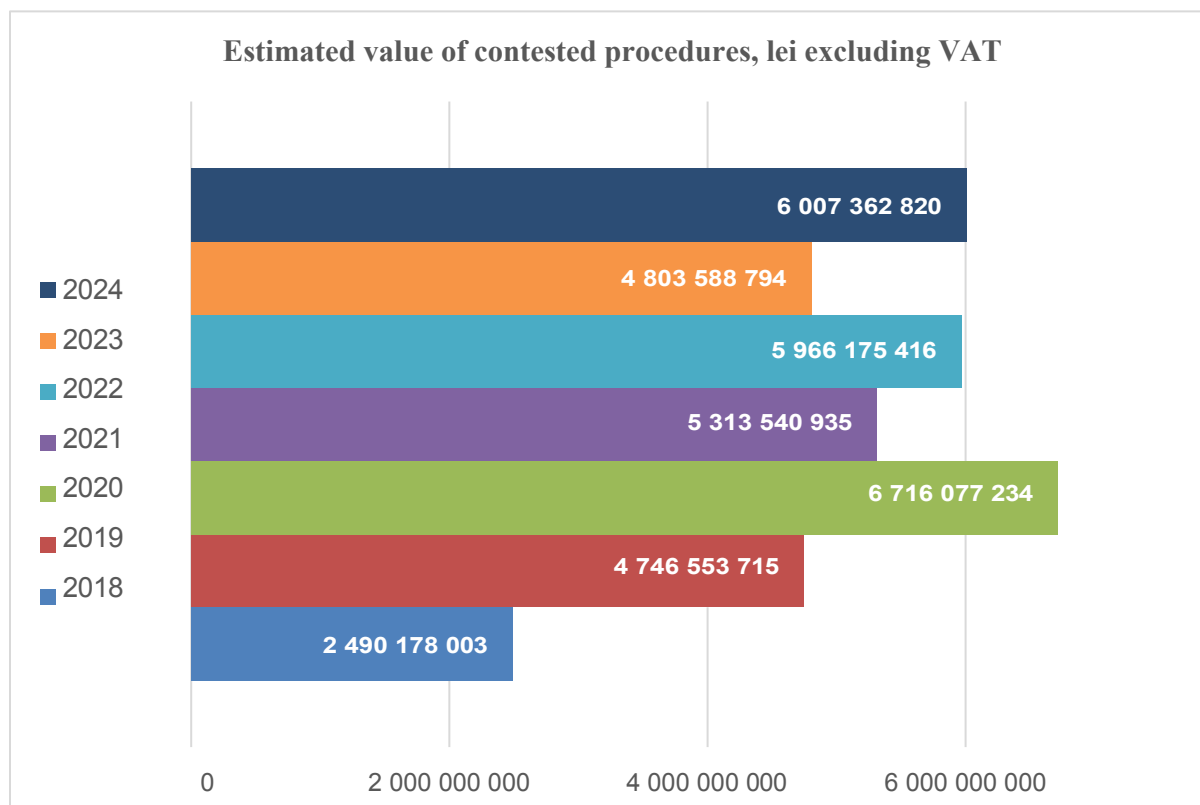


Source: prepared by the authors based on ANSC reports, www.ansc.md

From **Figure No. 1** it can be seen that in **2024** there **were 233 more protests** filed or about **23%** more than in **2023**. Thus out of the total of 1245 protests, **46.4%** were filed on procurement of goods procedures, **44.17%** on procurement of works procedures and **9.43%** on procurement of services procedures.

Statistical data also show that the estimated value of public procurement procedures contested by economic operators in 2024 also **increased by 25%**. **The value of contested procurements** amounted to **RON 6.01 billion (excluding VAT)**, which is **1.20 billion (excluding VAT)** higher than the similar period of 2023.

Figure no. 2 Estimated value of contested procurement procedures, period 2018 - 2024, lei excluding VAT



Source: Authors based on ANSC data and reports, www.ansc.md

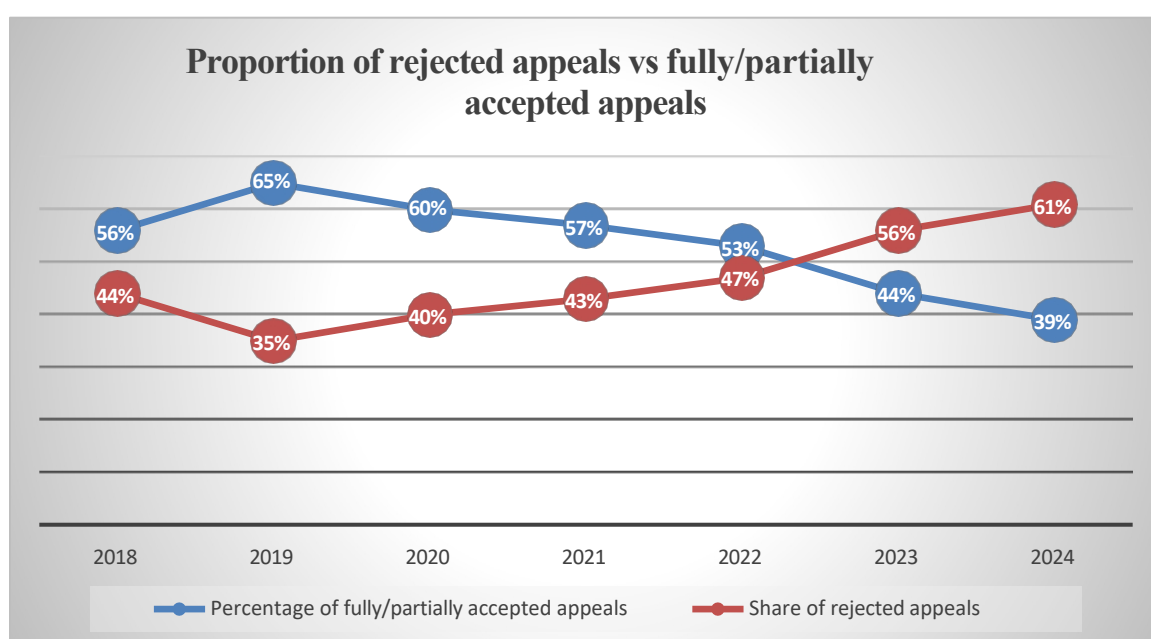
In order to analyze the extent to which maliciously filed challenges generate a negative impact on legally conducted public procurement award processes, the challenges withdrawn in 2024 and their evolution in the period 2018 - 2024 were analyzed.

ANALYSIS OF CHALLENGES REJECTED BY THE ANSC

Statistical data on appeals show that in 2024, **more than half (61%) of the total number of appeals examined on the merits by the ANSC (761 appeals) were rejected as unfounded (466 appeals)**. Of the 466 rejected appeals, 87 were dismissed. Therefore, the other **39% of the appeals examined on the merits were fully or partially admitted (295 appeals)**. In order to analyze the evolution of the share of rejected appeals compared to the share of fully/partially admitted appeals out of the total number of appeals examined on the merits, we note that since 2022, the **share of appeals rejected by the ANSC as unfounded has increased over the last few years**,

In particular in the last 3 years, from 47% (2022) to 61% (2024). At the same time, the share of fully/partially admitted appeals is continuously decreasing between 2019 and 2024. If in 2019, 65% of the challenges examined on the merits were fully/partially admitted, i.e. the contestants' claims were relevant, which contributed to the remedy of the admitted violations in the procurement procedure. Then, in 2024, only 39% of all challenges examined on the merits were fully/partially admitted, a significant reduction of 26 p.p. The same trend can be observed in the first months of 2025, if we analyze the ANSC decisions and the data available on the ANSC website.

Figure no. 3 Evolution of the share of rejected appeals vs. appeals fully/partially admitted by ANSC out of total appeals examined on the merits, 2018 -2024



Source: prepared by the authors based on ANSC data and reports, www.ansc.md

However, **not all challenges examined on the merits and rejected by the ANSC as unfounded can be categorized as abusive or maliciously filed.** On the contrary, in some cases, by filing an appeal, the economic operators have contributed to remedying violations of the law in the process of awarding the procurement contract and even canceling the acts issued in violation of the law.

For example, in 2024, out of 466 rejected challenges (61%), **87 challenges (11%) were rejected as moot, mainly because contracting authorities, on their own initiative, remedied the infringements detected or annulled their own decisions, those challenged by economic operators.** By comparison, in 2023, in

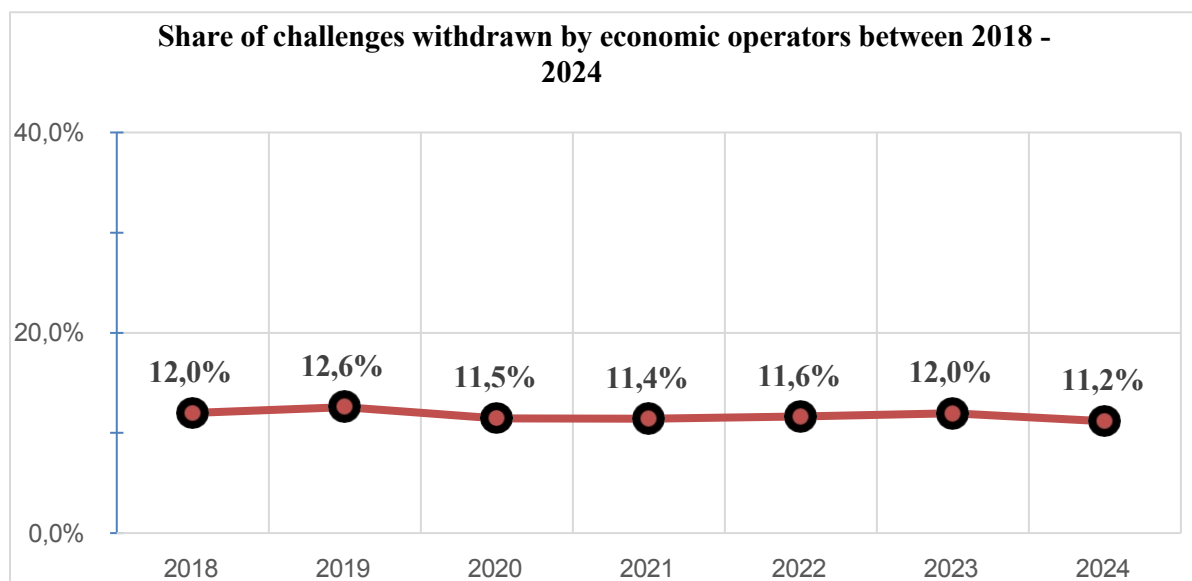
In 48 cases (7%), the ANSC rejected the complaints on the grounds that they were moot. In these cases, the contracting authorities, by their actions, recognized the infringements and took remedial action, including the cancellation of the flawed procurement procedures. This shows that **the economic operators, by lodging a challenge, contribute to remedying infringements of legal provisions in the public procurement process.**

ANALYSIS OF CHALLENGES WITHDRAWN BY THE CONTESTANTS

From Figure 4 below, it can be seen that **the share of challenges withdrawn by economic operators is relatively constant over the period 2018 - 2024, averaging 11.7% per year.** A withdrawn challenge can be generated by the acceptance of the arguments put forward by the contracting authority, the implementation of remedial measures by the authority and therefore, rendered moot or considered by the challenger itself as unfounded.

However, a challenge withdrawn without stating the reasons for the decision may signal possible risks, including the risk of awarding the procurement contract in breach of the law, but also fraud, corruption. The legislation in force stipulates that once withdrawn, the challenge claims submitted by the challenger are no longer examined by ANSC. Therefore, the withdrawal by the challenger of the challenge on the grounds that he no longer has any claims does not necessarily denote the absence of violations in the procurement procedure. At least in theory, the introduction of a fee should discourage economic operators who submit a challenge maliciously.

Figure 4. Analysis of challenges withdrawn by economic operators, period 2018-2024



Source: prepared by the authors based on ANSC data and reports, www.ansc.md

ANALYSIS OF THE DRAFT LAW ON THE INTRODUCTION OF A FEE FOR FILING AN APPEAL

In the Parliament of the Republic of Moldova was registered [the draft no. 91 of 25.03.2025](#) - *"For the amendment of some normative acts (introduction of a state fee for filing protests"*, which provides for the introduction of a state fee for the filing of protests by economic operators in public procurement procedures. Thus, the draft law proposes the introduction of a **fee of 1% of the estimated value of the procurement procedure, but not more than 10 000 lei**. The draft also stipulates that *"the economic operator will have 3 days from the moment of filing the contestation to pay the state fee, otherwise the contestation will be returned without examination"*.

As for the conditions that made it necessary to introduce a fee for lodging a complaint, they can be explained by the significant increase, in particular in 2024, in the number of complaints lodged (23%) in general and in the proportion of complaints rejected (466 or about 61%) in particular (excluding the 87 complaints rejected as not being admissible mainly because the authorities had remedied the infringements).

The arguments made and the objectives outlined reflect the essence and expected effects of the introduction of a challenge fee. The draft provides that capping the fee at 10,000 lei is an optimal economic measure that would ensure the accessibility of challenges for economic operators, discourage abuses without limiting competition and contribute to smooth procurement processes. However, we believe that the amount of this fee, in the way it has been set, may not generate the expected effects and, on the contrary, discourage economic operators, which is why we make recommendations for improving the project in the next chapter.

We consider it important to point out another shortcoming of the process of drafting and adopting the draft law, namely the lack of public consultations with the broad participation of all stakeholders: contracting authorities/entities, economic operators/business associations and representatives of civil society. Although, the draft law has been published on the Parliament's website, however, this is not sufficient and does not represent a form of broad consultation of the views of all stakeholders. According to the legislation, the consultation of stakeholders is ensured by organizing public public debates, opinion polls, soliciting the opinions of experts in the field, creating permanent or ad hoc working groups with the participation of civil society representatives.

FINAL CONCLUSIONS AND RECOMMENDATIONS

Considering that in 2024 there **were 233 more protests filed or about 23% more than in 2023**, and that the percentage of protests withdrawn by economic operators is relatively constant, **averaging 11.7% per year**, we can analyze the optimal option, which would lead to a decrease in unjustified protests in public procurement procedures. Following the elaboration of this proposal note, we consider the following solution to be the optimal one, which would ensure, on the one hand, respect for the right to challenge and, on the other hand, reduce frivolous challenges and demotivate bad faith challengers.

The established fee (1% with a maximum ceiling of 10,000 lei) could discourage small and micro companies with low financial capacity to challenge a procurement procedure, even if they have good reasons (breach of law, of procedure, etc.). On the other hand, this fee would not be a barrier for large companies (with high financial capacity participating in tenders of high value) to challenge a procurement procedure with malice, having other purposes than the defense of the injured right. Respectively, **we consider it appropriate to reduce the percentage of the state fee as a share of the estimated value (from 1% to 0.5%) and to increase its maximum ceiling (from 10,000 lei to 50,000 lei)**

The draft states that a fixed fee would simplify the process of administration, collection, and establishing the correctness of payment (compared to bail, which does not have to be refunded in the event of a full or partial acceptance of the appeal). Given that, in general, any fee imposed represents a barrier (higher or lower for different economic operators, depending on their capacities), there is a risk of reducing the number of appeals lodged and, consequently, of increasing the number of procurement procedures and contracts awarded in breach of the legislation.

In these circumstances, **we consider it appropriate to introduce a mechanism for the refund of the fee in the event of the admissibility of the full/partial appeal**. Through the fee refund mechanism, bona fide economic operators will have a greater incentive to challenge flawed procurement procedure and to point out breaches of legislation admitted by public authorities. And, in the absence of the refund mechanism, economic operators contesting a flawed procurement procedure are put in the same position as bad faith economic operators whose aim is not to defend the injured right and remedy procedural violations, but other purposes such as to delay the procurement process or the activity of competitors, etc.

Below, we present some examples of how the calculation of the challenge fee under the draft law compares with the fee proposed by the authors. For example, a fee of 5,000 lei for a micro/small company participating in a 500,000 lei procurement might be more discouraging than a fee of 10,000 lei for a large company participating in a 5,000,000 lei tender.

Table 1. Examples of challenge fee (draft fee vs fee proposed by the authors)

| | Amount of fee, according to the draft law, 1% (<10.000 lei) | Fee proposed by the authors, 0.5% (< 50,000 lei) |
|---------------------------------------|---|--|
| Acquisition with EV of 400.000 lei | 4.000 lei | 2.000 lei |
| Purchase with EV of 800.000 lei | 8.000 lei | 4.000 lei |
| Purchase with EV of 1.000.000 lei | 10.000 lei | 5.000 lei |
| Purchase with VE of 5.000.000 lei | 10.000 lei | 25.000 lei |
| Purchase with EV of 10.000.000 lei | 10.000 lei | 50.000 lei |
| Acquisition with EV of 12.000.000 lei | 10.000 lei | 50.000 lei |
| Acquisition with EV of 15.000.000 lei | 10.000 lei | 50.000 lei |

In conclusion, the introduction of a state fee for the submission of a procurement challenge can contribute to disciplining the behavior of challengers and making the procurement process more efficient, provided that the principles of proportionality and fair access to justice are respected. But it is essential that the setting of the amount of the fee and the maximum ceiling take into account the right to challenge and do not constitute a barrier for small and micro companies. However, the purpose of the challenge process is to defend the rights of economic operators, to remedy infringements of the fundamental principles of procurement and, ultimately, to award procurement contracts in legal and expeditious conditions that ensure that the needs for goods, services and works of the contracting authorities/entities are met.

At the same time, there is a need to assess the impact of the introduction of the fee on the evolution of the number of complaints, including by questioning economic operators. We recommend an impact assessment 1 year after the entry into force of the contestation fee and an analysis of whether an adjustment of the fee, the ceiling or the application and refund mechanism would be appropriate. Through these actions, we will ensure that the challenge system continues to serve the purpose of correct implementation of procurement law by ensuring that any breach of the law or admitted breach by a contracting authority is corrected or penalized.