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THE SUPREME ADMINISTRATIVE COURT

Seminar organized by the Supreme Administrative Court of Finland and ACA-Europe

"Recent case-law of the Court of Justice of the European Union and of the (Supreme) Administrative Courts in public procurement litigation"

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AUSTRIA

1. National legal system

1.1. Which court is responsible for the implementation of the appeal proceedings with respect to public procurement falling within the scope of the directives?

1.1.1. Is there an administrative, civil or special court, or an authority of a different kind?
1.1.2. Is there a distribution of functions between these courts (disputes for a substantiated decision? Compensation? Declaration of ineffectiveness? Any others?)
1.1.3. What exactly is the role of the Supreme Administrative Court[1] in disputes pertaining to procurement contracts (judge for full remedy proceedings, court of cassation, judge for abuse of power?)
1.1.4. Does the distribution between the courts change in relation to the proceedings for the measures introduced after concluding the contract?

A: The responsibility for the review procedures in Austria rests with the federal administrative court and the nine administrative courts of the provinces (depending on whether the contracting authority can be attributed to the federation or to one of the provinces). This applies to review procedures before and after concluding the contract. There are no special courts regarding appeal proceedings with respect to public procurement.
The only exception from the competence of the administrative courts concerns actions for damages, for which the civil courts are responsible. Nevertheless, an action for damages because of a violation of public procurement law is only admissible, if the competent administrative court has declared the respective decision of the contracting authority as illegal before.
Against the decisions of the administrative courts a final complaint can be lodged with the Austrian Supreme Administrative Court or the Austrian Constitutional Court. The Supreme Administrative Court acts – as a rule – as a court of cassation.

[1] The Supreme Administrative Court refers to a court that is a member court of the ACA and that acts as a court of last instance.

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2. Length of court proceedings

2.1. Are there any specific proceedings or methods to verify whether the national proceeding applied is quick and efficient (for example: definite deadlines to rule on interim measures, etc.)?

2.2. Is the average processing time determined for public procurement cases? Do you have specific data by type of proceedings and juridical level (level of the court)? If yes, specify. If no statistics are available regarding the average time duration of these types of proceedings, would it be possible to have an average for the cases dealt with by the Supreme Administrative Court?

2.3. Can the parties in litigation request acceleration of proceedings? If yes, does this apply to all the courts or only to the Supreme Administrative Court? If yes, in how often has this been applied?

A: The Federal administrative Court has to decide without delay, at the latest in public procurement cases within six weeks after receipt of the application (compared to six months in other legal matters). The maximum time-limit for decisions on interim measures for the federal administrative court is – as a rule – seven working days. Regarding the time-limits for the administrative courts of the provinces there are minor deviations.
If an administrative court does not decide within the stipulated time-limit, a request for a deadline can be lodged with the Supreme Administrative Court. On the level of the Supreme Administrative Court the parties cannot request acceleration of proceedings.

There are no statistics available for the level of the administrative courts (furthermore they have only been established in 2014 and it would be hard to compare the data with those of the previous system).

Procedure for "interim measures" (including suspension)

Year of case resolution	Number of public procurement proceedings resolved in the Supreme Administrative Court in the reference year	Average time period for the resolved proceedings every year, calculated in working days[2]		
		First instance court[3]	Second instance court[3]	Supreme Administrative court/Court of last resort[3]
2013	4			13
2014	2			11

Substantive proceedings (annulment, declaration of ineffectiveness, compensation, etc.)

Year of case resolution	Number of public procurement proceedings resolved in the Supreme Administrative Court in the reference year	Average time period for the resolved proceedings every year, calculated in working days[4]		
		First instance court[5]	Second instance court[3]	Supreme Administrative court/Court of last resort[3]
2013	70			386
2014	70			352

These data do not include actions for damages, as these fall in the responsibility of the civil courts.

[2] The day on which the appeal was lodged, as well as the day on which the decision was made, must be included in the calculation.
[3] If applicable.
[4] The day on which the appeal was lodged, as well as the day on which the decision was made, must be included in the calculation.
[5] If applicable.

3. Dialogue between the Supreme Administrative Court and the CJEU

3.1. How many requests for preliminary rulings has your Supreme Administrative Court made to the CJEU regarding public procurement cases?

A: Two (2011/04/0121, deadline for applications; Ro 2014/04/0069, "Fastweb")

3.2. Is there a documentation department that systematically analyses the judgements of the CJEU and informs the members of the Supreme Administrative Court about these judgements?

A: The so called "Evidenzbüro" informs the members of panel 4 (the panel dealing with public procurement cases) of the significant judgements of the CJEU in this field (without any claim to completeness – so this does not necessarily comprise all CJEU judgements).

3.3. Does the Supreme Administrative Court quote the jurisprudence of the CJEU in its decisions or does it make material references to its jurisprudence?

A: Yes, we do quote as well as make material references, if it seems appropriate.

4. Implementation of the remedies laid down in Directives 89/665/EEC and 92/13/EEC

4.1. Is it possible for the Supreme Administrative Court (or a lower-level court) to declare a public contract ineffective and/or impose alternative or other remedies (in accordance with Directives 89/665/EEC or 92/13/EEC) *ex officio* or only if it is required?

A: The administrative courts can declare a public contract ineffective and/or impose an administrative fine, if there has been an application to declare a certain decision of a contracting authority (e.g. to award a contract without prior publication of a contract notice) as illegal (and this appeal was granted). A specific application to declare the contract ineffective or to impose a penalty is not necessary.

4.2. Who can seek a declaration of ineffectiveness? Has the jurisprudence of the CJEU judgement dated 18 July 2007, Commission v/FRG, C-503/04 been incorporated into national law?

A: Any economic operator, having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.
There are no specific rules in the field of public procurement law referring to Art. 260 EC; the general civil law applies.

4.3. In how many cases has the balance of interests procedure been implemented for not formulating the interim or suspension measures?
4.4. Is the national jurisprudence subject to the balance of interests under certain conditions?
4.5. Directives 89/665/EEC and 92/13/EEC stipulate that when a first instance court, independent of the contracting authority, is reviewed by an appeal dealing with the contract award decision, the member States shall ensure that the contracting authority cannot conclude the contract before the appeal authority gives its judgement based either on the request for interim measures or the appeal.
Is it possible to have this suspension lifted automatically by your court? If yes, under what conditions?

A: The Supreme Administrative Court – in the last two years – decided in 6 cases on interim or suspensive measures in public procurement cases.
The suspensive effect of an application with an administrative court to render an interim measure cannot be lifted. Against the decision of an administrative court on an interim measure itself an appeal can be lodged at the Supreme Administrative Court, though the Supreme Administrative Court – as far as can be seen – in the last years did not have to decide on such a complaint.

5. Division of the award criteria into award subcriteria, balancing the award subcriteria, criteria for assessment and a scoring method for the offers (case law references: CJEU, C331/04 ATI EAC and others; CJEU, 24 January 2008, Lianakis, C-532/06)

5.1. How does your Court implement this jurisprudence in its everyday practice?
5.2. Does the jurisprudence or legislation allow the use of subcriteria that is not explicitly stated, and if so, under what conditions? Does the jurisprudence or legislation determine the subcriteria? Does the jurisprudence or legislation differentiate between the subcriteria and the assessment criteria?
5.3. What are the consequences of the jurisprudence using subcriteria that are not explicitly stated? Does the same question apply to the assessment criteria?
5.4. Does the national legislation or jurisprudence require any prior communication as regards the assessment method for the offers?

A: According to para 79 section 3 of the Public Procurement Act the contracting authority shall – when the award is made to the tender most economically advantageous – specify all criteria, that will be used, in proportion to their importance either in the contract notice or in the specifications. The importance of the award criteria in relation to each other has to be objectively comprehensible. The regulation does not differentiate between criteria and subcriteria.
According to the jurisprudence of the Supreme Administrative Court (2007/04/0065) award criteria shall enable a clear and neutral assessment of the tenders. The criteria and

their respective importance have to be specified in a way, that it is assessable for an economic operator, in which way an amendment of a tender has an impact on the overall assessment. The assessment method must not allow an adjustment of the importance of the award criteria in the course of the assessment of the tenders. In the quoted judgement the Supreme Administrative Court considered the given assessment method – in the course of a case-by-case assessment – as not compliant with public procurement law because the scoring system for certain subcriteria was not specified.

6. In-house horizontal cooperation [CJEU cases, C-15/13, Technische Universität Hamburg-Harburg; C-386/11, Piepenbrock Dienstleistungen; C-159/11, Azienda Sanitaria Locale di Lecce and C-480/06, Commission v. Germany (Grand Chamber)].
   6.1. Did your Supreme Administrative Court face any difficulties as regards the procurement contracts in the cooperation proceedings?
   6.2. In concrete terms, how is the examination of the fulfilment of these carried out?

   A: The Supreme Administrative Court once had to deal with a so called intermunicipal cooperation (cooperation between public entities; 2013/04/0020), and once with an (asserted) in-house situation (but not a horizontal one, 2009/04/0309).
   In the first-mentioned case the Supreme Administrative Court reviewed the given situation on the basis of the criteria developed by the CJEU in the quoted judgements (public task, that both concerned entities have to perform [in the given case this was waste disposal]; contract concluded exclusively by public entities; no preference for private parties; only considerations relating to the pursuit of objectives in the public interest). The Supreme Administrative Court considered these criteria as sufficient to decide on the case without a further request for a preliminary ruling (no outstanding difficulties were seen).

7. Confidentiality of the documents upon judicial review (case law references: CJEU, 14 February 2008, Varec, C-450/06)

   7.1. Is the confidentiality of the documents frequently invoked in litigations concerning public procurement that you deal with?

   A: As far as can be seen, the Supreme Administrative Court had to deal in content with the confidentiality of documents regarding appeal proceedings with respect to public procurement not very often (significant statements can only be found in three judgments: 2011/04/0207, 2009/04/0187, 2006/04/0238).

   7.2. How does the national legislation or jurisprudence obtain the confidentiality and the incentive for the decisions of the contracting authorities and the courts?

7.3. Is the question of access to confidential documents during the jurisdictional phase regulated by a specific legislation in your country? Are there general rules and/or specific rules for public procurement documents?

A: Regarding public procurement procedures, para. 23 of the Public Procurement Act provides, that contracting authorities and economic operators have to protect the confidential character of all information referring to these entities and their documents (especially regarding technical or commercial secrets).
Regarding the appeal proceedings, para. 314 of the Public Procurement Act stipulates, that all parties – when submitting documents – can demand, that certain documents – because of overriding reasons relating to the public interest or because of the protection of technical or commercial secrets – have to be excluded from the inspection of the files. These documents have to marked.
Para 17 of the General Administrative Procedure Act provides, that – as a rule – the parties can inspect the files concerning their case at the authority (in any technically feasible form) and make or have made copies or printouts of the files or parts of the files. According to section 3 of this regulation those parts of files whose disclosure would result in damage to justified interests of either party or of third parties or jeopardize the work of the authority or impair the objective of the proceeding are excluded from the right to inspection.

7.4. Does the national judge rule on the confidentiality of the documents? Must he/she refer to a specific instance in the matter? What criteria does the jurisprudence use to authorise or deny access to documents that are classified as confidential? Is there a difference depending on whether accelerated proceedings are applied or not?

7.5. When some documents are classified as confidential, how is the right to a fair trial guaranteed?

A: It is up to the judge in charge of the case to decide on the question, whether inspection of the files is granted or refused. There is no specific instance in this matter. A party in a pending proceeding can appeal against the refusal of inspection of the files together with an appeal against the decision terminating the proceedings.
The conflicting interests have to be balanced on a case-by-case basis. For this purpose it has to be disclosed, which topic the documents in question are related to and accordingly whether overriding confidentiality interests exist. The refusal of inspection of the files has to be restricted to the indispensable extent. Also reasons have to be given, why the right to a fair trial is guaranteed despite the secrecy.