



*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”***

Helsinki 22 – 23 October 2015

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 Court¹ 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?

Administrative and commercial court (only for compensation) High (Supreme Court) Administrative court judge for full remedy proceedings

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.)?

No, but proceedings are quick.

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.

No.

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? Average 60 days

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.





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	3	15-90days		15-20days
2014	3	15-90days		15-20days

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	30	176days		53days
2014	20	235 days		80 days

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.





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? No

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?

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?

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?

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? Only if it is required

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? All parties .

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?

Parties could lodge appeal to the State commission for controlling procedure of public procurement.

This appeal has suspension effect.

At the first instance court parties could ask court to decide that the complaint should have delaying effect.

The appeal at the High Administrative Court shall delay the enforcement of the appealed judgment.





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?
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?
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? **No**
 - 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? **There are general rules and specific rules.**
 - 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? **Yes. No.**
 - 7.5. When some documents are classified as confidential, how is the right to a fair trial guaranteed?

