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ACA EUROPE

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"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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CZECH REPUBLIC

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?

Contract award procedure and concession procedures are currently regulated by the Act on Public Procurement (no. 137/2006 Coll.) and the Act on Concession Contracts and Procedures (no. 139/2006 Coll.). The authority supervising public procurement is **the Office for the Protection of Competition** (hereinafter referred to as "the Office"). The Office supervises contract award procedures whereby it can a) formulate interim measures, b) assess contracting entity conduct in relation to the Act on Public Procurement, c) impose remedies (Art. 118 of the Act on Public Procurement), d) check the conduct of the contracting entity when awarding public contracts

. The Office hears administrative delicts according to the Act on Public Procurement and imposes sanctions for their commission.

There is possible to appeal against the first instance decision to the president of the Office. Decisions of the presidents can be subjected to review by administrative courts.
There are no special administrative courts regarding public procurement. However because the Office has its seat in Brno, in fact the only regional court that solves the cases is the Regional Court in Brno. There are no specialised judges or senates dealing with the agenda. It is possible to file a **cassation complaint** against the judgement of the Regional Court in Brno that is solved by **the Supreme Administrative Court** (hereinafter referred to as "the SAC").
Damages caused by breach of law regulating public procurement are solved by civil courts.

1.1.2. Is there a distribution of functions between these courts (disputes for a substantiated decision? Compensation? Declaration of ineffectiveness? Any others?)

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Generally it can be said that all public procurement litigations are heard before the Office and then before administrative courts, except claims for compensation that are tried by civil courts.

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?)

The SAC rules on the basis of the cassation principle. Be the cassation complaint justified, the SAC quashes the first instance court decisions and refers it back to that first instance. Usually the SAC can quash even decisions of the Office.

1.1.4. Does the distribution between the courts change in relation to the proceedings for the measures introduced after concluding the contract?

The Office can impose most of the remedies only to the moment when a contract is concluded. The only remedy that can be imposed after is prohibition on performance of the concluded public contract. Beside that the Office can after concluding the contract also decide on administrative infringements and impose a fine. Administrative courts only review decisions of the Office. Therefore also powers of administrative courts change indirectly after concluding of a contract. In case that remedy cannot be anymore granted by the Office a civil court should assess as preliminary question if public procurement legislation was breached.

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.)?

In general, there are no time limits for courts proceedings. Courts shall decide in the reasonable time. However, there are some exceptions when time limits are determined (e.g. 7 days for interim measures in civil proceedings and 30 days in proceedings in front of administrative courts). Judges can also be tried in disciplinary proceedings for delays.

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.

Not available.

[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.

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?

We have only average time duration for all the proceedings before the SAC, it stands for 106 days in 2014 compared to 204 days in 2013.
Average time duration of proceedings before the Regional Court in Brno and the SAC (from the commencement of proceedings before the Regional Court in Brno to the final decision of the SAC) stands for 592 days in 2013 and 471 days in 2014.

In 2013, the SAC decided 32 cases dealing with the public procurement and 22 cases in 2014. For more information, see the question 4.

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			does not exist	
2014			does not exist	

[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.

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			does not exist	
2014			does not exist	

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?

In the course of proceedings, parties in litigation have two possibilities – first, to file a complaint for delays before an administrative body of the court (minister of justice or president of the court) pursuant to Art. 164 of the Act on Courts and Judges (no. 6/2002 Coll.), second, more used, to file a request for determination of the time limit within which an act has to be done, such a request is filed before the court which is alleged to commit delays, but the request is resolved by a higher appropriate court (pursuant to Art. 174a of the abovementioned Act). The SAC (the only court that is competent to decide on such a request in administrative-law matters) has was deciding in this matter as is described in the following charter:

Year	**Number of decided/pending requests for determination of the time limit within which an act has to be done**

[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.

2015	52 (of which 1 pending)
2014	55
2013	74
2012	45
2011	23
2010	40
2009	14
2008	5
2007	7
2006	12
2005	0
2004	8
2003	0
Total	**335**

How the proceedings on requests were ended	
justified request	75
dismissed after considering the matter	207
rejected without consideration	11
another result	26
discontinued	15

After the litigation a party aggrieved by delays can claim reimbursement before the Ministry of Justice according to Art. 13 of the Act on Liability Due to Illegal Decisions or Maladministration Occurred in the Course of Public Power Exercise (no. 82/1998 Coll.).

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?

So far the SAC has not submitted any question for preliminary ruling before the CJEU concerning the public procurement.

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?

Yes.

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?

The SAC often cites CJEU case-law in its decisions concerning public procurement.

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?

ADMINISTRATIVE PROCEEDINGS

The Office conducts **proceedings on the contracting entity acts revision**, which is commenced generally on a written motion of a petitioner or *ex officio*. However the Office can forbid performance of a concluded contract, which leads to invalidity of the contract, only based on request.
The Office can formulate **interim measures**[6] (forbidding to make a contract, or suspension of award procedure). As for **correctional measures and invalidity of contract**[7], in case of breach of law from the part of contracting entity, the Office can **cancel award procedure** if any contract was not yet concluded, or on a motion it can **forbid performance of a concluded contract**. Forbidding performance of a concluded contract cannot be applied in case of breach of any provision of law but only in cases that are the same as those mentioned in Articles 2d of Directives 89/665/EEC and 92/13/EEC. A **contract on public procurement becomes invalid** for the breach of the law on public procurement only if the Office has forbidden its performance. Moreover the Office imposes **fines for administrative delicts**.

THE FIRST INSTANCE COURT PROCEEDINGS[8]

Decisions of the Office can be challenged by an administrative **action before a regional court** (court of first instance). The court of first instance can **quash** the challenged decision and returns it to the Office or it can under very specific conditions **declare nullity** of the challenged decision or of its part.

[6] Art. 117 of the Act on Public Procurement.
[7] Art. 118 of the Act on Public Procurement.
[8] Art. 32 and following of the Code of Administrative Justice.

If a **sanction** was imposed by an administrative authority, the court of first instance can **refrain from it or it can abate it**.

If the action is not justified, the court **dismisses** it.

PROCEEDINGS BEFORE THE SAC[9]

It is possible **to lodge a cassation complaint with the SAC** against regional courts decisions.

The SAC can **quash** the challenged regional court decision and return it to the court of first instance. If certain conditions are fulfilled, the SAC can usually **quash administrative decision or declare its nullity**.

If the cassation complaint is not justified, the SAC **dismisses** it.

Courts of first instance as well as the SAC can both order **interim measures and suspend enforcement of decision of the Office**.[10]

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?

Be legal conditions fulfilled, the Office **forbids** on a motion **performance of the concluded contract on public procurement**.[11] However Act on Public Procurement is silent to question who is entitled to submit the proposal. In other means of protection before submitting the proposal the claimant has to file objections to the contracting authority. Objections can be raised only by a person who is or has been interested in a given public contract award and whose rights are or could be threatened by alleged breach of law committed by the contracting authority. But for the proposal of declaration of ineffectiveness submission of objections is not necessary.[12]
A **contract on public procurement becomes invalid** for the breach of the law on public procurement only if the Office has forbidden its performance.[13]
As far as we know there was no implementation of the mentioned jurisprudence to the domestic law and it is a question if the Office or a Court could apply it based on direct application of the EU law.

4.3. In how many cases has the balance of interests procedure been implemented for not formulating the interim or suspension measures?

[9] Art. 102 and following of the Code of Administrative Justice.
[10] Art. 38 and 73 of the Code of administrative justice.
[11] Art. 118 sec. 2 of the Act on Public Procurement.
[12] Art. 110 sec. 7 of the Act on Public Procurement.
[13] Art. 118 sec. 6 of the Act on Public Procurement.

We do not have this kind of information.

4.4. Is the national jurisprudence subject to the balance of interests under certain conditions?

Be legal conditions fulfilled, the Office **forbids** on a motion **performance of the concluded contract on public procurement**.[14]

The Office **does not forbid performance of the contract**, if it finds that **special reasons linked with public interest demand continuation of the performance**. An economic interest on performance can be such a reason only in exceptional situations, when discontinuance of performance would lead to inappropriate consequences.[15]

Furthermore, the Office **does not forbid performance of the contract**, if this could **threaten safety of the Czech Republic**.[16]
There are no such legal limitations regarding remedies before concluding the contract. However courts use generally balance of interests of parties when interpreting law.

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?

The Office can formulate **interim measures that consist in forbidding conclude a contract** in the course of award procedure.

Courts of first instance and the SAC can also formulate **interim measures**[17], as stated above.

[14] Art. 118 sec. 2 of the Act on Public Procurement.
[15] Art. 118 sec. 3 of the Act on Public Procurement.
[16] Art. 118 sec. 4 of the Act on Public Procurement.
[17] Art. 38 of the Code of Administrative Justice.

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)

The only decision in which the SAC cited abovementioned CJEU case-law is the decision of 12th May 2008, file no. 5 Afs 131/2007-131. It is necessary to note that this ruling concerns the previous Act on Public Procurement (Act no. 40/2004 Coll., replaced by the current Act no. 137/2006 Coll.). In the decision file no. 5 Afs 131/2007-131the SAC evaluated a contract award procedure on containers. In the course of the contract award proceeding, one of candidates asked for further information in order to clarify the award criteria and the contracting entity supplied it to him whereby the initial award criteria were altered. The law did not state explicitly whether award criteria could be changed. Whereas according to the Office, the contracting entity was allowed to this modification, regional court, deciding this case, stated that because of transparency and non-discrimination any changes of award criteria were absolutely inadmissible. The SAC was not so strict, however it upheld the regional court opinion and dismissed the cassation complaint of the Office. The SAC emphasized transparency and non-discrimination of contract award procedures, citing CJEU case-law among others the decision C-331/04 ATI EAC and others, which implies that all the conditions and rules are clearly, exactly and unambiguously determined in award criteria. As the SAC ruled, all the qualification criteria and criteria for assessment of offers must be known in advance. Moreover the SAC stated that if the need to modify award criteria occurs, to ensure transparency and non-discrimination of contract award procedures, it is not always inevitable to cancel the running award procedure and open a new one. Award criteria may be changed but only under the condition that rules of modification are known at the very beginning of the contract award procedure.

5.1. How does your Court implement this jurisprudence in its everyday practice?

The SAC cites explicitly the CJEU decision C-331/04 in its decision of 12th May 2008, file no. 5 Afs 131/2007-131.
Regarding CJEU decision Lianakis on inadmissibility of qualitative selection criteria as award criteria this is explicitly forbidden by the Act on Public Procurement (Art. 50 and 63). Exception is stated from March 2015 for organisation, qualification and experience of persons involved in the implementation of the public contract if they have a significant impact on contract performance. This exception was implemented based on Art. 67 paragraph 2 letter (b) of directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC

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?

The jurisprudence requires that all criteria are explicitly stated since the very beginning of the award procedure. There is no distinction between subcriteria and award 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?

It is not possible to use subcriteria that are not explicitly stated.

5.4. Does the national legislation or jurisprudence require any prior communication as regards the assessment method for the offers?

No. In two types of the award procedure (negotiating procedure with publication and competitive dialogue) is expected that the contracting authority does not have to know at the beginning of the procedure what the award criteria will be. They have to be settled during the procedure based on communication with competitors.

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?

Act on Public Procurement stipulates more strict conditions for in-house contracts. It can be concluded only in case that the contracting authority holds so called exclusive property rights in such entity. It means that it controls by itself all voting rights resulting from holding an interest in any such entity or if such entity is entitled to manage the assets of such contracting authority, it possesses no assets of its own, and the management of such entity is exclusively controlled by such contracting authority. Probably because of this strict definition the SAC has not solved any case that would involve mentioned problem.

6.2. In concrete terms, how is the examination of the fulfilment of these carried out?

As described in the previous part, it is not possible to apply jurisprudence of CJEU regarding in-house horizontal cooperation because Czech law is stricter in this regard.

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, it is rare situation.

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?

In relation to this question, the law regulates only files inspection (see 7.3), not reasoning of decisions. In practice, courts in reasoning of their decisions do not mention those pieces of

information that are classified or subject to a trade secret. They only make a reference to files in which they are included.

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?

The Act on Public Procurement regulates explicitly the duty not to disclose trade secret.[18] Employees of the Office are obliged to maintain confidentiality of all the facts they have learnt while exercising their job duties. However, there are some exceptions to this obligation, e.g. criminal proceedings. If the Office gets knowledge of a fact that is subject to trade secret, it is obliged to take all necessary measures to maintain the secret, especially to exclude inspection of those parts of files that contain trade secret. However it also has to protect right to fair trial as stipulated in CJEU judgment Varec.[19]

As for **proceedings before courts of first instance and the SAC**, trade secret protection concerning public procurement is not specially regulated. The Code of Administrative Justice protects confidentiality of information in the framework of files inspection.[20] When presenting a file, administrative authority denotes those parts of the file that include classified information protected by a special law[21], or other protected information including trade secret[22]. Presiding judge excludes those parts from file inspection. This applies accordingly to court files, not only to administrative ones. It is not possible to exclude from inspection those parts of files that are used as evidence. Furthermore, may not be excluded parts that have been available before administrative authority. Only participants, their representatives or persons with a special certificate for classified information proving a serious legal interest are entitled to inspect confidential parts of files that were not excluded from 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?

Yes, national judges evaluate whether given pieces of information are subject to confidentiality, they do not refer to any special instance.

[18] Art. 122 of the Act on Public Procurement.
[19] See the judgment of the SAC of 30th May 2014, file no. 5 Afs 48/2013-272.
[20] Art. 45 of the Code of Administrative Justice.
[21] Act on the Protection of Classified Information (no. 148/1998 Coll.).
[22] Trade secret includes important, determinable, appreciable and little available facts, that are connected with enterprise and that are classified by their owner. (Art. 504 of the Civil Code).

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

There is very problematic situation regarding classified information. However in case of public procurement cases there was always been in stake only trade secret. In case solved by the SAC in judgment file no. 5 Afs 48/2013-272 was this situation solved in the following way. The Office was obliged at first of all to solve if the information provided really fulfills all definition criteria of trade secret. If yes then it had to decide if the information is necessary for making decision. If yes then it had to be available to the other party but only to the strictly necessary extent (e.g. by providing only part of a contract and not the whole one).

As was mentioned above similar situation is in judicial proceeding in case that it is not possible to exclude from inspection those parts of files that are used as evidence.