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THE SUPREME ADMINISTRATIVE COURT

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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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FINLAND

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?

In Finland the competence to scrutinize the legality of public procurement award procedure including the legal remedies inherent in these cases that are based upon the EU public procurement Directives is allocated to the administrative jurisdiction by Act on Public Contracts.

The basic rationale to allocate the competence in public procurement award cases to the administrative jurisdiction is based upon the idea that the contracting authority – be it state or municipal authority, state enterprise, body governed by public law and fulfilling the financial and management supervision conditions stipulated by the Act on Public Contracts – is a public body or an emanation of such a body thus utilizing public power and spending public money whilst carrying public procurement award procedure. Due to strong connection with public law, the administrative jurisdiction is deemed apt to use the judicial power in this sector of law.

It is, however, to be noted that civil liability cases relating to private contractual relations resulting from a public procurement award procedure are tried by the general courts. The general court system has the responsibility of civil and criminal matters and it is constituted of three instances: district courts, courts of appeal and the Supreme Court. The Supreme Court has quite recently established a precedent in a civil liability case relating to public procurement award procedure (KKO:2015:11). The pertinent legal question in this case concerned the right of a tenderer to get compensation for damage resulting from its participation into public procurement procedure that had been denounced as illegal by the Supreme Administrative Court due to erroneous invitation to tender. The Supreme Court came to the conclusion that the tenderer had not

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demonstrated that the prerequisites for civil liability of the Public Contract Act were fulfilled.

The administrative jurisdiction plays by far the most important role in public procurement law whether estimated by the judicial importance or by the volume of court cases. The status of administrative jurisdiction in public procurement law is not put into question and no changes to the basic solution on the allocation of the judicial competence are foreseen.

1.1.1. Is there an administrative, civil or special court, or an authority of a different kind?

The Market Court is the first instance court responsible for public procurement award cases. The Market Court is a special court and it forms part of the administrative jurisdiction. It normally convenes in a composition of three judges. The Market Court has also competence to decide competition law and IPR-cases amongst others.

The decision of the Market Court may be appealed against to the Supreme Administrative Court which is the court of last resort in public procurement award cases. At present, appeal to the Supreme Administrative Court in public procurement award cases is not subject to a leave to appeal. However, this situation may change, since a working party elaborating the amendments needed to the Act on Public Contracts due to transposing the new EU Public Procurement and Concessions Directives, has proposed to introduce the requirement of a leave to appeal to public procurement award cases. The Supreme Administrative Court has given its initial support to this proposal. Apart from public procurement award cases relating to interim measures that may be decided by the Supreme Administrative Court in a composition of three judges, public procurement award cases are decided in a composition of five judges. The cases are decided by presentation of the Referendary Councellor/Judiciary Clerk.

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

The Market Court and the Supreme Administrative Court both issue a material decision and in case a breach of the Act on Public Contracts (or e.g. of the EU law on public procurement) is established both Courts have the competence to issue the following sanctions (Section 94 subsection 1 of the Act on Public Contracts):

- cancel (wholly or in part) a decision of the contracting authority;

- forbid the contracting authority from applying erroneous part/section in a public procurement procedure document/contract or from otherwise pursuing an incorrect procedure;
- require the contracting authority to rectify an incorrect procedure;
- order the contracting authority to pay compensation to a party who would have had a genuine chance to winning the contract if the procedure had been correct;
- issue an ineffectiveness sanction on the contracting authority;
- order the contracting authority to pay the state an infringement fine;
- reduce the contract term so as to end after a period of time specified by the Court.

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 Supreme Administrative Court acts as a judiciary for full remedy proceedings and does not act solely as a court of cassation. Judging on abuse of power in public procurement award cases is based on the principles of impartiality and equality as stipulated in the Act on Public Contracts and perceived in EU public procurement law i.e. Public Procurement Directives and the case law of the CJEU (e.g. case C-538/13, eVigilo Ltd, and C-538/07, Assitur and joint cases C-21/03 & C-34/03, Fabricom).

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

The administrative judiciary (i.e. the Market Court and the Supreme Administrative Court) is competent to hear a public procurement award case even after the public procurement contract has been concluded. In such a case the following legal remedies (sanctions) are no longer available: cancelling the decision of the contracting authority, forbidding the contracting authority to carry on with an erroneous procedure and correcting such a procedure. In contrast, the Court may order the contracting authority to pay compensation, issue an ineffectiveness sanction, order the contracting authority to pay the state an infringement fine or order the contract term to end prematurely.

2. Length of court proceedings

[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.

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

There are a few means available to enhance the swift handling of public procurement award procedure that are based on the Act on Public Contracts.

As regards *the administrative procedure* carried out by the contracting authority, the said Act (Section 80 of the Act) provides for a simplified and swift national remedy, "*procurement rectification",* which is not based on the Remedies Directive. Procurement rectification is available for both the contracting authority and the candidates or the tenderers. By applying the procurement rectification procedure a contracting authority can remove an incorrect decision or annul other decisions made in the contract award procedure concerning the legal status of the candidates or the tenderers, and make a new decision if the award decision reached in the contract award procedure is based on an error occurring in the application of law. The consent of the party concerned is not needed. The decision may not be amended by way of procurement rectification if the contract has been concluded.

The party concerned shall demand the application of procurement rectification no later than 14 days after receipt of the notification of the award decision or other decision reached by the contracting authority in the public procurement award procedure. The contracting authority may itself amend the decision no later than 60 days after the date the decision concerning the procurement rectification is made (Section 81 subsection 2 of the Act).

An appeal to the Market Court does not prevent the procurement rectification from progressing but the Market Court shall be informed about the procedure. A procurement rectification may be applied to a decision which has become final if the case has not been submitted to the Market Court (Section 81 subsection 3 of the Act on Public Contracts).

According to the Act on Public Contracts (Section 37 of the Act) the standard time limits for the submission of request to participate etc. may be shortened in case of restricted or negotiated procedures. In open and restricted procedures the time limit for the receipt of tenders may also be shortened (Section 38 of the Act).

As regards *the court proceedings*, the time limit for appeal against an award decision to the Market Court is shorter than in other court cases. Whereas normally, in other court cases the time limit for appeal is 30 days after the notification of the decision contested, in public procurement award cases the time limit for appeal to Market Court is 14 days after the candidate or tenderer has received or is deemed to have received notification of the decision. If however the contracting authority has concluded a public procurement award

contract without respecting the standstill period, the time limit for appeal is 30 days after the tenderer has received the decision contested.(Section 87 of the Act)

Time limit for appeal against the decision of the Market Court to the Supreme Administrative Court is 30 days which does not differentiate from the time limit available in other appeal cases.

Where a public procurement award case falls within the jurisdiction of the Market Court it cannot be appealed against on the basis of the Local Government Act or the Administrative Judicial Procedure Act.

Apart from the above means available on the basis of the Act on Public Contracts there are other, voluntary ways the Court may use in order to guarantee prompt progress of public procurement award cases. Such are e.g.: prioritizing cases where the public procurement award contract is not yet concluded and cases where essential interest of the public are at stake (medical care, health, public transportation).

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.

There is no binding maximum time limit determined for the handling of public procurement cases. Notwithstanding this, the Supreme Administrative Court has determined and uses in its everyday work indicators that illustrate i) the degree of complexity of public procurement award cases in comparison with other Court cases under the jurisdiction of the Supreme Administrative Court (e.g. planning, taxation, migration, child custody cases) and ii) the ideal handling time allotted for these cases. These indicators are shown in the internal electronic record of pending cases of the Supreme Administrative Court. The complexity of public procurement award cases is determined to be C in a scale from A to D, A being the least complex and D the most complex case. Should the handling of the case exceed the ideal handling time, a figure (lozenge) shown in the electronic record of cases changes from yellow and to red.

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 Court?

As of the statistics see below.

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 court[3]
2013	8			70 (2,3 months)
2014	2			120 (4 months)

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 court[3]
2013	86	6,9 months		492 (16,7 months)
2014	46	6,1 months		374 (12,5 months)

[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.

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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, how often has this been applied?

The parties may and more often than not do request acceleration of the handling of a public procurement award case in the Supreme Administrative Court. There is no legislation on accelerated, expedited or urgent procedures in the Supreme Administrative Court in public procurement award cases nor are there such rules in the texts governing the procedure at the Supreme Administrative Court. When need be the Supreme Administrative Court may by way of prioritizing a case resolve it swiftly.

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 the procurement cases?

Thus far the Supreme Administrative Court has made four requests for preliminary ruling on the basis of Article 267 TFEU and its predecessor. These cases are as follows:

- C-513/99, Concordia Bus Finland Oy Ab
  - Public procurement award procedure – public transportation – taking into consideration of environmental requirements whilst defining the economically most advantageous tender
- C-244/02, Hansel Oy
  - Public procurement award procedure – goods – erroneous evaluation of the tender vis-à-vis the award criterion – waiving to carry on the public procurement award procedure
- C-615/10, Insinööritoimisto InsTiimi Oy
  - Application of public procurement award procedure – military goods and appliances – the protection of the essential interests of security of a Member State
- C-269/14, Suomen Palvelutaksit & Oulun Taksipalvelut
  - Transportation relating to disability and rehabilitation services provided by the Social Insurance Institution of Finland, Kansaneläkelaitos – application of public procurement procedure – concession

The Market Court has made one request for preliminary ruling:

- C-215/09, Mehiläinen
  - Public procurement award procedure – services – occupational health care – public-private-partnership

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?

There is an Information Service operating in conjunction with the library of the Supreme Administrative Court. The Information Service carries out information research activities upon request of the Referendary Councellors/Judicial Clerks or of the Justices. While preparing the case for handling of the Supreme Administrative Court the Referendary Councellors/Judiciary Clerks analyse the pertinent case law of the CJEU.

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

The Supreme Administrative Court both quotes the jurisprudence of the CJEU and makes references to it frequently.

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-ranking court) to declare a public contract ineffective and/or impose alternative or other penalties (in accordance with Directives 89/665/EEC or 92/13/EEC) *ex officio* or only if it is required?

Both the Supreme Administrative Court and the Market Court may impose legal remedies available in public procurement award procedure (see reply 1.1.2 above) on its own initiative i.e. without a request by a party to the case. The request by a party to the case to impose a specific remedy does not bind these Courts either. It is also possible that the Supreme Administrative Court imposes a different legal remedy than the remedy being at stake at the Market Court. For instance, if the public procurement award contract had not been concluded during the handling of the case before the Market Court, the Market Court have considered the application of the following legal remedies:

- cancelling (wholly or in part) a decision of the contracting authority;
- forbidding the contracting authority from applying erroneous part/section in a public procurement procedure document/contract or from otherwise pursuing an incorrect procedure;
- requiring the contracting authority to rectify an incorrect procedure.

Whereas if the public procurement contract was concluded after the Market Court had decided the case and the case is being applied to the Supreme Administrative Court, the Supreme Administrative Court may for instance order the contracting authority to pay compensation to a party who would have had a genuine chance to winning the contract

if the procedure had been correct and reduce the contract term so as to end after a period of time specified by the Court. In its deliberation concerning the legal remedies to be imposed, the Supreme Administrative Court is thus not bound by the legal remedies available at the Market Court.

In conclusion, both the Market Court and the Supreme Administrative Court have margin of appreciation regarding the legal remedies to be imposed. In their deliberation the emphasis is on the effectiveness of legal protection and on guaranteeing the enforcement of the objectives of the public procurement law.

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?

Either a party/parties to the proceeding before the Market Court or the Supreme Administrative Court may seek a declaration of ineffectiveness or these Courts may declare *ex officio* a contract ineffective (Section 94 subsection 1 para. 5 and Section 96 of the Act on Public Contracts).

The Market Court or the Supreme Administrative Court may declare a contract ineffective e.g. if the contracting authority has made a direct award in breach of the stipulations of the Act on Public Contracts or the contracting authority has concluded the contract without respecting the obligation to observe the standstill period or has concluded the contracts irrespective of the fact that the case have been brought before the Market Court. The Market Court/the Supreme Administrative Court decides to which contractual obligations ineffectiveness shall apply. In its deliberation these Courts are not bound by the requirements of the party/parties. Ineffectiveness shall apply only to such contractual obligations that have not been implemented.

Case C-503/04, Commission v. the Federal Republic of Germany is referred to in the Bill on amending the Act on Public Contract (HE 190/2009 vp, p. 22) by incorporating in it the opportunity to utilize ineffectiveness of contracts. The above mentioned Sections of the Act on Public Contracts on ineffectiveness of a public procurement award contract enshrine the rationale behind case C-503/04.

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

Balancing of interest test is applied each time the Market Court or the Supreme Administrative Court deliberates whether to apply interim measures in order to accept that the contracting authority proceeds (on an interim basis) to implement the obligations of the public procurement award contract. Essential factors to be taken into consideration when applying the balance of interest test are e.g. is there a legislative

obligation to carry on with the activities and/or are the vital needs of the persons concerned or public in general at stake. It is to be decided by the Court whether the advantages on proceeding with the implementation of the contract exceed the sanctity of the basic objectives of public procurement law i.e. the principles of equality and impartiality and non-infringement of competition.

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

See reply N:o 4.3.

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 from your court? If yes, under what conditions?

The Supreme Administrative Court does not automatically lift the suspension and it does not seem that there is any pertinent jurisdiction of the Supreme Administrative Court on this subject.

There have been few cases (two to my knowledge) where the Supreme Administrative Court has during its deliberation found out that the Market Court has erroneously lifted the suspension obligation and the contracting authority has thus carried on with the implementation of the agreement. In such a case the legal remedies such as ordering the contracting authority to cancel its public procurement award decision or rectifying erroneous procedure are no longer to be applied by the Supreme Administrative Court.

5. Division of the award criteria into award sub-criteria, balancing the award sub-criteria, 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?

The *Lianakis* case law has been applied or referred into in several public procurement award cases decided by the Supreme Administrative Court (cases 25.10.2010 t. 2805; 29.10.2010 t. 3041; 5.9.2012 t. 2347; 25.4.2013 t. 1454; 9.10.2013 t. 3179; 9.10.2013 t. 3180; 27.6.2014 t. 2077). In this case law either the interpretation of the CJEU regarding

the balancing of the award (sub)criteria or regarding the opportunity for the contracting authority to use professional merits of the person supplying the service as a criteria in determining the economically most advantageous tender are referred to.

As regards certain public procurement awards contracts *not* trespassing the EU threshold value, in the Act on Public Contracts as well as in the case law of the Supreme Administrative Court it has been accepted that the contracting authority may use the professional merits of the persons supplying the service as one of the criteria in determining the economically most advantageous tender.

Concerning the application of professional merits of persons supplying the service in public procurement contract trespassing the EU threshold value, the Supreme Administrative Court has in its recent decision (13.7.2013 t. 1997) taken note and referred to case C-601/13, Ambisig of the CJEU.

5.2. Does the jurisprudence or legislation allow the use of sub-criteria that is not explicitly stated, and if so, under what conditions? Does the jurisprudence or legislation determine the sub-criteria? Does the jurisprudence or legislation differentiate between the sub-criteria and the assessment criteria?

Sub-criterion that is not explicitly defined in the invitation to tender (or in the contract notice) cannot be used by the contracting authority. According to Section 41 subsection 1 para. 7 of the Act on Public Procurement Contracts, the invitation to tender or, where applicable, the contract notice shall include the award criterion and, where the criterion for the award is that of the economically most advantageous tender, the comparison criteria for the award and the relative weighting given to each of the criteria or a reasonable range or, in exceptional cases, the ranking of the comparison criteria.

Hence, the subcriteria cannot be determined by the jurisprudence.

According to settled case law of the Supreme Administrative Court which is based on e.g. the CJEU judgement in *GAT* (C-315/01) and on the Act on Public Procurement Contracts, the award criterion (Section 41 subsection 1 para. 7) and the proof/documentation concerning the candidate's or supplier's economic and financial standing, technical capacity and professional ability (Section 41 subsection 1 para. 6) are to be considered separately. The contracting authority may therefore not use the criteria on candidate's/supplier's suitability as a criterion for awarding the contract.

5.3. What are the consequences of the jurisprudence using sub-criteria that are not explicitly stated? Does the same question apply to the assessment criteria?

If it is established in court proceedings that the contracting authority has used sub-criteria or assessment criteria that is not explicitly stated in the invitation to tender/the

contract notice when awarding the public procurement contract and this has had implications in the public procurement award procedure and the contract has not yet been concluded, the decision of the contracting authority shall most probably be quashed and the contracting authority shall be required to rectify an incorrect procedure. If the contract is already concluded, the Court may order the contracting authority to pay the state an infringement fine if other conditions provided for giving such an order are fulfilled. It is to be noted that once a contract that is concluded is based upon a public procurement award decision of the contracting authority containing subcriteria that is not explicitly stated in the invitation to tender/the contract notice, it is difficult for the tenderer to show that he would have had a genuine chance to winning the contract if the procedure had been correct. Thus, in such a case the opportunities for the tenderer to be compensated by the contracting authority deem to be scarce.

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

See replies 5.1 to 5.3 above.

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 held in similar supervisory conditions?

There are pending cases before the Supreme Administrative Court concerning the outer limits of in-house horizontal cooperation. In these cases several federations of municipalities constituting together a hospital district have concluded co-operation agreements on emergency care with the local rescue service. The Market Court considered that both the hospital district and the local rescue service were established solely for the purpose of satisfying public interest but that these institutions were not subject to a common public service obligation. The Market Court however concluded that since the obligations allotted to the local rescue service supported the obligatory tasks of the hospital district and as there were some similarities in the tasks of these two institutions and furthermore since the local rescue service solely carried out assignments concerning emergency service to the hospital district in question, the conditions of in-house horizontal cooperation were fulfilled.

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

   7.1. Is the confidentiality of the documents frequently cited in litigations of procurement contracts that you deal with?

The Supreme Administrative Court requests on a standard basis the parties to the litigation (contracting authority, tenderers/suppliers) whether the documents (appeal, rejoinder, tenders etc.) they submit to the Supreme Administrative Court contain confidential or secret information (e.g. business or military intelligence). Normally, if the party is of the opinion that the document submitted to the Court contains confidential/non-public information, the party submits to the Court two versions of the document, one containing the secret/non-public information and another "public" version of the document not containing such information.

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?

The pertinent documents (the contract notice, the invitation to tender, tenders, the decision of the contracting authority regarding the public procurement award, decision of the Market Court that is being appealed against) are submitted to the Supreme Administrative Court by the parties to the case. The Market Court transmits its case file to the Supreme Administrative Court. The Supreme Administrative Court may request the parties to submit documents that are in their possession and that are needed for the deliberation of the case.

7.3. Is the question for accessing confidential documents during the jurisdictional phase regulated by the law in force in your country? Does it deal with general rules or special rules for procurement contracts?

The Act on the Openness of Government Activities contains a general provision (Section 24) on secret official documents to which access shall not be granted. This provision contains altogether 32 paras. including for instance documents concerning military intelligence and documents containing information on a private business or professional secret. Where only part of the document is secret, access shall be granted to the public part of the document if this is possible without disclosing the secret part of it.

A petitioner, an appellant and any other person whose right, interest or obligation in a matter is concerned (i.e. a party) shall have the right of access to the contents of a document which is not in the public domain provided that the contents of the document may influence or may have influenced the consideration of his matter (Section 11 subsection 1 of the Act on the Openness of Government Activities). However, such a party shall not have access to information compiled in connection with an official invitation to tender and relating to business and professional secret of another tenderer. The party shall have the right of access to information on the tender price.(Section 11 subsection 2 para. 6).

According to the Act on the Publicity of Administrative Court Proceedings, court proceedings and trial documents are public unless otherwise provided in the said Act (Section 1 of the Act). Party to the proceedings has the right to receive information also from other than a public trial document that can affect or could have affected consideration of his or her case. The administrative court may refrain from providing information that is to be kept secret in accordance with the above mentioned provision of the Act on the Openness of Government Activities providing the secrecy of information compiled in connection with an official invitation to tender and relating to business and professional secret of another tenderer. A precondition for not giving access to such information is that this is necessary in order to protect the interest referred to in the secrecy provision and refraining from providing the information does not endanger due process.(Section 9, subsection 1 and 3).

In conclusion, the access to trial documents relating to public procurement award is stipulated by both the Act on the Openness of Government Activities and on the Act on the Publicity of Administrative Court Proceedings where there are both general provisions applicable to public procurement award cases and specific provisions (by reference) on the confidentiality of the documents of the tenderer/supplier containing business or professional secrets.

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?

The final decision on whether the party to the proceedings has the right of access to a document of another party containing confidential information is made by the Court (i.e. the Market Court or the Supreme Administrative Court). Normally, where a request to have access to information containing business or professional secrets of the other party to the proceedings is made, the Supreme Administrative Court gives a separate decision on the access to documents prior to deciding on the merits of the case. The party to the proceedings whose document are at stake is heard before the decision on access to document is made.

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

See reply 7.3 above. In considering the right of the party to documents containing classified or confidential information the Court is under an obligation stipulated by the Act on Publicity of Administrative Court Proceedings to respect due process. If the party cannot exercise its right to a fair process without having access to such information, the information must be made available to it. Since solely information that can affect or could

have affected consideration of the case shall be made available to the party, court proceedings cannot be abused as a medium to gain access to information which could be used to distort competition or to prejudice the legitimate interest of economic operators who participated in the public procurement award procedure.