KORKEIN HALLINTO-OIKEUS
HÖGSTA FÖRVALTNINGSDOMSTOLEN
THE SUPREME ADMINISTRATIVE COURT

ACA EUROPE

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?

The administrative and labour courts (közigazgatási és munkaügyi bíróság – hereinafter: administrative courts) act in the first instance, in several cases the county courts (törvényszék) act as appeal courts and Curia acts in the extraordinary review procedure. In several cases the ordinary, civil courts have the power to invalidate the contracts.

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

There is a special authority, the Public Procurement Board of the Public Procurement Authority (hereinafter: Board). The procedure of the Board is a prerequisite of the process of the courts. The Board is considered by the law of the European Union as a tribunal.

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

If infringement of the public procurement statute is held and fines are imposed by the Board, both the administrative decision and the validity of the public procurement contract may be challenged at courts. In these cases the administrative courts carry out a joined procedure: the review of the decision of the Board and the invalidity of the contract is evaluated by a joined procedure. There is an ordinary appeal procedure against the first instance judgement on the invalidity of the contract, while the judgement on the decision of the Board can only be challenged by an extraordinary review lawsuit at the Curia. The result of this regulation is that the invalidity procedures are mostly suspended by the county courts until the judgement of the Curia on the review procedure.

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 Curia can amend the judgement of the administrative courts, although this is not a full remedy: the Curia can decide only on legal issues and it only has jurisdiction over cases in which the administrative fines exceeded the 1 million HUF (ca. 3300 EUR). In the procedure of the Curia evidence cannot be taken.

[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.

Seminar organised with the financial support of the European Commission

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

Yes, if these questions belong to the competences of the ordinary (civil) courts.

2. Length of court proceedings:

The public procurement procedures are accelerated cases, therefore it is typical, that the cases are closed within six months at the first judicial instance. The procedures could be longer than six month if expert (professional) evidence is needed. The appeal procedures and the procedures of the Curia are typically closed within six month.

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.)?

Such methods in the Hungarian law are the joined (civil and administrative) procedures and the accelerated or extraordinary trial. There are other procedural regulations, but those are not specifically for public procurement cases. Another special regulation is that decisions of the Board can be repealed in limited scope by the administrative courts, and the first instance judgment can be ordinarily appealed, only if the decision of Board was expressly changed by the administrative court of first instance. (The remedies against the decisions in a joined process can be seen in point 1.1.2.)

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.

We do not have specific data.

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?

Typically from 3 to 6 month.

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	No data available	No data available	No data available	No data available
2014	No data available	No data available	No data available	No data available

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	No data available	No data available	No data available	No data available
2014	No data available	No data	No data	No data

[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.

		available	available	available

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?

It is not typical. The cases are closed relatively quickly (compared to other cases) in all instances.

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 none.

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?

In 2013 the European Legal Consultant Network has been established. The members of the Network are judges, along with several judges of the Curia (who judge procurement cases) as well. The task of the members of the Network (the consultant judges) in these cases are to monitor the public procurement practice of the CJEU and to draw the attention of the judges to the relevant and landmark decisions of the CJEU. There are also senior scientific advisers at the Curia, who are specialized in EU law and they have similar tasks as well.

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 Curia quotes the jurisprudence of the CJEU typically in those cases, in which it is also invoked by the litigants. Typically in these cases, the help of the consultant judge of the Network is also required, who usually provides preparatory materials.

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?

The contracts – which were the results of an unlawful public procurement – can be - in certain cases should be – contested by the Board at the court. Thus theoretically every contract of the state or local government bodies can be challenged and so the principle declared by the judgement C-503/04 has been incorporated in the Hungarian law.

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

We do not have any statistics on this.

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

In the case of interim measures, otherwise the review of the balance of interests is not subject of the litigation.

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 Board has such a competence and the contract cannot be signed and finalised as long as – at least – an interim measures is not decided (provided that this is done within a certain time limit). The administrative courts do not have such jurisdictions, they can decided only individually, on request of the suspension of the enforcement of the decision of the Board. The suspension of the enforcement may have such result that the contract cannot be finalised.

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?

Such practice could not be formerly observed, therefore the Curia hasn't have such cases.

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 post factum application of subcriteria is not allowed by either the statutory provisions or the judicial practice. There is a difference between the assessment criteria and the subcriteria, but subcriteria within in one criteria should be defined in advanced explicitly.

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?

See 5.2.

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

If a public procurement is in progress, clarifying questions may be asked regarding the assessment method in several procedures.

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?

There has not been a relevant practice in the Curia for the last 3 years .

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

See 6.1.

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?

It is very rare. I have not had any instances of this at the Curia, only at first instances 6-8 years ago.

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?

Until 2009 both the relevant law and the judicial practice handled the question by conducting a necessity and proportionality test in the judicial procedure between the protection of commercial secrets and the right to legal remedies, along with obtaining a non-disclosure statement by the other party. The current practice is, however, more restrictive, because the consent of the holder of the commercial secret is needed in order to reveal the trade secret to the other party. Due to the rare instances of occurrence, as far as I know, it has not caused any problems. Nonetheless, the public procurement statute contains special and detailed provisions regarding that after disclosing the summary of the procedure, such data may not be classified as a commercial secret and thus it could be revealed for the other party which was used in the assessment as a criteria. see: Act on Public Procurement § 80-81.

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 no special provisions for the judicial proceedings – apart from the one described in section 7.2., which has an effect on the access to data in the judicial procedure.

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?

See.7.2.

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

The above mentioned necessity and proportionality test could ensure the right, if since 2009 the restrictive provision had not been in effect, stating that the holder of the trade secret must consent to the application of the test and the judge's right to rule on the access to such data based on the special circumstances of the case (which is a possibility after the consent was given). Without a consent, however, only the judge can access the documents, which based on the majority opinion of the judges do not fulfil the requirements of a right to a fair trial, so this opportunity is usually not used.