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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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?

In Ireland there is a single system of courts which deal with all matters whether civil, criminal, administrative or constitutional. The High Court of Ireland is the superior court which has full first instance jurisdiction in relation to all of those matters. It is the court which would deal with general administrative law proceedings and is also the court which deals with all first instance applications under the directives.

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

The High Court deals, at first instance, with all disputes arising under the directives irrespective of the nature of the relief claimed.

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?)

Prior to November 2014 the Supreme Court (which is the court specified in the Constitution as having general final appellate jurisdiction in all matters including administrative law questions and constitutional issues) operated as a court of final appeal directly from the High Court. In the vast majority of cases (including public procurement matters) either party had an appeal as of right to the Supreme Court. However, with effect from the end of October 2014, the Irish Constitution was

[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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amended to provide for a second instance in the form of a new Court of Appeal. The right of appeal to the Supreme Court which formerly existed was, by virtue of the relevant legislation brought about after the constitutional amendment, transferred to the Court of Appeal. Thus the position now is that a party to public procurement proceedings has a right of appeal to the Court of Appeal. Thereafter, a party may apply to the Supreme Court for leave to pursue a further appeal. The constitutional criteria for the grant of such leave is that the Supreme Court must be satisfied either that the proposed appeal involves a matter of general public importance or that it is otherwise in the interests of justice that a further appeal to the Supreme Court be pursued. There is also a possibility for a so-called "leapfrog" appeal direct from the High Court to the Supreme Court where, in addition to the ordinary criteria for the grant of leave to the Supreme Court, the Supreme Court must also be satisfied that there are exceptional circumstances warranting a direct appeal. Thus the current role of the Supreme Court is to hear appeals involving important legal issues in the public procurement field or cases where there are other requirements of the public interest that an appeal to the Supreme Court be permitted. The role of the Supreme Court is, therefore, to act as a court of final appeal in respect of all issues brought before the High Court in public procurement proceedings. The scope of the role of the Supreme Court is that which is normally exercised by courts of final appeal in common law systems. That scope of appeal does not fit neatly into the definition of "cassation" or "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?

There is no difference between the courts having jurisdiction and the roles of those courts which is dependent on whether a contract has been concluded or not.

2. Length of court proceedings

Note:
As pointed out in the answer to question 1. the current model whereby the second instance Court of Appeal has come into existence was not, for practical purposes, in being during the years 2013 and 2014 and the statistics which appear hereafter exclude that court.

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.)?

There are no specific measures in place concerning the timeframe within which public procurement proceedings must be completed. The relevant procedural law is to be found in Order 84A of the relevant rules of court. Applications are required to be brought within strict time limits. (normally within 30 days of the date of notification) Contracting

authorities or interested parties who intend to oppose the application are required, under Rule 6(1), to file a statement setting out the grounds for their opposition together with appropriate supporting evidence within seven days of the date of service of the application. The application is listed for hearing before the Court on an early date fixed at the time the application is filed but the question of whether the application can be determined on the day when it is first listed may be dependent on whether, in the Court's view, other parties require to be put on notice of the application or existing or other parties should be given the opportunity to submit additional evidence or file written legal submissions.

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?

All Proceedings

Note: The information currently available is not sufficient to allow separate figures for applications for interim measures and substantive relief to be provided. See also the answer to Q. 3.3 in that regard.

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	7 Cases in High Court	Approx. 4.5 months	N/A	No Cases
2014	9 Cases in High Court	Approx. 3.5 months	N/A	2 Cases Approx. 13 weeks

[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.

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 open to any party before any of the courts to suggest any reason why the case should be afforded particular priority. As the case at first instance is placed before a judge for hearing at an early date specified at the time the application is filed all parties have an early opportunity to address any questions of urgency before that court. The Supreme Court operates a general system of according urgent cases priority upon written application. As it happens the two cases referred to as having come before the Supreme Court in the statistics included in the last paragraph were both given such priority.

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?

As can be seen from the statistics referred to above the number of public procurement cases coming before the Supreme Court is relatively small. There have been no recent references for preliminary ruling to the CJEU.

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 the context of this question it is important to understand that it is not usual practice in the courts of common law countries for the court itself to maintain a significant research department. Rather it is normal practice in common law countries for the court to rely on the lawyers representing the parties to present any relevant legal materials which may be relevant to the court's consideration. The ethical rules applicable to lawyers impose an obligation to bring to the court's attention any relevant legal materials even if unfavourable to that lawyer's client's case. Thus the court will, ordinarily, find that the parties refer the court to any relevant jurisprudence of the CJEU which may be material to the issues arising.

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?

It would not be unusual for the Supreme Court to cite the jurisprudence of the CJEU in its judgments. For example see one of the two cases recently determined by the Supreme Court.
http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/fb9cad12c047e62680257d89005c6d63?OpenDocument

As appears from the judgment in that case it may well be that there was a misunderstanding in Ireland as to the precise meaning of "interim measures" as used in the directives. The reasons for that potential misunderstanding are addressed to an extent in the judgment. Those difficulties may provide an explanation, at least in part, as to why the statistics referred to in the previous paragraph cannot be divided as and between applications for interim measures, on the one hand, and substantive proceedings, on the other.

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?

The rules that govern the availability of remedies such as a declaration of ineffectiveness are contained in two sets of regulations, which implement nationally the directives in question. The first is the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010, SI No. 130 of 2010 (the "Public Sector Remedies Regulations") which provide for remedies and enforcement procedures in respect of contracts governed by the Public Sector Regulations. These rules implement Directive 89/665 EEC (as amended by Directive 2007/66/EC.)

The second set of rules is the European Communities (Award of Contracts by Utility Undertakings)(Review Procedures) Regulations 2010, SI No. 131 of 2010 ("the Utilities Regulations") which implement Directive 92/13/EEC (as amended by Directive 2007/66/EC).

These regulations are commonly referred to together as the "New Remedies Regulations" since they revoke and replace a set of regulations referred to as the "Original Remedies Regulations" that were in effect prior to the amending Directives being passed.

Further, the Rules of the Superior Courts, specifically Order 84A, govern court practice and procedure in this particular area by providing for a special form of judicial review in public procurement cases.

It is, under certain circumstances, mandatory for the court to make a declaration of ineffectiveness. These circumstances are set out in the Remedies Regulations, and are subject to certain exceptions.

In essence, the Court must declare a contract ineffective where:

(i) the contracting authority has concluded the contract without first publishing the required contract notice in the OJEU;

(ii) the contracting authority has concluded the contract in breach of its obligation to observe either the standstill period or the automatic suspension of the award procedure and such breach was combined with another infringement of the procurement Regulations; and

(iii) the contracting authority has infringed the rules on the award of a contract under a framework contract or a dynamic purchasing system and where the value of such contract equals or exceeds the current relevant threshold values.[4]

However, a contracting authority can avoid the mandatory application of the remedy of ineffectiveness in case (i) above by publishing a voluntary ex ante transparency notice in accordance with Commission Regulation 1150/2009 and voluntarily observing a standstill period, and in case (iii) above, by informing tenderers of the results of the award process in accordance with the requirements of the Remedies Regulations and voluntarily observing a standstill period.[5]

Further, the court has discretion to decline to make such a declaration even if the conditions are satisfied for the making of a mandatory declaration if there are overriding reasons relating to a general interest which require that the contract should be maintained.[6] In those circumstances, the court must impose an "alternative penalty" .[7] Damages are not considered to constitute a sufficient "alternative penalty" in these circumstances.

It should be noted that Ireland opted for "prospective ineffectiveness" only. In other words, contractual obligations that have already been performed will not be affected by such a declaration.

[4] See Kelly and Costello, *A Guide to Public Procurement in Ireland,* in GLG, "The International Comparative Legal Guide to Public Procurement 2014" (6th ed.) 2014 at p.89.
[5] *ibid*
[6] *ibid*
[7] *ibid*

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?

Under Regulation 8 of the New Remedies Regulations, an "eligible person" may apply to the court for interlocutory orders or for review, and the court may make such orders as provided under regulation 9, which includes a declaration that a reviewable contract is ineffective.

Regulation 4 provides the definition of "eligible person" as follows:

4.—For the purposes of these Regulations, a person is an eligible person in relation to a reviewable public contract if the person—

(a) has, or has had, an interest in obtaining the reviewable public contract, and

(b) alleges that he or she has been harmed, or is at risk of being harmed, by an infringement, in relation to that reviewable public contract, of the law of the European Communities or the European Union in the field of public procurement, or of a law of the State transposing that law.

The question of whether the jurisprudence of the judgement of the Court of Justice dated 18 July 2007, Commission v/FRG, C-503/04 has been implemented into Irish law is an interesting one in circumstances where Irish law had provided for the setting aside of contracts in this context under the old regulations, which were in place under the Old Remedies Regulations. The remedy of set aside of a contract for non-compliance with procurement procedures was available "under the prior remedial framework…although not required by the Original Remedies Directives"[8]. While this did not occur very frequently, an example of a declaration that a contract was null and void for non-compliance with the procurement procedures could be found in *Advanced Totes v. Bord na gCon and Scientific Games Worldwide Ltd* 3 IR 77.

The New Remedies Regulations would not necessarily seem to permit such a remedy of themselves, but this matter does not seem to have arisen before the courts yet.

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

The "balance of interests" test is reflected in the wording of regulation 9(4) of the New Remedies Regulations, which provides:

(4) When considering whether to make an interim or interlocutory order, the Court may take into account

[8] Catherine Donnelly, *The New Remedial Landscape in Public Procurement in Ireland,* in '*Public Procurement Law – Damages as an Effective Remedy'* (Hart Publishing, 2011) at p.136.

the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to make such an order when its negative consequences could exceed its benefits.

While this test has been considered in some cases (see for example the answer to question 4.2) it is difficult to provide a definitive number of cases in which this test has been implemented as described. See also the commentary on this question in the case referred to in the answer to Q.3.3. The wording of Reg. 9(4) seems to conflate "interim or interlocutory order" with "interim measures".

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

See answer to question 4.1 above for details of the application of the test in the context of the making of a declaration of ineffectiveness.

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?

Yes. Regulation 8(2) (and certain other defined conditions such as Regulation 70 of the Defence Procurement Regulations) provides that if a person applies to Court (and the contract has not yet been concluded) the award procedure is automatically suspended until either the case has been determined or terminated or the Court specifically grants leave to lift the suspension.

Regulation 8(4) provides that where a person intends to make an application to the court in accordance with that Regulation, they shall first notify the contracting authority in writing of the alleged infringement, their intention to make an application to the Court, and the matters that in his or her opinion constitute the infringement.

In *QDM Capital Limited v Athlone Institute of Technology* [unreported, High Court, 3 June 2011] the High Court considered for the first time a (successful) application by a public contracting authority to lift the automatic suspension period.[9] Since then, the question of the application of the test under Regulation 9(4), as set out in the answer to question 4.3

[9] Kelly and Costello, Op. Cit. at p.90.

(above) has been considered again in *OCS One Complete Solution Limited v. The Dublin Airport Authority PLC* [2014] IEHC 306. In that case, the High Court considered a number of issues pertaining to the operation of the regulations in this context, such as whether a suspension automatically resulted from the issuing of proceedings which prevented the parties from entering into the disputed contract and, if so, whether any suspension could be lifted on interim application by the Dublin Airport Authority. The Court was also asked where the burden of proof lay in such an application, and finally, what the appropriate test was.

The Court held that suspension commences immediately upon a Regulation 8 (1) application being made. The Court held that it was clear from Regulation 8(2) that where a person makes an application under Regulation 8(1), the contracting entity shall not conclude the contract in dispute until (a) the High Court has determined the matter or (b) the court gives leave to lift any suspension of a procedure or (c) the proceedings are continued or otherwise disposed of. The burden of proof in such applications was held to fall on the applicant to satisfy the court that the suspension must be lifted and, specifically, that the negative consequences of making any interim or interlocutory order as sought would not exceed the benefits of such an order. In this case, the Court concluded the negative consequences of making an order lifting the suspension would exceed the benefits of denying such order and therefore refused to make the order.

On appeal, the Supreme Court upheld the High Court's finding that the bringing of an application for the review of the award of a contract under Regulation 8(1) gives rise to an automatic suspension of the entitlement of the relevant contracting entity to conclude the contract concerned, whether or not the challenge is brought within the standstill period, and without the challenger having to bring a specific application before the Court for that purpose. The fact that such proceedings were in being was sufficient to achieve this aim.

However, the Supreme Court differed from the High Court in so far as it held that the Regulation does not give to the courts a jurisdiction to permit the contracting entity to conclude the relevant contract prior to the final determination of the substantive application for review.

Essentially, it is the bringing (within the limitation period) of the application seeking a review of the decision to award that operates automatically to impose the suspension.

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?

It would seem that the Irish courts have not given direct consideration to this particular line of case law though, as noted, the case law of the European Union would routinely be considered in the event that the issue arose.

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?

Irish regulations implementing the relevant directives do not differentiate between award criteria and award sub-criteria, and the matter has not yet arisen before the Irish courts. The general requirement in relation to award criteria is that they must be set out in the tender documentation and that they should, where possible, be set out in descending order of importance. In *Advanced Totes Ltd. v. Bord na gCon* [2006] 3 IR 77 it was held that award criteria must be formulated in such a way as to allow all reasonably well-informed tenderers to interpret them.[10]

Criteria that are used to decide tenders must be linked to the subject matter of the contract. In circumstances where criteria are not used, a contracting entity should award a contract on the basis of the lowest price tendered.[11] The contracting entity should also specify the relative weighting for criteria to be used to determine the MEAT (most economically advantageous tender). Where, "for demonstrable reasons", the publication of weighting criteria is not feasible, the contracting entity should set out the criteria in descending order of importance in the relevant notice and contract documents.[12] It would seem likely that the requirement for clarity would be applied equally to sub-criteria in accordance with the ECJ jurisprudence.

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 answers to questions 5.1 and 5.2 above.

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

See answer to question 5.2 above. Awards may be challenged where criteria are not sufficiently clear.

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)].

[10] David Browne, *The Law of Local Government* (Dublin, 2014) at paras. 6-04 to 6-05.
[11] *ibid* at para. 6.23.
[12] *ibid*

6.1. Did your Supreme Administrative Court face any difficulties as regards the procurement contracts in the cooperation proceedings?

The Irish Courts have not yet had occasion to consider the application of this particular case law, or the principles derived from them. A case which would seem to be relevant, however, is *Student Transport Scheme Ltd. v Minister for Education and Skills* [2012] IEHC 425, in which the High Court considered the School Transport Scheme, as implemented by the defendant Minister and run by Bus Éireann since its inception. The applicant in that case argued that a contract existed between the Minister and Bus Éireann for the transportation of children to schools which should have been put out to tender and which, therefore, caused a loss to the applicant. The High Court found against the applicant in circumstances where the applicant did not satisfy the test for eligibility under the regulations, and the Court held that a contract did not exist within the meaning of the directive or the regulations in any event. At time of writing, this decision is under appeal.

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

The examination of the fulfilment of such contracts would be carried out in the usual way, as outlined above, namely by way of judicial review of a decision of the public entity concerned by an eligible person or body.

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 not possible to provide a definitive answer to this question due to the interlocutory nature of procedures by which information if generally sought in the context of litigation and recourse to the Information Commissioner in the alternative. Please see answer to question 7.2 below.

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?

It is practical to answer this question and question 7.3 together, since the rules and procedures for protecting confidentiality are based on the same instruments and mechanisms by which disclosure of such information may be sought.

First, the FOI Acts facilitate requests for access to information held by public bodies that are subject to the Acts, which may include records relating to the tendering procedures of

public contracting authorities.[13] Of course, certain records may be exempt from the provisions of the FOI Acts on the grounds of commercial sensitivity or confidentiality. In practice, tenderers are normally required to specify what information within their tenders is confidential and to provide supporting reasons. Further, if a request is made under the FOI Acts, a contracting authority's deciding officer will normally consult with a tenderer before deciding on whether to disclose such information.[14] Such decisions will be made on a case by case basis, with no particular category of information or documents being automatically protected. Decisions of the Information Commissioner can provide some guidance in that regard.[15]

Second, applications for disclosure of documents in the context of litigation are regulated under national rules such as the Rules of the Superior Courts. These applications are made at the interlocutory stage and are subject to the test of relevance and necessity so that discovery can not be overly broad. Applications for discovery in the context of judicial review proceedings is relatively rare because such proceedings are normally concerned with the manner in which a decision was made rather than factual accuracy thereof, but discovery has been ordered in some cases. For example, in *P. J. Walls (Civil) Ltd v. Aer Rianta Cpt., High Court*, (Master Honohan) January 26, 2005 (Firstlaw FL 11529), the Master of the High Court ordered discovery in the context of judicial review proceedings. In that case, the applicant was an unsuccessful tenderer for certain works who sought judicial review of the decision to award the contract on the basis of breaches of the Utilities Directive 93/38. This was an application to the Master of the High Court, who used to consider such matters. In any event, it was held in that case that it was necessary to order discovery so as to enable the court to exercise effectively its function of judicial review and so as to make the principles of the Directives effective. An exhaustive overview of such discovery decisions would be outside of the scope of this answer and would also be impossible given that written decisions are not routinely provided in such applications. It is sufficient to note that such applications are adversarial and applications are considered on their merits subject to the test, as mentioned above, of relevance and necessity.

Finally, there are specific provisions in relation to matters such as defence contracts under the Defence Procurement Regulations.

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?

Please refer to the answer to question 7.2, above.

[13] Kelly and Costello, *op. cit.* at p. 84
[14] *ibid.*
[15] See http://www.oic.gov.ie/en/decisions/

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?

Please refer to the answer to question 7.2, above.

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

As noted above, no category of documentation is classified as confidential and all requests for information, whether under the FOI Acts or in an application for discovery, will be considered on its merits. In this way, and in conjunction with the rules of court in relation to fair procedures, endeavours will be made to ensure that the trial process is fair.

Note:

So far as the obligation to disclose may arise in the context of litigation before the courts it is important to emphasise that, provided that documentation is both relevant to the issues which arise and is necessary for the fair resolution of the litigation, the fact that the documentation may be confidential (as opposed to privileged) does not, of itself, provide, in accordance with the Irish jurisprudence, a valid reason for disclosure not being ordered. However, that being said, the Irish courts tend to be concerned to ensure that confidential information is only disclosed to the minimum extent necessary to allow for the proper determination of the issues which arise in the case in question. For example, confidential commercial information, which is not necessary to the proper finalisation of the case, can be redacted from documents which must be disclosed. Furthermore, in appropriate cases, disclosure may be confined to lawyers representing parties (or experts) who may need to have access to the relevant information but who may be placed under a strict obligation not to disclose the information concerned to their client. However, these are principles applicable to the disclosure of confidential information in litigation in Ireland generally. As noted earlier the appellate courts (including the Supreme Court) have not as yet had to consider in detail how those principles and the case law of the ECJ might apply specifically in the public procurement field.