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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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LITHUANIA

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?

Art. 93 of the Public Procurement Law of the Republic of Lithuania (hereinafter – PPL) states that court of first instance in public procurement cases is a Regional Court (civil court), therefore appeals are decided by the Court of Appeal.

Article 423¹ of the Civil Procedure Code of the Republic of Lithuania (hereinafter – CPC) establishes that public procurement disputes are decided under general rules of civil procedure with exceptions stated in part XX¹ of the CPC “Peculiarities of examination of public procurement cases” and other special laws.

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

Public procurement cases are decided by courts of general jurisdiction (civil courts) (PPL Art. 93, CPC Art. 423¹).

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

There is no distribution of functions between these courts. All of the public procurement cases are decided by general (civil) court system. It is important to note that some of the public procurement issues are interrelated with matters of administrative nature, therefore some of the public procurement issues are analyzed in administrative courts (for more detailed explanation, please consult question No. 1.1.3.).



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1.1.3. What exactly is the role of the Supreme Administrative Court¹ in disputes pertaining to procurement contracts (judge for full remedy proceedings, court of cassation, judge for abuse of power?)

The Supreme Administrative Court of Lithuania (hereinafter – the Supreme Administrative Court) does not have a direct jurisdiction in disputes pertaining to procurement contracts, however it acts as the court of appeal, when cases related to public procurement are decided by administrative courts, in situations where their administrative nature is prevailing over civil matters. This includes:

- cases regarding EU financial support and its allocation, administration, implementation etc.;
- cases regarding certain decisions of the Public Procurement Office:
 - o decisions to allow amendments to a concluded public procurement contract;
 - o decisions to allow/forbid to choose restricted tendering as a public procurement method;
 - o decisions to allow for a contracting authority to cancel public procurement procedures, decisions to oblige contracting authority to suspend public procurement proceedings until public procurement office conducts an investigation;
 - o decisions to terminate public procurement procedures, when infringements of public procurement regulations were ascertained, or to amend or annul unlawful decision or acts (PPL Art. 8² p. 2).

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

No, the distribution between the courts remains unaffected.

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.)?

The CPC and PPL define shorter deadlines for the public procurement litigation and there are several other measures implemented to ensure the acceleration of proceedings. This includes measures listed below:

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.





- All cases regarding public procurements are decided in written process, an oral hearing can be carried out (CPC Art. 4231 p. 4) only if exceptional circumstances exist and a court decides that it is necessary to have an oral hearing.
- Court delivers all documents only by email, fax or other electronic tools that are acceptable to the parties, unless there are technical limitations to do that. Court also has a right to inform parties about future procedural actions three days in advance by phone (CPC Art. 4231 p. 3).
- The admission of the claim shall be decided within three days after it was received in the court. Court can set a term for a correction of the deficiencies of the claim, but only if it could not be done in the preparation for the proceedings stage. The decision to refuse to admit the claim shall be sent out not later than within three business days. If court admits claim it shall inform all the participants of the case immediately, but not later than within three business days (CPC Art. 4232).
- Term for the response of the interested parties is limited to seven days; however court can decide to extend it up to fourteen days (CPC Art. 4235 p. 1).
- Preparatory stage shall be completed within thirty days after the claim was admitted to the court. Preparatory stage is carried out with preparatory documents. In exceptional cases court can appoint one hearing, if it finds that it would make preparation faster and more comprehensive (CPC Art. 4236 p. 1).
- Final court's decision shall be adopted within sixty days after the admittance of the claim to the court (CPC Art. 4238 p. 4).
- Appeal shall be dealt within fourteen days after the final decision was adopted (CPC Art. 4239 p. 1).
- Decision of the appeal shall be adopted within forty five days after the case was received in the appeal court (CPC Art. 4239 p. 3).
- Cassation complaint shall be adopted within one month after the decision in question came into force (CPC Art. 42310).

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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?





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	-	-	-	-
2014	-	-	-	-

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

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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2013	-	72 days ⁶	51 day ⁷	-
2014	-	Up to 6 months.	Up to 6 months.	

⁶ The relevant data is published by the Public Procurement Office:

http://www.vpt.lt/vpt/uploaded/Bylu_nagrinejimas_teismuose/Viesuju%20pirkimu%20bylu%20nagrinejimas%20teismuose%202013%20m.pdf

⁷ Ibid.





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?

There are no special rules regarding requests for the acceleration of proceedings. As it was mentioned before, specific brief terms for judicial public procurement proceedings are set in the CPC and PPL.

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?

The Supreme Administrative Court has not requested for preliminary rulings to the CJEU regarding the public procurement cases.

However, the Supreme Court of Lithuania (hereinafter – the Supreme Court) has requested for preliminary rulings in two public procurement cases:

- regarding the interpretation and application of certain provisions of the Directive 2004/17 related to the suppliers right to rely on the capacities of other entities (Case C-298/15; pending);
- regarding the interpretation and application of the provisions of the Directive 2004/18 and Directive 2007/66 on the evaluation of tenders in a public procurement procedure (Case C-538/13).

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?

The Department of Legal Research and Information of the Supreme Administrative Court systematically and periodically analyses the judgments of the CJEU and every two months circulates legal summaries of the most significant decisions and rulings where they concern interrelated administrative matters. However, there are no analyses published by the similar department of the Supreme Court of Lithuania made available to the public and other lawyers.

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 Supreme Administrative Court frequently quotes and makes material references to the jurisprudence of the CJEU in its decisions. As public procurement issues in the courts





decisions are dealt indirectly, references to the CJEU jurisprudence concerning the public procurement are not very frequent. However, the courts of general jurisdiction do refer to the case-law of the CJEU on a more regular basis.

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 courts (including the Supreme Administrative Court) does not have jurisdiction in the aforementioned cases.

However, according to the consistent jurisprudence of the Supreme Court, the court can *ex officio* declare a public contract ineffective if it infringes mandatory legal rules. The court declares a contract ineffective regardless of the parties' requirements and shall decide on the legal consequences of an ineffective contract.

According to Art. 423⁸ of the CPC, the Court taking in account the circumstances noted in the claim and disclosed at the hearing, has a right to exceed the action: it can satisfy more requests, than it was originally claimed or to make a decision on the requests that were not claimed, but are directly related to a subject matter and cause of the action. If one of the alternative remedies is claimed in the case and the court decides that there is no reason to satisfy it, the court has a right to apply any other legal remedy to protect person's rights and legitimate interests.

4.2. Who can seek a declaration of ineffectiveness? Has the jurisprudence of the CJEU judgement dated 18 July 2007, Commission v/FRG, C-503/04 been incorporated into national law?

All interested parties can seek a declaration of ineffectiveness. Interested parties, according to Art. 93 of the PPL, are suppliers who consider that the contracting authority did not follow rules of the public procurement law and therefore infringed or will infringe suppliers' legitimate interests. Also, according to Art. 82 p. 2 p. 10 of the PPL, the Public Procurement Office can seek a declaration of ineffectiveness in order to protect the public interest. The Supreme Court formulates a consistent jurisprudence requesting the courts to assess at all times, independently from the subject's factual and legal status in the public procurement procedure, whether those subjects have an interest to conclude a public procurement contract which is called





into question. This includes cases when they have reasonable expectations that after declaring a public contract ineffective they will be allowed to compete with other suppliers at the new public procurement procedure. The circumstances related to the merits of the case are not evaluated when dealing with the question of the claimant's right to lodge a claim and it mainly concerns the procedural status of the applicants (or other interested parties).

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

It has not been implemented in the jurisprudence of the Supreme Administrative Court in public procurement related cases.

There is no statistical data available about the implementation of a balance of interest procedure in courts of general jurisdiction. However, a general overview of the jurisprudence on the formulation of the interim or suspension measures suggests that the balance of interest is evaluated in a majority of such cases.

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

In most of the cases the courts evaluate the request to implement interim measures in accordance with the number of principles taken together, such as economy, balance of interest etc. The principle of economy and the balance of interests imply that the court shall assess not only how interim measure would ensure legitimate interests of the supplier but also the possible negative consequences for the contracting authority or other persons where public procurement procedures are suspended, a contract is not concluded or implementation of a contract is suspended. Moreover, the courts take into account whether the requested interim measures would have a negative effect on the public interest.

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?

These issues do not fall under the jurisdiction of the Supreme Administrative Court.





As much as the matters concern the courts of general jurisdiction one should note Art. 95 of the PPL. It states that when the contracting authority receives a copy of a claim it is not allowed to conclude a contract until the terms established in public procurement regulations are set and until it receives court's notice that: 1) a claim was not admitted; 2) a request for interim measures, received in court before claim, was dismissed 3) a claim was admitted without setting interim measures.

As soon as one of these decisions is made the contracting authority can proceed with public procurement procedures. There are no other specific provisions entitling the appeal court to lift this 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?

The courts of general competence consistently refer to the aforementioned jurisprudence when analyzing issues of the assessment of the suppliers and scoring method for the offers: the distinction between these procedures and criteria that were applied, their apportionment in time. Courts of general competence have established consistent jurisprudence regarding the separation between award criteria and qualitative selection criteria in line with the abovementioned CJEU jurisprudence. The Supreme Court forms consistent jurisprudence that qualitative selection criteria cannot be used at the assessment of the proposals procedure, that is to say that once the contracting authority evaluated qualitative suitability of the suppliers, it shall not re-evaluate their qualification or to give extra points for supplier's experience, which was already evaluated during qualitative selection procedure.

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?

These issues do not fall under the jurisdiction of the Supreme Administrative Court.





National legislation does not set any specific provisions regarding the subcriteria, neither this issue was analysed in detail by the Supreme Court.

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?

The issue was not discussed in the jurisprudence of the Supreme Administrative Court, nor the Supreme Court of Lithuania.

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

Art. 24 of the PPL states that the contracting authority shall state the following information in public procurement documents (that are freely available to the suppliers):

- suppliers' qualification requirements and its' evaluation procedures;
- assessment criteria for the offers and assessment procedure (method).

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?

These issues have not been dealt by the Supreme Administrative Court of Lithuania.

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

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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?

As the Supreme Administrative Court does not directly solve public procurement disputes, confidentiality of the documents has not been invoked and there is no sufficient jurisprudence regarding this question. However the issue of confidential documents is frequently invoked in the jurisprudence of the Supreme Court of Lithuania.





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?

Art. 6 of the PPL establishes that the purchasing authority, public procurement's commission, its members and other interested parties shall not disclose to third parties any information submitted by the supplier if he specified it as confidential, and if this does not violate legal regulations, especially related to the rules of publishing concluded agreements and submitting information for other suppliers, such as information about results of public procurement procedure, (Art. 41, Art. 79 of the PPL), notice about beginning of the procedures, conclusion or the absence of the conclusion of the agreement (Art. 74, Art. 86 p. 4 of the PPL).

Confidential information primarily includes commercial (industrial) secrets and confidential aspects of the offers. Price (except its components) is not considered confidential. Upon request of other suppliers, public procurement shall provide them possibility to examine offers of other suppliers, excluding the information which was specified as confidential by supplier.

Information related to analyses, evaluation and comparison of offers' is accessible only to the members of the public procurement's commission and the experts invited by the contracting authority, representatives of the Public Procurement Office, head of the contracting authority and authorized representatives acting on his behalf, other persons and institutions having this right under other laws of the Republic of Lithuania and public entities, administering financial support of the EU or the states, when this right was granted by the Government's decrees (Art. 41 p. 5 of the PPL).

Contracting authority shall not disclose information if the disclosure of it is against a law, can harm the public interest, lawful interest of the supplier or interferes with fair competition (Art. 41 p. 3 of the PPL).

The Supreme Court considers that the protection of the confidential information in public procurement procedures shall be interpreted in a narrow sense and shall be applied without misuse of it (for instances suppliers cannot declare that the whole offer is confidential). Supreme Court has ruled that qualifying information as confidential, first of all, depends on whether or not supplier has indicated this information as confidential in his offer, however contracting authority is not solely obliged by this indication; when making decision about confidentiality of the particular data, contracting authority shall take into account nature of the information, for instance an obligation to make particular information public under other laws, norms of the Civil Code (Art. 1.116). Specific character of public procurement implies that the confidentiality of the information is an exclusive and not an ordinary situation.





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?

General rules regarding the confidentiality of public procurement documents were analyzed in the previous question. During jurisdictional phase court has a right to access confidential information and a duty to ensure its confidentiality.

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?

- Under Art. 10 p. of the CPC, a person providing documents or other material which contains data constituting professional or commercial secret has a right to request the court not to grant access to this information. Court makes a ruling on this matter. Rulings are based on the specific circumstances of the case.

- Under Art. 10 of the CPC all the files of the decided case are public and accessible to all persons despite whether they were parties of the case or not. However court can make a ruling that all or part of the case files are not public if *inter alia* it has a ground to believe that otherwise commercial or other legally protected secret will be disclosed. Participants of the proceedings can make a request for a ruling or court can decide this *ex officio*.

- The PPL does not specify the term confidential information; therefore the general norms of the Civil Code are applied (Art. 1.115 “Commercial (industrial) secret”). The Supreme Court has established main criteria that information must fulfill to be considered as confidential:

- Information shall be secret (non-public). Only information that is not known or freely accessible to third parties can be considered confidential. On the other hand, the mere fact that information is not publicly known is not itself sufficient enough to declare that provided information is considered as completely secret.
- Information must have a real or potential commercial (industrial) value, because of the fact that it is not known by third parties and cannot be freely accessed. Confidential information must give competitive advantage to its holder that is to say some sort of business virtue, industrial supremacy, financial benefit etc.
- Information is secret because of its owner’s or other person’s to whom it was entrusted, rational attempt to keep its confidentiality. Whether person undertook rational measures to protect information is decided by taking into consideration whether he made a decision to declare particular data as protectable and undertook rational protection measures. Those





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measures must be rational, however not extraordinary as this would unreasonable restrict limits of commercial secret.

- There is no difference where the accelerated proceedings are carried out.

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

The Supreme Court has ruled that the requirement to protect confidential information shall be combined with the principle of effective legal protection, the right to a fair hearing of the parties and duty of judicial institution to ensure fair trial. Therefore, the institution, responsible for the review of public procurement procedures (in particular – courts), has a right to access confidential information. However, the court has a duty to ensure confidentiality of this information. Right to fair trial also implies that the concept of confidential information shall be interpreted in a narrow sense. Confidentiality of the information is related to possible damages that can occur if it would be disclosed to the suppliers or other persons. These conclusions of the Supreme Court were based on the CJEU decision C-450/06.



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