"Recent case-law of the Court of Justice of the European Union and of the (supreme) administrative jurisdictions in connection with contentious proceedings relative to public contracts"

1. National jurisdictional organisation

Preliminary remark:

Luxembourg's national court organisation with respect to public contracts is mainly governed by the law of 10 November 2010 instituting appeals (recourse) in connection with public contracts, as modified by the law of 26 December 2012, hereinafter the *"law of 10 November 2010"*. The said laws transposed into Luxembourg law Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 modifying directives 89/665/EEC of 29 December 1989 and 92/13/EEC of 25 February 1992 with respect to improved effectiveness of the appeal procedures in connection with conclusion of public contracts, as well as Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 relative to coordination of procedures concerning conclusion of certain contracts relative to work, supplies and services by awarding authorities or awarding entities in the fields of defence and security, and modifying directives 2004/17/EC and 2014/18/EC.

Pursuant to article 22 of the law of 10 November 2010, the modified law of 13 March 1993 relative to execution in Luxembourg law of directive 89/665/EEC and of the law of 27 July 1997 relative to execution in Luxembourg law of 92/13/EEC are abrogated.

The law of 10 November 2010 does not apply to all public contracts, but rather concerns only the contracts under Books II and III of the modified law of 25 June 2009 concerning public contracts, hereinafter the *"law of 25 June 2009"*, i.e., public contracts of a certain size and the public contracts in the sectors of water, energy, transportation and postal services.

1.1. What jurisdiction is responsible for application of the appeal procedures in connection with conclusion of public contracts falling within the field of application of the directives?

1.1.1. Is it an administrative or civil or special jurisdiction, or a body of some other nature?

In a nutshell, one may say that the courts responsible for application of the appeal procedures in connection with public contracts are both the administrative courts and the judicial or civil courts. No special court or body of any other kind has been provided for in Luxembourg law.

1.1.2. Is there is a division of roles between those jurisdictions (contentious proceedings relative to the decision giving grounds? Indemnification? Declaration of absence of effect? … ?)

In Luxembourg law, there is a strict separation of powers between the administrative court and the civil court as a function of the nature of the suit filed in the court.

Thus since the above-mentioned law of 13 March 1993, Luxembourg law has had a procedure enabling a person considering himself injured by a violation of community law or of national law in connection with public contracts to apply to the presiding judge of the administrative court in a precontractual phase. The provisions relative thereto appearing in the law of 13 March 1993, abrogated in the meantime, were incorporated into the law of 10 November 2010. The procedure is characterised as precontractual summary proceedings and is governed, in particular, by articles 3 and 4 of the law of 10 November 2010.

The presiding judge of the administrative court may provisionally order any required measures for the purpose of correcting the alleged violation or preventing other prejudice from being caused to the interests involved, including measures aimed at suspending or obtaining suspension of the market conclusion procedure in question as long as the awarding authority or the awarding entity has not carried out the required correction. In particular, it may do away with the discriminatory technical, economic or financial specifications appearing in the documents concerning a call on competition, in the specifications or in any other document relating to the procedure for concluding the contract in question. The procedure relative to precontractual summary proceedings is called on to apply only in the phase prior to the decision awarding the contract.

The bidder does not need to make a parallel filing of an appeal on the merits, and the measures that are ordered are no longer the object, later, of an examination by the trial and appeal judge. The measures ordered by the presiding judge of the Administrative Court are characterised as provisional in the sense that they occur before the award decision, but they are final in that they are no longer the object of examination by the trial and appeal judge.

Thus it has been decided on several occasions that *"the administrative court lacks jurisdiction for doing away, in the specifications, with clauses that are incompatible with community law, the said power being exercised solely by the presiding judge of the court ruling in summary proceedings"*. (See, in particular, Court adm. 29 November 2001, n° 12592C in the list).

Under the terms of article 4 of the law of 10 November 2010, the presiding judge of the administrative court may decide not to grant the requested measures when a comparison of the likely consequences of the measures for all interests that might be injured as well as of the public interest shows that the negative consequences of the said measures could outweigh their advantages.

The filing of an application on the basis of article 3 of the law of 10 November 2010 has a suspensive effect, the awarding authority or entity being required to suspend continuation of the procedure relative to a call on competition, or even the award decision until service of the order in summary proceedings.

The order in summary proceedings is subject to appeal. In the absence of specific procedural provisions, the appeal will have to be taken to the Administrative Court, the supreme administrative jurisdiction in Luxembourg, sitting as a panel (3 judges), in accordance with the procedural rules indicated by the modified law of 21 June 1999 regulating proceedings before the administrative courts, hereinafter *"the law of 21 June 1999 "*. It should be pointed out that the legislator failed to provide for a suspension of the proceedings concerning conclusion of a contract for the duration of the appeal proceedings, an omission that may explain the absence of applications as of now to the Administrative Court as an appeal jurisdiction in connection with precontractual summary proceedings.

Then there is the possibility of filing, on the basis of article 6 of the law of 10 November 2010, again with the presiding judge of the Administrative Court, an application to suspend execution during the time between the award decision and signature of the contract. The unsuccessful bidder may use this possibility solely by means of a parallel filing on the merits of recourse for cancellation in the Administrative Court, sitting with a panel (three judges). The application or a stay of execution is aimed at preventing a situation in which the contract has not already been executed at the time at which the administrative Court makes a decision on the merits of the

case. However, such a stay may not be granted by the presiding judge of the Administrative Court as long as the contract has not been signed, the law of 10 November 2010 being careful to require a suspension period of 10 days or, as the case may be, two weeks, depending on the communication means used (article 5 of the law of 10 November 2010) during which conclusion of the contract that follows the decision to award the contract may not take place. Article 6 of the law of 10 November 2010 explicitly provides that the Presiding Judge of the Administrative Court may be applied to within the periods laid down in article 5 in accordance with the procedural rules appearing in article 11 of the law of 21 June 1999.

However, it should be noted that the order issued by the presiding judge of the Administrative Court in connection with a stay of execution is not subject to appeal.

The major innovation of the law of November 2010 is, under the terms of articles 9 to 15, the nullification of a public contract already signed, the most effective way to re-establish competition and to create new commercial prospects for the companies that have been illegally deprived of the possibility of taking part in a contract conclusion procedure. Article 9 of the law of 10 November 2010 assigns this new power to the presiding judges of the civil courts, mainly, the presiding judge of the "tribunal d'arrondissement" sitting as a judge in summary proceedings.

Let us briefly indicate the cases for application of this type of court appeal, namely non-publication of the contract notice, disregard of the rights guaranteed by the law itself (non-observance of the obligation to suspend continuation of the proceedings for a call on competition or the award decision until service of the order in summary proceedings issued on the basis of article 4 of the law of 10 November 2010, non-observance of the waiting period for signature, non-observance of the obligation to suspend conclusion of the contract if the presiding judge of the Administrative Court has been applied to during the signature suspension period on the basis of article 6 of the law of 10 November 2010) and the violation of the provisions governing the award of contracts based on a framework agreement.

The order issued by the presiding judge of the "tribunal d'arrondissement" may be appealed to the Court of Appeals of Luxembourg, sitting in summary proceedings (3 judges).

As already indicated above, a decision to award the contract may be attacked on the merits by filing an appeal for cancellation in the Administrative Court sitting in panel formation. The fact is that the Administrative Court holds jurisdiction for considering the regular nature of the unilateral decision made by the awarding authority to choose the procedure for conclusion of a given public contract, just as it holds jurisdiction to consider the regular nature of a decision for a concrete award of the said contract.

An appeal may be filed in the Administrative Court of Appeal sitting in panel formation (3 judges).

On the other hand, contentious proceedings relative to conclusion of a public contract are heard by the civil court judge, as well as recourse for indemnification (damages). The said recourse is taken to the "tribunal d'arrondissement" sitting in panel formation with a possibility of appeal to the Court of Appeals.

1.1.3. What is the exact role played by the Supreme Administrative Court[1] in connection with contentious proceedings relative to public contracts (judge of full contentious proceedings, judge of cassation, judge of abuse of authority)?

As noted above, the Administrative Court of Appeals, the supreme administrative court in Luxembourg, holds twin jurisdiction with respect to contentious proceedings relative to public contracts.

Thus it may be called on to sit as a court hearing appeals against orders issued by the presiding judge of the Administrative Court adopted on the basis of articles 3 and 4 of the law of 10 November 2010, mainly in connection with precontractual summary proceedings. No cases have been filed to date on this basis in the Administrative Court of Appeals.

However, the Administrative Court of Appeals is also called on to hear, as a trial and appeal court, appeals aimed at decisions made by the administrative court.

The fact is that by virtue of article 2 (1) of the modified law of 7 November 1996 relative to organisation of the jurisdictions of the administrative order, hereinafter "the law of 7 November 1996", the administrative court rules on the appeals filed on the grounds of lack of jurisdiction, excess and misuse of power, violation of the law or of the forms aimed at protecting private interests, against all administrative decisions for which no other recourse is admissible according to the laws, rules and regulations.

For all of these appeals, article 2 (3) of the law of 7 November 1996 provides that an appeal may be filed in the Administrative Court of Appeals.

Thus the administrative court holds jurisdiction as the judge of cancellation for considering the regular nature of the unilateral decision made by the awarding authority to choose the procedure for conclusion of a given public contract, just as it holds jurisdiction for considering the regular nature of the concrete decision to award the said contract. – Since the law does not provide for any recourse for reversal in connection with public contracts, the administrative court, beyond its power under common law enabling it to cancel an award of a contract that it considers illegal, lacks jurisdiction for awarding the contract to a bidder. – It is not incumbent on the administrative court, as judge of legality, to substitute its own judgement for the judgement of the principal, but rather it checks on whether the latter's judgement is based on objective criteria and was developed in a non-arbitrary way. Thus the administrative judge is called on to respect the judgmental power of the principal, his check consisting of verifying whether the facts underlying the decision are established and whether the measure adopted is in keeping with the established facts, only an obvious judgmental error on the part of the authority having made the referred decision having to be sanctioned as a result.

1.1.4. Does the breakdown of powers between jurisdictions change in connection with proceedings for suits that are filed after contract conclusion?

In Luxembourg law, conclusion of the contract following an award decision is of a strictly civil nature and constitutes an act that that can be separated from the award decision. Thus when it comes to pubic bids, the cancellation ab initio of a public contract cannot affect the legal integrity of the contract that was formed at the time of the award between the principal and the

[1] The term Supreme Administrative Court refers to the jurisdictions that are members of the ACA and rule on final jurisdiction.

winning bidder. – Accepting the contrary would imply that the administrative judge's decision governs the fate of a civil right, which, all the same, is subject to the sole jurisdiction of the courts of the judiciary.

Thus even if it cannot be denied that the administrative judge is not the judge of the contracts that public persons conclude with private persons, and he cannot claim to be entitled to interfere therein, it remains true all the same that he holds jurisdiction for considering the regular nature of the unilateral decision made by an awarding authority to choose the procedure for conclusion of a given public contract just as he holds jurisdiction for considering the regular nature of the concrete decision to award the said contract. The fact is that conclusion of a public procurement contract, a management act falling within the purview of the judicial judge with respect to its interpretation and execution, is necessarily preceded by an administrative operation leading to the choice of conclusion procedure, or even to the choice of the co-contracting party. But the choices made prior to the acts of execution are to be analysed as administrative acts that can be the object of recourse for cancellation filed with the administrative judge.

A check by the administrative judge remains possible, even after conclusion of the public procurement contract, as long as it is exercised within the legal period, namely the period under common law of 3 months following the time of familiarisation with the award decision.

Hence conclusion of the public procurement contract has no effect in the proper sense on the breakdown of powers between the administrative courts and the civil courts, excluding the hypothesis already mentioned with respect to the presiding judge of the administrative court sitting in summary proceedings who, if applied to with an application for a stay of execution during the time between the award decision and signature of the contact, may grant such a stay only as long as the contract has not been signed.

2. Duration of the legal proceedings

2.1. Are there any specific means or procedures for making sure that the national procedure applied is effective and rapid (for instance: specific deadlines for ruling on provisional measures, etc.)?

In Luxembourg, there are no specific means or procedures for the purpose of verifying whether the national procedure applied is effective and rapid. However, it can be seen from the figures provided in the table below that on average, proceedings before the presiding judge of the administrative court, sitting in summary proceedings, are settled within an approximate period of a little more than 20 calendar days.

As to cases on the merits, we should point out that the proceedings in the administrative courts are written and that the law of 21 June 1999 provides, with respect to investigation of the cases, for strict deadlines under penalty of extinction, namely, on initial jurisdiction 3 months for the response, following filing of the appeal, one month for the reply and one month for the rejoinder. On appeal, the response must be provided one month after the filing of the appeal document, and then one month for the reply and one month for the rejoinder.

If a party to the proceedings considers that its case is particularly urgent, the ordinary periods for investigation may be shortened by an order issued by the presiding judge of the lower court or of the Court of Appeal (art. 5 (8) and 46 (5) of the law of 21 June 1999).

2.2. Can one measure the average period for handling public procurement matters? Do you have any specific data by type of proceedings? And by court level? If so, what are they?

The average period for handling cases involving public contracts is not the object of any separate statistics. In order to provide a precise answer at this level, the figures indicated below for the years 2013 and 2014 have been calculated for each case on the basis of the decisions issued by the administrative courts, whether that involves the presiding judge of the administrative court sitting in summary proceedings, the administrative court sitting on initial jurisdiction, as well as the Administrative Court of Appeals acting on final jurisdiction. The undersigned has been unable to obtain figures concerning the times taken by proceedings in the civil courts.

In case there are no statistics available concerning the average duration of this kind of proceedings, would it be possible to have an average for the cases handled by the Supreme Administrative Court?

It can be seen from the second table below that contentious proceedings in connection with public contracts in the Supreme Administrative Court are extremely rare and that that Court has only been called on to hear four (4) cases in connection with public contracts in the years 2013 and 2014. Those four cases were settled in 101, 179, 1,311 and 205 calendar days, the long period of 1.311 days being explained by the fact that in that case, the Supreme Administrative Court had appointed two consulting experts, each of whom filed an expert's report.

Proceedings in terms of "provisional measures" (including suspension)

Year of case settlement	Number of proceedings in connection with conclusion of public contracts settled in the Supreme Administrative Court during the reference year	Average duration of the proceedings settled every early calculated in calendar days[1] 2013 : 23.43 days 2014 : 20.89 days		
		Initial jurisdiction[2]	On Appeal[3]	Supreme Administrative Court – court of final jurisdiction[3]
2013		14		
2014		9		

Proceedings "on the merits" (cancellation, declaration of absence of effect, indemnification, etc.)

1 For the calculation, one must include the day on which the appeal is filed and the day on which the decision is handed down

[2] If applicable

Year of case settlement	Number of proceedings in connection with conclusion of public contracts settled in the Supreme Administrative Court during the reference year	Average duration of the proceedings settled every year calculated in calendar days[3]		
		Initial jurisdiction [4] 2013 : 427 2014 : 473	On appeal[3]	Supreme Administrative Court – court of final jurisdicion[3] 101 179 1311 205
2013	3	12		3
2014	1	6		1

2.3. Can the parties to contentious proceedings request a shorter period for the decision? If so, is that in connection with all proceedings or only in the Supreme Administrative Court? If so, in what proportion is this possibility used in connection with proceedings?

As noted above (point 2.1.), a party to the case considering that the latter is particularly urgent may request that the ordinary periods for investigation be shortened by an order issued by the presiding judge of the lower court or of the Court of Appeal (art. 5 (8) and 46 (5) of the law of 21 June 1999). This possibility exists both at the level of the administrative court and with respect to the Supreme Administrative Court.

But since the strict deadlines with respect to investigation of the cases, as indicated in point 2.1. above, are binding and are rather close together, this option is seldom used. To date, no use has yet been made of this possibility in the Supreme Administrative Court in connection with contentious proceedings involving public contracts.

3. <u>Dialogue between the Supreme Administrative Court and the CJEU</u>

3.1. How many preliminary points of law has your Supreme Administrative Court put to the CJEU as concerns public contracts?

As of now, the Supreme Administrative Court has not yet put any preliminary points of law to the CJEU in connection with public contracts.

[3] For the calculation, one must include the day on which the appeal is filed and the day on which the decision is handed down.

[4] If applicable

3.2. Is there a documentation service that systematically analyses the CJEU decisions and informs the members of the Supreme Administrative Court about the responses to preliminary points of law?

There is no documentation department responsible for analysing decisions by the CJEU having the task of informing the members of the administrative courts about the responses made to the preliminary points of law, whether with respect to public contracts or to any other subject.

3.3. Does the Supreme Administrative Court quote the CJEU case-law in its decisions or make any material reference thereto?

There is no rule or precise practice in this domain. Depending on the compositions and the reporting judge in connection with a case, the court applied to is either led to quote *in extenso* precise passages from the decisions made by the CJEU, or to make a mere reference.

4. <u>Implementation of the appeals procedures targeted in directives 89/665/EEC and 92/13/EEC</u>

4.1. Can the Supreme Administrative Court (or a lower-ranking court) declare that a public contract is ineffective and/or order substitution or other sanctions (pursuant to the directives 89/665/EEC or 92/13/EEC) *ex officio*, or only as long as it is asked to do?

The law of 10 November 2010 empowers only the Luxembourg courts, and to be more precise the presiding judge of the "tribunal d'arrondissement" sitting as a judge in summary proceedings, to declare that a public procurement contract already signed is ineffective.

Thus under the terms of article 9 of the law of 10 November 2010:

"A contract is declared to be ineffective by the presiding judge of the "tribunal d'arrondissement" sitting as a judge in summary proceedings:

if the awarding authority or the awarding entity has concluded a contract without first having published a contract notice in the Official Journal of the European Union without being authorised by virtue of the provisions of Books II or III of the law concerning public contracts;

in case of violation of articles 4, paragraph (2), 5, 6, 20, paragraph (5), or of the article 21, if the said violation has deprived the bidder filing an appeal of the possibility of filing or of carrying out precontractual recourse when such a violation is accompanied by a violation of the provisions of Books II or III of the law concerning public contracts respectively of the provisions governing the general specifications applicable to public contracts of a certain scope and the general specifications applicable to contracts in the sectors of water, energy, transportation and postal services, as laid down by regulation in the Grand Duchy and if the said violation has compromised the chances of the bidder filing an appeal to win the contract;

in the cases mentioned in article 8, point c), second paragraph.

The decision ruling that a contract is ineffective may be conditional on a decision on the merits establishing that the violation has been committed."

Similarly, article 14 of the law of 10 November 2010 empowers the presiding judge of the "tribunal d'arrondissement" sitting as a judge in summary proceedings to pronounce substitution sanctions, that article having the following tenor:

" (1) In case of a violation of articles 4, paragraph (2), 5, 6, 20, paragraph (5) or of article 21, without the conditions for application of article 9, point b) being satisfied, the presiding judge of

the " tribunal d'arrondissement ", sitting as a judge in summary proceedings, pronounces substitution sanctions.
(2) The substitution sanctions that may be pronounced pursuant to article 10, paragraph (2) and pursuant to article 14, paragraph (1) must be effective, appropriate and dissuasive.
They consist of the following:
imposing financial penalties on the awarding authority or on the awarding entity, or
shortening the contract duration.
The presiding judge of the "tribunal d'arrondissement ", sitting as a judge in summary proceedings, takes account of all relevant factors, including the seriousness of the violation, the behaviour of the awarding authority or of the awarding entity, and, in the cases mentioned in article 10, the extent to which the contract continues to produce effects (…) ".
However, the presiding judge of the "tribunal d'arrondissement" is not entitled to order the said sanctions ex officio.
The fact is that under the terms of article 1, paragraph 4, of the law of 10 November 2010 "the appeal procedures are available to any person having or having had an interest in winning a given contract and having been or who risks being injured by an alleged violation of community law or of national law transposing community law in connection with public contracts".
Thus the powers granted to the presiding judge of the administrative court and to the presiding judge of the "tribunal d'arrondissement" by virtue of the law of 10 November 2010 presuppose an initiative on the part of a person demonstrating a sufficient interest in acting.

4.2. Who may request a declaration of absence of effects? Has the precedent of the CJEU decision of 18 July 2007, Commission vs./FRG, C-503/04, been integrated into national law?

As noted above, any person demonstrating a sufficient interest in acting may apply to the presiding judge of the "tribunal d'arrondissement" with a view to obtaining nullification of a contract (article 1, paragraph 4, of the law of 10 November 2010).
Case C-503/04 concerns an appeal on the grounds of shortcoming filed by the Commission of the European Communities against Germany on the ground that the said State has not adopted sufficient measures for conforming to a decision issued by the CJEU (C-20/01 and C-28/01) by not proceeding, within the required period, with termination of a contract concluded by a German city for waste elimination, in violation of the community provisions concerning public contracts.
With respect the incorporation of the lessons of decision C-503/04 into international law, it is appropriate to respond in the affirmative with respect to the problem mentioned in point 23 of the said decision in conjunction with article 3 of the directive 89/665/EEC.
Thus under the terms of article 17 of the law of 10 November 2010 "any awarding authority or awarding entity other than the State that has been the object of a notification served by the European Commission, in application of article 3 of directive 89/665/EEC of the Council dated 21 December 1989 relative to coordination of the legislative, regulatory and administrative provisions concerning application of the appeal procedures in connection with conclusion of public contracts relative to supplies of work, or in application of article 8 of directive 92/13/EEC of the Council dated 25 February 1992 coordinating legislative, regulatory and administrative provisions relative to application of the community rules concerning procedures for conclusion of contracts of the entities operating in the sectors of water, energy,

transportation and telecommunications as modified by directive 2007/66/EC of the European Parliament and of the Council dated 11 December 2007, is required to provide the authority determined by Grand Duchy regulation, within 10 days following notification, with all of the documents and information required for development of the communication to be made in application of the above-mentioned directives".

Even if the lesson to be drawn in decision C-503/04 was to incorporate, into national law, a provision aimed at putting an end to the effect of the contracts concluded in violation of the community directives on the subject of public contracts by an initiative of the State concerned taking satisfactory steps as a consequence of the decision by the CJEU, Luxembourg legislation does not now provide for any possibility for the State to apply to the presiding judge of the " tribunal d'arrondissement" with a view to obtaining a declaration that the contract in question is ineffective, the said procedure being available only to persons having or having had an interest in winning a given contract.

4.3. In what proportion of cases does one apply the mechanisms relative to a balance of interests to avoid ordering provisional or suspension measures?

With respect to precontractual summary proceedings, (articles 3 and 4 of the law of 10 November 2010), article 4 of the law of 10 November 2010 allows the presiding judge of the administrative court to refrain from issuing the requested measures when a comparison of the probable consequences of the measures or all interested that might be injured, as well as the public interest, shows the negative consequences of the said measures could outweigh their advantages. It is appropriate to point out that the mechanism of the balance of interests was already provided for at the level of prior legislation, namely, the above-mentioned law of 13 March 1993.

The presiding judge of the administrative court is seldom applied to on an interlocutory basis on this legal basis, hardly once a year. As of now, he has not applied the mechanism of the balance of interest in order to reject the measure requested by the applicants.

As to the application for a stay of execution filed with the presiding judge of the administrative court (article 6 of the law of 10 November 2010) to be filed during the time between the award decision and the signature of the contract, such a request is subject to the conditions of common law as provided for in article 11 of the law of 21 June 1999, namely on one hand, that execution of the contested decision risks causing serious and definitive prejudice to the applicant and, on the other hand, the arguments called on in support of the appeal aimed at the decision appear to be serious. The suspension is rejected if the case is in condition to be argued and decided in the near future (ord. pres. 17 September 2012, n° 31340 of the docket).

When it comes to applications for a stay of execution, the mechanism of the balance of interests does not apply, the presiding judge of the administrative court being entitled either to order a stay of execution so that the contract will not already have been performed at the time at which the administrative court makes a decision on the merits of the dispute, or he may purely and simply reject the application in case the above-mentioned conditions are not satisfied. To be complete, let us also point out that the mechanism of the balance of interests is also provided for in an indirect way in articles 10 and 11 of the law of 10 November 2010 in the context of an application for a finding that a contract is ineffective.

Thus under the terms of article 10 of the law of 10 November 2010:

"The consequences of the finding concerning the absence of effect of a contract are left up to the judgement of the presiding judge of the "tribunal d'arrondissement" sitting as a judge in summary proceedings.
The retroactive cancellation of all contractual obligations is possible, but the scope of the cancellation may also be limited to the obligations still to be performed. In the latter case, the presiding judge of the "tribunal d'arrondissement ", sitting as a judge in summary proceedings, will have to levy financial penalties in the meaning of article 14, paragraph (2)."
Similarly, article 11 of the law of 10 November 2010 states that:
"The presiding judge of the "tribunal d'arrondissement", sitting as a judge in summary proceedings has the option of not considering a contract as ineffective, even if it has been concluded illegally for the reasons mentioned in article 9, if he finds, after having considered all relevant aspects, that imperious reasons of general interest require the effect of the contract to be maintained. In that case, the presiding judge of the "tribunal d'arrondissement ", sitting as a judge in summary proceedings, must impose financial sanctions, which apply as substitution.
In all cases, a contract may not be considered as not producing any effect if the consequences of the said absence of effect can seriously threaten the very existence of a broader defence and security program that is essential for the interest of a Member State of the European Union in the field of security.
The economic interest in having the contract lose its effects may not be considered as an imperious reason except when, under exceptional circumstances, the absence of effect would have disproportionate consequences. However, the economic interest directly connected with the contract in question does not constitute an imperious reason of general interest. The economic interest directly connected with the contract includes, in particular, the cost resulting from a delay in performance of the contract, from launching a new contract conclusion procedure, from the change of economic operator for realisation of a contract, and from legal obligations resulting form the absence of effect.
Since jurisdiction in this domain belongs to the presiding judge of the "tribunal d'arrondissement ", the undersigned in not in a position to provide any further details concerning the number of cases in which the mechanisms of the balance of interests has been applied.

4.4. Does national case-law make the balance of interests subject to any particular conditions?

Leaving aside the criteria as set forth in the law of 10 November 2010, Luxembourg case-law has not yet had an opportunity to institute any particular conditions or criteria in connection with the mechanism of the balance of interests.

4.5. Directives 89/665/EEC and 92/13/EEC provide that when a court holding initial jurisdiction, independent of the awarding authority, is applied to with an application bearing on the contract award decision, the Member States must make sure that the awarding authority cannot conclude the contract before the appeals court rules either on the request for provisional measures or on the appeal.

Under the terms of article 5 of the law of 10 November 2010 *"conclusion of the contract that follows the decision to award a contract (…) may not take place before the end of a period of at least ten days beginning with the day following the day on which the decision to award the contract has been sent to the bidders and candidates* concerned *if a fax machine or an electronic means is used or, if other communication means are used,*

before the end of a period of at least two weeks beginning with day following the one on which the decision concerning the contract award is sent to the bidders and candidates concerned (…)".
Article 6 of the law of 10 November 2010 stipulates that *"the presiding judge of the Administrative Court may be applied to within the periods provided for in article 5 in accordance with article 11 of the law of 21 June 1999 governing proceedings in the administrative courts.*
The awarding entity is required to order suspension of conclusion of the contract until service of the order in summary proceedings and until the end of the period provided for in article 5".

Is it possible to have this automatic suspension lifted by your court? If so, under what conditions?

It is appropriate to remind you at this stage that the orders issued by the presiding judge of the administrative court handed down on this basis are not subject to appeal, article 11 of the law of 21 June 1999 having the following tenor:
"The order is enforceable as of the time it is served. It is not subject to any appeal. It ceases its effects when the court has settled the main issue or part of the main issue".
Hence it is not possible to lift either the automatic suspension measure before service of the order in summary proceedings (article 6, paragraph 2, of the law of 10 November 2010), or the decision to suspend execution made by the presiding judge of the administrative court if he approved the request of a bidder considering itself as wrongly evicted (article 11 of the law of 10 June 1999).
However, the order in summary proceedings issued on this basis ceases to produce its effect at the time on which the administrative court hands down its judgement on the merits in the case.
If the applicant also obtains satisfaction on the main issue in the administrative court, article 35 of the law of 21 June 1999 allows the court to make its decisions subject to provisional enforcement during the appeal period and possible appeal proceedings, so as to maintain the *status quo.*

5. **Division of award criteria into award sub-criteria, weighting of the award sub-criteria, judgmental elements and method of rating bids** (case-law references: CJEU, C-331/04 ATI EAC and Others; CJEU, 24 January 2008, Lianakis, C-532/06**)**

5.1. How does your court apply this case-law in its daily practice?

In spite of relatively limited contentious proceedings in connection with public contracts, in Luxembourg, the Supreme Administrative Court has already had an opportunity to apply *"literally "* the decision CJEU C-331/04, if not the lesson to be drawn from the decision by the CJEU C-532/06, both mentioned above.
In a decision dated 7 July 2009 (n° 25347C of the docket), the Supreme Administrative Court ruled as follows in connection with a contract dealing with work relative to construction, earthworks and installation of piping for transport of drinking water:
"According to the case-law of the CJEC, the award criteria defined by an awarding authority must be connected with the object of the contract, must not grant unlimited freedom of choice to the awarding authority, must be explicitly mentioned in the specifications or in the contract notice, and must in particular respect the fundamental principles of equal treatment, non-discrimination and transparency (CJEC, 17 December 2002, aff. C-513/99, pt. 91; 24 November 2005, aff. C-331/04, pt. 21).

The CJEC laid down three conditions for the criteria applied in order to identify the bid that is the most advantageous from the economic viewpoint and complies with the requirement of community law, while emphasizing that it is up to the national court to make a concrete judgement as to whether the awarding authority has violated community law (decision dated 24 November 2005, mentioned above, pt. 25).

It is appropriate, in the first place*, to check on whether, in the light of all of the relevant elements in the case on the main issue, the decision providing for such weighting modifies the market award criteria defined in the specifications or in the contract notice (pt. 26). (…)*

According to the CJEC, it is appropriate in the second place to consider whether the decision providing for application of sub-elements contains elements that, if they had been known at the time of bid preparation, could have influenced the said preparation (pt. 28). (…)

Thirdly, it is appropriate to check on whether the awarding authority has made the decision providing for weighting by taking into account some elements that could have a discriminatory effect vis-a-vis one of the bidders (pt. 30). (…)".

In this particular case, after verification of these three conditions, the Supreme Administrative Court reached the conclusion that the application, by the awarding authority, of the sub-criteria aimed at judging the technical value of the respective bids had not been illegal.

In a decision dated 20 June 2006 (n° 20141C in the docket), the Supreme Administrative Court carried out the same procedure as the CJEU in its decision C-532/06, but without explicitly referring to community case-law.

It is appropriate to point out, in connection with this particular case, that decision No. C-532/06 by the CJEU targeted the assumption of a determination ex post by the awarding authority, after presentation of the bids, both of the weighting coefficients and of the sub-criteria for the award criteria, while in the case that led to the decision by the Supreme Administrative Court dated 20 June 2006, the awarding authority had not only carried out a weighting of the criteria, but in addition had changed one of the initial criteria.

Hence the Supreme Administrative Court pronounced cancellation of the contract in dispute, dealing with digging a highway tunnel, noting that "it can be seen from the comparison of these two versions that the awarding authority not only carried out a weighting of the criteria, but also did away with the criterion concerning the "reduction of periods" in order to replace it with the criterion of "risk", this at a time at which the potential bidders had necessarily been involved for three months in development of their bid" and stating that "in the presence of a modification of the criteria applicable in order to determine the most advantageous bid, developed and published after launching the public bidding process and outside the conditions of equality, it is appropriate, by reversing the decision dated 9 June 2005, to cancel the ministerial order issued by the Minister of Public Works on 2 July 2004 awarding, by virtue of a judgement based on the modified criteria, a public contract relative to digging the tunnel (…) to the grouping (…)".

5.2. Do case-law or legislation accept the use of sub-criteria that are not explicitly announced, and under what conditions? Do case-law or legislation define the sub-criteria? Do case-law or legislation make a distinction between sub-criteria and judgmental elements?

The Luxembourg legislator refers to the criteria relative to awarding public contracts respectively to weighting of the said criteria in chapter V of the law of 25 June 2009 and more precisely in article 11, having the following tenor:

" (1) The contracts to be concluded by means of an open or a limited procedure are awarded by a decision, giving grounds, sent to the bidder having presented either the regular bid that is the most advantageous from the economic viewpoint, or the regular bid at the lowest price. One considers as a regular bid any bid that, after evaluation, conforms to requirements from the formal and technical viewpoints and complies with qualitative selection criteria that may be laid down in the special specifications.
(2) When the award is to be made on the basis of the principle of the bid that is the most advantageous economically speaking from the viewpoint of the awarding authority, the following criteria connected with the object of the public contract in question are to be taken into account: quality, price, technical value, aesthetic and functional nature, the environmental characteristics, the social aspect, the cost of use, the profitability, after-sale service and technical assistance, the delivery date and the period for delivery or execution.

The awarding authority is free to apply, for a given public contract, only part of the criteria listed in the foregoing paragraph.

(3) In the contract notice or in the special specifications, the awarding authority is to indicate the relative weighting it assigns to each of the chosen criteria in order to determine the bid that is the most advantageous from the economic viewpoint.

The said weighting may be expressed by providing for a range, the maximum and minimum points of which must be appropriate.

(4) When, in the opinion of the awarding authority, weighting is not possible for demonstrable reasons, it to indicate, in the contract notice or in the special specifications, the decreasing order of importance of the criteria.

(5) Within the framework of public services contracts, the application of legal, regulatory or administrative provisions is not affected by the provisions of (1) to (3)".

At the level of the grand-ducal regulation of 3 August 2009 relative to execution of the law of 25 June 2009, hereinafter the "grand-ducal regulation of 3 August 2009", the criteria relative to awarding a public contract are to be mentioned, first of all, in article 16 (1), dealing with the object of the call for tenders, having the following tenor:

"The object of the tender must be described in special specifications. The said special specifications, which constitute the basis for the contract to be concluded, must be established in a sufficiently clear and detailed way so that there can be no doubt about the nature and the execution of the contract. They is to indicate in particular, and insofar as possible in decreasing order of the importance assigned, the criterion or criteria taken into account in order to determine the bid that is the most advantageous from the economic viewpoint."

In chapter XIX, called award, the grand-ducal regulation of 3 August 2009 specifies the following in articles 88 and 89:

"Art. 88. (1) The contracts to be concluded by means of an open or a limited procedure are awarded by a decision, giving grounds, sent to the bidder having presented either the regular bid that is the most advantageous from the economic viewpoint, or the regular bid at the lowest price. One considers as a regular bid any bid that, after evaluation, conforms to requirements form the formal and technical viewpoints and complies with qualitative selection criteria that may be laid down in the special specifications.
(2) When the award is to be made on the basis of the principle of the bid that is the most advantageous economically speaking from the viewpoint of the awarding authority, the following

criteria connected with the object of the public contract in question are to be taken into account: quality, price, technical value, aesthetic and functional nature, the environmental characteristics, the social aspect, the cost of use, the profitability, after-sale service and technical assistance, the delivery date and the period for delivery or execution.

The awarding authority is free to apply, for a given public contract, only part of the criteria listed in the foregoing paragraph.

Art 89. (1) The awarding authority is free to apply, for a given public contract, only part of the criteria listed in the foregoing paragraph. In the contract notice or in the special specifications, the awarding authority is to indicate the relative weighting it assigns to each of the chosen criteria in order to determine the bid that is the most advantageous from the economic viewpoint.

The said weighting may be expressed by providing for a range, the maximum and minimum points of which must be appropriate.

The method of rating the points must be specified in the special specifications and must be transparent.

(2) When, in the opinion of the awarding authority, weighting is impossible for reasons that can be demonstrated, it indicates, in the contract notice or in the special specifications, the decreasing order of importance of the criteria".

At the level of case-law, the Luxembourg administrative courts on several occasions have recalled the importance of the fundamental principles of equal treatment, non-discrimination and transparency in this domain, pointing out that: the award criteria defined by an awarding authority must be connected with the object of the contract, must not grant unlimited freedom of choice to the awarding authority, must be explicitly mentioned in the specifications or in market notice, and must respect in particular, the fundamental principles of equal treatment, non-discrimination and transparency. The duty to respect the principle of equal treatment corresponds to the very essence of the directives in the field of public contracts, and the bidders must be on an equal footing, both at the time at which they prepare their bids and at the time at which those bids are evaluated". (Court Adm. 7 July 2009, n° 25347C of the docket).

The notion of "sub-criteria" not enshrined in the legislative and regulatory texts was specified by case-law in the form of a decision issued by the administrative court on 14 January 2008 (n° 22756 of the docket) which explicitly referred to the case-law of the CJEU. Even if therefore, in Luxembourg law, the use of sub-criteria is authorised by virtue of the case-law in this domain, the rating of the various bidders by virtue of the said criteria that are not explicitly announced is possible only if the conditions as defined in decision C-331/04 by the CJEU are respected, the administrative court, in its above-mentioned decision of 14 January 2008 having recalled "that a breakdown carried out by sub-criteria is not prohibited in itself, as was properly noted by the government delegate, but all the same it is possible only as long as it does not modify the market award criteria defined in the specifications, it does not contain any elements that could have influenced the said weighting, and it does not take into account any elements that could have a discriminatory effect vis-a-vis one of the bidders".

We should specify the fact that in this particular case, concerning a public services contract, the court cancelled the bid in dispute on the ground that in the presence of 5 initial selection criteria appearing in the specifications, the rating document underlying the selection made was then based on 13 sub-criteria without any objective rating rule for 8 of the said sub-criteria being

detectable. As a result, the administrative court reached the conclusion that the grounds given for the award decision did not make it possible to verify that the initial criteria appearing in the specifications had been respected.
Finally, let us indicate that in Luxembourg law, no distinction is made between sub-criteria and "judgemental elements".

5.3. What consequence does case-law draw from the use of sub-criteria that are not explicitly announced? Same question for the judgmental elements.

It is appropriate to refer you to the response given to point 5.2. above, namely, that use of sub-criteria that are not explicitly announced outside the conditions as defined in decision C-331/04 by the CJEU entails cancellation of the award decision.

5.4. Do case-law or national legislation require advance communication of the method to be used in evaluating the bids?

In the light of the content of the applicable legislative and regulatory texts and of case-law indications, it is appropriate to answer the question in the affirmative.

6. Horizontal internal cooperation [decisions by the CJEU 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 vs. Germany* (grand chamber))].

6.1. Does your Supreme Administrative Court run into any difficulties connected with the contracts concluded in connection with cooperation procedures?

As of now, the Luxembourg administrative courts have not yet been applied to in connection with problems similar to the ones described in the CJEU decisions C-15/13 (contract awards known as *" in house"* or the notion of *"analogous control")*, C-159/11 (conclusion of a contract between two public entities instituting cooperation between them under the cover of a public service mission), C-386-11 (cooperation contract between two public entities contracting with a view to execution of a joint public service mission by which a public entity entrusts another public entity with activities relative to clean public billings involving financial compensation with a possibility, for the latter entity, of calling on third parties for carrying out the said mission), and C-480/06 (a contract relative to the elimination of waste concluded between territorial authorities and not having been the object of a call for tenders).

6.2. Concretely speaking, how is the examination of the condition relative to analogous control carried out?

The notion of *"analogous control"* has never yet been the object of examination by the Luxembourg administrative courts.

7. **<u>The confidentiality of bids on the occasion of judicial review</u> (case-law references CJEU, 14 February 2008, Varec, C-450/06)**

7.1. Is the confidentiality of documents called on frequently in the contentious proceedings relative to public contracts that you handle?

In spite of a limited number of contentious proceedings relative to public contracts, the issue of the confidentiality of documents arises relatively frequently in the cases submitted to the administrative courts.

7.2. How do national legislations or case-law reconcile confidentiality with the grounds given by the awarding authorities and the courts?

Luxembourg case-law has had an opportunity to express itself on several occasions as concerns the problem of reconciling the confidential nature of sensitive documents with the obligation to indicate reasons for the administrative decisions made in connection with public contracts.

Thus the Supreme Administrative Court, in a decision dated 3 October 2002 (n° 14687C of the docket), by confirmation of a decision issued by the administrative court on 6 February 2002, expressed itself as follows: "*On the specific subject of public bids, the right of access to the administrative dossier is to be applied more or less strictly, as a function of the stage of the proceedings, in the sense that the obligation to keep certain documents secret dominates the <u>award preparatory phase</u>, while it fades, but without disappearing, after conclusion of the contract in favour of the requirement for transparency of contract proceedings. This nuanced application of the right of access to the dossier results from the need for reconciling the two imperatives governing the system of public contracts, namely, the concern for respecting the free play of competition, on one hand, and the guarantee of a transparent and regular contract procedure on the other hand*".

In this particular case it was a question of a decision to cancel a public tender made by the awarding authority on the ground that the prices indicated by the bidders were exaggerated, the awarding authority basing itself in this context on an estimate by an outside company, but which it refused to communicate.

But to arrive at a solution, the Supreme Administrative Court emphasized *"<u>the universal nature and the functional importance of the general principle known as representation of all sides,</u> not only in connection with legal proceedings, but also with respect to administrative procedures*", a general principle that "*finds itself formally imposed on the administration's decision-making process by article 12 of the grand-ducal regulation of 8 June 1979 relative to non-contentious administrative proceedings, a text that confers, on persons subject to the administration, a right to access to the documents on which the administration has based itself or intends to base itself at the time of development of a decision*".

In another particular case, the judge in summary proceedings of the administrative court, by an order dated 16 November 2006, expressed himself as follows on the point of the problem raised concerning the unit prices of a bid that one of the competitors refused to make public.

"The bidders may legitimately refuse to disclose the unit prices that they charge to their competitors and to third parties, and the administration, acting as referee, is then in possession of all of the figures emanating from the various bidders, without its being entitled to communicate them to the protestors in connection with complaints or contentious proceedings. The procedural position of the administration changes, however, in case of recourse to contentious proceedings aimed at an award decision, the administration then holding status as party, and no longer as referee, the latter role being up to the judge. But the latter, because of the adversarial nature of the proceedings and the communicability of all of the documents filed, does not then possess information from which the administration could benefit in order to make its decision, so that he finds himself in a position making it very difficult to check on the legality of the said decision looking beyond the strictly formal conditions, a check that is insufficient in the light of the law, which moreover requires observance of certain basic conditions such as, precisely, the one relative to a normal bid price. Hence the judge may then only limit himself to presumptions in order to develop his conviction", while pointing out that "*two rights that are equivalent a priori, mainly, the one concerning the adversarial nature of the legal proceedings, including proceedings in the expert's presence, and the one relative to business secrecy, risk paralysing each other"* and that "*neither the national legislator nor the community organs have provided the judge with an instrument enabling him to have information as complete as the administration's information in order to develop an opinion, in appropriate cases by means of adjustments to the adversarial nature of the proceedings, including proceedings involving the use of experts".*

7.3. Is the issue to access to confidential documents during the court phase settled by law in your country? Is it a question of general rules or of special rules for public contracts?

The issue of confidentiality of documents at the level of proceedings is governed both by a text of general application, namely, the provisions appearing in the grand-ducal regulation of 8 June 1979 relative to the procedure to be followed by the state administrations and those of the communes, hereinafter the *"grand-ducal regulation of 8 June 1979"*, as well as by various provisions appearing in the grand-ducal regulation of 3 August 2009.

Thus under the terms of article 12 of the grand-ducal regulation of 8 June 1979 *"any person concerned by an administrative decision that could attack his rights and interests is also entitled to obtain communication of the information elements on which the administration has based or intends to base itself".*

However, article 13 of the grand-ducal regulation of 8 June 1979 adjusts this rule by stating the following:

"In all cases, communication of documents may be refused if:

substantial public interests require maintenance of secrecy;

substantial private interests, particularly the ones of the parties having conflicting interests, require that secrecy be maintained or when documents containing information may constitute an attack on the intimacy of the private life of other persons;

danger is present and the decision cannot be postponed.

The document that the party has been prevented from consulting may not be used against it unless the authority has informed it in advance and in writing about the essential content relative to the case in question and has given it an opportunity to make its remarks".

At the level of the special regulation applicable to public contracts, the grand-ducal regulation of 3 August 2009 contains, in various places, specific provisions dealing with the confidentiality, respectively, of the documents and of the bids.

Thus with respect in the first place to the contract notice, article 39 (5) of the grand-ducal regulation of 3 August 2009 states that "one may not inform the bidders about the estimate that the awarding authority has established for execution of the total undertaking, or for only certain parts of the undertaking".

With respect to communication of the drawings and documents by the awarding authority to the various potential competitors with a view to development of the respective bids, article 41 of the grand-ducal regulation of 3 August 2009 provides that "the names of the competitors to which the bid documents have been delivered are not disclosed".

As concerns the provisions relative to the content of the bid, article 61 of the grand-ducal regulation of 3 August 2009 specifies that "the awarding authority shall see to it that the supporting calculations, the drawings and variants that accompany the bids remain the intellectual property of their author. The awarding authority may not use the said items, directly or indirectly, without the owner's authorisation. Furthermore, it shall see to it that the supporting calculations, drawings and variants are not disclosed to the other competitors or to third parties".

Finally, among the articles of the chapter dealing with the deposit and opening of the bids submitted by the bidders, article 66 (3) of the grand-ducal regulation of 3 August 2009 states that "no knowledge is provided concerning the unit prices, either before or after the award".

All of the general and specific provisions, the bulk of which moreover already appear in a grand-ducal regulation dated 2 January 1989 adopted in execution of prior legislation, have been applied and construed at the level of national case-law by the administrative Courts.

7.4. Is it the national judge who rules on the confidentiality of the documents? Does he have to consult a particular body in this connection? Is there a difference depending on whether the contentious proceedings are urgent or not?

In Luxembourg law, it is up to the national judge alone to rule on the confidential nature of the documents, without having to consult any other specific body in this connection.

There is no difference in principle whether the procedures are pending in the trial courts or before the presiding judge of the administrative court, sitting in summary proceedings. However, it should be noted that the judge in summary proceedings, ruling provisionally, makes only a

summary examination of the elements submitted to him and that therefore his powers are more limited in arriving at concrete solutions, particularly if he has to make a decision on the basis of actual elements that are marked by gaps and are incomplete made available to him by the respective parties to the proceedings.

7.5. What criteria are used by case-law to allow or reject access to documents indicated as confidential? When documents are considered confidential, how is the right to a fair trial organised?

In a general way, Luxembourg case-law, in the presence of documents considered confidential, makes a distinction as a function of the procedural stage to which the dossier is applicable.

On the subject of the problems that arise, the administrative court expressed itself in particular as follows: "*The bidders may legitimately refuse to disclose, to their competitor and to third parties, the unit prices that they charge, in the light in particular of the content of article 66 § 3 of the grand-ducal regulation of 7 July 2003* [now article 66 (3) of the grand-ducal regulation of 3 august 2009]*, and the administration, acting as referee, is then in possession of all of the figures emanating from the various bidders, without its being entitled to communicate them to the protestors in connection with complaints or recourse to contentious proceedings. – However, the administration's position changes in the case of court proceedings aimed at an award decision, the administration then holding status as party and no longer as referee, the latter role then being up to the court. But the court, because of the adversarial nature of the proceedings and of the communicability of all of the documents filed, then lacks information from which the Administration could benefit in making its decision, so that it finds itself in a position making it very awkward to check on the legality of the said decision other than in terms of strictly formal conditions, a check that is insufficient in the light of the law, which moreover requires observance of certain basic conditions such as, precisely, the ones relative to verification of the price in connection with a contract awarded to the bidder having presented the cheapest bid from the economic viewpoint. So it turns out in this case that two rights that are equivalent a priori, namely, the one concerning the adversarial nature of the court proceedings and the one relative to business secrecy, risk paralysing each other. Furthermore neither the national legislator nor the community organs have made an instrument available to the judge enabling him to have information as complete as the administration has in order to develop an opinion, if the case arises, by making adjustments to the adversarial nature of the proceedings. Finally, in the presence of a dispute the very object of which is a refusal to communicate administrative documents, the court could not make a decision concerning the applicability of a secret without knowing the exact tenor of the documents in dispute. The administrative courts, even within the framework of their power of checking on legality, are authorised all the same to order any investigatory measures that they consider necessary in the interest of resolution of disputes, a power that stems from the obligation of the judge of legality to verify whether the facts on which the administration bases itself are materially established beyond any doubt. Using the said power, the administrative courts are authorised in particular to request the competent public authorities to produce all files and documents that they consider necessary for their information, with the sole exception of the documents covered by secrecy guaranteed by law".* (administrative court, 5 July 2007, n° 22184 of the docket).

In this case, by application of these developments, the court of initial jurisdiction came up with a pragmatic solution and ordered communication by the State party, by a filing in the clerk's office, of various data contained in study reports with the possibility for the State party to

suppress passages containing data that were sensitive from the viewpoint of commercial and industrial secrecy.

Similarly, the Supreme Administrative Court, in a decision dated 24 May 2011 (n° 27947C of the docket), confirmed the grounds explained by the court of initial jurisdiction in the context of a case involving cancellation of a public bid due to overrunning the estimate, a jurisdiction that had found that secrecy in the commercial and industrial domain is not applicable to the administrative courts, pointing out that: *"Article 13 of the grand-ducal regulation of 8 June 1979 regulating non-contentious administrative proceedings does not have the object of governing communication of the administrative file to the judge, but solely governing its communication to the persons subject to the administration. To be able to judge the communicable nature or, on the either hand, the secret nature of the documents in the administrative dossier for the interested parties, the judge must have the entire dossier in the interest of a subsequent ruling on the request for communication. As an exception to the principle of representation of all sides, the said dossier is not to be communicated to the interested parties. This exception to the said general principle of law is necessarily applicable, given the fact that the refusal to communicate documents in the file constitutes the very object of the dispute. The fact is that deciding the contrary, i.e., associating the plaintiff with this court check and communicating to it the tenor of the documents in dispute, would be tantamount in fact to granting the application before any decision on the merits as concerns the existence of its right of communication".*

Similarly, it has been decided that "*the object of the general safeguard provision of article 13 of the grand-ducal regulation of 8 June 1979 is to guarantee, inter alia, business secrecy, or in other words, industrial and commercial secrecy. Thus it aims at protecting businesses against unfair competition, by preventing disclosure of the secrets of the processes and of economic and financial information that could harm their competitive ability. – This exception to the rule of the right to access to documents on which the administration based itself or intends to base itself in connection with a decision-making process applies, with respect to* public *bids, in a more or less strict way, as a function of the procedural stage. Thus the obligation to keep certain documents secret dominates the preparatory phase of the award, while it fades, but without disappearing all the same, after conclusion of the contract in favour of the requirement for transparency of the contract procedure. This nuanced application of the exception derived from the business secrecy obligation results from the need for reconciling the two imperatives governing the public contract system, namely the concern for respecting the free operation of competition, on one hand, and the guarantee of a transparent and regular contract procedure on the other. The fact is that freedom of competition can be conceived only within the framework of a contract procedure, guaranteed by a check, a posteriori, on the regular nature and the fairness of the contract procedure"* (administrative court, 16 February 1998, n° 9776 of the docket).

In this particular case, the court of initial jurisdiction, on the point of the confidential nature of the unit prices, applied these principles by holding that "*article 29 (7) of the grand-ducal regulation of 2 January 1989* [now article 66 (3) of the grand-ducal regulation of 3 August 2009] *institutes secrecy having to characterise the contract procedures until conclusion of the contract. – The fact is that the maintenance of secrecy concerning the unit prices, at the time of the opening session and until conclusion of the contract, is justified by the fact that the principle may, in various cases, result in cancellation of a public bid, in which case the*

communication of the unit prices would risk distorting the normal play of competition at the time of a new award by public bidder. – Even if it is still true that the said risk is not ruled out by communication of the units prices following conclusion of the contract, it being given, on one hand, that judicial cancellation could, theoretically, wind up with a new public bid, and, on the other hand, more generally because such information could be of interest to the competitors at the time of future public bids, it remains true all the same that the vital need for a check on fairness and the regular nature of the award procedure must necessarily, from this viewpoint, prevail over the guarantee of free play of competition".

Along the same lines, the Supreme Administrative Court, in a decision dated 3 October 2002 (n° 14687C of the docket), found that "article *23 (4) of the grand-ducal regulation of 2 January 1989* [now article 39 (5) of the grand-ducal regulation of 3 August 2009] *which precludes disclosure of the estimate before conclusion of the contract, does not affect the bidders' access to the administrative dossier after conclusion of the contract, particularly in connection with contentious proceedings aimed at verifying the legality of the awarding authority's decision".*