



*Seminar organized by the Supreme Administrative Court of Finland  
and ACA-Europe*

***“Recent case-law of the Court of Justice of the European Union and of the  
(Supreme) Administrative Courts in public procurement litigation”***

Helsinki 22 – 23 October 2015

**POLAND**

1. National legal system

1.1. Which court is responsible for the implementation of the appeal proceedings with respect to public procurement falling within the scope of the directives?

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

The rules on public procurement in Poland are provided by the Act of 29 January 2004 – *Public Procurement Law* (PPL). **Two review bodies exist in the field of public procurement:**

- 1) the National Appeal Chamber – the first level,
- 2) ordinary (civil) courts – the second level; these courts are responsible for the implementation of appeal proceedings with respect to public procurement falling within the scope of the European directives.

Legal protection measures are granted to economic operators and participants of the design contest, as well as other persons if they have or had interest in being awarded the contract and suffered or may suffer a damage as a result of the violation of the provisions of the Act – *Public Procurement Law*.

There are two main legal protection measures specified in this statute: an appeal to the National Appeal Chamber and a complaint to the court. **It should be underlined that this system is entirely beyond the jurisdiction of administrative courts.**





The appeal is examined by the National Appeal Chamber, in a panel composed of a single member. The Chairman of the Chamber may order the case to be examined by a panel of three members if it is found advisable due to the particular complexity or a precedential nature of the case. An appeal shall only be admissible against actions incompliant with the Act, performed by the contracting authority in the course of contract award procedure or against failure to act which the contracting authority is bound to perform under this Act. The Chamber issues a judgement on the dismissal or admission of an appeal.

According to the judgement of 13 December 2012 (C-465/11) of the Court of Justice of the European Union, the National Appeal Chamber “has been granted exclusive jurisdiction to hear and determine at first instance disputes between economic operators and competent authorities [and] does constitute a court or tribunal, within the meaning of the Article 267 TFEU, in the exercise of its jurisdiction in relation to those provisions, as is the case in the main proceedings”.

It seems, that the National Appeal Chamber is a kind of the independent administrative authority. In other words, this body is a court in its functional sense. It should be noted that currently there is not a clear-cut boundary between courts, especially administrative courts, and quasi-judicial administrative bodies (“tribunals” as they are called in the tradition of many common law systems).

The parties and participants of the appeal procedure may complain to the civil court against the Chamber’s ruling. The complaint should be lodged with the district court competent for the seat or place of residence of the contracting authority.

In Polish legal system exists also **a central government body competent for matters concerning public contracts – President of the Public Procurement Office** (PPO President), who is appointed by the Prime Minister. This body controls the award of contracts, although it plays a lower role in litigation procedures. The PPO President may impose a financial penalty and infer to the court for the quash of procurement contract in its entirety or in part.





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

The litigation procedure described above constitutes two-instance system. The National Appeal Chamber (first instance) and the civil court (second instance) are endowed with similar competences and may:

- 1) if the public contract has not been concluded – demand performance or repetition or demand cancellation of action performed by the contracting authority;
- 2) if the public contract has been concluded - invalidate the contract or impose a financial penalty.

1.1.3. What exactly is the role of the Supreme Administrative Court<sup>1</sup> in disputes pertaining to procurement contracts (judge for full remedy proceedings, court of cassation, judge for abuse of power?)

**In Poland, as previously mentioned, administrative courts, including Supreme Administrative Court, basically have no jurisdiction concerning public procurement litigation.** However, the administrative courts examine complaints against the PPO President decisions, imposing a financial penalty. Taking into account the whole system, this role can be characterised as marginal; only 4 cases was judged by Supreme Administrative Court in 2013 year, and 6 cases in 2014 year.

It should also be noted that the regulations of PPL do not apply to construction works concessions. According to the Article 27 of the Act *on Concession for Construction Works or Services* of 9 January 2009, the interested entity whose legal interest in being awarded the concession contract was or may be prejudiced as the result of actions undertaken by the concession-granting has the right to lodge a complaint to the administrative court (Supreme Administrative Court judged only 7 cases regarding construction works concessions since 2011 year). A complaint

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<sup>1</sup> 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.





may be lodged upon prior written summon of the appropriate authority to eliminate the breach of law.

It's safe to say, that **there are two regimes of legal protection in the field of public procurement in Poland: 1) general, which is define by the Act – *Public Procurement Law*, 2) special, limited but more informal, which is define by the *Act on Concession for Construction Works or Services*.**

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

See above – point 1.1.2.

## 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.)?

According to PPL (Art. 154 p.16), the PPO President prepares and presents to the (Polish) Council of Ministers and to the European Commission annual reports on the functioning of public procurement system.

The National Appeal Chamber examines the appeal within 15 days from the date of its submission to the Chairman of the Chamber (Art. 189 of PPL).

The court shall forthwith examine the complaint, however not later than within 1 month of the day, on which the complaint was received by the court (Art. 198f of PPL).





According to the *Act on Concession for Construction Works and Services* (Art. 31), the administrative court shall examine the complaint forthwith, however not later than within 30 days from the day of receipt of the case files along with replay to complaint.

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?

See above – p. 2.1

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 <sup>2</sup>		
		First instance court <sup>3</sup>	Second instance court <sup>3</sup>	Supreme Administrative court/Court of last resort <sup>3</sup>
2013				
2014				

<sup>2</sup> 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.

<sup>3</sup> If applicable.





Not applicable to administrative courts. In regard to complaints against the PPO President decisions, imposing a financial penalty - see above: p.1.1.3.

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 <sup>4</sup>		
		First instance court <sup>5</sup>	Second instance court <sup>3</sup>	Supreme Administrative court/Court of last resort <sup>3</sup>
2013				
2014				

Not applicable to administrative courts. In regard to complaints against the PPO President decisions, imposing a financial penalty - see above: p.1.1.3.

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?

<sup>4</sup> 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.

<sup>5</sup> If applicable.





No

### 3. Dialogue between the Supreme Administrative Court and the CJEU

Not applicable (see above – p. 1.1.1. and p.1.1.3.)

3.1. How many requests for preliminary rulings has your Supreme Administrative Court made to the CJEU regarding public procurement cases?

As mentioned above, the National Appeal Chamber, has basically first-instance jurisdiction regarding public procurement cases and it can requests for preliminary rulings to the CJEU, as it did in case C-465/11 (cited in p.1.1.1.).

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?

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?

### 4. Implementation of the remedies laid down in Directives 89/665/EEC and 92/13/EEC

Not applicable (see above – p. 1.1.1. and p.1.1.3.).

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?

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?





- 4.3. In how many cases has the balance of interests procedure been implemented for not formulating the interim or suspension measures?
- 4.4. Is the national jurisprudence subject to the balance of interests under certain conditions?
- 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?
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)
- Not applicable (see above – p. 1.1.1. and p.1.1.3.)
- 5.1. How does your Court implement this jurisprudence in its everyday practice?
- 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?
- 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?
- 5.4. Does the national legislation or jurisprudence require any prior communication as regards the assessment method for the offers?
6. In-house horizontal cooperation [CJEU cases, C-15/13, Technische Universität Hamburg-Harburg; C-386/11, Piepenbrock Dienstleistungen; C-





159/11, Azienda Sanitaria Locale di Lecce and C-480/06, Commission v. Germany (Grand Chamber)].

- 6.1. Did your Supreme Administrative Court face any difficulties as regards the procurement contracts in the cooperation proceedings?
- 6.2. In concrete terms, how is the examination of the fulfilment of these carried out?

Not applicable (see above – p. 1.1.1. and p.1.1.3.)

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

Not applicable (see above – p. 1.1.1. and p.1.1.3.), with the exception of proceedings regarding: 1) complaints against the PPO President decisions, imposing a financial penalty, and 2) complaints in the matters of concession for construction works or services. **The Act of 30 August 2002 – Law on Proceedings before Administrative Courts provides that court sessions shall be public, and the decision-making court shall hear cases at trial.** However, the Article 29 p. 2 of the *Act on Concession for Construction Works and Services* states, that on the concession-granting authority's motion the regional administrative court **in a closed session**, may, by means of decision grant his consent to conclusion of concession contract.

- 7.1. Is the confidentiality of the documents frequently invoked in litigations concerning public procurement that you deal with?
- 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?
- 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?
- 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?





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that are classified as confidential? Is there a difference depending on whether accelerated proceedings are applied or not?

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

