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THE SUPREME ADMINISTRATIVE COURT

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

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

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PORTUGAL

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?
1.1.2. Is there a distribution of functions between these courts (disputes for a substantiated decision? Compensation? Declaration of ineffectiveness? Any others?)
1.1.3. What exactly is the role of the Supreme Administrative Court[1] in disputes pertaining to procurement contracts (judge for full remedy proceedings, court of cassation, judge for abuse of power?)
1.1.4. Does the distribution between the courts change in relation to the proceedings for the measures introduced after concluding the contract?

In Portugal, in addition to the Constitutional Court, there are the following categories of court:

a) The Supreme Court of Justice and the courts of law of first and second instance;

b) The Supreme Administrative Court and the administrative and tax courts of first and second instance;

c) The Court of Auditors.

There may be maritime courts, arbitration tribunals and justices of the peace.

The Supreme Court of Justice and the courts of law of first and second instance constitute what you call the judiciary courts. These courts of law are the general courts in civil and criminal matters and shall exercise jurisdiction in every area that is not allocated to other judicial orders.

[1] The Supreme Administrative Court refers to a court that is a member court of the ACA and that acts as a court of last instance.

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The Supreme Administrative Court and the administrative and tax courts of first and second instance have the competence to hear and try contested actions and appeals whose object is to settle disputes arising from administrative and fiscal legal relations.

Any matter (claims for a substantiated decision, compensation, declaration of ineffectiveness, any other) concerning the implementation of the appeal proceedings with respect to public procurement falling within the scope of the directives is to be dealt with by the administrative courts. There is no special court on theses disputes.

The Supreme Administrative Court caseload consists almost entirely cassation cases, and these are subject to a leave to appeal decision by a chamber comprising three of the most senior justices of the Court. There are, however, some very few cases where the Supreme Administrative Court has original jurisdiction: these are the cases where some very high authorities are defendants in the dispute (for instance, the judicial review of administrative decisions taken by the president of the parliament, by the Council of ministers, by the prime minister). And there are also some few cases that come to review from the first instance courts directly to the Supreme Court (this is called, review *per saltum)*.

There is no distribution change between the courts in relation to the proceedings for the measures introduced after concluding the contract.

2. Length of court proceedings jurisdiction

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.)?

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?

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?

The Code of Procedure in the Administrative Courts – hereinafter CPTA (acronym of *Código de Processo nos Tribunais Administrativos*), stipulates very precise deadlines to public procurement proceedings, especially on the pre-contractual disputes.
On this subject it is useful to notice what is established in articles 101, 102 and 103 of the CPTA:
- Article 101º establishes that the pre-contractual litigation cases are urgent and must be brought within one month of notification of the interested, or, if there will be no notification, the date of knowledge of the act;
- Article 102º establishes the procedural time limits to be observed: a) 20 days to contest the claim; b) 10 days for the decision of the judge or the judge rapporteur, or to submit the case to trial; c) 5 days for all other cases;
- Article 103 stipulates that when it deems advisable to clarify the case the fastest as possible, the court may, on its own initiative or at the request of either parties choose to hold a public hearing on the matter of fact and law; after the hearing the oral closing arguments are made at the end of which the sentence is immediately served.

And on interim measures the CPTA also determines the urgency of the proceedings establishing, for instance, under article 119, that the judge or the judge rapporteur hands down decision within five days after the last date of submission of the answer to the demand or the course of their term, or the production of evidence, when this has taken place.

For the moment we do not have any official statistics discriminating the data required above.
The following relates to the Supreme Administrative Court and are provisional data (as long as it is very limited the number of cases with a preliminary ruling by the CJEU, as well as direct appeal cases and interim procedures, they are not considered, here):

Year of case resolution

2014 –
22 cases on public procurement proceedings;
Average time (calculated in working days) for the leave to appeal judgment (granting or refusing): 16,57;
Average time (calculated in working days) for the final judgment (time for granting leave to appeal, plus time for the final decision): 91,75

Unlike what happens with the Code of Criminal Procedure, neither the Code of Civil Procedure nor the Code of Procedure in the Administrative Courts contains a specific mechanism to requesting acceleration of proceedings.
It must be said, however, that there is a rule in the Code of Civil Procedure that may have the same impact. In fact, according to its article 156, as long as the court has not enacted the prescribed act three months after the time determined by law the superior judicial council has to be informed in order to pursue the adequate measures. At the same time, the president of the court concerned may also enact the necessary measures to the quick processing of to the case. All this apply to all the administrative courts.
In practice, in interim measures and pre-contractual cases these mechanisms have not been applied. In fact, because these proceedings are legally defined as urgent proceedings, they have to be dealt with priority over any others, and the courts try the most to respect the time defined by the statute.

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?

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?

Most recent requests for a preliminary ruling:

Year 2015
Request of 09 April 2015, case 01472/14, concerning Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts on matter regarding the rejection of the tender that is not accompanied by any evidence accounting for the low level of price or costs procedures - abnormally low tender – (no decision yet by the CJEU);

Year 2013
Request of 24 October 2013, case 0840/13: Court of Justice C - 601/13, judgment 26 March 2015: «With regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, Article 53(1)(a) of Directive

2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts does not preclude the contracting authority from using a criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract and which takes into consideration the composition of the team and the experience and academic and professional background of the team members».
Final judgment of the Supreme Administrative Court - 30 April 2015;

Year 2012
Request of 06 November 2012, case 0718/12: Court of Justice C - 574/12, judgment 19 June 2014: «Where the contractor under a public contract is a non-profit association which, at the time of the award of the contract, has as partners not only public sector entities but also private social solidarity institutions carrying out non-profit activities, the requirement for 'similar control', established by the case-law of the Court in order that the award of a public contract may be regarded as an in-house operation, is not met, so that Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts applies».
Final judgment of the Supreme Administrative Court - 25 September 2014

There is no documentation department that systematically analyses the judgements of the CJEU. There is, however, an informal group of members with the coordination of the vice president which periodically meets to take notice of the more important cases dealt with by the CJEU. Following these meetings it is given an account to all the members of the Supreme Administrative Court.

The Supreme Administrative Court, as well as the other courts, quote and make reference to the jurisprudence of the CJEU, depending on the circumstances of the specific case.

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?
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?

Every administrative court is empowered to declare a public contract ineffective or to impose alternative or other remedies.
In general terms, the courts have to obey to the principle of *non ultra petita.*
However, it is considered not to infringe this principle some situations defined by the very CPTA as an objective modification of the proceedings: when, in cases initiated against the Administration, there is a situation of absolute impossibility to the satisfaction of the interests of the author, or the compliance by the Administration to the duties that would be imposed to it would lead to an exceptional harm to the public interest, the court dismisses the application in question and invites the parties to agree, within 20 days, the amount of compensation due (vide article 45). This rule applies to the pre contractual litigation (article 102, 5)

In interim proceedings there is also the possibility of modification. According to article 120, 3, the protective measures to be taken should be limited to what is necessary to avoid damage to the interests defended by the applicant, but the court, after hearing the parties, may adopt other measures, instead of that or those which have been specifically required, when it is deemed appropriate to avoid injury of those interests and be less burdensome for other interests, public or private, involved.

Moreover, according to article 95 of the Code of Procedure in the Administrative Courts, when examining a remedy against an administrative act, courts should decide not only over the strict invalidity causes brought up by the complainant but also they should, after hearing the parties, decide taking into account other invalidity causes they may have discovered in the course of their analysis.

In principle, every person interested in the public procurement procedure concerned (candidate, tenderer), is entitled to demand that the public contract be declared ineffective. In certain circumstances, the public prosecution office, NGOs and local authorities may also present a file against the public contract effectiveness.

The Portuguese case law on the balance of interests has mainly been developed in the light of a general rule on the interim measures. This rule says that the adoption of the providence is to be refused if properly weighed the public and private interests in presence, damage that would result from its concession prove superior to what may result from his refusal, and can not be avoided or mitigated by the adoption of other measures.

The current Portuguese Public Procurement Code (or Public Contracts Code) – CCP (acronym of *Código dos Contratos Públicos*) also establishes that the courts may not fully considerer the consequences that would derive of the infringement of previous administrative procedural rules when the balance of interest so determines. That is the case, for instance, when the courts deem that the annulment or ineffectiveness of the contract would be disproportionate or contrary to the good faith, and when it is without doubt that the procedural error committed during the tender procedure was not a determining factor for the choice of the contracting partner (article 283º).

In the light of Law nº 100/2015, of 19 August, the Code of Procedure in the Administrative Courts will be amended soon in order to contemplate that since there is a lawsuit against the contract award decision this decision is automatically suspended. In the original version of the CPTA, the automatic suspension only occurs with the request for interim measures.
At the same time the courts will be able, under demand, to lift the suspension, if the balance of interests so determines, more or less the same way already established on the interim measures procedures.

5. Division of the award criteria into award sub criteria, balancing the award sub criteria, 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?
   5.2. Does the jurisprudence or legislation allow the use of sub criteria that is not explicitly stated, and if so, under what conditions? Does the jurisprudence or legislation determine the sub criteria? Does the jurisprudence or legislation differentiate between the sub criteria and the assessment criteria?
   5.3. What are the consequences of the jurisprudence using sub criteria 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?

The Portuguese jurisprudence has long been following the general principle that the criteria and sub criteria have to be identified in the specific rules governing the invitation to tender, that is, in the procurement documents, (e.g., case 048343, judgment of 15-01-2002, case 077/02, judgment of 18-06-2003, 01977/03, judgment of 28-07-2004).
Strictly as for the sub criteria, it has been admitted its formulation after the public notice, provided that it be before the knowledge of the tenders: more or less in the light of the same strict circumstances that are referred to in Lianakis, C - 532/06 (e.g., case 0173/04, judgement of 17-03-2004).
At present, the Portuguese Public Procurement Code establishes that in open procedures the procurement documents must specify the contract award criteria and sub criteria (article 132, 1, n)).
According to the Portuguese case law, while the criteria and sub criteria have to be specified in the procurement documents, assessment criteria are not subject to such restriction.
The infringement of the rules relating to the time of explicit specification of the criteria and sub criteria may determine the judicial annulment of the award decision.
As long as nothing different is determined by statute or regulation, the award decision is taken after hearing the candidates (article 147). So, at least at that time, the candidates have to know the assessment criteria that the awarding is intending to observe.

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?

The request of the Supreme Administrative Court on its case 0718/12, Court of Justice C - 574/12 (see point 3., above), signals the difficulties with this matter.

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?
   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 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?

The Portuguese Public Procurement Code establishes (article 66º) that any bidder may demand the public procurement award authority that the documents or some of the documents that constitute their tender be classified as involving commercial, industrial military or other secrecy. The award authority must decide after hearing the other candidates. That decision may be appealed before the administrative courts.

In general terms, it is the Law no. 46/2007, of 24 August 2007, that rules the matter:
«Article 6
Restrictions on the right of access
1. Documents which contain information, knowledge of which is deemed capable of endangering or damaging the internal and external security of the State, shall be subject to prohibited access or access with authorisation, for such time as is strictly necessary, by means of their classification as such in accordance with specific legislation.
2. Access to documents concerning the confidentiality of legal proceedings shall be governed by specific legislation.
3. Access to administrative documents which are preparatory to a decision or which are included in incomplete files may be delayed until the decision in question is taken, the file is archived, or one year has passed since they were drawn up.
4. Access to inquiries and investigations shall occur after the time period for any disciplinary proceedings has passed.
5. Third parties shall only possess the right of access to nominative documents if they are in possession of written authorisation from the person to whom the data refer, or if they demonstrate a direct, personal and legitimate interest which is sufficiently important under the principle of proportionality.
6. Third parties shall only possess the right of access to administrative documents which contain commercial or industrial secrets or the internal life of a company, if they are in possession of written authorisation from the company in question, or if they demonstrate a direct, personal and legitimate interest which is sufficiently important under the principle of proportionality.

7. Administrative documents which are subject to restricted access shall be the object of partial communication whenever it is possible to expunge the information concerning the reserved matter».

«Article 15
Right of complaint
1. Applicants may complain to CADA [The Commission on Access to Administrative Documents] about a lack of response, denial of an application, or any other decision which restricts access to administrative documents.
2. A complaint shall interrupt the time period for judicial submission of a request for a court order to provide information, consult files, or issue certificates, and shall be made within the said time period, to which the provisions governing the submission to a court of procedural items shall apply mutatis mutandis.
3. In the event that the complaint is not summarily dismissed, CADA shall invite the body to which the application was made to respond to the complaint within ten days.
4. In both the case of a complaint and that of the consultation provided for by Article 14(1), CADA shall have forty days in which to draw up the applicable situation assessment report and send it with its due conclusions to all the interested parties.
5. Once it has received the report referred to by the previous paragraph, the body to which the application was made shall communicate its duly justified final decision to the applicant within ten days, failing which there shall be deemed to be an absence of decision.
6. An interested party may impugn either the decision or the absence of decision referred to by the previous paragraph before the administrative courts, whereupon the rules governing the process of requesting a court order referred to by paragraph (2) above shall apply».

The CPTA establishes an urgent proceeding on the subject - articles 104 to 108.
As it is said in article 104º, if it is not given full satisfaction to requests in exercise of the right to information or procedural right of access to administrative records and files, the interested party may apply to the administrative courts the subpoena of the administrative authority.

The problem may arise as a lateral problem when, for instance, the author of the judicial action complains that it had no right to the full understanding of the award decision because of the lack of access to the documents of the winner candidate. That was the situation in case 01977/03, judgment of 28-07-2004.
The Supreme Administrative reasoned then:
«The case-law of the administrative courts and of the Constitutional Court has been declaring the legal and constitutional conformity of restrictions of access to

administrative documents when that is imposed to the safeguard of other constitutional rights (inter alia, judgements of this Court of 13-02-97, case 41495 and of 15-0797, case 42504; judgements 188/92, 436/91 and 254/99, of Constitutional Court.
[…]
The Community case-law also underlines the need of safeguarding the industrial secrecy […] e.g. C-53/5, judgment of 24-06-86».

The right to a fair trial is examined on a case by case basis, the same way it is said in CJEU, 14 February 2008, Varec, C-450/06.

Lisboa, 15.09.2015