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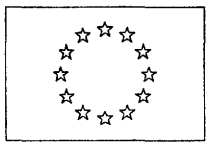

EUROPEAN COMMISSION

PUBLIC PROCUREMENT IN THE EUROPEAN UNION

PRACTICAL GUIDE ON REMEDIES

This guide has no legal value and does not necessarily represent the official position of the Commission

GENERAL CONTENTS

REMEDIES

INTRODUCTION

1. THE PURPOSE OF THIS GUIDE

This guide outlines the remedies available in the 15 Member States in respect of breaches of the European Union (EU) procurement rules, as implemented into national law. Separate chapters are devoted to the situation in each Member State. The guide is intended to increase awareness and understanding amongst suppliers to the public and utility sectors. Each chapter gives practical guidance on the steps open to suppliers who feel that they have suffered as a result of a breach.

The guide does not, however, purport to provide a detailed legal analysis of all the options since each case will clearly turn on its particular facts. Potential complainants will, therefore, need to take legal advice in appropriate cases.

2. THE SUBSTANTIVE PROCUREMENT RULES

The EU has laid down a series of laws, in the form of directives, which are intended to ensure that public procurement is open to European-wide competition and that suppliers and service providers in any EU Member State are given an equal opportunity to bid for and win public contracts. The rules constitute an important element of the Single Market programme.

One set of directives (the "public sector" directives) covers contracts awarded by central government, local authorities and other bodies in the public sector. The substantive rules for these public bodies (known as "contracting authorities") are set out in the following three directives:

i Council Directive 93/36/EEC of 14th June 1993 coordinating procedures for the award of public supply contracts ("the Supplies Directive")[1];

ii Council Directive 93/37/EEC of 14th June 1993 concerning the coordination of procedures for the award of public works contracts ("the Works Directive")[2]; and

iii Council Directive 92/50/EEC of 18th June 1992 relating to the coordination of procedures for the award of public service contracts ("the Services Directive")[3].

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1 Official Journal [1993] L 199/1

2 Official Journal [1993] L 199/54

3 Official Journal [1992] L 209/1

A parallel set of rules is set out in Council Directive 93/38/EEC of 14th June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ("the Utilities Directive")[4]. This Directive applies to procurement by utilities which are in the public sector or which, although in the private sector, carry out the specified activity on the basis of "special or exclusive rights".

3. THE VALUE THRESHOLDS

The procurement rules apply whenever an awarding authority intends to award a contract of more than a specified value. The value thresholds are as follows:

i ECU 5 million for all works contracts (construction and civil engineering);

ii Special Drawing Rights (SDR) 130,000 for supplies and services contracts awarded by Central Government authorities covered by the international accord known as the Government Procurement Agreement (GPA);

iii ECU 200,000 for supplies and services contracts that are put out by other public sector bodies (eg. local government);

iv ECU 400,000 for supplies and services contracts awarded by utility companies other than telecommunications operators; and

v ECU 600,000 for services and supplies contracts awarded by telecommunications utilities.

The equivalent amounts expressed in national currencies are fixed periodically for a two-year period and published in the Official Journal.

4. OBLIGATIONS AND POTENTIAL BREACHES

Before awarding a contract above the relevant threshold, the awarding authority is usually obliged to advertise the contract by way of a notice in the Supplement to the *Official Journal of the European Communities* and to carry out a fair, competitive procedure in order to select the successful supplier. Potential breaches of the procurement rules include the following:

i a failure to advertise a relevant contract in the *Official Journal*;

ii the awarding authority uses non-objective criteria in choosing its supplier, whether at the qualification or award stage, which discriminate between suppliers;

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[4] Official Journal [1993] L 199/84

iii the authority fails to specify its qualification and award criteria at the outset of the procedure or it does so but then changes them or applies them in an unfair way;

iv the authority lays down technical specifications or standards which discriminate against certain suppliers, for example because national standards are used;

v the authority fails in some other way to respect the duty to treat all tenderers equally.

The above is only a short and non-exhaustive list of the types of conduct which may well infringe the procurement rules. The remainder of this chapter considers the remedies potentially available to suppliers who believe that they have been prejudiced by such a breach.

5. THE REMEDIES DIRECTIVES

The substantive procurement rules are backed up by two directives specifically dealing with remedies (collectively "the Remedies Directives"), which are as follows:

i Council Directive 89/665/EEC of 21st December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts[5];

ii Council Directive 92/13/EEC of 25th February 1992 coordinating the laws, regulations and administrative provisions relating to the application of community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[6].

Directive 89/665 applies in relation to public procurement covered by the Supplies Directive, Works Directive and Services Directive. Remedies Directive 92/13, on the other hand, applies to procurement by utilities under the Utilities Directive.

The Remedies Directives have required each Member State to ensure effective remedies and means of enforcement are made available to suppliers, contractors and service providers who believe that they have been harmed by an infringement of the substantive procurement rules. This has usually been achieved through the enactment of legislation at national level, incorporating into national law the rights and remedies of complainants under the procurement rules. The provisions in each Member State are considered further in Chapters 2 to 16 of this guide.

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[5] Official Journal [1989] L 395/33

[6] Official Journal [1992] L 76/14

6. REMEDIES AVAILABLE IN NATIONAL COURTS AND TRIBUNALS

6.1 Interim measures

The Remedies Directives require Member States to ensure that interim measures are available. In particular, complainants must have the possibility of obtaining an interim suspension order which suspends the contested award procedure in question. The rapid availability of such interim orders is critical because, in almost all Member States, an award decision cannot be set aside once the resulting contract has been entered into. Hence, without interim orders, the complainant would be powerless to stop the relevant contract being entered into, leaving damages as his only possible remedy.

In general, interim suspension orders may not be granted after the contract in question has been entered into. It is therefore essential for complainants to seek such orders without delay as soon as they become aware of the alleged infringement of the procurement rules.

In order to obtain an interim order, the complainant may first have to establish that he has at least a prima facie arguable case. More importantly, the courts in most Member States apply some form of "balance of interests" test. Thus, the complainant may have to show that he is likely to suffer serious and possibly irreparable harm if the interim order is not granted. Furthermore, that harm must outweigh the inconvenience which the interim order would cause both to the awarding authority and to the public interest at large. The complainant might also have to show that the harm which he is likely to suffer, if the interim order is not granted, could not be adequately compensated through financial damages.

6.2 Set aside and amendment orders

The Remedies Directives also stipulate that national courts or tribunals must be given the power to lay down set aside orders and orders for the amendment of documents. As for interim measures, Member States are entitled to stipulate that set aside and amendment orders can only be requested prior to the date on which the contract in question is entered into. In deciding whether or not to grant such orders, national courts and tribunals generally apply a balance of interests test similar to the one which governs the grant of interim orders.

6.3 Damages

The Remedies Directives require the remedy of damages to be available to a complainant, regardless of whether or not the contract in question has been entered into. In all Member States, damages may only be granted in the ordinary civil courts, even though the complainant typically has to apply to an administrative court or tribunal in order to obtain interim or set aside orders. The Remedies Directives do not expand

upon the principles governing the availability and measure of damages. Nevertheless, these matters are subject to the general principle that there must be effective remedies for breaches of Community law. This wider principle was underlined by the European Court of Justice in the Joined Cases C-46/93, *Brasserie de Pêcheur* and C-48/93, *Factortame*. In its judgment of 5th March 1996, the Court stated that:

> **"Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damages sustained so as to ensure the effective protection for their rights".**

Subject to this general principle, damages largely remain to be determined by national law and practice.

Typically, a complainant seeking damages must prove that:

i the awarding authority has committed an infringement of the procurement rules;

ii the complainant has suffered some harm or loss; and

iii there is a direct causal link between the said breach and the damage suffered.

In some Member States, the complainant is not obliged to prove the fact of the breach if it brings a claim for damages in the civil courts after the contested decision in question has already been declared unlawful and set aside by an administrative court or tribunal.

In most Member States, it appears that an aggrieved tenderer should in principle be entitled to recover (all or in part) one or both of the following:

i the costs he incurred in preparing his tender and participating in the award procedure ("bid costs");

ii loss of the profit he would have derived if awarded the contract.

One recurring issue is whether, in order to recover damages, (or at least loss of profit) a complainant needs to prove that, in the absence of the alleged breach, he would have been awarded the contract in question. Alternatively, is it sufficient for the plaintiff to establish only that he had a real chance of winning the contract?

Remedies Directive 89/665 is silent on this question, whereas Directive 92/13 provides some clarification as regards the recovery of bid costs as against utilities. Directive 92/13 provides that where an aggrieved tenderer establishes that an infringement deprived him of a "real chance" of winning the contract, he is entitled (at least) to damages covering his bid costs. General principles and relevant case law in a significant number of Member States suggest that this "real chance" test would apply more generally to any claim for damages under either Remedies Directive.

6.4 Dissuasive penalty payments

Under Article 2(1) of Remedies Directive 92/13, applicable to utilities, Member States were given the option of introducing an alternative remedy to the usual combination of interim measures and set aside orders which must be made available, at least prior to the conclusion of the contract. Instead of those two remedies, Member States could legislate for the availability of dissuasive penalty payments where an infringement is not corrected or prevented. The option of dissuasive penalty payments has only been taken up by 3 Member States: France, Denmark (as regards offshore oil and gas utilities only) and Luxembourg.

7. COMPLAINTS TO THE EUROPEAN COMMISSION

As well as (or instead of) bringing an action before a national court, it is open to a supplier to lodge a complaint with the European Commission in Brussels at the following address: 200 rue de la Loi, 1049 Brussels. The Commission is responsible for overseeing compliance with the procurement directives and is used to handling complaints from individuals and firms.

Under the Remedies Directives, the Commission may invoke a "corrective" procedure when, prior to a contract being concluded, it considers that a clear and manifest infringement of EU procurement rules has been committed. In such a case, the Commission will notify the awarding authority and the relevant Member State Government of the circumstances of the alleged infringement. The Commission will set a time limit of at least 21 days (public sector) or 30 days (utility sectors) within which the national Government has to respond. In practice the awarding authority, through the medium of Government, is called upon to justify its conduct, rectify the infringement or suspend the award procedure.

In cases where the Commission is not satisfied with the explanations or actions of the awarding authority or the Member State Government, it may commence formal proceedings against the latter under Article 169 of the Treaty of Rome. Such an action may ultimately result in the European Court of Justice ("ECJ") issuing a ruling which condemns the Government in question for failing to fulfil its Community law obligations. In particularly serious cases, the Commission might also ask the ECJ to grant interim measures.

8. ALTERNATIVE DISPUTE RESOLUTION

Where a dispute arises relating to a procurement procedure, it will usually be in the interests of both sides (the authority and the supplier) to attempt to resolve the matter without embarking upon litigation. Hence, the supplier in question should consider informing the authority of its grievance, with a view to settling the matter in an amicable way. For example, the authority might be persuaded to remove a discriminatory technical standard or award criterion.

Where amicable discussions fail to resolve the matter, the parties could seek to reach a settlement through arbitration. The parties could agree to the appointment of an independent arbitrator drawn from a recognised body of independent arbitrators. An address for such a body in each Member State is given in the annex of useful addresses at the end of each national chapter below.

Where a dispute relates to procurement by a utility, a supplier may seek to invoke the conciliation procedure laid down in Remedies Directive 92/13 for the utilities sectors. Recourse to this conciliation procedure involves the following steps:

i the supplier forwards a request for use of the conciliation procedure to the European Commission;

ii the Commission asks the utility in question to state whether it is willing to take part in the conciliation procedure. The procedure can only continue if the utility gives its consent;

iii the Commission proposes a conciliator drawn from a list of independent persons. Both sides must state whether they accept the conciliator and each side designates an additional conciliator;

iv the applicants supplier, the utility and any other relevant candidate/tenderer have the opportunity to make representations to the conciliators; and

v the conciliators endeavour to reach agreement between the parties which is in accordance with Community law.

The utility or the supplier may withdraw from the procedure at any time. Unless the parties decide otherwise, each is responsible for its own costs.

AUSTRIA

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AUSTRIA

1. Implementation of the Remedies Directives

The laws on public procurement, as in other areas, reflect the Federal structure of government in Austria. At Federal level, all of the EU directives on procurement, including Remedies Directives 89/665 and 92/13, have been implemented through the Federal Procurement Act. At the level of the 9 regional States within Austria, each State has introduced its own laws governing procurement by bodies within the ambit of that State, to the extent that such procurement is caught by the EU directives. This chapter will concentrate mainly on the position at Federal level in Austria, although references will be made to the position at State level where appropriate.

The current version of the Federal Procurement Act entered into force on 1st January 1997 and amends an earlier version of the Act which has applied since 1994[7]. The consolidated text of the Act was published on 27 March 1997[8]. The newer Act applies to all public and utility contracts which fall above the relevant thresholds for application of the EU rules. Below the thresholds the standard rule ÖNORM A 2050, elaborated by a private association and published in Federal Law Gazette 17/1994, applies to all procurement procedures undertaken by public contracting authorities outside the utilities sectors[9].

The parts of the Act concerning remedies may be extended to public contracts below the threshold by way of a Government Regulation. Only one such Regulation has been issued to date, which states that the Federal Procurement Act also applies to certain works contracts with a value exceeding ECU 500,000.

The State Procurement Acts in the 9 Austrian States to some extent lag behind the full implementation achieved at Federal level by the 1997 Act. Hence, in some States, services contracts and the provisions on remedies in the utilities sectors still do not apply. These gaps in coverage are in the process of being rectified by the introduction of revised State Procurement Acts in each State.

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7 Bundesvergabegeset (Public Procurement Act) of 14 July 1993 (Federal Law Gazette 1993/462) amended by *Bundesgesetz, mit dem das Bundesvergabegesetz geändert wird*, literally "An Act to amend the Federal Procurement Act". (Federal Law Gazette 1996/776). The amending Act entered into force on 1st January 1997.

8 Federal Law Gazette I 1997/56. This publication of the Federal Procurement Act renumbers all sections and modifies all references to sections thereof, but it has not changed any legal position.

9 Apart from contracts for "non-priority" services, such as legal, hotel and restaurant services.

2. The relevant forum

2.1 Federal level

At Federal level, two administrative bodies have been set up to deal with procurement complaints: the *Vergabekontrollkommission* (Commission for the Control of Award Procedures; hereinafter "Control Commission") and the *Bundesvergabeamt* ("Public Procurement Agency"). Both of these bodies are located at the same site as the Federal Ministry of Economic Affairs in Vienna and are funded by the Ministry[10]. However, they are legally independent from the Ministry and are not bound by any government orders as regards their decisions on procurement matters. The Control Commission has a mediation function, while the Public Procurement Agency has powers of decision and is a court within the meaning of Article 177 of the EC Treaty.

The chairman and the vice-chairmen of the Public Procurement Agency must be judges. As for the Control Commission, its chairman and vice-chairmen do not have to be judges, but they must not come from awarding authorities or tenderers. Together with the other members of the Control Commission and the Public Procurement Agency, they are appointed by the Federal Government for a tenure of 5 years.

2.1.1 Role of the Control Commission

At first instance, a complainant has to address himself to the Control Commission. The Control Commission cannot make decisions; its purpose is merely to act as a mediator and to give non-binding opinions. The Control Commission may be asked to give an opinion in the following cases:

(1) before the award is made, the Control Commission may mediate as between candidates or tenderers and the awarding authority when the former claim that the authority did not comply with the provisions of the Federal Procurement Act;

(2) if the awarding authority intends to award the contract to a given tenderer, the authority may ask the Control Commission for an opinion to ascertain the legality of the intended award if the value of the contract exceeds ATS 200 million;

(3) after the award has been made, the awarding authority may ask the Control Commission for an opinion on the execution of the contract; and

(4) in order to guide them for their future procurement practices, awarding authorities may ask the Control Commission for a non-binding decision on the applicability of the Federal Procurement Act to their procurement procedures.

The first function listed above - mediation - is by far the most important in practice. The Control Commission must try to foster an amicable settlement between the

[10] The Federal Government may order that branches of the Control Commission and the Public Procurement Agency be set up outside Vienna, but at present no such branches exist.

complainant and the awarding authority. If this is not possible, the Control Commission has to make a recommendation for a decision. This recommendation is not binding.

When the Control Commission notifies the awarding authority of the complaint, the authority is prohibited from awarding the contract within four weeks beginning with the date of this notification. A contract concluded within this period is null and void, unless the complaint is dismissed for lack of jurisdiction or the parties reach an amicable settlement in the meantime. Thus, an aggrieved tenderer has the power, simply by filing a complaint, to prevent the contracting authority from awarding the contract for a period of four weeks (except if the Control Commission fails to notify the authority of the complaint). The awarding authority can no longer create a *fait accompli* after the initiation of a mediation procedure with the Control Commission simply by awarding the contract.

2.1.2 Jurisdiction of the Public Procurement Agency

The Public Procurement Agency has two competencies: .

(1) during the award procedure, it may annul decisions of the awarding authority and may issue interim measures; and

(2) after the award of the contract, it may on request of an aggrieved applicant or tenderer decide whether the awarding authority has unlawfully failed to award the contract to the most economically advantageous tender and, on request of the awarding authority, whether the claimant would not have had a real chance of winning the contract, had the awarding authority complied with the law.

If a tender is rejected, and the complainant claims that the rejection was illegal, the law sustains the fiction that the award procedure is still in force.

An award procedure may be brought before the Agency *prior to* the award of the contract only if a mediation procedure has first taken place before the Control Commission or if the Control Commission either fails to act within two weeks or declares itself incompetent to decide on the matter in question. Thus, a complainant has to attempt to reach an amicable settlement before the Control Commission before he may apply to the Public Procurement Agency.

A complaint to the Agency has to be filed within two weeks of the Control Commission giving its recommendation. However, the complaint is inadmissible if an amicable settlement has been reached before the Control Commission. Such a settlement precludes the Agency from ruling on the complaint, unless the complainant shows that the awarding authority has failed to adhere to the settlement.

For complaints brought before the Public Procurement Agency *after* the contract in question has been awarded, the time limit is six weeks, starting from the day on which the complainant learns of the award.

2.2 State level

The Austrian States have made use of their discretion when implementing the Directive 89/665, creating a diverse range of remedies systems at State level. Most have provided for review by a single body, rather than the two-stage system laid down at Federal level. However, Upper Austria has opted for a full two-stage system (first instance: State government of Upper Austria; second instance: the administrative tribunal of Upper Austria), while Lower Austria requires at least mediation before the State government of Lower Austria as a precondition for filing a complaint with the administrative tribunal of Lower Austria.

Carinthia, Burgenland, Upper Austria and Lower Austria have declared their administrative tribunals (*Unabhängige Verwaltungssenate*) competent to hear cases from complainants who claim that an awarding authority of the relevant State did not comply with the law. In Burgenland, a specialised chamber of the Independent Administrative Senate hears public procurement cases. In Upper Austria, complainants have to resort to the State government before they can appeal to the Independent Administrative Senate.

The other States have established specialised administrative bodies to hear public procurement cases. Vorarlberg, Tyrol and Vienna have installed authorities which are basically similar: the chairman of the body has to be a judge (in Tyrol: not the chairman, only one member), while half of the other members are appointed by the Chambers of Commerce and the Chamber of Civil Engineers, and the other half by State administrative authorities[11]. The chairman is appointed by the State Government. The same applies in Salzburg, except that the presiding judge is not a civil judge from a Federal court (as in the other States) but a member of the administrative tribunal of Salzburg (*Unabhängiger Verwaltungssenat Salzburg*).

The situation in Styria is fundamentally different: the newly installed body to control award procedures is located at the Court of Auditors for Styria and its members are drawn from that Court. Although the review body is integrated with the Court of Auditors from an organisational and budgetary point of view, neither the Court of Auditors nor the Styria State government has any influence over the rulings of the review body's members upon procurement matters. Those members remain unfettered in their decision-making and are not bound by any Government rules or orders.

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[11] The Constitutional Court of Austria held that the review body of Tyrol did not comply with Article 2(8) of Remedies Directive 89/665. This question has now been submitted to the European Court of Justice by Tyrol's review body itself (Case C-103/97, OJ C 142/10).

3. Available remedies

The remedies in this section are described by reference to the Federal Procurement Act. It may be noted, however, that essentially the same remedies are also available at State level. The only exceptions relate to services contracts and utilities contracts, where a number of the States have still not implemented the relevant EU directives.

3.1 Mediation/arbitration

At Federal level, the complainant may ask the Control Commission for a non-binding opinion, which is the prerequisite for a decision of the Public Procurement Agency. The Control Commission has no competence to deliver any enforceable acts, but is merely restricted to mediation and negotiation.

The 1997 Act provides that the awarding authority and a tenderer may enter into an agreement to resort to arbitration in order to resolve any dispute that may arise in the course of the procurement procedure. The arbitration is then governed by the Austrian Code on Civil Procedure.

3.2 Interim measures

A complainant in a procurement case at Federal level may apply to the Public Procurement Agency for an interim order suspending the whole procurement procedure or part of it (eg. the award of the contract) or ordering any measure to prevent the complainant from suffering damage. Such an application is only permissible if the complainant has first asked for mediation before the Control Commission, if an amicable settlement has not been reached and if the application for an interim order is filed within two weeks of the date on which the complainant learns of the Control Commission's recommendation. An amicable settlement precludes the issue of interim measures, unless the applicant attests that the awarding authority has failed to adhere to that settlement.

Interim measures are only available during the award procedure: once the contract in question has been entered into, interim measures will no longer be available. Under the Federal Procurement Act, the contract is deemed to be formally concluded as soon as the awarding authority gives the successful tenderer written notice that his tender has been accepted.

The 1997 Act ensures that a complainant has the opportunity to prevent the awarding authority from making an allegedly unlawful award, since:

(i) the awarding authority is precluded from awarding any contract within four weeks of it being notified that a complaint has been lodged with the Control Commission;

(ii) the Control Commission has to give a decision within two weeks; and

(iii) the Public Procurement Agency has to issue a decision concerning interim measures within five days.

The interim order may suspend the entire award procedure, annul certain decisions of the awarding authority or take any other appropriate steps to prevent and rectify damage caused to the complainant. Under § 116(5) of the 1997 Act, the maximum length of an interim measure is two months. As the time limit for the Public Procurement Agency to annul a decision of the awarding authority is two months, this means that the interim order will remain in force for so long as the Agency has not yet decided on the merits.

According to § 109(8) of the Act, should the awarding authority award a contract within the first four weeks, starting from the date it receives notification of the motion for a procedure before the Control Commission, the contract concluded between the authority and the successful tenderer is null and void. § 109(8), however, refers only to the first four weeks from the date when the authority receives notice. It does not explicitly stipulate that the contract will be null and void in cases where, in violation of the interim order laid down, it is unlawfully awarded *after* the expiry of that four week period. If the successful tenderer under that contract had not been made aware of the interim order, the contract concluded, although in violation of the interim order, may not be rescinded.

The applicant for an interim measure has to prove that his interests are endangered by the contested act of the awarding authority. According to Federal Procurement Act, the Public Procurement Agency has to take into account any possible negative effects when deciding whether to grant an interim measure. The Agency has to consider and balance the interests of the awarding authority, of the complainant and of the other tenderers/candidates. Furthermore, the Public Procurement Agency has to pay special attention to any public interest in the prompt execution of the award procedure. The burden of proof for establishing such a public interest is on the awarding authority.

3.3 Set aside or annulment orders

A complainant may apply to the Public Procurement Agency for an order annulling any of the decisions taken by an awarding authority in the course of an award procedure.

For an annulment order to be available, the complainant will need to show that:

i his legal rights, whether procedural or material, have been infringed;

ii the contested decision will have a decisive impact on the outcome of the award procedure; and

iii a mediation procedure was previously conducted before the Control Commission and did not lead to an agreed settlement. However, the Public Procurement Agency is not bound by the opinion given by the Control Commission in that earlier procedure.

At Federal level, the annulment order can relate to any decision taken in the course of the award procedure. The position is essentially the same at State level in seven of the nine Austrian regions. The position is, however, more restricted in Carinthia and Vienna. In Carinthia, not every decision handed down by the awarding authority may be contested. Only discriminatory specifications of an economic or technical nature

contained in the tender, non-admission to a closed or negotiated procedure or the unjustified dismissal of a tenderer may be subject to an annulment order. In Vienna, the legislation is even more restrictive: the only matters that may be contested are technical or economic specifications in the invitation to tender which have a discriminatory effect, and the dismissal of a tenderer in a negotiated or closed procedure who complies with the specifications in the invitation to tender.

In contrast to decisions taken during an award procedure, a signed contract cannot generally be annulled or suspended. This is because the principle of inalterability of contracts applies, even if the contract was concluded unlawfully. The Public Procurement Agency has no power to annul a contract. This power is reserved to the civil courts.

Under the law of contract, either party to the contract, but not an aggrieved tenderer, may apply for the annulment of the contract or of clauses of the contract, provided the contract or the clauses infringe a law and if that law is at least partly aimed at prohibiting contracts that breach it. In particular, clauses of the tender documents or the invitation to tender violating fundamental principles of the 1997 Act, eg. the non-discrimination principle, are null and void in respect of the contract awarded. The successful tenderer is not obliged to adhere to such a contract and does not need to apply to a court for its annulment. On the other hand, the contracting authority may rescind the contract awarded, if the successful tenderer has committed a crime (eg. bribery) to obtain the award.

3.4 Damages

Pursuant to § 122 Federal Procurement Act, a candidate or tenderer in a procurement award procedure may claim damages in the civil courts if the awarding authority breached the provisions of the Federal Procurement Act.

A complainant seeking damages first has to file a motion for a review procedure with the Public Procurement Agency. An action for damages is only admissible if the Agency has ascertained whether or not the awarding authority has violated a provision on public procurement. If such a violation has occurred, the Agency has to determine its impact upon the chances of the aggrieved tenderer of winning the contract. A claim for damages is excluded if the Public Procurement Agency decides that the tenderer would have had no real chance of winning the contract (§ 122(2)).

If the Public Procurement Agency holds that there was a breach and that the complainant had some chance of being awarded the contract in the event that the awarding authority had complied with the law, that complainant may take legal action against the awarding authority with little risk of failure, as the essential issue has already been decided. The procedure before the court will then concern only the extent of damage and the issue whether the awarding authority negligently breached the law. Moreover, the burden of proof is no longer on the complainant. Instead, it will be up to the awarding authority to prove that it did not negligently breach the law (shifting of the burden of proof). Since the awarding authority is obliged to be familiar with and to

comply with the law, there will hardly be any cases where the authority is not at fault with respect to its breach of legal provisions.

The 1997 amendment abolishing the previous exclusion of damages for lost profit, as well as the general civil law[12], make it clear that a rejected tenderer may recover lost profit, as well as bid preparation costs, before the civil courts. To do so, the tenderer must prove that he would have been awarded the contract, had the procurement rules been complied with. All State procurement Acts (except for Upper Austria and Carinthia) still exclude recovery of damages for lost profit, but these exclusions are likely to be lifted in the near future in order to reflect the recent change at Federal level.

As already mentioned, the Public Procurement Agency has to decide whether a complainant tenderer submitted the most economically advantageous tender and that he, therefore, should have been awarded the contract in the absence of the infringement. The complainant will be able to recover damages for loss of profit in the civil courts only if the Public Procurement Agency concludes that he did indeed submit the most economically advantageous tender. Otherwise, it appears that any damages award will (at best) be confined to recovery of bid costs.

To date, there have not yet been any published rulings where the civil courts have awarded damages in respect of claims under the Federal Procurement Act[13]. Consequently, the principles governing the availability and quantum of damages under the Act remain to be developed in practice.

4. Who may apply?

4.1 Federal level

The Federal Procurement Act makes it clear that both a *tenderer* (a firm or person who submits a tender) and a *candidate* (someone who has sought an invitation to take part in a restricted or negotiated procedure) may file a complaint before the Control Commission. Chambers of Commerce and other associations (*Interessenvertretungen*) also have standing to initiate a mediation procedure before the Control Commission on behalf of particular undertakings. Such bodies may not, however, file a motion for a review procedure before the Public Procurement Agency. The awarding authority itself may ask the Control Commission for a legal opinion.

Any interested candidate or tenderer who believes that his rights have been violated is entitled to take his case to the Public Procurement Agency, provided he previously tried to reach an amicable settlement of the case before the Control Commission. If a settlement was actually agreed, a complaint to the Public Procurement Agency is not

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12 § 1311 ABGB

13 Under the general civil law and before the Federal Procurement Act had been enacted, the Austrian Supreme Court of Civil Matters (*Oberster Gerichtshof*) granted damages in respect of a violation of the (at that time, non-binding) provisions on public procurement (Case 7 Ob 568/94). This award of damages was based on the general principle of *cupla in contrahendo*, on the basis that even before the conclusion of the contract the likely partners to that contract have to obey certain obligations of fairness.

allowed. Furthermore, the undertaking may not ask the Public Procurement Agency for a decision if the alleged violation did not have any impact on the award.

As already explained above, a favourable ruling by the Public Procurement Agency is a pre-condition for any action for damages in the civil courts.

4.2 State level

At State level, it is generally open to tenderers and candidates to lodge a complaint with the relevant review body. In Vienna, however, a rejected candidate may only bring an action if he can prove that he ought to have been admitted in the event that the awarding authority had complied with the law. In Vienna, there is also a requirement that, where the complainant is a tenderer, he proves that the contract would have been awarded to him if the awarding authority had complied with the law. In Salzburg, the complainant has to prove that the contested decision has a decisive impact on the award procedure.

In a majority of the States (Burgenland, Salzburg, Tyrol, Vorarlberg and Upper Austria), recourse to the administrative tribunal is only allowed after prior notification of the alleged illegality has been given to the awarding authority. In Lower Austria, a candidate or tenderer may only raise a complaint with the administrative tribunal if he first underwent a mediation procedure and if this procedure was unsuccessful. In Upper Austria, the complainant must first file its complaint with the State Government of Upper Austria, which gives a binding decision thereon. If that decision is negative, the complainant may appeal it to the administrative tribunal of Upper Austria.

In Carinthia, after the contract in question has been awarded, it is not necessary for the complainant to bring its complaint before the administrative tribunal of Carinthia. The action for damages may be lodged directly with the civil courts, which are not bound by any decision of the administrative tribunal. The court has to decide for itself whether the awarding authority has violated a public procurement provision.

5. Time limit for bringing actions

5.1 Federal level

There is no strict time limit for filing a complaint with the Control Commission. Under the Federal Procurement Act, a complainant has to lodge his complaint as soon as possible after learning of the alleged violation of the public procurement rules. However, since the awarding authority may award the contract for as long as it has not been notified of a pending action with the Control Commission, it is in the interests of any aggrieved party to initiate promptly any mediation procedure.

A complaint to the Public Procurement Agency prior to the award has to be filed within two weeks after the complainant learns of the decision of the Control Commission (§ 115(2) of the 1997 Act). If the complaint is filed after the award has been made, the time limit is six weeks, starting from the day the complainant learns of the award (§ 115(4)).

5.2 State level

In Vienna, the law distinguishes between the various causes on which the complaint is based: if the bid of a tenderer was rejected or if a candidate were excluded from a restricted or negotiated procedure, the complaint has to be filed within two weeks after notification of the rejection or, in the case of an accelerated procedure, within three days after notification. If the provisions of the tender documents or the invitation to tender do not comply with the State Procurement Act of Vienna, the complaint has to be filed at least two weeks before the end of the time limit for the award procedure, but in the case of an accelerated procedure this period is reduced to one week. If the complaint is filed after the award has been made, the time limit for the complaint is two weeks after the award has been published in the EC *Official Journal*. If there is no publication, the time limit is six months after the award has been made.

In Lower Austria, where the administrative tribunal is asked to ascertain if the awarding authority complied with the law, the complaint has to be filed within four weeks after the complainant becomes aware of the award (or six months if the complainant does not have knowledge if it). The application for an interim measure has to be made within one month after knowledge of the allegedly illegal act.

In Upper Austria, the motions for both claims, annulment and interim measures, have to be filed within two weeks after the authority's report on the alleged illegality is received by the complainant. In the absence of such a report, the motions have to be filed two weeks after the date on which the awarding authority should have had submitted such a report (two weeks after initial notification by the claimant). The contract must not be awarded during the period beginning with the notification by the tenderer to the contracting authority of an alleged violation and ending with the date for filing a complaint. After the award has been made, the complaint has to be filed within six weeks, starting from the date the complainant learned of the award.

In Salzburg, Carinthia, Burgenland and Vorarlberg, the complaint (including any application for an interim order) has to be filed within two weeks after the awarding authority's report on the alleged illegality is received by the complainant. After the award has been made, the complaint has to be filed within two weeks after the complainant has had knowledge of the award (or, in Burgenland and Vorarlberg, within 6 months if he had no such knowledge). In Carinthia, the awarding authority is prohibited from awarding the contract within four weeks of it receiving notice of the complaint. A contract awarded within this four-week period would be null and void.

In Tyrol, a complaint against a rejection of a bid has to be brought within 20 days after the rejection has been received. If a complaint is brought during a restricted or negotiated procedure, the complainant has to seek recourse within half of the application period. If the complaint is filed after the award, the time limit is two weeks after the publication of the award.

6 Procedure and duration of proceedings

6.1 Complaints before the Control Commission

The procedure before the Control Commission is very informal. It is a mediation procedure designed to reach an amicable settlement between the tenderer and the awarding authority. The motion may either be filed in writing or submitted orally to records kept by the Control Commission. The awarding authority is obliged to hand over the relevant records and to give the Control Commission any necessary additional information. If the authority fails to comply with a demand to see certain documents, the Control Commission may deem the allegations of the complainant to be true (default judgment: § 106 of the 1997 Act).

If the complaint is admissible, a hearing will take place. The procedural rules are laid down by the competent body of the Control Commission with a view to fostering an amicable settlement. If no settlement can be reached within two weeks, the Control Commission will make a non-binding recommendation.

6.2 Complaints before the Public Procurement Agency

The procedure before the Public Procurement Agency is governed by the Code on General Administrative Procedure[14]. The application may either be filed in writing or submitted orally to the Public Procurement Agency. The application has to indicate the procurement procedure in question, the awarding authority, the facts including the interest of the complainant in the award, the damage incurred or impending, reasons for the alleged illegality, the remedy claimed. In the case of an application before the award of the contract, it is also necessary to supply the recommendation of the Control Commission or an attestation that the Control Commission denied its competence or failed to act within two weeks.

After the application has been filed, it is up to the Public Procurement Agency to ascertain the relevant facts and to collate the evidence. The awarding authority is obliged to hand over the relevant records and to give the Public Procurement Agency any necessary additional information. If the authority fails to produce requested information, the Agency may draw adverse conclusions. The compliance of public contracting authorities with their obligation to supply requested information is safeguarded by special government orders and disciplinary actions which are applicable to public authorities. In addition, private contracting entities in the utilities sectors may be penalised for failing to supply requested information by way of a fine up to ATS 50,000, under a separate administrative procedure. The parties in the procedure may file applications and must be heard, but they cannot prevent the Agency from collecting additional evidence.

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[14] Art II § 2(c) *Einführungsgesetz zu den Verwaltungsverfahrensgesetzen*, which may be literally translated as Introductory Law to the Codes on Administrative Procedures.

If the Public Procurement Agency renders a decision on the merits, a hearing will take place. In fixing the procedure, the Agency is bound by principles of due process, fairness, equality and justice, but the process is relatively informal compared to procedures before the civil courts.

These procedural provisions apply equally to applications for interim measures. An interim measure may be issued in the general review procedure. It has to be issued within five days.

6.3 Actions for damages in the civil courts

The procedure before the civil courts is quite formal. The complainant's motion must be filed in writing with the competent court. The jurisdiction of the specific civil court depends on where the awarding authority has its seat. As regards actions for damages in procurement cases where the relevant thresholds are met, the *Landesgericht* where the awarding authority has its seat is competent, regardless of the amount of damages requested. The amount of damages sought determines the jurisdiction only in the case of public procurement procedures below the thresholds or ones which are governed by the Carinthian Procurement Act[15].

The application has to indicate the competent court, the parties to the civil suit, the matter in dispute (here: the requested amount of damages), the facts of the case, the facts in respect of jurisdiction of the civil court, a statement of reasons, the specific claim and the name of the complainant.

Civil procedures are lead partly by the judge and partly by the parties. It is up to the judge to control the overall procedure and to reject any actions which seriously infringe Austrian law. However, it is up to the parties to lodge specific motions in order to ascertain certain facts, to explain evidence and to determine the object of the procedure. The procedure is principally based on adversarial oral hearings and is governed by very formal procedural rules.

6.4 Duration of proceedings

As noted above, the Control Commission has to render a decision within two weeks of receiving a complaint. Prior to the award of the contract, the Public Procurement Agency has two months within which to lay down a ruling upon an application for annulment. Where the complainant seeks an interim order, the Agency must render its decision within 5 days. Once the contract has been concluded, the time limit for the Agency's decision is six months. The judge is bound to respect these motions and determinations and may not deviate from them.

The civil courts are under no such stringent time constrains when dealing with an action for damages. On average, it takes the civil courts about one to two years to issue a judgement upon an action for damages.

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[15] All other eight State Procurement Acts and the Federal Procurement Act lay down a special competence in favour of the *Landesgericht* where the awarding authority has its seat.

6.5 *Is it necessary to engage a lawyer?*

There is no requirement to be legally represented by a lawyer in disputes before the Federal Control Commission or the Procurement Agency, although it is usual practice for lawyers to be involved (particularly before the Agency). In the civil courts, it is generally compulsory for both parties to be represented by a lawyer. Certain contracting authorities, in particular the Austrian Republic, may be represented by a specific agency (*Finanzprokuratur*).

7. *Costs of proceedings*

An application to the Control Commission is not subject to any court fee or stamp duties. No additional costs for collecting evidence (eg. for experts, translators or on-site inspections) can occur, given that the Control Commission is only competent to mediate and has no formal decision-making powers. A complainant has to bear his own costs, such as costs of lawyers, incurred in connection with the filing of the complaint and the mediation. The complainant's costs are not reimbursed by the awarding authority, even if the complainant is successful.

An application to the Public Procurement Agency is subject to payment of stamp duty. The amount of duty payable is currently ATS 180 for each application made (eg. a complainant applying for an interim order and a set aside order would have to pay stamp duty of ATS 360) and ATS 45 for each enclosure (up to a maximum of ATS 270 for all enclosures). In addition, the complainant is required to bear any expenses incurred by the Public Procurement Agency for experts, translators, on-site inspections and the like, except where such expenses are incurred because of an application by the awarding authority (in which case the authority has to bear them).

The general principle before the Public Procurement Agency is that the complainant has to bear all of his costs. Thus, even if the awarding authority loses the case, it is not obliged to reimburse any costs of the successful complainant. Each party has to bear its own costs in connection with filing applications and the procedure before the Agency (eg. costs of lawyers, the stamp fee, expert costs, etc).

An application for damages to a civil court is subject to a court fee, which varies according to the amount of damages sought and is much higher than the stamp fee required by the Public Procurement Agency. All expenses incurred by the civil courts for experts, translators, etc have to be borne in the first instance by those parties which request them. However, contrary to the procedure before the Control Commission and the Public Procurement Agency, the unsuccessful party in the litigation has to reimburse all costs incurred by the "winning" party. Thus, the losing party has to reimburse not only the court fee and costs of gathering evidence, but also the lawyers' costs for preparing and presenting (or defending) the action for damages. The successful party might also be able to recover the costs which it incurred in connection with the earlier procedure before the Public Procurement Agency[16].

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[16] It remains to be seen whether the civil court would consider the costs incurred before the Public Procurement Agency as being necessary costs for obtaining damages.

8. Rights of appeal

8.1 Federal level

According to § 99(2) Federal Procurement Act, appeals against decisions issued by the Public Procurement Agency are not permitted, because the Agency makes decisions in first and last instance. As the Public Procurement Agency is a collegial agency with judicial character, complaints against its decisions to the Administrative Court are not allowed under principles of constitutional law. A complaint to the Constitutional Court would be possible, but only if the Public Procurement Agency was in violation of the Austrian Constitution, for example, by violating the due process of law or equity clause.

Any aggrieved party to a civil suit may appeal against a civil court ruling. The appeal is restricted to the facts alleged in the procedure of first instance. Provided the damages claim exceeds ATS 15,000, the appeal may dispute any violation of fundamental principles or other essential provisions of civil law of procedure, incorrect assessment of facts or incorrect legal assessment.

A further appeal against the decision of the court of second instance may be filed with the Austrian Supreme Court in Civil Matters (*Oberster Gerichtshof*). However such an appeal is restricted by various formal requirements: in particular, such an appeal may only be filed if the decision concerns a point of law which has not yet been clearly decided by the courts.

8.2 State level

Rights of appeal vary from State to State. In Tyrol, Vorarlberg and Vienna, the position mirrors that at Federal level, in that the State Control Commission is a collegial body with judicial character and its decisions cannot be appealed to the administrative courts. Again, a complaint may only be lodged with the Constitutional Court on the grounds of a violation of the Austrian Constitution. In all of the other States, on the other hand, decisions of the relevant review body are subject to rights of appeal to the administrative courts.

9. Enforcement of judgements

The Austrian code on the execution of administrative acts (*Verwaltungsvollstreckungsgesetz*) applies to the decisions of the Public Procurement Agency, including interim orders. In the event that such rulings are violated by an awarding authority, they can be immediately executed by means of financial or penal penalties.

Should an awarding authority fail to comply with the binding order of a civil court to pay a certain amount - which is highly unlikely - the complainant may file an application for a court order for execution of this amount with the competent civil court. This motion has to refer to the binding court ruling, stating the claim and the means by which the claim should be enforced (eg. seizure and liquidation of real estate or other assets belonging to the authority).

ANNEX 1

Useful addresses

(a) Relevant administrative review bodies on federal level

Bundes-Vergabekontrollkommission
(Federal Control Commission)
Dampfschiffstraße 4
1030 Wien

Bundesvergabeamt
(Public Procurement Agency)
Dampfschiffstraße 4
1030 Wien

(b) Relevant administrative review bodies in the Austrian States

Vergabekontrollsenat Amt der Wiener Landesregierung
(State Procurement Agency Vienna)
Rathaus
Stiege 5
Halbstock
Zimmer 200 F
1010 Wien

Tiroler Landesvergabeamt
(State Procurement Agency Tyrol)
Amt der Tiroler Landesregierung
Wilhelm-Greil-Straße 17
6020 Innsbruck

Vergabekontrollsenat Steiermark
(State Procurement Agency Styria)
Landesrechnungshof Steiermark
(Audit Office of Styria)
Hofgasse 15
8011 Graz

Vergabekontrollsenat Vorarlberg
(State Procurement Agency Vorarlberg)
Amt der Vorarlberger Landesregierung
Landhaus
Römerstraße 15
6900 Bregenz

Vergabekontrollsenat Salzburg
(State Procurement Agency Salzburg)
Amt der Salzburger Landesregierung
Chiemseehof
5010 Salzburg

Landesregierung Oberösterreich
Amt der Oberösterreich Landesregierung
Klosterstraße 7
4020 Linz

Unabhängiger Verwaltungssenat Oberösterreich
(Administrative Tribunal of Upper Austria)
Fabrikstraße 32
4020 Linz

Niederösterreichische Schlichtungsstelle fur öffentliche Aufträge
Amt der Niederösterreichischen Landesregierung
Landhausplatz 1
3109 St Pölten

Unabhängiger Verwaltungssenat
Niederösterreich
(Administrative Tribunal of Lower Austria)
Bundesländerhaus
Neugebäudeplatz 1, 4.
Stock
3100 St Pölten

Unabhängiger Verwaltungssenat
Kärnten
(Administrative Tribunal of
Carinthia)
Völkermarkter Ring 25
9021 Klagenfurt

Unabhängiger Verwaltungssenat Burgenland
(Administrative Tribunal of Burgenland)
Neusiedlerstraße 35-37/8
7000 Eisenstadt

(c) Other Austrian courts deciding on procurement cases

Verwaltungsgerichtshof
(Administrative Court)
Judenplatz 11
1010 Wien

(d) Selected Civil Courts

Oberster Gerichtshof
(Supreme Court in Civil Matters)
Justizpalast
Schmerlingplatz 10-11
1016 Wien

Oberlandesgericht Wien
Schmerlingplatz 11
1016 Wien

Oberlandesgericht Graz
Marburger Kai 49
8010 Graz

Oberlandesgericht Innsbruck
Maximilianstraße 4
6020 Innsbruck

Oberlandesgericht Linz
Gruberstraße 20
4020 Linz

Landesgericht für ZRS Wien
Justizpalast
Museumstraße 12
1010 Wien

Handelsgericht Wien
Riemergasse 7
1010 Wien

Landesgericht Eisenstadt
Wiener Straße 9
7000 Eisenstadt

Landesgericht Klagenfurt
Dobernigstraße 2
9020 Klagenfurt

Landesgericht St Pölten
Schießstattring 6
3100 St Pölten

Landesgericht Korneuburg
Hauptplatz 8
2100 Korneuburg

Landesgericht Krems
Südtirolerplatz 3
3500 Krems

Landesgericht Wiener Neustadt
Maria-Theresien-Ring 5
2700 Wr. Neustadt

Landesgericht Linz
Fadingerstraße 2
4020 Linz

Landesgericht Ried im Innkreis
Bahnhofstraße 56
4910 Ried im Innkreis

Landesgericht Steyr
Spitalsky Straße 1
4400 Steyr

Landesgericht Wels
Maria-Theresia-Straße 12
4600 Wels

Landesgericht Salzburg
Justizgebäude
Rudolfsplatz 2
5020 Salzburg

Landesgericht für ARS Graz
Nelkengasse 2
8010 Graz

Landesgericht Leoben
Erzherzog-Johann-Straße 3
8700 Leoben

Landesgericht Innsbruck
Maximilian Straße 4
6020 Innsbruck

Landesgericht Feldkirch
Schillerstraße 1
6800 Feldkirch

(e) **Federal Ministries responsible for overseeing Public Procurement**

Federal Chancellery
(Bundeskanzleramt)
Ballhausplatz 2
PF 20
1014 Wien

Federal Ministry for Economic Affairs
(Bundesministerium für
wirtschaftliche Angelegenheiten)
Stubenring 2
1011 Wien

(f) **Federal Ministry responsible for informing the European Commission of violations of the procurement directives**

Federal Ministry for Foreign Affairs
(Bundesministerium für auswärtige Angelegenheiten)
Ballhausplatz 2
PF 426
1014 Wien

BELGIUM

Prepared by Herbert Smith (Brussels)
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BELGIUM

1. Implementation of the Remedies Directives

The Belgian law concerning the award of public contracts is set out in an Act of 24th December 1993 ("the 1993 Act") as amended by several subsequent Royal Decrees. The 1993 Act (as amended) applies to all kinds of procurement, both in the "traditional" public sectors and in the utilities sectors. The date of the Act's entry into force was not immediate but remained to be determined by subsequent Royal Decrees. These provided that the main provisions of the 1993 Act, including all the rules regarding the award of public contracts by public authorities, entered into force on 1st May 1997.

The Belgian Government has not considered that any specific legislation is necessary in order to implement the Remedies Directives into Belgian law. It considers the existing system of access to the Belgian courts to be sufficient to comply with most of the requirements of the Remedies Directives. The only elements of the Remedies Directives which have been the subject of implementing Royal Decrees are the "corrective mechanisms" whereby the European Commission may intervene under Directives 89/665 and 92/13 (see section 7 of Chapter 1 above), as well as the attestation system and conciliation procedure for utilities under Directive 92/13. These implementing provisions do not concern the rights of complainants to bring actions in the Belgian courts. Instead, such rights are governed by the general rules and principles of administrative and civil law in Belgium.

2. The relevant forum

The appropriate court for bringing an action depends on the nature of the decision or act that is challenged. A fundamental but often blurred distinction exists between the Conseil d'Etat (the administrative court in Belgium) and the ordinary civil courts. Only the Conseil d'Etat can set aside administrative decisions taken in a procurement procedure prior to the award of a contract, including an award decision or any other "*acte détachable*". It can also make interim suspension orders, backed-up by daily fines. However, the Conseil d'Etat lacks the power to award damages. Moreover, once a contract is awarded, it is considered to be a matter of private law which may only be challenged before the ordinary civil courts.

Any action for damages should be brought before the ordinary civil courts of first instance. Such courts may, under general principles, award damages to an aggrieved tenderer, who need not prove fault if the contested decision has already been annulled by the Conseil d'Etat. The civil courts may in principle grant interim measures and set-aside orders but will usually decline to do so in respect of public contracts, on the basis that the award decision is a matter within the discretion of the awarding authority and hence the complainant has no "subjective right" to be awarded it.

The rules allocating jurisdiction between the Conseil d'Etat and the ordinary courts can raise complex issues, particularly where interim orders are sought. The same dispute is sometimes litigated simultaneously before both the Conseil d'Etat and the ordinary courts. For example, proceedings for interim measures were brought in both the Conseil d'Etat and the ordinary courts in the well known case involving the Centre de Communication Nord ("the CCN case"), which is discussed further below.

3. Available remedies

3.1 Interim orders

A complainant may apply to the Conseil d'Etat for an interim order suspending a contract award procedure or the effects of a particular decision taken in the course of that procedure. The action before the Conseil d'Etat must relate to a decision (an *acte détachable*) whose legal effects adversely affect the interests of the applicant, such as one excluding the applicant from the award procedure.

The normal form of interim order is one suspending the administrative decision in question, but other interim measures that have been granted by the Conseil d'Etat include:-

(i) an injunction requiring the Belgian State to invite (within 2 weeks) the complainant to take part in the further stages of the award procedure;

(ii) an obligation to accord the same treatment to the complainant as that which the other candidates had enjoyed in the period between the challenged decision and the judge's injunction, including a special extension of time for the complainant to study the contract documents;

(iii) an injunction prohibiting the contracting authority from notifying its award decision, backed up by the suspended imposition of daily fines.

A complainant seeking interim relief will usually be required to establish that:

(i) he has a prima facie case which raises a "serious cause";

(ii) a serious harm would result from the immediate execution of the decision under challenge and this harm could not easily be rectified; and

(iii) the balance of interests lies in favour of granting the interim order, taking into account all the probable consequences of the suspension for all interests likely to be harmed. The order will be refused if its negative consequences would exceed the benefits.

The second and third requirements listed above are closely related and in practice represent the two most difficult hurdles to overcome. According to the French Chambers of the Conseil d'Etat, the harm that a complainant suffers or risks suffering, as a result of a breach in a procurement procedure, will very rarely be sufficiently serious and irreparable. Given the financial nature of that harm, the complainant can almost always be adequately compensated in damages.

In contrast, the Flemish Chambers of the Conseil d'Etat have been much more willing to recognise the serious harm which can result from an infringement in the procurement process. Its various judgments have referred to matters such as the risk of losing highly specialised personnel, loss of commercial prestige and reputation and prejudice to the chance of being chosen for later projects. This "Flemish" case law tends to give preference to the preventive nature of interim proceedings, given the great difficulty in obtaining any further relief once the contract has been concluded.

Interim measures are not usually available before either branch of the Belgian courts once a contract has been entered into. After that point, the harm caused by a procurement breach may never be regarded as sufficiently serious and irreparable to justify suspension, leaving damages as the only remedy. A complainant may therefore find itself without any interim remedy, particularly given that a contract is regarded as having been concluded upon the notification of the award decision to all tenderers.

Interim orders are also available at least in theory from the ordinary civil courts, which tend to apply very similar tests as the ones applied by the Conseil d'Etat. In practice, however, the civil courts are reluctant to grant interim orders suspending administrative decisions in the field of public procurement (see section 2 above).

The recent CCN case[17] illustrates the complex relationship between the Conseil d'Etat and the ordinary courts which often leads the plaintiff to pursue separate but complementary actions, including applications for interim measures, before both forums in relation to the same dispute. Rulings in that case suggested, for the first time, that if the Conseil d'Etat has ordered the suspension of an award decision, then the plaintiff can request the ordinary court to suspend the execution of the (concluded) contract in question. In the CCN case, both the Flemish Chambers of the Conseil d'Etat and the Brussels Court of Appeal appeared to recognise that rejected tenderers may otherwise have no effective remedy and that damages are not always adequate compensation. A similar line was taken by the Conseil d'Etat (Flemish chamber) in the more recent *Strukton* case[18]. Other rulings have, however, been less helpful to aggrieved tenderers.

3.2 Set-aside or annulments orders

Complainants can request the Conseil d'Etat to annul any administrative decision (*acte détachable*) taken in the course of an award procedure. A decision may be found to be unlawful on a number of grounds, such as a manifest error in the authority's assessment of tenders having regard to its selection criteria or an unjustified use of the negotiated award procedure. A further ground is where the awarding authority is guilty of a "*détournement de pouvoir*", such as a deliberate policy of bias towards a particular contractor (for example, on political grounds).

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17 Conseil d'Etat decisions of 13.10.92 (suspension, Case No 40.734), 1.6.93 (annulment, Case No 43.019) and 22.2.94 (second proceeding, Case No 46.174); all published in Conseil d'Etat decision reports. Decisions of Brussels Court of Appeal of 25.3.93 (Entreprise et droit, 1993, page 232), 22.4.93 (Entreprise et droit, 1993, page 241) and 31.8.93 (not yet published).

18 *NV Strukton de Meyer v Maatschappij voor het Intercommunal Vervoerte Brussel*, decision of the Brussels Court of Appeal of 18.12.96, Case No 63.634, not yet published.

The Conseil d'Etat is generally willing to set aside an unlawful administrative decision. Once the contract in question has been entered into, the benefit of such a ruling is limited to the fact that it constitutes proof of fault in any subsequent tort action for damages in the ordinary courts.

As mentioned above, there was a suggestion in the CCN case that the setting aside of an unlawful award decision by the Conseil d'Etat could enable the complainant to ask a civil court to set-aside the contract entered into on the basis of that award decision. However, most of the case law goes in the opposite direction and there has not yet been a ruling in the ordinary courts where a concluded contract has been set-aside at the request of a third party such as an aggrieved tenderer.

3.3 Damages

3.3.1 Availability of Damages

Damages are only available in the ordinary courts: the Conseil d'Etat has no power to award damages. In order to obtain damages, the complainant in a procurement dispute (as in any other case) will have to prove that the awarding authority committed an unlawful act or "fault" and that this act was the direct cause of loss or damage suffered by the plaintiff.

In cases where judgment for annulment has been given by the Conseil d'Etat, the ordinary civil court is bound to follow the Conseil d'Etat's decision regarding the illegality of the award decision. Hence, the complainant will only be left to prove the existence of his damage and that this was caused by the unlawful decision. Where the complainant has not filed a request for annulment before the Conseil d'Etat, the ordinary court will itself review the legality of the awarding authority's conduct.

3.3.2 Quantum of Damages

In the case of a procedure (*adjudication*) where the award criterion is lowest price only, a rejected tenderer who can prove that he put forward the lowest regular tender will be automatically entitled to a compensation award of 10% of his tender price. This amount was fixed in the 1976 Act and the 1993 Act. Any additional request for damages will be refused, although the lowest regular tenderer is entitled to claim interest (at 8% per annum) on his indemnity for the period between the unlawful award decision and the payment.

In a procedure (*appel d'offres*) where the award criterion is the most economically advantageous tender, a complainant is required to demonstrate the extent of his loss. The court will estimate the damages in order to compensate the prejudiced party as fully as possible, by putting him in the position he would have been in if there had been no illegality.

The main criterion which helps the ordinary courts to establish the amount of the damages is the economic value of the contract. This value depends mainly on the expected economic profit. The case law shows that damages will principally and almost exclusively compensate the loss of profit, but not the bid costs linked to the tender (unprofitable preparatory work, administrative expenses, etc.).

Generally, the courts have chosen a simple solution by estimating a fair profit to be 10 per cent of the net amount of the tender. This percentage is deemed to correspond to the usual net profit under public works contracts. In at least one case, the court increased this percentage in order to compensate monetary devaluation or the loss of subsidies. Moreover, if the plaintiff can demonstrate that both his expenses and his usual net profits are higher, he may obtain more than 10 per cent of his usual net profit as damages (generally between 10 and 20 per cent).

In other cases, the court appointed an expert to determine the loss of profit of the aggrieved contractor. In such cases, the expert bases his assessment on the profit obtained by the plaintiff when performing other works over the same period. Other elements can be taken into account in the estimation of damages. Owing to the difficulty of quantifying them, they are generally included in the head of damages covering loss of profit.

The loss of a reference for future contracts is particularly difficult to quantify, but it can increase the award of damages. Immobilisation of material and staff may also be recoverable, depending on whether they would have been used during the same period on other contracts.

4. Who may apply?

4.1 Before the Conseil d'Etat

According to the rules of the Conseil d'Etat, a complainant must "establish an injury or an interest". A complainant must show that the decision has caused him a prejudice (either material or moral), so that the suspension or annulment of the challenged decision will confer a material or moral advantage to him. The annulment of an *acte détachable* has consistently been held in case law to grant at least a moral advantage.

In procurement cases, a complainant who submitted a tender or at least showed an intention to do so, will have a sufficient interest. A complainant who did not participate in the contract award procedure can also have the necessary interest in challenging the award decision. For instance, such an interest may arise when the contract was not properly advertised, when the contracting authority has decided unlawfully to apply the negotiated procedure or when the complainant was unfairly excluded from the award procedure.

It is generally accepted that a rejected candidate has an interest in requesting the annulment of a final award decision even if he did not submit the lowest or most economically advantageous tender. The complainant is not therefore required to prove that, in the absence of the infringement, the contract would necessarily have been awarded to him.

4.2 Before the ordinary courts

To bring an action before the ordinary courts, the complainant must have an interest which is concrete, personal and direct (Article 17 of the Procedural Code). As in the Conseil d'Etat, group actions by associations of individuals are not possible.

5. Time limit for bringing actions

5.1 Before the Conseil d'Etat

Actions for interim or set-aside orders before the Conseil d'Etat must be initiated by a written petition filed *within 60 days* following the date on which the decision in question is published or notified. If there is no obligation to publish or notify the administrative act, the 60 day period starts immediately following the day when the party concerned first became aware of the administrative decision.

The date to take into consideration is the date on which the candidate became aware of the decision itself and not when he first knew of the elements which made it invalid. When a candidate asks the contracting authority to give reasons for its choice, such a request suspends the time-limit if it is filed within the 60 day period from the date of notification of his rejection.

Where the defendant authority claims that the complainant has not respected the 60 day period, the authority has the burden of proof. For his part, the rejected candidate who files a petition before the Conseil d'Etat must have behaved in a diligent way and taken steps to obtain information about the exact contents of the authority's decision.

5.2 Before the ordinary courts

Actions before the ordinary courts are not subject to any special time-limit for their commencement but solely to the thirty years' statute of limitation. Tort actions must be filed within 30 years from the date of the wrongful act for which damages are claimed.

As for interim proceedings, undue delay in bringing the action may cast doubt on the urgency of the proceedings. The judge may consider that the necessary urgency does not exist if the complainant waited too long before filing his petition.

6. Procedure and duration of proceedings

6.1 Applications for interim orders

6.1.1 Before the Conseil d'Etat

The registrar notifies without delay a copy of the request for suspension and/or any other request for interim measures (which will be joined in a single action) to the Auditor (who plays a role similar to that of an Advocate General before the European Court of Justice), to the defendant and to any other parties likely to have an interest in the outcome of the case.

Within eight days from the notification of the request, the defendant authority sends its file to the registrar together with any observations. Copies are forwarded to the applicant, the intervening parties and the Auditor.

Within eight days from the receipt of the file, the Auditor drafts a report relating the facts and the arguments of the case, and states his opinion on the merits of the request. On the basis of this report, the President of the Conseil d'Etat fixes a date for the hearing. If the request is manifestly inadmissible, the hearing should take place within ten days from the transmission of the report. In all other cases the ruling of the Conseil d'Etat should take place within 45 days from the submission of the suspension request.

However, none of these time-limits are compulsory. In practice, given the number of requests submitted to the Conseil d'Etat, the time taken for an interim ruling averages between 4 and 6 months.

In cases of extreme urgency, which are assessed at the discretion of the President with regard to the circumstances of the case, the President may convene the parties "*à son hôtel*". The suspension order must be confirmed by a second decision delivered within 45 days from the date of the first.

The parties must be heard, except in cases where the urgency is such that the parties or some of them cannot be heard before the suspension decision. In such a case, the parties shall be convened within three days from that decision, although a delay beyond three days is not sanctioned.

6.1.2 Before the ordinary courts

The procedure is commenced by the notification of a summons by the process-server. The period of summons is usually at least two days.

Generally, the case will be pleaded by way of short debates (*"débats succincts"*), at the interlocutory hearing or within a very short time lag. The exchange of conclusions is not compulsory but is generally used in most cases. Interim proceedings can proceed rapidly and rulings can be laid down very shortly after the opening of the procedure.

In cases of extreme urgency, the President may rule without hearing the defendant. The extent of his decision is strictly limited to what the urgency requires. Both sides will subsequently be given an opportunity to present their case, leading to a new decision.

6.2 Applications for annulments orders

6.2.1 Before the Conseil d'Etat

The procedure for obtaining an annulment order involves the following exchange of pleadings: the request by the applicant; the response by the defendant; the applicant's reply; the report of the Auditor; and a final "*mémoire*" for each party. The Conseil d'Etat can request investigations, such as the designation of an expert. Interested parties are allowed to intervene.

The parties are heard through their pleadings and the Auditor via his opinion. The Conseil d'Etat then gives its decision. The usual time taken for the issue of a decision, from the filing of the request, amounts to between two and three years.

However, under Article 94 of the Rules of Procedure of the Conseil d'Etat, when the Auditor considers (after examination of the file) that the request is manifestly well-grounded, he immediately makes his report. The parties are convened by the President for the hearing shortly after (and at the latest ten days after) the submission of the Auditor's report. The President then gives his decision "without delay". This accelerated procedure can lead to the issue of a decision within the same time frame as that for a request for suspension, say between four and six months.

More and more applicants request the application of the accelerated procedure under Article 94. However, the Auditor will normally only have the opportunity - and the time - to examine the file after the exchange of the first three pleadings of the written procedure (request, response and reply), being at least one year after the filing of the appeal. The simultaneous filing of a request for suspension can have the advantage of forcing the Auditor to examine the file more rapidly.

6.2.2 Before the ordinary courts

The procedure is initiated by the notification of a summons by the process-server. In some cases, the applicant may make a unilateral request, but he usually has to serve a copy on the other side beforehand so that both sides can be heard.

The case is registered in the general list of the Court. There is then an exchange of conclusions. From the date of communication of the applicant's file, the defendant has one month to submit his conclusions. Similarly, the applicant benefits from another month from the date of communication of the defendant's conclusions to file his own conclusions. Each party is allowed to file additional conclusions within 15 days. Non-compliance with these time-limits does not result in the action being declared void. Consequently, the written part of the procedure can take months or even several years.

The fixing of a date for the hearing may be requested only when the case is "*en état*", which means that the parties have exchanged all their arguments and documents through their conclusions and that the case is ready to be pleaded. However, because of the judicial backlog, a date might not be fixed for the hearing until several years after the demand for a date.

Some special means are at the disposal of the petitioner in order to accelerate the procedure. For example, he may request an order to fix a timetable, which lays down the date on which each party must have filed their first and additional conclusions, as well as the date for a hearing. This timetable is compulsory, with the sanction that any conclusions submitted out of time will be disregarded. Alternatively, the applicant can ask the court to fix a date by which the other party must have filed his conclusions. A failure to do so would lead to the issue of a judgment by default which could only be challenged before the Court of Appeal.

6.3 Actions for damages

As already made clear, actions for damages can only be brought in the ordinary civil courts. The procedure is the same as that for annulment actions in the ordinary courts, as described in section 6.2.2 above.

6.4 Is it necessary to engage a lawyer?

It is usual practice and generally recommended that complainants before the Conseil d'Etat instruct a lawyer to act as their legal representative in the proceedings, although this is not strictly compulsory. In the ordinary civil courts, the general rule is that the parties must be represented by a lawyer (*avocat*).

7. Costs of proceedings

7.1 Before the Conseil d'Etat

Under Article 66 of the Rules of Procedure of the Conseil d'Etat, the procedural costs comprise the standard fee (4,000 BEF paid through a fiscal stamp), the fees of any experts and the special tax on witnesses. However, in relation to interim proceedings, the fee of 4,000 BEF is not payable when a request is lodged for a suspension order. The procedural costs are paid in advance by the applicant and the final level of the applicant's contribution is determined by the Conseil d'Etat in its definitive decision.

The most substantial expense will be lawyers' fees. Contrary to the practice before the European Court of Justice, the lawyers' fees are not part of the costs of proceedings in Belgium. They remain payable by each party whatever the outcome of the case may be. This means that the successful party is not entitled to request the payment or reimbursement of his lawyer's fees, even by way of damages before the ordinary judge.

Legal aid (*"assistance judiciare"*) may be granted on request.

7.2 Before the ordinary courts

Under Article 1018 of the Procedural Code, the costs consist of (i) the stamp duties, registrar duties and registration duties, (ii) fees of the authors of judicial acts (the process-servers), (iii) the cost of expedition of the judgment, (iv) the expenses of any investigation measures, i.e. the witnesses' tax, (v) the travel and accommodation expenses of the judges, registrars and parties when ordered by the judge, (vi) the expenses of acts established for the purpose of the case and (vii) the procedural indemnities (*"indemnité de procédure"*), which cover the lawyer's material expenses. The various elements of the costs are subject to scales, established and revised by Royal Decrees.

The judge decides who will pay these costs only when he issues a definitive ruling. In interim proceedings, the judge "reserves" the costs until his final judgment (on setting aside the contract or on the grant of damages). As in proceedings before the Conseil d'Etat, the lawyers' fees are not counted as part of the procedural costs and neither side can be ordered to pay those of the other. Legal aid *("assistance judiciare")* can again be requested.

8. Rights of appeal

There is no right of appeal from the decisions of the Conseil d'Etat, which is the highest administrative authority in Belgium.

Rulings of the President of an ordinary court in interim proceedings can be appealed to the President of the Court of Appeal. The filing of an appeal does not suspend the execution of the first interim ruling. The final decision of ordinary courts can also be appealed to the Court of Appeal. In this case, the filing of an appeal will generally suspend the execution of the first ruling, except where that ruling specifies that it is enforceable notwithstanding any appeal. The supreme authority, to which points of law (but not fact) may be appealed, is the *Cour de Cassation.*

9. Enforcement of judgements

9.1 Judgements of the Conseil d'Etat

Judgements of the Conseil d'Etat have *res judicata* authority. They operate *erga omnes*, with respect to the parties, third parties and courts and tribunals. The annulled decision is held never to have been made. The administrative authority is obliged to enforce the judgement with all its consequences. Its enforcement is submitted to the control of the Conseil d'Etat. The res judicata authority of the judgement is of a "public order" *(ordre public)* nature. This signifies that any infringement of it is a serious matter and may be invoked by any third party and not just by the parties directly concerned.

A suspension judgement allows the administration to withdraw its suspended decision and to replace it. However, the administration may decide to wait for the final judgment on the merits. The suspension judgement operates *erga omnes*, so that it is also binding on third parties, such as the preferred tenderer, but is only effective *ex nunc* (ie. as from the date of the order).

The enforcement obligation of the administrative authority will depend on the reason for annulment, the nature of the annulled decision, the vested rights of the applicant and those of third parties. In most cases a new decision will be taken under a new or re-organised procedure.

While the administration usually tries to comply fully with annulment judgments, it can sometimes refuse to do so. The violation of the *res judicata*, being of a "public order" nature, is sanctioned in different ways. The applicant can lodge a new appeal directed either against the act made in violation of the annulment judgement or against the implied decision to disobey that judgement.

The failure to comply with the judgement within a reasonable period renders the administrative authority liable. A new request for annulment can be accompanied by a request for suspension, for interim measures and even for daily fines. The controlling authority ("*autorité de tutelle*") can also require the recalcitrant authority to execute the decision. If required, the Conseil d'Etat can impose daily fines.

9.2 Judgements of the ordinary courts

Interim orders as well as definitive judgements (such as an award of damages) benefit from *res judicata* authority. However, the judgements operate only as between the parties. When the judgement is referred to the Court of Appeal, its *res judicata* authority remains and will only cease when the judgement is reviewed by the Court of Appeal.

When an authority fails to comply with a ruling, enforcement can be ensured through charges on property ("*attachments*") and the imposition of heavy daily fines.

ANNEX 1

Useful addresses

Registrar of the Conseil d'Etat (French and Flemish chambers): 33 rue de la Science, 1040 Brussels.

Ordinary civil courts in Brussels: Tribunal de première instance (or, for interim measures, Monsieur le President du Tribunal de première instance), Palais de Justice, Place Poelaert, 1000 Brussels.

Recognised body of independent arbitrators: the CEPANI (Centre pour l'Etude et la Pratique de l'Arbitrage National et International), 8 rue des Sols, 1000 Brussels.

Government department responsible for public procurement: Chancellerie of the Prime Minister, 16 rue de la Loi, 1000 Brussels (tel. 501 02 11 or 501 04 17).

DENMARK

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CONTENTS

DENMARK

1. Implementation of the remedies directives

Directive 89/665, applicable to procurement by public sector authorities, has been implemented in Denmark by way of the Procurement Remedies Act no. 344 of 6th June 1991 (the "Remedies Act") which entered into force on 1st January 1992. As regards procurement in the utilities sectors, Remedies Directive 92/13 has been implemented through an amendment to the Remedies Act which was enacted on 19th December 1992 and then entered into force on 1st January 1993.

The Remedies Act was further amended in 1995[19] in order, inter alia, to meet the European Commission's concern that the Act contained a loophole in respect of certain infringements of Utilities Directive 93/38. The original Remedies Act together with the subsequent amendments have been consolidated by way of Consolidating Act no. 1166 of 20th December 1995.

In this chapter the term "Preparatory Works" refers to the written comments of the Danish Government accompanying the above implementing legislation when this was introduced to the Danish Parliament. In addition, the term refers to the parliamentary debates preceding the final adoption of the implementing legislation.

2. The relevant forum

The "*Klagenævnet for Udbud*" ("the Complaints Board") has been established by virtue of the Remedies Act, while detailed rules of procedure are laid down in Order no. 26 of 23 January 1996 ("the Complaints Board Order").[20] Members of the Board are appointed by the Minister for Business and Industry.

According to Article 1 of the Remedies Act, the Complaints Board is - as a general rule - competent to deal with all complaints regarding infringements of Community law in the field of public procurement, including Directives 92/50, 93/36, 93/37 and 93/38 as well as the Danish implementing legislation.

However, according to Article 5(1) of the Remedies Act, the Complaints Board must reject complaints concerning infringements committed by awarding authorities who exploit a geographical area with the purpose of extracting natural resources ("offshore awarding authorities"). Under Article 6(4) of the Remedies Act, such complaints fall within the exclusive jurisdiction of the Maritime and Commercial Court which shall deal with the complaints as a matter of urgency.

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19 By way of Act No. 206 of 25th March 1995 which entered into force on 31st March 1995.

20 This Order consolidates Orders no. 912 of 18 December 1991 and no. 72 of 30 January 1992.

Furthermore, according to Article 5(2) of the Remedies Act, the Complaints Board is not competent with regard to claims for damages. Such claims can be brought only before the ordinary civil courts.

Under Article 6(1) of the Remedies Act, infringements of the procurement rules may result in the imposition of fines. However, such imposition of fines falls outside the competence of the Complaints Board and is therefore a matter only for the Public Prosecutor and the ordinary courts.

The Complaints Board's competence within the scope of the procurement rules is not exclusive. Thus, complainants are free to bring their complaints before the ordinary courts without first having approached the Complaints Board. Claims for interim injunctions, as well as enforcement matters, may be brought before the Bailiff's Court (see section 3.1.2 below). Otherwise, civil cases (such as claims for damages) are generally heard by the City Court at first instance. However, according to Articles 226 and 227 of the Administration of Justice Act, cases concerning previously unsettled questions of law or cases involving claims exceeding DKK 500,000 (approximately ECU 67.000) can be brought directly before the High Court.

3. Available remedies

According Article 5(1) of the Remedies Act, the Complaints Board may annul unlawful decisions, suspend an on-going award procedure or order the awarding authority to rectify any illegalities (collectively "Article 5(1) Remedies"). The application of these remedies is described in more detail in sections 3.1 and 3.2 below. In addition, the ordinary courts, but not the Complaints Board, may award damages to complainants, as explained in section 3.3 below.

3.1 Interim orders

3.1.1 Before the Complaints Board

The Complaints Board has the power to suspend an on-going award procedure if it finds that there has been an unlawful act. Even in the absence of such a finding, the Board may suspend a procedure where this is deemed necessary or where such a suspension is specifically provided for by law.

It appears from the Preparatory Works that the remedy of suspension is mainly intended for cases where a contract has been awarded without prior publication and in the absence of a competitive tendering procedure. Furthermore, it appears that the Complaints Board in such cases may deal with the question as a matter of urgency.

Otherwise, the Remedies Act does not expand upon the principles governing the grant of interim orders. However, it appears from the Preparatory Works that the factors to be taken into account when considering whether to grant suspension are primarily the gravity of the infringement and consequences of suspension. Hence, the Complaints Board will carry out an overall assessment of the interests involved in the case.

It also appears from general principles of Danish law on interim relief that the complainant will have to establish, within the limited confines of an interlocutory proceeding, that it is at least likely that his claim will be held to be valid at the final trial. Moreover, the complainant may well have to establish that it is probable that the purpose of his action will be defeated unless an interim suspension order is granted. The Complaints Board has granted very few interim orders to date, suggesting that the various tests and principles are fairly difficult to satisfy.

The Remedies Act does not expressly deal with the question of whether the Complaints Board may suspend a contract which has already been entered into. The Preparatory Works suggest that the normal remedy in such cases should be the award of damages to the injured party. It appears from the case law of the Complaints Board that it does not consider itself competent to annul concluded contracts. Thus, the Complaints Board appears reluctant to interfere with the rights of third parties arising under a concluded contract, since the Complaints Board is an administrative body whose decisions are directed solely towards awarding authorities.

3.1.2. Before the Bailiff's Court

As mentioned above, complainants can proceed directly to the ordinary courts rather than bringing an action before the Complaints Board. Under Article 642 of the Administration of Justice Act (*Lov om Rettens Pleje*), the Bailiff's Court may issue a prohibitory injunction if the complainant establishes that the defendant will or is likely to perform an act which infringes the complainant's rights. Moreover that Act specifies that the complainant must establish that it is probable that the purpose of his action will be forfeited unless a prohibitory injunction is granted. In addition, such an injunction cannot be granted if it appears that the normal rules on penalties and compensation afford sufficient protection to the complainant. An application for interim relief is likely to be rejected if there is an obvious discrepancy between the complainant's interest in relief and the harm which this will inflict upon the defendant.

Although the question has yet to be settled authoritatively, the Preparatory Works appear to be based on the assumption that the Bailiff's Court would be competent to suspend the performance of a concluded contract, provided that the general conditions under Danish law for obtaining an injunction are fulfilled. Nevertheless, an injunction would probably not be available where the concluded contract has already been substantially performed.

3.2. Set-aside or annulment orders

3.2.1. Before the Complaints Board

Article 5(1) of the Remedies Act empowers the Complaints Board to annul unlawful decisions. Indeed, it appears from the Preparatory Works that in exceptional cases an entire award procedure may be annulled. Such annulment may at least occur prior to the time when the contract is entered into, whereas it is more questionable whether annulment may be granted thereafter.

It appears from the case law of the Complaints Board that grounds for annulment would include a failure to advertise a relevant contract, discrimination in favour of a particular tenderer and the application of unlawful criteria or criteria that had not been previously specified. It is also apparent from the decisions of the Complaints Board that the alleged infringement must be of a certain gravity and must have had a direct effect on the award decision. This reflects the general principle of Danish administrative law, that infringements only lead to annulment if they are likely to have had a direct effect on the final decision. However, the burden of proving that the infringement did not have such an effect may rest upon the administrative body.

As when deciding upon an application for interim measures, the Complaints Board will take into account the interests of all parties involved when deciding whether to grant the annulment order. The Board appears to accept that a certain measure of administrative discretion has to be left to awarding authorities and it would generally be reluctant to annul decisions which fall reasonably within that discretion.

As mentioned above, the Complaints Board does not consider itself competent to interfere with the rights of third parties under a concluded contract. Hence the Board probably lacks the power to annul a contract which has already been entered into. The Board may nevertheless annual an unlawful award decision, even though it cannot rule upon the effect of such annulment upon the concluded contract.

3.2.2. Before the ordinary courts

The ordinary courts enjoy a general competence to annul an unlawful administrative acts, provided such acts had or are likely to have a direct effect on the final decision. The Preparatory Works suggest that in exceptional circumstances the ordinary courts may even annul a contract which had been entered into. This seems to correspond with the general principle of Danish law, that the courts may set aside contracts concluded in contravention of mandatory statutory rules. However, it must be assumed that in practice the ordinary courts will be reluctant to annul concluded contracts.

3.3. Damages

Complainants may seek damages in the ordinary courts as against awarding authorities and utilities who breach procurement rules. The Complaints Board, on the other hand, is not competent to award damages. Consequently, a successful claim for annulment before the Complaints Board will have to be followed by subsequent court proceedings where damages are claimed. However, nothing in the Remedies Act prevents the courts from awarding compensation in the absence of a prior annulment decision.

There is only one provision in the Remedies Act (Article 13(a)) dealing with availability and quantum of damages. This provision implements Article 2.7 of Remedies Directive 92/13 as regards damages against utilities. It states that a complainant will be able to recover lost bid costs if it establishes that it had a reasonable chance of winning the contract and that this chance was adversely affected by the utility's breach of the

procurement rules. Hence, the complainant is not required to prove that he would in fact have been awarded the contract in the absence of the breach.

Apart from this provision for the utilities sectors, the award of damages is governed by the general principles of Danish law. These indicate that a complainant should be entitled to damages where he can prove that there has been an infringement of the procurement rules and that, as a direct and foreseeable consequence of that infringement, he has suffered an economic loss. In principle, the complainant should be placed in the same financial position as if the injury had not occurred. The Danish courts have traditionally been concerned not to over-compensate the complainant, who has a general duty to mitigate his loss.

As regards the measure of damages, the complainant may in practice have a choice between compensation for tender costs and loss of profits. As regards recovery of tender costs, it may probably be assumed that even outside the utilities sectors the complainant will only have to prove that he had a reasonable chance or a genuine possibility of being awarded the contract and that this chance has been adversely affected. This assumption is supported by the ruling of the Eastern High Court on 30th May 1996, which followed up the ruling of the European Court of Justice in the "Storebaelt Bridge" case of C-243/89 *Commission v Denmark*. In that case, the Danish court awarded damages totalling around DKK23 million (ECU 3.1 million) to several firms who had tendered unsuccessfully for the Storebaelt Bridge contract. These damages covered bid costs only and were awarded even though the court did not find evidence that any of the complainants would (but for the breach) have been awarded the contract.

Conversely, the Storebaelt Bridge case suggests that recovery for lost profits will only be upheld if the complainant is able to prove that he would have been awarded the contract had the procurement rules not been infringed. It may be possible to establish such proof where the award criterion is "lowest price" or where there were only a small number of bidders (perhaps only two) and the successful bid was obviously inferior. In the great majority of cases, however, it will be extremely difficult for the complainant to prove that he would have been awarded the contract in the absence of the infringement. Hence, recovery of expended bid costs, rather than lost profit, is likely to be the more usual measure of damages.

3.4. Fines

Under Article 6(1) of the Remedies Act, infringements may result in the imposition of fines. Such fines do not affect possible claims for damages. The Remedies Act does not specify the magnitude of the fines. However, it appears from the Preparatory Works that fines shall be sufficiently large effectively to discourage awarding authorities from infringing the rules or from upholding such infringements (cf. also Article 2(5) of Directive 92/13).

In respect of awarding authorities other than offshore awarding authorities, it appears from the Preparatory Works that imposition of fines shall be reserved for particularly serious infringements. In contrast, fines are intended to be the primary sanction

available (to the Maritime and Commercial Court) in respect of offshore awarding authorities. This is due to the fact that these entities are particularly vulnerable to suspensions and annulments.

According to Article 6(3) of the Remedies Act, infringements committed by offshore awarding authorities may also be met with the Article 5(1) Remedies under special circumstances. However, it is a precondition that the alleged infringement is of such a nature that it may result in imprisonment and that the case has been initiated by the Public Prosecutor. In addition, it appears from the Preparatory Works that, with respect to offshore awarding authorities, the courts shall not cumulatively impose fines and provide for the application of Article 5(1) Remedies.

4. Who may apply?

Complaints may be brought before the Complaints Board by any person or entity having a so-called "legal interest". This means that complainants must be individually and materially affected by the alleged infringement.

Furthermore, the Remedies Act authorises the Minister for Business and Industry to grant trade organisations and public bodies general legal standing which is not conditional upon the display of a specific legal interest in the case at hand. At present 48 different trade organisations and public bodies have been granted such standing. These trade organisations and public bodies have been listed in an annex to the Complaints Board Order.

Prior to the most recent amendment to the Complaints Board Order, only 9 trade organisations and public bodies had been granted such standing. The extension of the list is intended to grant a larger number of complainants the possibility of bringing complaints through their respective trade organisations and thereby preserving their anonymity. It should be noted that the Secretariat of the Competition Council has also been granted general legal standing.

Finally, under Article 4(2) of the Remedies Act, the Complaints Board may allow third parties who have a legal interest in a pending case to intervene in support of one of the parties.

5. Time limit for bringing actions

The Remedies Act does not specify any time limits within which actions must be brought before the Complaints Board. According to the general Danish rule on the statute of limitations, claims are time-barred after five years following the time when the complainant first became able to bring his claim before the courts. A complaint brought before the Complaints Board suspends this five-year period with respect to the lodging of that complaint before the ordinary courts.

It should be noted that complainants may in practice be under a general obligation to take action within a reasonable time. In one case, the Complaints Board rejected a claim for annulment due to the complainant's (four-month) delay in taking action.

6. Procedure

6.1. Applications to the Complaints Board

Generally speaking the procedure before the Complaints Board is governed by the same principles, laid down in the Administration of Justice Act, which apply with respect to the ordinary courts.

Thus, actions are instituted by a written Claim (Writ of Summons) which must contain an indication of the claim, a brief review of the facts supporting the claim and an indication of any documents put forward in support of the claim. The defendant's Reply shall in all essentials contain the same type of information as the Claim (Summons). In most cases, the parties will submit at least one further brief each, before the exchange of written pleadings is closed.

It is a fundamental principle before the ordinary courts that the actual deliberations of the parties be conducted orally. However, before the Complaints Board, oral pleadings will only be made if the parties so request and the Chairman of the Complaints Board consents to such a procedure. Unless one of the parties objects, requests for oral pleadings are normally accepted. Otherwise the decision of the Complaints Board will be based solely upon the written pleadings.

6.2. Procedure in the ordinary courts

As mentioned in section 6.1 above, proceedings before the ordinary courts involve the exchange of written pleadings, beginning with the complainant's Claim (Writ of Summons) and the defendant's Reply. The case will then proceed to an oral hearing, where both sides present their evidence orally and are able to cross-examine each other. Finally, the judge lays down his ruling.

6.3 Duration of proceedings

Case law to date suggests that the Complaints Board will lay down its decision regarding an application for interim suspension order within approximately two months. On the other hand, in the Bailiff's Court, the decision on injunctions may be rendered within a few weeks following the submission of an application claiming such an order.

As regards applications for annulment orders, decisions of the Complaints Board to date suggest that it takes approximately eight months, although this may be reduced where there is some urgency. The Complaints Board has recently taken measures to speed up its procedures and these can be expected to result in significant reductions in the average time taken for a decision.

As regards the ordinary courts, the time taken for a decision (other than an interim decision) tends to be significantly longer than is the case before the Complaints Board. Proceedings usually last for several years before a final ruling is given.

6.4 Is it necessary to engage a lawyer?

While not compulsory, it is usual practice and generally advisable for complainants (particularly foreign parties) to be represented by a lawyer in proceedings both before the Complaints Board and the ordinary courts. The cost implications of doing so are considered in section 7 below.

7. cost of proceedings

Under the Complaints Board Order, complainants are required to pay a fee of DKK 4,000 (approximately ECU 550) upon the submission of a complaint. This fee is reimbursed if the complaint is rejected due to lack of competence on the part of the Complaints Board or because the complainant has no locus standi. Furthermore, the fee is reimbursed if the complaint is upheld in part or in full or if the awarding authority rectifies its decision in accordance with the complaint.

Other costs of proceedings mainly comprise legal fees. These fees are not likely to differ materially from the fees incurred in connection with proceedings before the ordinary courts.

According to Article 13(c) of the Remedies Act, the Complaints Board may order the awarding authority to reimburse the complainant's costs incurred in connection with the proceedings, provided that the complainant's action is upheld in part or in full. This provision was inserted into the Remedies Act in 1995 because prior experience revealed that the costs of proceedings discouraged small and medium-sized enterprises from bringing complaints before the Complaints Board.

This rule corresponds with the general rule of Danish law, that the losing party may be ordered to reimburse the successful party's legal costs. The ordinary courts will generally order such reimbursement where the complainant's claim is upheld partly or in full.

8. Rights of appeal

Decisions of the Complaints Board cannot be appealed to any other administrative forum. Under Article 5(4) of the Remedies Act, Board decisions shall be final and binding unless appealed to the ordinary courts within eight weeks from the date when the complainant was notified of the Board's decision.

Decisions of the ordinary Bailiff's Court and City Courts may be appealed to the High Court, but any further appeal to the Supreme Court will only be allowed in exceptional circumstances. When the High Court is acting in its capacity as the court of first instance, its decisions, on the other hand, can always be appealed to the Supreme Court.

9. Enforcement of judgements

According to Article 13(b) of the Remedies Act, fines may be imposed on awarding authorities who intentionally or by gross negligence ignore decisions issued by the Complaints Board or the ordinary courts under the Remedies Act.

This provision was inserted into the Remedies Act in 1995 in response to concerns raised by the European Commission. The purpose was to ensure the proper implementation of Article 2(8) of Directive 92/13 which requires that the decisions of review bodies can be properly enforced.

With regard to the ordinary courts, it is a general rule of Danish law that court rulings may be enforced through the Bailiff's Court upon an application from the successful plaintiff to that effect. However, this is not the case with regard to decisions of the Complaints Board.

Useful Addresses

Klagenævnet for Udbud
(The Complaints Board for Public Procurement)
Erhvervs - og Selskabsstyrelsen
Kampmannsgade 1
1780 Copenhagen V

Tel: 00 45 33 30 76 21
Fax: 00 45 33 30 77 99

Østre Landsret
High Court, Eastern Division)
Bredgade 59
1260 Copenhagen K

Tel: 00 45 33 97 02 00
Fax: 00 45 33 14 58 22

Vestre Landsret
(High Court, Western Division)
Graabrødre Kirkestræde 3
8800 Viborg

Tel: 00 45 86 62 62 00
Fax: 00 45 86 62 63 65

Københavns Byret
(Copenhagen City Court)
Domhuset
Nytorv
1450 Copenhagen K

Tel: 00 45 33 93 32 33
Fax: 00 45 33 11 00 85

Retten i Aarhus
(Aarhus City Court)
Tinghuset
Vestre Alle 10
8000 Aarhus C

Tel: 00 45 86 12 20 77
Fax: 00 45 86 19 71 91

Erhvervsministeriet
(Ministry for Business and Industry)
Slotsholmsgade 12
1216 Copenhagen K

Tel: 00 45 33 92 33 50
Fax: 00 45 33 12 37 78

Konkurrenceraadet
(The Competition Council)
Nørregade 49
1165 Copenhagen K

Tel: 00 45 33 93 90 00
Fax: 00 45 33 32 61 44

Det Danske Voldgiftsinstitut
(Danish Institute of Arbitration)
Frederiksborggade 1
1360 Copenhagen K

Tel: 00 45 33 13 37 00
Fax: 00 45 33 13 04 03

FINLAND

Prepared by Herbert Smith (Brussels)
and Castrén & Snellman (Helsinki), 1997

CONTENTS

FINLAND

1. Implementation of the Remedies Directives

The EU rules on public procurement are implemented in Finland by the Finnish Public Procurement Act (the "Act") which entered into force on 1st January 1994. The remedies provided for in Remedies Directives 89/665 and 92/13 are set out in Articles 8, 9 and 10 of the Act. The Act is a framework law for all public contracts in Finland, including those falling below the thresholds in the EU Directives.

In May 1997, a proposed Bill was laid before the Finnish Parliament. It was adopted on 26th of November and the amendments will enter into force on 1st of March 1998. In particular, the amendments provide that:

i the Competition Council will be competent to deal with complaints concerning public sector contracts even where their value falls below the thresholds laid down in the EU Directives;

ii it will become possible to file a complaint before the Competition Council even after the contract in question has been signed, as long as the complaint is lodged within 14 days after the complainant is informed of the awarding authority's decision (although the Competition Council will still not be able to annul any contract which has already been signed). In case the contract has already been concluded, the complainant may recover a "compensatory payment", provided he had a "real chance" of winning the contract. The payment will be set according to the damage suffered and the nature of infringement committed (sanction);

iii the parties to a procurement dispute in the utilities sectors have the option of invoking the conciliation procedure provided for under Utilities Remedies Directive 92/13.

This amendment of the Act on Public Procurement will considerably increase the competence of the Competition Council.

The provisions of the Finnish Procurement Act apply in the Aland Islands by virtue of the County Act on Implementation in the County of Aland of 11th May 1994 and the County Degree on Public Procurement of 27th February 1996. These laws do not, however, apply to contracts falling below the EU thresholds.

2. The relevant forum

A complainant wishing to challenge a procurement decision covered by the Act may bring an action before the Competition Council (*Kilpailuneuvosto*), which is also the appellate body dealing with competition issues in Finland. A majority of the Council's members are drawn from economic entities and the body has special expertise in procurement issues. The Competition Council handles cases in a manner comparable to a court.

According to Finnish municipal and administrative legislation, there is also a possibility of bringing an action against municipal and state authorities' decisions when the authority is acting as a contracting authority under the Act on Public Procurement. The competent courts in these cases are the County Administrative Courts. An appeal can be brought to a County Administrative Court against a final decision taken by the local council or against a decision by the local government or a municipal board on a demand for rectification. An appeal can be brought by one of the parties or by any member of the municipality.

In practice this second possibility means that currently there are two parallel systems which may be used alternatively. This system will, however, be changed as a consequence of the amendments to the Act on Public Procurement. From the beginning of March 1998 there will no longer be the possibility of bringing an appeal to administrative courts under the jurisdiction of the Act if the Competition Council is also competent to examine the case. The aim of the amendment is to avoid duplication and diverging decisions.

Any claim for damages must be made in an ordinary court of first instance, since the Competition Council and County Administrative Courts do not have the power to decide upon and award damages. When the amendment of the Act enters into force on 1st of March 1998, the amount of a possible compensatory payment will be taken into account when awarding damages.

One further possibility is for a complainant to make an informal complaint to the Finnish Ministry of Trade and Industry. Upon receiving such a complaint, the Ministry may exercise its powers under Article 13 of the Act to request information from awarding entities (public sector and utilities) regarding the award procedure in question. The Ministry may then give recommendations and instructions concerning the procedure and regarding interpretation of the Act. A complaint to the Ministry might therefore avert the need for the complainant to take court action, although such a complaint will not bring any legal remedy (such as compensation) specifically for the complainant. More than 60 such informal complaints were treated by the Ministry in 1996 and 1997.

3. Available remedies

3.1 Interim orders

According to Article 10 of the Public Procurement Act, the Competition Council may decide upon applications for interlocutory or interim measures and suspension orders in cases falling under the Act. After the amendment of the Act on Public Procurement these decisions can be taken also concerning contracts the value of which is below the threshold.

The Competition Council may order that a decision taken by an awarding authority shall not be implemented and/or that the procedure for an award of a contract be suspended for the time of the proceedings before the Competition Council. These rulings may be reinforced by the imposition of a conditional fine.

Furthermore, interlocutory injunctions may prohibit the application of a specific clause in a procurement-related document or of a procedure which infringes the Act. The Competition Council may, also as an interim measure, oblige the contracting entity to correct its infringement. These rulings by the Competition Council may again be backed up by the imposition of conditional fines. These are all interim measures which may be laid down pending the conclusion of the proceedings before the Competition Council.

Once the contract has been entered into by the parties, any subsequent application for interim measures is to be considered out of time and the only remedy will be damages. However, after 1st of March 1998 the complainant will in this case have the right for a compensatory payment (as described above in chapter 1.). The decisive factor is whether or not the contract has been defined and agreed upon in detail. In practise this usually means the signature of the contract. Where the awarding authority has only decided which alternative it is going to approve but the detailed contract has not yet been signed, all the measures described above are still available.

In deciding upon the measures described above, the Competition Council is required by the Act to take into consideration the probable consequences of the measures for all interests likely to be harmed, including the public interest. The Council may decide not to grant the measure in question where the negative consequences could exceed the benefits. This application of the balance of interests –test is in accordance with the Remedies Directives.

3.2 Set-aside orders

Article 9 of the Act gives the Competition Council the power to grant set-aside or annulment orders. This provision follows very closely the equivalent provisions in the Remedies Directives.

In the event of an infringement of the Act, of regulations introduced under the Act or of Community rules on public procurement or the Competition Council may order the set aside of a contracting entity's decision, either in its entirety or in part. Where such an

infringement occurs, the Competition Council may also prohibit the contracting entity from applying a particular provision in a document in connection with a procurement or otherwise applying an unlawful procedure. Furthermore, the Competition Council may in cases of infringement order the awarding authority to correct its unlawful procedure. The Competition Council does not have the power to correct by itself a decision made by an awarding authority or, for example, to order that a contract be made with a particular undertaking.

Like interim measures, set-aside orders may be laid down at any time before the actual signing of a contract. Until that moment, decisions may be set aside even if they have given rise to what would usually be considered to be a binding contract under normal civil law in Finland.

The Competition Council may impose a conditional fine in order to secure compliance with rulings which prohibit an authority from applying a particular provision in a procurement-related document or from otherwise applying unlawful procedure. A conditional fine is not necessary, on the other hand, in relation to any ruling setting aside an authority's decision. Such an order automatically nullifies the authority's decision, without any measures being necessary on the side of the awarding authority.

3.3 Damages and compensation (from 1.3.1998)

According to Article 8 of the Act, an awarding authority is liable to pay damages to a supplier where it causes the supplier damage by way of an infringement of the Act, of regulations passed under the Act or of the Treaty of Rome.

Under Article 8(2) of the Act, where a claim is made for damages representing the costs of bid preparation or of participation in an award procedure, the person making the claim shall be required only to prove an infringement of the relevant procurement rules; that he would have had a real chance of winning the contract; and that, as a consequence of the infringement, that chance was adversely affected. This rule in the Act corresponds with Article 2(7) of Remedies Directive 92/13.

According to the bill under which the Act was proposed, Article 8(2) (the "real chance" test) is only applicable in cases falling under Remedies Directive 92/13, which only covers procurement by utilities. After the amendment of the Act the "real chance" test of Article 8(2) will, however, cover also the contracting authorities of the public sector.

The Act does not lay down any further guidelines on how damages should be quantified. Statements in the preparatory works for the Act suggest that damages may in many cases be limited to the bid costs incurred by the complainant in participating in the award procedure. In practice it may be expected that damages will principally cover such bid costs. General principles of Finnish contract law only provide for compensation for loss of profits where there has been a breach of contract. Generally, such compensation is not available for a complainant who did not become a party to a contract. However, legal commentators have suggested that in some cases loss of profits could be recovered where an authority knowingly carries out a defective award procedure. At present there is no established case law on the point.

General principles of Finnish law suggest that the complainant will have to satisfy a higher level of proof (going beyond the "real chance" test) in order to recover loss of profit. A complainant may have to prove, for example, that there was at least a high probability that he would have won the contract but for the breach of the procurement rules. The precise requirements remain to be clarified by the Finnish courts.

Finally, it may be noted that applications for damages are independent from actions for an interim or set-aside order before the Competition Council. Nevertheless, a finding of an infringement by the Competition Council is likely to have a positive impact in support of the complainant's claim for damages before the court of first instance.

As has been described above in chapter 1. the entering into force of the amendment of the Act on 1st March 1998 will considerably add the powers of the Competition Council to order sanctions. In case the person whom the matter concerns would have had a real chance of winning the contract in a correct contract award procedure, the Competition Council may order the contracting entity to pay compensation to the applicant. This compensatory payment may be ordered if the application has been made only after the conclusion of the contract or in case the balance of interest- test shows that the application of other remedies would have too harmful effects. When ordering a compensatory payment for example the value of the contract, the nature of the infringement and the damages suffered will be taken into account.

4. Who may apply?

Under Article 9 of the Act (after the amendment 1.3.98; Article 9a), the application for review may be instituted by any person whom the matter concerns. According to the bill under which the Act was originally proposed, this means a person who has a legal interest in challenging the wrongful procurement procedure. Indeed, that bill made specific reference to Article 1(3) of the Remedies Directives, which state that an action may be bought by any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. In practice, therefore, action may be bought by any economic operator interested in the subject matter of the contract and who would have had a chance of having his own offer accepted if the award procedure had been carried out correctly.

The Ministry of Trade and Industry and the Ministry of Finance may under certain circumstances also institute proceedings for the Competition Council in respect of breaches of the Act. After the amendment of the Act on Public Procurement, proceedings may according to the Article 9a also be instituted by state authorities, which have granted subsidies to certain type of works contracts defined in Article 5(4).

5. Time limit for bringing actions

According to Article 9 (after the amendment 1.3.98 Article 9a) legal proceedings have to be initiated in principle before the contract in question has been signed. In practice a complainant has had to intervene fairly rapidly. After the amendment of the Act on Public Procurement the conclusion of the contract does not prevent the handling of the application made to the Competition Council in case it has been made within 14 days from having been informed of the contract award decision. After signing of the contract, the only remedy available has been damages from the ordinary courts. After the amendment the applicant may also receive a compensatory payment defined in Article 9 of the amended Act.

If a complainant chooses to bring an action against the decision of a municipal authority before a County Administrative Court, special time limits laid down in administrative legislation have to be observed. A formal request for rectification should normally be made to the awarding authority itself within fourteen days after service of a decision. The authority is required to deal with the request without delay. If necessary, a further complaint can be filed with the County Administrative Court within thirty days after service of the decision. Municipal decisions should include details on how to lodge any appeal.

Actions for damages before the ordinary courts are subject to the normal limitation period of ten years.

6. Procedure

6.1 Duty to give notice

Before commencing an action for interim or set-aside orders before the Competition Council, the complainant must first have given prior notice to the awarding authority of the alleged infringement and of his intention to seek review. The complainant has to show in the appeal documents that such written notice was given. The Act does not give further instructions concerning the written notice, but an ordinary letter or fax sent to the awarding authority should be sufficient.

The purpose of the notice requirement is to give the awarding authority an opportunity to rectify its defective procedure before the case goes to the Competition Council. For example, if the breach in question involves a clear numerical miscalculation, the awarding authority could rectify this without delay and thereby avoid proceedings before the Competition Council.

As regards actions for damages before the ordinary courts, no prior notification is required.

6.2 Applications to the Competition Council

A complainant before the Competition Council should institute proceedings by way of a written application. The application must set out the grounds for the action and the remedy sought. The awarding authority is then asked to submit an answer to the claim. The Competition Council may ask the parties to submit additional written pleadings.

The Competition Council may hold oral hearings in which it hears evidence from the parties and any other witnesses or experts. The Council may, under the threat of a fine, oblige the parties to be present at a hearing and to provide documentation. In some cases the parties are then asked to provide final pleadings in writing.

A special feature which improves the rapid availability of interim measures under the Act is the power whereby the presiding judge of the Competition Council may in urgent matters rule on interim measures in the absence of the other members of the Competition Council. The rulings of the presiding judge are later confirmed or cancelled in a session of the full Competition Council. Interim measures may be granted even before the other party (the awarding authority) is heard, in cases where the effectiveness of such measures would otherwise be put in jeopardy.

6.3 Actions in County Administrative Courts

A complainant wishing to bring an action before the County Administrative Court must send a written appeal to that Court specifying the decision under appeal, the remedies sought and the detailed grounds for the claim. The awarding authority is then asked to submit a written answer to the claim. An official of the Court prepares the case and has competence to request further written pleadings and other information (within a set time limit) from the parties. An oral hearing takes place if either party requests it.

6.4 Actions for damages in the ordinary courts

A complainant seeking damages shall submit an application for a summons to a court of first instance. The application should set out the claim and the grounds on which it is based, together with details of the relevant course of events and of the evidence to be presented to the court. The awarding authority has to submit a written answer to the court. The court then invites both parties to a preparatory hearing in which the scope of the dispute is defined and the case is prepared for the main hearing. All written evidence has to be presented at the latest in the preparatory hearing.

A main hearing takes place either (in simple cases) immediately after the preparatory hearing or (more usually) at a subsequent date. At the main hearing, oral submissions may be made by representatives of the parties as well as witnesses and experts.

6.5 *Duration of proceedings*

The duration of the proceedings varies according to the complexity of the case. Nevertheless, the time period between commencement of the action and a final ruling tends to be approximately one to six months before the Competition Council, ten months before the County Administrative Courts and one year before a court of first instance.

6.6 *Is it necessary to engage a lawyer?*

Finnish law does not require parties to be represented by a lawyer before the Competition Council or a court. However, it is normal and generally recommended that both parties be legally represented in proceedings before either of these forum.

7. Costs of proceedings

No court fee is payable in respect of complaints to the Competition Council. A fee of FIM 400 is payable before the County Administrative Courts. The fee for actions before the courts of first instance varies between FIM 300 and FIM 800, depending on the complexity of the case and the length of the procedure.

The principal expense entailed in pursuing an action is likely to be the cost of instructing lawyers. The amount of such costs will of course vary, depending on the duration and complexity of the case.

As a general rule, both the Competition Council and the courts will order the losing party in the litigation to pay all or part of the legal costs of the successful party, provided it would be unreasonable for the successful party to have to pay its own costs. In deciding whether an awarding authority should be obliged to pay the complainant's costs, any fault on the part of that authority is taken into consideration. The right of the successful party to receive compensation for legal costs is strongest in the courts of first instance, where the general rule is that the successful party should be compensated for all its necessary costs. This is clearly an important factor which complainants should bear in mind at the outset when deciding whether to commence proceedings.

8. Rights of appeal

Under Article 12 of the Act on Public Procurement, there is a right to appeal the Council's decisions before the Supreme Administrative Court. The time limit for submitting an appeal is thirty days. No leave to appeal is required.

Judgements of the County Administrative Courts can also be appealed to the Supreme Administrative Court within 30 days. No leave to appeal is required when the case concerns a decision by a municipal authority.

Rulings on damages by a court of first instance may be appealed to the Court of Appeal within thirty days. Before submitting such an appeal, the appellant party must have given notice to the court of first instance of his intent to appeal within seven days. A further appeal to the Supreme Court requires leave to appeal.

9. Enforcement of judgements

In Finland court judgements are generally implemented effectively, in particular where the defendant is a public authority. As was mentioned above, the Competition Council may reinforce its judgements by imposing conditional fines. In the event that the awarding entity fails to implement a judgement, the conditional fine would become payable.

Useful addresses

I Competition Council

Kilpailuneuvosto
Aleksanterinkatu 4
FIN-00170
Helsinki

Tel: 09 160 3677
Fax: 09 160 4022

II County Administrative Courts

Cities: Helsinki, Espoo, Vantaa

Uudenmaan lääninoikeus
Ratapihantie 9
FIN-00520
Helsinki

Tel: 09 17 3531
Fax: 09 17 35 3479

Cities: Tampere, Hämeenlinna

Hämeen lääninoikeus
Raatihuoneenkatu 1
FIN-13100
Hämeenlinna

Tel: 03 62 231
Fax: 03 622 3269

Cities: Turku, Pori

Turun ja Porin lääninoikeus
Itsenäisyydenaukio 2
FIN-20800
Turku

Tel: 02 266 0111
Fax: 02 266 1423

The island of Aland

Alands Förvaltningsdomstol
Statens ämbetshus
Torggatan 16
FIN-22100
Mariehamn

Tel: 018 6350
Fax: 018 635 202

III Civil Courts of First Instance

Helsingin käräjäoikeus Pasilanraitio 11 FIN-00240 Helsinki	Tel: 09 1571 Fax: 09 157 2717
Espoon käräjäoikeus Vitikka 1 FIN-02630 Espoo	Tel: 09 157 206 Fax: 09 524 481
Tampereen käräjäoikeus Oikeustalo Kelloportinkatu 5A FIN-33100 Tampere	Tel: 03 288 2111 Fax: 03 288 2490
Turunseudun käräjäoikeus Kaskenkatu 9 FIN-20700 Turku	Tel: 02 251 6180 Fax: 02 232 8510
Vantaan käräjäoikeus Kielotie 21 FIN-01300 Vantaa	Tel: 09 873 091 Fax: 09 873 0939

IV Body of Independent Arbitrators

Keskuskauppakamarin välityslautakunta (Board of Arbitration of the Central Chamber of Commerce in Finland) Aleksanterinkatu 17 (WTC) FIN-00100 Helskinki	Tel: 09 69 6969 Fax: 09 65 0303

V The Government Ministry responsible for overseeing the Procurement Rules

Kauppa-ja teollisuusministeriö (Ministry of Trade and Industry) Aleksanterinkatu 4 FIN-00170 Helsinki	Tel: 09 1601 Fax: 09 160 3666

FRANCE

Prepared by Herbert Smith (Brussels)

and Delvolvé Rouche (Paris), 1997

CONTENTS

FRANCE

1. Implementation of the Remedies Directives

Remedies Directive 89/665 has been transposed into French legislation by Law No. 92-10 of 4th January 1992, as subsequently amended. Its relevant provisions on remedies have been incorporated into Law No. 91-3 of 3rd January 1991 which implemented Works Directive 71/305 (an earlier version of Works Directive 93/37). A further law (No. 93-122 of 23rd January 1993) extends these provisions so that they also cover public contracts for supplies and services and public services concessions.

As regards remedies in the utilities sectors, Remedies Directive 92/13 has been implemented in France by Law No. 93-1416 of 29th December 1993. That law incorporates the remedies provisions into the earlier law (No. 92-1282) which implemented Utilities Directive 90/531.

2. The relevant forum

A fundamental differentiation is made in France between matters subject to administrative law and thus reserved for the exclusive jurisdiction of the administrative courts, and those for which the ordinary civil courts are competent. Depending on whether or not a contract is considered to be administrative in nature, the competent courts are:

(i) for administrative contracts: the *Tribunaux Administratifs, Cours Administratives d'Appel* and/or *Conseil d'Etat* (the supreme court for administrative cases), which are collectively referred to as "the administrative courts";

(ii) for non-administrative contracts: the *Tribunaux de Grande Instance* or *Tribunaux de Commerce, Cours d'Appel* and *Cour de Cassation* (the supreme court for civil and commercial cases), which are collectively referred to as "the civil courts".

In each branch, certain powers are granted to the president of the lower court,[21] enabling him to adjudicate on certain matters of urgency, through expedited proceedings (*procédures en référé*).

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[21] That is, the president of the *Tribunal Administratif* or his delegate, or the president of the *Tribunal de Grande Instance* or of the *Tribunal de Commerce* or their respective delegates, as the case may be. When acting in this capacity, these various judges may all be described as the *juge des référés*.

At the risk of over-simplification, a contract should normally be considered to be administrative if:

(i) it is concluded by a public entity, being the State, a *département*, a *commune* or their public administrative organs, or a private person or corporation contracting on behalf of such an entity; and

(ii) the object of the contract is a public service or the contract contains clauses which one would not usually find in contracts between private persons.

In France, the great majority (in terms of numbers, if not value) of the contracts covered by the procurement legislation are awarded by public entities, either directly or indirectly through persons or corporate bodies acting on their behalf, and these contracts do relate to the implementation of public services. Nevertheless, a significant proportion of contracts covered by the procurement Directives fall within the jurisdiction of the civil courts.

Under the implementing legislation cited in section 1 above, appropriate provisions have been laid down with a view to covering *both* types of contract, with the specified remedies being available in the civil courts as well as the administrative courts.

3. Available remedies

3.1 Interim and annulment orders

These two distinct but parallel remedies have been implemented within the same provisions of the above-mentioned French implementing laws and are very closely related. The same judges, in the same action and within the same proceedings, may alternatively lay down an interim order or a final annulment order for the protection of the complainant. Moreover, the same factors are likely to govern the availability of both types of remedy. They are therefore assessed together in the following sections.

It should also be noted that interim and annulment orders are only available as regards public contracts falling within the scope of Remedies Directive 89/665. They are not generally available as against utilities under the measures implementing Remedies Directive 92/13. An alternative system of penalty fines applies to utilities, as explained in section 3.2 below.

3.1.1 Before the administrative courts

A complainant in a procurement dispute concerning an administrative contract may, before that contract has been entered into, apply to the president of the *Tribunal Administratif* or his delegate in respect of a breach of the procurement rules. Law No. 92-10 gives the president the power to take certain preventative measures, by stipulating that Article L 22 of the *Code des Tribunaux Administratifs et des Cours Administratives*

d'Appel ("the TA/CAA Code") shall apply in relation to procurement infringements. Under that Article, the president may order the awarding authority to comply with its obligations and at the same time suspend the award of the contract or the execution of any related decision. He may also nullify such decisions and cancel clauses or conditions intended to be included in the contract where they are contrary to the said obligations.

Such an action is preventative in nature. It attempts in effect to obtain the intervention of the judge before the contract at stake is concluded by the parties. The action must be filed before the contract is signed, whether it is an action for interim measures or one for a final annulment of decisions or draft contractual clauses. It is clear from the wording of the implementing legislation that, after the contract is signed, there is no longer any scope for such intervention and the judge would have to declare himself incompetent to adjudicate the case. Given that this type of procedure is specifically in derogation of usual procedures, the judge would be likely to apply a restrictive approach.

The proceedings follow an expedited procedure known as a *procédure en référé*. The powers of a judge ruling on *référé* are generally limited to interim measures. However, under the provisions implementing Directive 89/665 the judge's powers are more extensive than usual, as he may also declare an administrative act null and void.

The implementing law provides for a decision rendered *"en la forme des référés"*, confirming that the procedure is the expedited one that generally applies in emergency cases. The decision is not a typical *"ordonnance de référé"*, which is provisional in nature and may subsequently be reversed by the court (of which the *juge des référés* is a member) when the court is called upon to adjudicate the case on its merits (*"jugement au fond"*). Here, the judgement of the *juge des référés* is final and binding.

3.1.2 Before the civil courts

Interim and annulment orders are also available in the civil courts in respect of contracts which are caught by the EU procurement rules but which have a non-administrative nature.

Law No. 92-10 adds a new Article 11.1 to the law (No. 91.3) implementing the EU procurement rules for public works contracts and is also applicable to public supplies and services contracts. Under the said Article 11.1, a complainant may, prior to the contract being signed, ask the judge to lay down an interim order. Such an order would instruct the awarding authority to comply with its obligations and may suspend the award procedure or the execution of any decision relating to that procedure. The complainant may also seek the annulment of such decisions or the cancellation of clauses or conditions intended to be incorporated into the contract, where these are contrary to the procurement rules.

Such an action has to be brought before the president of the competent civil court or his delegate, who shall again follow the accelerated *référés* procedure.

3.2 *Penalty fines against utilities*

The remedies of interim suspension orders and annulment orders, as described in section 3.1 above, are only available as against public authorities falling within the scope of Remedies Directive 89/665. As regards utilities, the French Government has opted for the alternative form of remedies provided for in Article 2(1)(c) of Directive 92/13: namely, the imposition of dissuasive payments (penalty fines) upon the awarding utility.

An order for such penalties can be sought in either the administrative courts or the civil courts, depending upon whether or not the contract is administrative in nature. As regards the administrative courts, Law No. 93-1416 adds a new Article 23 to the TA/CAA Code. For actions in the civil courts, on the other hand, Law No. 93-1416 adds a new Article 7.1 to the law which implemented Utilities Directive 90/531 (Law No. 92-1282). These two new provisions are virtually identical and the following explanation therefore applies regardless of whether the action is brought in the administrative or civil courts.

A complainant alleging an infringement by a utility may, before the contract in question is concluded, apply to the president of the *Tribunal Administratif* or (as appropriate) of the civil court. The president may then order the utility to comply with its obligations within a particular time limit. At the same time, he may also impose a provisional daily fine (*une astreinte provisoire*) as from the expiry of the specified time limit.

In deciding whether to impose such an order, the president should take into account the probable effects of the measure as regards all the interests potentially at stake, including the public interest, and should refrain from granting the order where the negative consequences would exceed the benefits. Hence, the judge must apply a "balance of interests" test. There is as yet very little case law giving guidance on the way in which this test will be applied in practice. To the knowledge of the authors, there has only been one reported case in which a president of an administrative tribunal has ordered a dissuasive penalty fine.[22]

The amount of the provisional daily penalty shall become payable in the event of non-compliance, but taking into account the utility's behaviour and any difficulties it may have met in complying with the order. If the infringement in question has not been corrected in accordance with the judge's directions, the judge may impose a final penalty (*une astreinte définitive*).

The president or his delegate decides upon the imposition of a provisional or final penalty through the *référés* procedure. As explained above, this is a form of accelerated procedure which is usually reserved for measures of an interim nature. The implementing law specifies that a provisional or final penalty fine may be partially or fully annulled if it is proven that the utility's non-compliance, or delay in complying, with the president's order was due to any extraneous circumstances.

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[22] Société Biwater Europe Ltd v Sivom de la région d'Aigues Mortes, where the president of the administrative tribunal of Montpellier granted an order on 14 September 1994. Courrier des maires 11 November 1994, p. 57, cited in Rep. Dalloz Droit communautaire, v marchés publics, No 617.

The implementing law confirms that the imposition of a penalty fine, whether provisional or final, is entirely independent of any action for damages. Thus, the imposition of such a fine will not hinder a complainant from also seeking an award of damages as against the utility.

Finally, it may be noted that there is no express provision allowing the imposition of penalty fines as against public sector authorities under the laws implementing Remedies Directive 89/665. Nevertheless, such an order might in principle be made even against such authorities, as it is among the measures that a judge *des référés* may in general take under the TA/CAA code and the new French code of civil procedure.

3.3 Damages

Independently from the preventative measures described in sections 3.1 and 3.2 above, a complainant may bring a claim for damages before the ordinary civil courts. Whereas the remedies described above may only be requested if the contract in question has not yet been entered into, damages may be claimed regardless of whether or not the contract has been entered into.

French general law and case law indicates that a complainant may bring an action for damages where he has been deprived of a right as a result of fault or negligence by the defendant. The complainant has the burden of proving the existence of the fault, the damage suffered and the causal link between the fault and the damage.

A fault may consist in the violation of a legal obligation, constituting an unlawful act. Such fault is deemed to have occurred if the defendant, whether voluntarily or otherwise (with intention or by negligence), fails to comply with a duty expressly laid down by law.

It has long been recognised that where the fault results in a party losing the chance of concluding a contract, that party may in principle recover damages. The complainant is, however, required to prove that its chance of being awarded the contract in question was significant (*"sérieux"*). It is up to the judge to determine whether this is the case, according to the circumstances. Damages may cover loss of profits. In addition, the complainant may obtain compensation for its expenses related to the preparation of its offer.

The French government did not consider it necessary to introduce an express provision implementing Article 2.7 of Directive 92/13. Under that Article, a complainant seeking to recover bid costs only has to prove that a utility has committed an infringement of the procurement rules, that he had a "real chance" of being awarded the contract (in the absence of the breach) and that this chance was adversely affected as a result of the infringement. Under pre-existing French law, this is probably all that a plaintiff would need to prove in any event.

4. Who may apply?

The persons having standing to bring actions of the types described above are those having an interest in the conclusion of the contract at stake and who are potentially harmed by the alleged infringement of the procurement rules. Thus, the complainant must have a personal interest in being awarded that contract, although this does not necessarily imply that he must have actually participated in the award procedure.

It may also be noted that the State representative in a *Département* also has standing to bring an action if the contract in question is concluded or to be concluded by a regional or local authority. Moreover, the public prosecutor has the right to bring such an action in cases where the European Commission has notified the French Government that a clear and manifest infringement has been committed (the "corrective mechanism" under the Remedies Directives) and/or that the Commission intends to bring infringement proceedings against France under Article 169 of the EC Treaty.

5. Time limit for bringing actions

No specific time limit is laid down in the legislation implementing the Remedies Directives. The only significant time constraint is that any action for an interim order, annulment order or an order for penalty fines must be brought before the contract in question is entered into (ie. signed). This reflects the preventive nature of these remedies, which all seek (provisionally or finally) to restrain the awarding authority from signing a contract or from incorporating unlawful stipulations into a contract.

As regards actions for damages in the civil courts, the general rule is that any action only becomes time-barred once 10 years have elapsed since the infringement in question.

6. Procedure

6.1 Duty to give prior notice

In actions for interim or annulment orders against public authorities (under the measures implementing Directive 89/665), the complainant is under an express obligation to give prior notice to the authority of his intention to commence proceedings. This is the case whether those proceedings will be in the administrative or civil courts. The advance notice must take the form of a written request that the authority complies with its obligations under the procurement rules. If the authority fails to do so within 10 days of the notice, the complainant may submit his application to the president (or his delegate) of the competent court. Such an action is not admissible until that 10 day period has expired.

Case law has indicated that the required notice must go into some detail regarding the complainant's arguments and must expressly seek to persuade the authority to take the necessary measures in order to comply with its obligations under the procurement rules. It would not be sufficient for the complainant merely to ask for reasons as to why he was not invited to tender or was not awarded the contract.

The obligation to give prior notice (and to wait for 10 days before commencing the action) might have the effect of inducing the awarding authority to accelerate the process of signing the contract so as to avert the risk of an order being made (given that these can be made only before the contract is signed). In such circumstances, the plaintiff may be able to benefit from other remedies available under ordinary *référés* proceedings. For example, a judge has general powers to prescribe interim measures in order to prevent any imminent prejudice or to prevent manifestly unlawful conduct. However, such measures may have no real impact if the contract has already been entered into, in which case the complainant's only real remedy will be an action for damages.

Another option would be for the complainant to argue that the acceleration of the signing process after his giving notice constitutes an abuse of law, resulting in a so-called *"détournement de pouvoir"* or *"détournement de procédure"*. Under classic French law, these are grounds for the annulment of an administrative act or decision. However, the complainant would bear the burden of proof and the alleged abuse might be difficult to establish.

6.2 Référés procedure for interim and annulment orders

As explained above, complainants may seek orders for interim measures and/or the annulment of administrative acts as against public authorities within the scope of Directive 89/665. Such actions may be brought before either the administrative or civil courts, depending on the nature of the contract, and have to be preceded by the prior notice described in section 6.1 above.

Such an application is made by submitting a written request to the administrative court or a writ of summons (*assignation*) before the civil courts. The application is then heard by the court's president (or his delegate), who follows an accelerated form of "*référés*" procedure. The French provisions implementing Directive 89/665 specify that the president shall deliver his ruling within 20 days of the application being lodged. However, no legal sanction arises where that time limit is not met and in practice judges frequently fail to respect the time limit.

A decision of the Conseil d'Etat suggests that this 20-day time limit is indicative only. Hence, the president is not deprived of his competence solely because he was unable to deliver his ordinance within the prescribed period of 20 days. Nevertheless, the Conseil d'Etat will generally require the *juge des référés* to expedite the matter in the shortest possible time. Indeed, the obligation to do so has been used by some judges to justify an acceleration of the procedure to an extent which may override usual adversarial

principles. It has been held that it does not matter that the complainant has not been forwarded a copy of the defendant's written submission in due time; it suffices that both parties are given the opportunity orally to exchange and debate their arguments at the hearing.

6.3 Applications for penalty fines

As explained in section 3.2 above, a complainant may ask either the administrative or civil courts to impose penalty fines upon a utility who has infringed the procurement rules. Such an action should again be brought before the president of the lower court and a form of expedited *référés* procedure is again followed.

Although the procedure is likely to be fairly rapid, there is no fixed time limit (such as the 20-day requirement applicable under the implementation of Directive 89/665) within which the judge must deliver his ruling. Also, there is no obligation to give the utility prior written notice and to wait for 10 days before filing the action. In all other respects, however, the procedure is the same as that outlined in section 6.2 above.

6.4 Actions for damages in the civil court

An action for damages in the civil courts is commenced by a written summons (*assignation*), which is filed in the court and notified by a public server (*huissier*). Written pleadings are exchanged under the auspices of a judge. Finally, the parties and their representatives attend the final hearing at the court, where oral pleadings are made. The judge usually delivers his judgement within one month following the hearing.

The entire process, from commencement of action to final judgement, takes an average of 8 to 14 months in the lower courts. Any appeal to the courts of appeal takes on average a further 18 months.

6.5 Is it necessary to engage a lawyer?

In the administrative courts, it is not compulsory for the parties to be represented by a lawyer (*avocat*) if the action is limited to seeking the annulment of an administrative decision on grounds of illegality. Even if not mandatory, however, it is general practice and highly recommended that both sides be legally represented.

In the civil courts, the parties are generally required to be legally represented, although they can plead in person before the lower commercial courts.

7. Costs of proceedings

In the administrative and lower civil courts, the only significant expenses to be borne by the parties are lawyers' fees. The successful party will only rarely be able to obtain an order for (partial) reimbursement of its legal fees by the losing party.

8. Rights of appeal

As regards actions for interim or annulment orders, the decision of the president of the lower court (*juge des référés*) is not subject to a full right of appeal. In other words, that decision cannot be appealed on its merits to the *Cours d'Appel.* This does not preclude a party from filing a *pourvoi en cassation* before the *Cour de Cassation*, provided this is done within 15 days (instead of the ordinary time limit of 2 months). The purpose of such a *pourvoi* is limited to a review of the legality of the decision itself, which may be cancelled only if contrary to certain basic legal principles to which any judgment must conform. The facts and merits of a claim cannot be discussed again in the *Cour de Cassation.*

Similarly, an order by the *juge des référés* imposing a provisional penalty fine upon a utility is not subject to a full right of appeal. However, a full right of appeal to the *Cour d'Appel* does exist where the judge decides to convert a provisional penalty fine into a final penalty.

A ruling of the civil courts upon an action for damages may be subject to an appeal, within one month, to the *Cour d'Appel* and ultimately to the *Cour de Cassation* (the supreme court for civil and commercial cases).

9. Enforcement of judgements

Public bodies will usually comply, relatively promptly, with judgements made against them. In general, public authorities are reluctant to face the inconveniences and bad publicity resulting from lengthy, unresolved disputes. A failure to comply could, for example, result in the matter being referred to the *Médiateur de la République* (a type of ombudsman). As regards utilities, the possible imposition of daily penalty fines creates an obvious incentive for those entities to comply with orders made against them.

If a public authority were to fail to pay damages awarded against it, there are procedures by which the complainant creditor may render it mandatory for the public authority to pay the debt within four months. A failure to do so may result in the public accountant responsible being held personally liable for the debt.

Useful addresses

1. Selected administrative courts

Conseil d'Etat
Palais Royal
1 place du Palais Royal
75001 Paris

Cour administrative d'appel de Paris
10 rue Desaix
75015 Paris

Tribunal administratif de Paris
Hôtel d'Aumont
7 rue de Jouy
75181 Paris Cedex 04

Tribunal administratif de Versailles
56 avenue de Saint-Cloud
78011 Versailles Cedex

Tribunal administratif de Melun
2 avenue Galliéni
77000 Melun

Tribunal administratif de Lille
143 rue Jacquemars Giélée
BP 2039
59014 Lille Cedex

Tribunal administratif de Strasbourg
31 avenue de la Paix
BP 1038 F
67070 Strasbourg Cedex

Tribunal administratif de Lyon
Palais de Justice de Part-Dieu
184 rue Duguesclin
69433 Lyon Cedex 03

Tribunal administratif de Marseille
22 rue Breteuil
13281 Marseille Cedex 6

Tribunal administratif de Montpellier
6 rue Pitot
34063 Montpeller Cedex

Tribunal administratif de Toulouse
51 rue Raymond IV
31068 Toulouse Cedex

Tribunal administratif de Bordeaux
8 rue Tastet
BP 947
33063 Bordeaux Cedex

Tribunal administratif de Nantes
6 allée de l'ile Gloriette
44041 Nantes Cedex 01

Tribunal administratif de Caen
3 rue A. Leduc
14000 Caen

Tribunal administratif de Rouen
80 Boulevard de l'Yser
BP 500
76005 Rouen Cedex

2. Selected civil courts

Cour de cassation
Palais de Justice
5 quai de l'Horloge
75055 Paris RP

Cour d'appel de Paris
Palais de Justice
4 boulevard du Palais
75055 Paris RP

Tribunal de Grande Instance de Paris
Palais de Justice
4 boulevard du Palais
75055 Paris RP

Tribunal de grande instance de Lyon
67 rue Servient
69433 Lyon Cedex 3

Tribunal de grande instance de Marseille
6 rue J. Autran
13281 Marseille Cedex 6

Tribunal de grande instance de Lille
Avenue de Peuple Belge
59034 Lille Cedex

Tribunal de commerce de Paris
Palais de Justice
1 quai de Corse
75181 Paris Cedex 04

Tribunal de commerce de Lyon
44 rue de Bonnel
69433 Lyon Cedex 03

Tribunal de commerce de Marseille
2 rue E Pollak
13291 Marseille Cedex 06

Tribunal de commerce de Lille
Halle aux Sucres
33 avenue de Peuple Belge
BP 109
59009 Lille Cedex

3. Recognised bodies of independent arbitrators

Association Française d'Arbitrage
8 avenue Bertie Albrecht
75008 Paris

Chambre de Commerce Internationale
38 Cours Albert 1er
75008 Paris

4. French Ministries

Ministère de la Justice
13 place Vendôme
75001 Paris

Ministère des Affaires Etrangères
38 quai Orsay
75007 Paris

Ministère de l'Equipement
et des Travaux Publics
La Grande Arche
92055 La Defense Cedex

Ministère de l'Industrie
101 rue Grenelle
75007 Paris

GERMANY

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GERMANY

1. Implementation of the Remedies Directives

In Germany, the Remedies Directives have been implemented by the insertion of §§ 97 – 129 as new fourth part into the Federal Law against Restraint of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB) by the so-called Public Award Amendment Law (*Vergaberechtsänderungsgesetz* – VgRÄG).

Pursuant to former § 57a HGrG (*Haushaltsgrundsätzegesetz* – Act on Budgetary Principles), the Federal Government had adopted the Procurement Regulation (*Vergabeverordnung* - VgV) of 22 February 1994. This procurement regulation is applicable until the Federal Government adopts a modified Procurement Regulation pursuant to § 97 VI GWB. A draft of the new Procurement Regulation has already been published and the new Procurement Regulation is going to be adopted in spring 2000 at the latest. This new regulation will *inter alia* and like the current one define the rules applicable to contracts (as defined in § 99 GWB) awarded by the contracting entities (as defined in § 98 GWB) by reference to the provisions of the pre-existing general terms and conditions applicable to public contracts (*Verdingungsordnungen*) known as "VOB/A" (works contracts)[23], "VOL/A" (supplies and services contracts)[24] and "VOF" (contracts for non-pre-defined freelance services)[25] and it will establish the thresholds. Both VOB/A and VOL/A have been amended to take account of the procedural rules for the award of public works, , services, and supplies contracts in both the classical field and the utilities sector under EC procurement law.

The first section (§§ 97 – 101 GWB) formulates general principles of the procurement procedure. Furthermore, it defines the terms "public contract" and "contracting entity", to which the procurement procedure and review provisions apply. The second section (§§ 102 – 124 GWB) contains provisions with regard to the procurement review procedure and to the procurement review bodies of first and second instance, the Federal/State Procurement Chamber (*Vergabekammer*) and the Procurement Division at the Court of Appeal (*Vergabesenat des Oberlandesgerichts*). The third section (§§ 125 – 129) relates to certain damages and the costs of the review procedure. The first and third sections empower the Federal Government - not the *Länder* - to adopt more detailed (Federal) Regulations. The Federal Government is using this authorisation by adopting the said new Procurement Regulation (VgV).

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[23] Verdingungsordnung für die Vergabe von Bauleistungen.

[24] Verdingungsordnung für die Vergabe von Leistungen außer Bauleistungen.

[25] Verdingungsordnung für die Vergabe von freiberuflichen Dienstleistungen.

For convenience, the remainder of this chapter will focus principally on the position at Federal level, although the most important distinct features regarding remedies at State level will also be pointed out.

2. The relevant forum

The German implementing provisions provide a review system consisting of a non-obligatory review procedure at the pre-existing Procurement Review Body (*Vergabeprüfstelle*), of a review procedure at the Procurement Chamber (*Vergabekammer*) as the review body of first instance and of a review procedure at the Procurement Division at the Court of Appeal (*Vergabesenat des Oberlandesgerichtes*) as a review body of second instance. The function of this facultative procedure is merely to consult and resolve matters. The Federal Government and the *Länder* are allowed to set up (or keep the existing) Procurement Review Bodies, which can happen in a way that the administrative entity, which generally supervises the legality of its activities (*Rechtsaufsicht*), also acts as Procurement Review Body. It is not necessary to have filed a complaint with that Body beforehand in order to be able to lodge a reviewing application to the Procurement Chamber. Due to this fact, most *Länder* are about to abolish their non-obligatory procurement review bodies. On the federal level a procurement review body may be found only at the Ministry of Economic Affairs.

2.1 The Procurement Chamber

The Federal Government and the *Länder* Governments have each been obliged to set up an independent Procurement Chamber (*Vergabekammer*) as a first level of review. Each Federal Procurement Chamber has three members, at least two of whom (including the Chairman) must be career civil servants qualified for higher administrative service and at least one of whom – preferably the Chairman – must be qualified to hold judicial office. The two civil servant members of the Chamber should have a good knowledge in the area of public procurement. The non civil servant member should have practical experience in that area. Their term of function lasts five years.

The Federal Government establishes the necessary number of Chambers at the Federal Competition Office. The *Länder*, when establishing their State Procurement Chambers, have to ensure the participation of at least one qualified to hold judicial office and having a good knowledge of public procurement.

These Chambers are exclusively competent for the reviewing of award procedures. Claims against awarding authorities aiming at their obligation to take or not to take certain measures in an award procedure can only be lodged with this Chamber.

The remedies available before the Procurement Chamber are considered further in section 3.1 below.

2.2 The Procurement Division at the Court of Appeal

Each Court of Appeal has been obliged to set up a specialised Procurement Division (*Vergabesenat des Oberlandesgerichts*). The role of these Procurement Divisions of second instance is to review the legality of decisions taken by the Procurement Chambers of first instance. Strictly speaking, they may not directly review the legality of award procedures themselves. In practice, however, the Procurement Division will review whether the Procurement Chamber has fully complied with its obligation to establish the relevant facts and has applied the law to those facts on a sound basis.

The Procurement Division can only rule on the legality or illegality of the Procurement Chamber's decision. It may take a new decision replacing the decision of the Procurement Chamber or instruct the Procurement Chamber to render a new decision taking into consideration the point of view of the Division, if the decision appealed against was unlawful. Otherwise, the appeal will be rejected. After the contract in question has been awarded, the Procurement Division can issue only declaratory decisions.

2.3 The ordinary civil courts

While the Procurement Chamber and the Procurement Division clearly lack the power to award damages, the implementing provisions of the GWB leave open the possibility of a complainant bringing an action for damages before the civil courts. For claims with a value of more than DM 10,000 the responsible courts are the district courts (*Landgerichte*). For claims of lower value action has to be taken at the local courts (*Amtsgerichte*). Such actions will be governed by the principles of German civil law and are analysed in section 3.3 below.

3. Available remedies

3.1 Interim suspension orders

A complainant in a procurement case before the Procurement Chamber does not need to apply expressly, in order to obtain the suspension of the award procedure in question. Such a suspension is already (automatically) effected by the simple notification of the complainant's application to the awarding authority for reviewing the award procedure itself. The suspension is based on the law itself – no suspension order is to be taken at that stage of the procedure. The awarding authority is bound to respect this suspensive effect and has to refrain from awarding the contract until two weeks after the Procurement Chamber issues its final decision.

In order to fight this suspensory effect the awarding authority may apply to the Procurement Chamber for permission to award the contract. When considering such an application for permission to award the contract, the Procurement Chamber is obliged to apply a balance of interests test. The GWB states that all potentially aggrieved interests and the public interest to avoid unreasonable delays in the award of contracts are to be

taken into consideration. That law also states that permission can be given if the public interest in the continuation of the award procedure prevails.

In this case the suspensive effect is set aside and the awarding authority may award the contract two weeks after this decision, unless the complainant appeals to the Procurement Division at the Court of Appeal and applies for the restoration of the suspensive effect. A direct appeal against the Chamber's decision to set aside the suspensive effect is not permitted.

If the Procurement Chamber does not allow the award of the contract, and by this makes the suspension continue, the awarding authority may, following the Chamber's judgment, apply to the Procurement Division at the Court of Appeal for permission to award immediately the contract.

Due to the exclusive competence of the Procurement Chamber as a review body of first instance and the automatic suspensive regime, it is not possible anymore for a complainant to request a preliminary injunction in the civil courts.

3.2 Set aside or annulment orders

Until the contract in question has been entered into, a complainant may apply to the Procurement Chamber for the annulment of unlawful acts taken by the awarding authority in the course of an award procedure.[26] The Procurement Chamber may not "annul" measures in the proper sense of the word, but it may order the contracting authority to take adequate measures in order to annul unlawful measures or to adopt lawful measures, for example to send the contract documents to a bidder who had been unlawfully excluded from the award procedure and allow him to submit a tender.

The Procurement Chamber examines the lawfulness of the contested award procedure upon an application by any person concerned. In particular, the Chamber examines whether any of the procurement rules applicable under the GWB or the VgV have been infringed. In principle, any breach of the procurement rules gives rise to the finding that the award procedure is unlawful, because there is no express requirement in the wording of the GWB itself that the infringement must concern essential provisions or be particularly serious. But the explanatory notes to the GWB state that only those provisions aiming at the protection of the bidders should give rise to the qualification of an award procedure as unlawful.

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[26] In this context it is worth noting that the new Procurement Regulation, to be adopted in springtime 2000 by the latest, is presumed to take up the recent judgement of the ECJ on bidders' review rights (judgement of the ECJ of 28 October 1999, C-81/98 "Alcatel"). According to the ECJ "Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met".

Once a contract has been entered into, neither the Procurement Chamber nor the Procurement Division at the Court of Appeal may set it aside. The powers of the Procurement Chamber are limited to possible annulment of acts and decisions of awarding authorities prior to the conclusion of the contract. If the awarding authority enters into or awards the contract, before the Procurement Chamber has had the opportunity to act, that Chamber will in all cases be limited to a mere declaratory decision (such a declaration being binding as regards any subsequent action for damages). Due to the exclusive competence of the Procurement Chamber as a review body of first instance, there is no means of recourse to the administrative courts. But the ability of the civil courts in Germany to annul concluded contracts has increased due to the (ex lege) suspensive regime. Since the highly unlikely award of a contract despite the suspension of the award procedure is a breach of an express legal prohibition, the contract would be void according to § 134 BGB (*Bürgerliches Gesetzbuch* – Civil Code).

3.3 Damages

The review procedures laid down in the GWB and the associated implementing regulations state the legal basis for certain actions for damages before the civil courts. This does not exclude an action for damages under the general provisions of German civil law. Indeed, damages are the only remedy available once the contract in question has been entered into and it cannot be annulled as void.

§ 126 GWB states an express legal basis for the recovery of costs of preparing a tender and participating in the award procedure (bid costs). These costs constitute direct losses (the so-called "negative interest"). A complainant is able to recover his bid costs, provided that the awarding authority has infringed a provision intended to protect bidders and that (in the absence of the breach) the bidder would have had a *real chance* of winning the contract. The bidders claiming their tender costs (negative interest) are privileged compared to those claiming the so-called positive interest by the application of a lower standard of proof. However, the usual remuneration for employees involved in the preparation of the bid can be claimed only if it can be shown that their working capacity could have been profitably used elsewhere. Furthermore, it may be relevant to consider whether the costs for the preparation of the offer have been incurred solely for participation in a particular award procedure, or whether they have been, or will be, used in other cases.

In the past damages have often been claimed under the concept of *culpa in contrahendo*. Following this concept, damages may be claimed if a prejudice has been suffered because of detrimental reliance on legitimate expectations in contractual negotiations or pre-contractual contacts, provided that the other party is in fault. Since the concept of *culpa in contrahendo* limits the damages to direct losses only, it has lost much of its importance in the field of public procurement following the new § 126 GWB, which states an express legal basis for the recovery of bid costs.

Damages that go beyond the recovery of bid costs may be claimed pursuant to § 33 GWB. In addition, § 823 II of the German Bürgerliches Gesetzbuch (BGB) generally provides a possibility to claim damages for the infringement of a statute intended for the

protection of others. Following § 97 VII GWB, the rules on public procurement of the GWB constitute such a statute.
Under general principles, it appears that indirect or potential losses (the so-called "positive interest") may only be recovered in exceptional circumstances. In such cases, the bidder has to be compensated as if he had obtained the contract. Hence, lost profits may be recovered. In order to calculate the amount of lost profit, expenditure relating to materials, salaries, taxes and fixed costs should be deducted from the contract remuneration.

In a ruling in 1992, the Federal Supreme Court of Germany for the first time granted compensation for lost profits to a bidder who could prove that, if the proper procedures had been followed, the contract would have been awarded to him. Given the great difficulty that any complainant will have in proving that (in the absence of the breach) he would have obtained the contract, recovery of damages for loss of profits will prove difficult and exceptional in practice.
In order to recover damages, a causal link has to be established between the breach of a legal obligation and the injury. In the event of a breach of the procurement rules, all unsuccessful bidders might claim damages. In order to limit the economic burden on the awarding authority, the courts have been very restrictive with regard to the causal link. Thus, according to the case law of the Federal Supreme Court, the bidder who claims recovery of his positive interest must prove that he would almost certainly have obtained the contract. A mere "real chance" is not sufficient (unlike in the case of the negative interest or bid costs). It must be established "beyond reasonable doubt" that the complainant would have obtained the contract. It appears, therefore, that a very high standard of proof will apply in these actions for damages regarding cases under the procurement rules.

Finally, § 125 GWB states a legal basis for another category of damages namely damages caused by the misuse of the right to apply or to appeal. An applicant or appellant has to pay for the damage caused to his competitors and the awarding authority if he introduces wrong information in order to achieve the initial or further suspension of the award procedure. The same is true for the introduction of a complaint in order to harm competitors, delay the award procedure or withdraw the complaint at a later stage for money.

It is not a pre-condition for a damages action in the civil courts that the complainant has first contested the act in question before a Procurement Chamber or a Procurement Division at the Court of Appeal. However, where a claimant omitted to contest an act before those bodies, the damages he is awarded might be reduced on the grounds of contributory negligence or failure to mitigate damages. But if the claimant for damages has previously mounted a challenge before the Procurement Chamber or Division at the Court of Appeal, the civil court is bound by the finding of either of these bodies and must not itself establish whether a violation of the public procurement rules has occurred.

4. Who may apply?

Any complainant who has an interest in a relevant contract or who claims a violation of his rights by infringement of procurement rules or who suffered, or could probably suffer, damages by the alleged infringement of procurement rules may initiate a review procedure before the Procurement Chamber in respect of an alleged infringement of the procurement rules. But an application to the Procurement Chamber will be rejected as inadmissible if the complainant had already become aware of the alleged infringement during the award procedure without immediately complaining about it to the awarding authority or if he did not complain about infringements of procurement rules that could have already been realised on the basis of the (contract) notice. It is not necessary that the complainant had previously initiated the facultative procedure at the Procurement Review Body.

The Procurement Chamber may intervene only upon application, but not *ex officio*, even if it has reason to believe that the procurement rules have been violated. The complainant has the right to a review procedure upon his application.

Any complainant who has previously applied to the Procurement Chamber may appeal against that Chamber's decision to the Procurement Division at the Court of Appeal. The wording of the implementing Regulations also provides that the awarding authority itself and any bidder whose interests were seriously affected by that decision and who had therefore been invited to intervene in the procedure at the Procurement Chamber also have standing to appeal against the decision of the Procurement Chamber.

Third parties who did not participate in the original procurement procedure clearly do not have standing to appeal against the decision of the Procurement Chamber to the Procurement Division.

5. Time limit for bringing actions

There is no time limit for bringing a complaint before the Procurement Chamber. Complainants nevertheless have an interest in acting quickly, since the powers of the Procurement Chamber are merely declaratory once the contract in question has been awarded. Suspensive effect, interim measures or annulment orders are only available if the complainant intervenes before the contract is entered into.

Under § 117 GWB, a so-called 'immediate appeal' against a final decision issued by a Procurement Chamber may only be submitted to the Procurement Division within *two weeks* after notification of the Chamber's decision to the complainant.

Actions for damages in the civil courts are subject to different limitation periods. As a general rule the limitation period for non-contractual damages under German civil law (e.g. under § 823 II BGB) is three years (§ 852 BGB).

Damages under the concept of *culpa in contrahendo* may in principle be claimed within a period of 30 years.

6. Procedure

6.1 Before the Procurement Chamber

§§ 107 – 115 GWB contain no specific procedural rules, for example with regard to hearings, motions of the parties, expert opinions or other forms of evidence. In very general terms, the provisions state that the Procurement Chamber has to examine the compliance of the award procedure with the applicable rules. For this purpose, the Procurement Review Body may request from the awarding authority all relevant information it deems necessary for its factual and legal assessment. The parties of the procedure must be heard and have to contribute to the finding of the facts and to the acceleration of the procedure. The Chamber may even set time limits to the parties after which further statements of the parties may be disregarded. In principle, the decision is to be taken on the basis of an oral hearing, but if the parties agree, a decision on the basis of the documents is possible.

The decision of the Procurement Chamber contains a qualification whether the rights of the complainant have been violated or not and the appropriate measures to be taken in order to put an end to the violation and avoid damages to the interests involved. The Procurement Chamber is not bound by the application of the complainant, which means that it can order the measures necessary to restore the lawfulness of the award procedure. A legal notice informing about the possibility of appeal against this decision and the competent review body has to be attached to the decision.

6.2 Before the Procurement Division at the Court of Appeal

§ 120 GWB contains no details of the procedure to be followed by the Procurement Division. It merely states that the parties have to be represented by a lawyer who is admitted to a German court and that these Divisions should proceed according to certain parts of the code on civil procedure (Zivilprozeßordnung – ZPO). § 119 states that all the parties involved in the procedure of first instance are also parties to the review procedure of second instance at the Procurement Division at the Court of Appeal.

§ 118 states that the immediate appeal has a suspensive effect with regard to the Procurement Chamber's decision. Depending on whether there have been applications as well as granting or denying decisions in the first instance concerning the suspension of the award procedure, the suspension continues until the issue of the final decision in the second instance, on the one hand, or ends two weeks after the expiration of the time limit for lodging the immediate appeal (but can be extended until the issue of the final decision upon separate application of the complainant) on the other hand.

If the party initiating the proceeding does not have standing, or if the appeal is not submitted in time, i.e. within two weeks after the decision of the Procurement Chamber has been received, the appeal can be rejected as inadmissible.

The decisions handed down by the Procurement Division must contain, *inter alia*, the names of the members of the Division and of the parties, the finding and the reasons upon which the decision is based. The Committee decides by an absolute majority of its members. Thus, the necessary quorum is two votes. The decision has to be sent to the parties without undue delay.

The decisions to be taken by the Procurement Division at the Court of Appeal depend on whether the awarding authority has brought an application for a preliminary decision on the award of the contract together with the immediate appeal. In this case the Chamber may allow the awarding authority to continue the award procedure or award the contract in question. The Chamber may allow this after taking into account the prospect of success of the immediate appeal or after applying a balance of interests test similar to the one applied by the first instance granting or denying the suspensive effect. In this decision, the Chamber also has to explain the lawfulness or unlawfulness of the award procedure. When denying the permission, the award procedure is considered as finished 10 days after the notification of the decision, unless the awarding authority itself takes the measures necessary to ensure the lawfulness of the award procedure. When granting the permission, the contract can be awarded and the substantive procedure has served its purpose and may only lead to a declaratory decision about the lawfulness or unlawfulness of the award procedure with binding effect on the civil courts.

Without such separate application the Procurement Division at the Court of Appeal may confirm the Procurement Chamber's decision or annul it and then replace it by its own substantive decision or order the Procurement Chamber to hand down a new decision taking into account the legal guidelines of the Procurement Division at the Court of Appeal.

Due to the fact that the Procurement Division at the Court of Appeal is an integrated part of the ordinary Court of Appeal, it has to be considered as empowered and as the Court of last instance obliged to refer questions to the European Court of Justice under Article 234 of the EC Treaty.

6.3 Before the civil courts

The civil procedure is governed by the code on civil procedure (*Zivilprozeßordnung*, ZPO). Civil actions commence with the issue of a claim by the complainant, three copies of which must be registered with the court. The claim contains the names of the parties, the grounds, legal rules in support of the claim and the amount in dispute.

In the opening phase of the civil procedure the court considers the admissibility of the claim and decides whether it opts for a written preliminary procedure or a procedure,

which involves an early oral hearing. A written preliminary procedure is mostly chosen if the matter seems to be rather complicated and may result in a longer process.

As the case proceeds, the court determines what is necessary to decide the issue. When it has enough evidence it will declare this in court and the main hearing will take place, which usually lasts no more than a day. At this oral hearing there is a general duty imposed on the court to discuss the details of the case fully and to ensure that the parties are aware of all relevant legal aspects. The court summarises the factual and legal issues and the arguments for the parties by reference to the written admissions and any legal points not raised by the parties. The parties are given the opportunity to comment on this. The means used to prove the facts are hearing of witnesses, expert evidence, the court's inspection, documents and questioning of the parties, all of which are subject to the discretion of the judge and are conducted first by the judge.

The oral hearings are concluded by the opportunity to sum up orally. This consists only of a reference to all the pleadings and defence previously considered and a final plea on behalf of the client. If the case is not withdrawn or settled beforehand, either in or out of court, a final judgement may be made at this stage if possible, but it is more likely a later date will be set for the reading of the judgement. Judgement is given orally after all evidence has been heard and the oral hearing closed. The judges retire to decide on the basis of a simple majority and the court will be recalled for the oral judgement to be read out. A detailed and reasoned written decision is given and forms the basis of any appeal to the next instance.

6.4 Duration of proceedings

The Procurement Chamber has to hand down its final decision on the substantive application within five weeks after bringing an application. In extraordinary cases with factual or legal difficulties the Chairman of the Chamber can extend the time limit. If the Chamber does not issue its decision within that time limit, the application is considered denied. The complainant is nevertheless entitled to appeal against it. Even though there is no express time limit for the decisions about interim measures (permission to award the contract immediately), it is obvious that the Chamber has to take them within shorter periods.

There is no time limit for the full procedure and the final substantive decision on the immediate appeal. It will therefore vary from case to case and depend on the workload of the Procurement Division at the Court of Appeal. Comparable procedures before the Court of Appeal usually last nine months. There is also no time limit for the decisions on the applications (to restore the suspensive effect or to allow the immediate award of the contract) that serve as recourse against the Chamber's interim decisions to allow or not to allow the immediate award of the contract. But the Procurement Division is obliged to hand down its preliminary ruling to allow the award of the contract (a two faced interim measure taken by the Procurement Division which – whether granting or denying the permission to award the contract - anticipates the final decision) within five weeks after the application for that permission.

Actions for damages in the civil courts usually take at least one year before a final judgement is issued.

6.5 Is it necessary to engage a lawyer?

It is not strictly compulsory for either side to be legally represented by a lawyer before the Procurement Chamber. However, such representation is usual practice and generally recommended. But all parties except legal persons under public law have to be legally represented by a lawyer before the Procurement Division at the Court of Appeal. The said legal persons may be represented by their civil servants or employees qualified to hold judicial office.

Before the civil courts, it is obligatory for both the complainant and the authority to be represented by lawyers, if the value of the claim exceeds DM 10,000 (and is therefore dealt with in the relevant district court).

7. Costs of proceedings

With respect to the Procurement Chamber, § 128 paragraph 4 GWB provides that an administrative fee between DM 5,000 (may be reduced to DM 500) and DM 50,000 (may be raised to DM 100,000) is to be fixed. The value of the immediate appeal to the Procurement Division at the Court of Appeal is limited to 5% of the contract value. The court fees depend on whether an urgent procedure (caused by applications for interim measures) has to take place.

The lawyers' fees in the review proceedings before the Procurement Chamber and the Procurement Division at the Court of Appeal, as well as in court proceedings, are difficult to predict. There is a Federal attorney's fee ordinance (*Bundesgebührenordnung für Rechtsanwälte*) according to which lawyers' fees may be calculated on the basis of the value of the matter at stake. For example proceedings involving a value of DM 2.5 million would (if an oral hearing is held) cost DM 20,450 for each party (plus VAT, expenses etc.). The general rule is that the lawyers' fees on each side will amount to approximately 3% of the value at stake if the value is in excess of DM 1 million. The percentage increases on a sliding scale (up to a maximum of 8.5%) where the claim is worth less than DM 1 million. During proceedings a lawyer will usually earn three fees (general court fee, oral hearing fee and taking of evidence fee), while another fee will be earned if a settlement is agreed in court.

The current practice of the larger law firms is to charge the client according to the time spent on the case. The hourly amount charged depends upon the qualification of the lawyer and his seniority.

The losing party will generally be ordered to bear all the court and attorneys' fees in court cases, including the review proceedings before the Procurement Division at the Court of Appeal. This is also true for review proceedings before the Procurement Chamber according to § 128 paragraph 4 GWB.

8. Rights of appeal

As noted above, the decisions of a Procurement Chamber may be appealed against within two weeks to the Procurement Division at the Court of Appeal. The laws implementing the procurement rules do not, however, provide for any right of appeal from the decisions of the Procurement Division at the Court of Appeal. Although a decision taken by a Chamber constitutes an administrative act (*Verwaltungsakt*), its legality cannot be reviewed by the administrative courts because of the exclusive competence of the Procurement Chamber for reviewing award procedures. There is no doubt that the Procurement Division at the Court of Appeal constitutes a court or tribunal within the meaning of Article 234 of the EC Treaty and may in specific cases be obliged to refer questions of interpretation of the EC-Treaty to the European Court of Justice for a so-called "preliminary ruling".

Rulings of the ordinary civil courts on damages may be appealed to the relevant Court of Appeal if the value of the claim exceeds DM 1,500. The time limit for appeals is one month after reception of the Court's judgment.

9. Enforcement of judgements

As regards the possibilities of enforcement, the Procurement Chamber's decision needs to be distinguished from the judgement handed down by the Division at the Court of Appeals.

The decisions of the procurement chambers are administrative acts (*Verwaltungsakte*) according to § 114 III GWB. They are addressed to the complainant and have to include the necessary information for judicial review by the Procurement Division at the Court of Appeals (§ 61 GWB). As mentioned above, the decision may only be appealed against within a period of two weeks. German administrative law provides for the enforcement of the *Verwaltungsakt* according to the provisions of the relevant federal or state enforcement law (VwVG - *Verwaltungsvollstreckungsgesetz des Bundes – LVwVG - Verwaltungsvollstreckungsgesetze der Länder*). If the Procurement Chamber obliges the losing party to act or to refrain from acting, the relevant *Verwaltungsvollstreckungsgesetz* will allow for a so-called *substitute performance* (*Ersatzvornahme*) or a periodic penalty payment (*Zwangsgeld*) in those cases where a party refuses to act accordingly.

The situation is somewhat different with regard to the judgments of the Procurement Division at the Court of Appeals: They are full court judgements and may be enforced in the same way as a judgement following a civil court proceeding for damages before the *Amts-* or *Landgerichte*. In both cases enforcement is governed by the provisions of §§ 704, 724, 750 ZPO (*Zivilprozeßordnung*). Acts or omissions may be enforced pursuant to §§ 803 and under ZPO, a claim for money pursuant to §§ 883 and under ZPO.

In general though, enforcement action will not prove necessary. Article 20 III of the German constitution obliges the administration to act in a lawful manner (*Gesetzmäßigkeit der Verwaltung*). This includes the general obligation to enforce all court decisions.

Finally, it should be remembered that following § 124 GWB any decision taken by the Procurement Chamber or the Procurement Division at the Court of Appeals on the legality of the award procedure has a binding effect on the judge in a civil law procedure for the recovery of damages.

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Updated in 1997 and does not take account of the modified law (N2522/1997) published in the Greek Official Journal on 8 September 1997.

CONTENTS

GREECE

1. Implementation of the Remedies Directives

The legal framework provided for by the Remedies Directives 89/665 and 92/13 has not yet been implemented in Greece. Only one regulation refers to Directive 89/665, namely Presidential Decree 23/1993. Its application is confined, however, to those provisions concerning the controlling powers of the European Commission provided for in Article 3 of the Directive.

On 6 July 1995, the Commission brought an action against Greece under Article 169/EEC for failure to implement Directive 89/665[27]. The European Court of Justice gave final judgment in this case on 19 September 1996, condemning Greece for failing in its obligation to transpose the Directive. The Court rejected claims by the Greek Government that its national laws already provided guarantees equivalent to those in Directive 89/665. The Court stressed that clear and precise legislation is necessary in order to inform individuals of the full extent of their rights. The Greek authorities have promised that a Presidential decree transposing the Directive will be adopted in due course.

Directive 92/13, on the other hand, does not have to be implemented in Greece until the date of entry into force of Utilities Directive 93/38 which (for Greece) is 1 January 1998. This chapter does not therefore deal with utilities but concentrates instead on remedies in relation to public contracts awarded by Greek public authorities.

Decrees have been passed in order to implement the Works and Supplies Directives, [28] but these only contain the substantive rules relating to the award of works and supplies contracts and not the rules relating to remedies for breach of these rules. The award of public services contracts is not generally regulated, Greece having failed as yet to implement Services Directive 92/50.

Given the absence of implementing measures regarding remedies, the rights of redress for complaints must be assessed by reference to the general legal framework for proceedings before the administrative or civil courts in Greece, as well as pre-existing national rules regarding public works and supplies contracts.

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27 Case C-236/95, OJ [1995] C248/4.

28 Presidential Decrees nos. 23/93 and 370/95.

2. The relevant forum

2.1 Non-judicial remedies

Before being entitled to seek remedies in the administrative or civil courts, a complainant must firstly exhaust his non-judicial remedies. During the various stages of an award procedure (pre-selection, submission of tenders and evaluation) anyone who has participated in that procedure or who has been excluded from it, may raise a complaint addressed to the relevant committee of the supervisory authority which oversees the awarding authority. The supervisory authority is generally the Public Works Ministry or such other authority as provided for by specific laws. That authority decides upon the complaint based on its merits as well as the legal arguments.

2.2 The administrative courts

A complaint is subject to the jurisdiction of the administrative courts when it concerns a contract which has been awarded by the Greek state or a public authority and if the contract directly affects the public interest. Assuming this is the case, one of two branches of the administrative courts may have jurisdiction, depending on the nature of the act being challenged.

If the complainant seeks the annulment of an administrative act, such as an award decision, the complainant must file his action for annulment before the Conseil d'Etat (*Symvoulion Epikratias*), being the supreme administrative court in Greece. Interim measures may be sought from the Injunction Committee of the Conseil d'Etat.

Where the complainant seeks to recover damages from the authority, or seeks to annul a public contract (rather than an act leading to the award of such a contract), the action must be brought before the administrative court of first instance.

2.3 The civil courts

If the public tender is made by or for the benefit of an enterprise or legal entity which is owned or controlled by the State, but is otherwise subject to private law, any litigation is subject to the jurisdiction of the civil courts. Under the relevant rules of private law (e.g. liability in tort or pre-contractual liability), the complainant may only sue for damages in his main lawsuit.

The complainant could in principle also seek an interim order. However, he may not apply for the annulment of the award decision since the civil courts have no relevant jurisdiction to annul administrative acts.

3. Available remedies

3.1 Interim orders

A complainant may apply to the Injunction Committee of the Conseil d'Etat for an interim order provisionally suspending an administrative act taken during the course of a procurement award procedure. Such an application must be accompanied by a request for the act in question to be annulled.

In considering an application for an interim order, the Injunction Committee firstly verifies that an application for annulment has been filed and that it is admissible. Thus, it will check that the application for annulment has been filed in time and that it concerns an administrative act which has legal effects. The Committee does not, however, examine in detail the merits of the application itself, nor does it examine in depth the legality of the act being challenged. The Committee will simply consider whether the contested act is obviously legal (in which case it will reject the application for an interim order, even if irreparable damage may occur) or obviously unlawful (in which case it will grant the application).

The main factor that determines whether an interim order will be granted is the occurrence of specific, direct and irreparable damage to the complainant. Such damage must be either proven by the complainant or admitted by the awarding authority. The damage may be material or moral. Pecuniary damage is usually deemed to be reparable, since the complainant may file an action against the authority for damages. The only exception is where the financial damage is likely to lead to the financial bankruptcy of the complainant. Even where irreparable damage is established, the Injunction Committee may refuse to grant an interim order if this would be harmful to the public interest or when the interests of a third party may be seriously prejudiced.

Recent decisions of the Injunction Committee suggest that a complainant applying for an interim order will have to establish the following:

i that there exists prima facie serious evidence that the contested administrative act of the awarding authority (eg. the complainant's exclusion from the award procedure) infringes the relevant procurement rules;

ii that the complainant may suffer serious harm as a consequence of the said act; and

iii that such harm to the complainant is greater than the damage which might be caused to the interests of the public or third parties if the interim order were to be granted (a balance of interests test).

Applying the above criteria, the Injunction Committee has, in nealy half of the procurement cases dealt with recently (1994 to 1996), decided that the balance of interests lay in favour of granting the interim order. The order has usually obliged the awarding authority in question to admit the complainant to the award procedure.

However, the Committee has always dismissed applications which have been filed after the contract in question has been entered into and where the complainant seeks to suspend the legal effects of the award decision. Hence, it is essential that applicants for interim orders intervene before the contract in question is entered into.

Finally, it may be noted that interim orders are also potentially available in proceedings before the civil courts. In procurement cases, such an order would provide for the provisional protection of the complainant's interest, in particular through a provisional suspension of the award procedure.

3.2 Set aside orders

An unlawful administrative act taken during a contract award procedure, or the award decision itself, can be annulled by the administrative courts. [A breach of the procurement rules would usually constitute good grounds for such annulment.] If a contract has been concluded on the basis of the unlawful award decision (which is usually the case), the annulment of that award decision has the effect of rendering the contract itself null and void. However, a concluded contract can only be set aside or annulled if the contract has been declared null and void by a final court decision.

3.3 Damages

A complainant generally has a right to recover damages from the awarding authority if the latter's award decision has been found to be unlawful, whether by the administrative or the civil courts. Such liability is provided for by the Greek Civil Code.

Under the general principles of the Code, a claimant seeking damages will have to prove that he has suffered damage as a direct result of the unlawful act or omission by the awarding authority. The required causal link between the breach and the loss will be established if it can be shown that the breach was likely to lead to the damage in the usual course of events.

As regards the quantum of damages, Article 298 of the Civil Code provides that:

> "Damages shall comprise the decrease in the existing assets of the creditor [positive damage] as well as any loss of profit. Such lost profit shall be that which can be reasonably anticipated in the ordinary course of events or by reference to the special circumstances and in particular the preparatory steps taken".

The general rule is that the amount of damages should fully compensate the complainant for the entire loss which he suffered as a result of the unlawful act. In a procurement context, the damages should cover the "positive loss" of the tender and other costs incurred in participating in the award procedure, as well as the "negative loss" of the

profit which the complainant could reasonably have expected to derive from the contract.

4. Who may apply?

In order to challenge administrative decisions in the administrative courts, the complainant must have a personal, direct and legitimate interest in the decision in question. This concept is similar to that of direct and individual concern under Article 173 of the EC Treaty. Jurisprudence has indicated that all the candidates who participated in a competitive award procedure have a legitimate interest in challenging the authority's award decision. However, persons who did not indicate an intention to participate in the award procedure, even though they fulfilled the requirements of any advertised notice, do not have the required legitimate interest. A future, contingent or indirect interest would not be sufficient to give standing.

5. Time limit for bringing actions

The time limit for the compulsory non-judicial complaint (see section 2.1 above) differs depending on the stage reached in the award procedure. For example, any complaint referring to the tender specifications must be filed within a period corresponding to half of the period allowed for submission of bids. Complaints alleging irregularities in the bid procedure or opposing the selection of other participants may be submitted until one working day following the day on which the bids are first "opened" before the awarding authority in order to be evaluated.

The time limit for bringing an action for annulment in the administrative courts is *sixty days* from the date on which the contested act is published or notified. In the absence of publication or notification, the sixty days starts to run from the date on which the complainant became aware of the contested act. Should the authority fail to respond to the complaint, the sixty-day time limit begins to run three months after the filing of that complaint. In practice, the obligatory non-judicial phase frequently has the effect of delaying the commencement of an action in the Conseil d'Etat by a period of three months.

The statute of limitation for commencing actions in the civil courts is five years.

6. Procedure

6.1 Interim orders

An application for interim orders has to be lodged at the Conseil d'Etat in the form of a judicial document. The hearing will usually take place within two weeks. Both parties are given the opportunity to present oral and written arguments at the hearing before the

Injunction Committee. The procedure is rapid and the judgment is usually issued within a few days of the hearing. In cases of extreme urgency, the Injunction Committee may grant a provisional injunction, which is valid until the date of the Committee's definitive ruling on the application for an interim order.

6.2 *Ordinary procedure before the Conseil d'Etat*

An application for annulment has to contain the grounds for the annulment; additional grounds may also be presented in a separate document which must be filed at least 15 days prior to the hearing. Unlike the procedure before the Injunction Committee, this procedure is slow and may take up to three years before a judgement is issued.

6.3 *Actions in the civil courts*

Following the filing of a lawsuit, a first hearing usually takes place several months later. The court of first instance examines the witnesses during the first hearing. In the case of actions for damages exceeding 5 Million Drachmas, the court issues a preliminary decision containing the issues to be proved by witnesses. Following the first hearing and if no further hearing or other procedural steps regarding the evidence are ordered by the court, the latter will issue its final decision (usually several months later). However, in cases brought before the court exceeding 5 Million Drachmas a second hearing must take place after the completion of the examination of the witnesses (a maximum of two witnesses may be examined in favour of each litigant) which may take place several months or even years later depending on the availability of the witnesses.

6.4 *Duration of proceedings*

As indicated above, interim orders can be obtained from the Injunction Committee of the Conseil d'Etat within a very short time frame (within a few weeks or even days). It generally takes longer to obtain an interim order in the civil courts, where the time lag is usually three to four months.

Applications for a final annulment order in the Conseil d'Etat usually take at least 18 months before final judgement is given. Actions for damages in the civil courts take at least two to three years.

6.5 *Is it necessary to engage a lawyer?*

It is compulsory that complainants be legally represented by a lawyer in any formal proceedings before the administrative or civil courts in Greece.

7. Costs of proceedings

The fees for commencing proceedings in the administrative courts are minimal. When filing an action for damages in the civil courts a judicial stamp is payable in a sum equal to 1% of the amount claimed by way of damages. The complainant may avoid this requirement by filing an action for acknowledgement of his right to compensation (without adjudication of the relevant sum), but in such cases he may not claim default interest.

The most significant expense in any proceedings is likely to be the cost of instructing lawyers. In both administrative and civil proceedings, the judge will usually order the losing party to pay the legal costs of the successful party, although the costs awarded by the court will not cover the full legal costs actually incurred. In certain circumstances, the court may release the losing party from this obligation either in its entirety or in part.

8. Appeals

There is no right of appeal against interim orders. The final rulings of the Conseil d'Etat or the Administrative Court of Appeal can be appealed to the Conseil d'Etat (Appeals Section) within sixty days of the delivery of the Court's decision.

Decisions of the civil or administrative courts of first instance can be appealed to the Civil or Administrative Court of Appeal respectively, within thirty days from the delivery of the Court's decision.

The final decision (in first instance) of the Civil Court of Appeal (litigation and public works contracts) can be appealed to the Supreme Court (*Areios Pagos*). The time limit for such appeals is again thirty days.

9. Enforcement of judgements

A judgement of an administrative court which annuls an administrative act is directly enforceable against the authority in question, as is an interim order laid down by the Injunction Committee of the Conseil d'Etat or by a civil court.

Judgements of the civil courts awarding damages may not be enforced against the Greek state, but in practice the Greek state almost always complies voluntarily with such judgements. The same applies to certain state-owned entities which, although subject to private law, enjoy special immunity under specific laws.

Useful addresses

i Selected Administrative Courts

First Instance	Court of Appeal
Athens: 1 Sofocleous St	1 Sofocleous St
Piraeus: 31-33 Gounari St	12 Nikita St
Thessaloniki: Court Building of City	68 Fragon St
Patras: 60 Kanari St	147 Riga Fereou St
Larissa: Court Building of City	12 Kouma St
Chania: 3 Stratigou Ganakaki St	3 Stratigou Ganakaki St

Conseil d'Etat

47 Panepistimiou St, Athens
(Changed to Eleftheriou Venizelou)

ii Selected Civil Courts

First Instance	Court of Appeal
Athens: Ex Military School	65 Socratous St
Piraeus: 3-5 Skouze & Philonos St	3-5 Skouze St and Philonos St
Thessaloniki: Court Building of City	Court Building of City
Patras: 30 Gounari St	30 Gounari St
Larissa: Central Square	Central Square
Chania: Liberty Square	Liberty Square

Supreme Court (Areios Pagos). 121 Alexandras Avenue, Athens

iii Government Departments responsible for overseeing the EU procurement rules

Ministry of Commerce	Kanigos Square, Athens
Ministry of Environment and Public Works (Department of Public Works)	182 Harilaou Trikoupi St, Athens
Ministry of Foreign Affairs (Department for EU Issues)	3 Academias St, Athens

iv Independent Arbitrators for commercial disputes in Greece

Chamber of Commerce	8 Academias St, Athens
Athens Bar Association	60 Academias St, Athens

IRELAND

Prepared by Herbert Smith (Brussels)
and McCann FitzGerald (Dublin), 1997

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IRELAND

1. Implementation of the Remedies Directives

The EU procurement Directives have been implemented into Irish law through a series of Statutory Instruments. The provisions on enforcement laid down in Remedies Directives 89/665 and 92/13 have been implemented by Statutory Instruments No. 309 of 1994 and No. 104 of 1993 respectively.

The Remedies Directives have been transposed largely by reference rather than by repeating or reiterating the provisions of those Directives. For example, S.I. No. 309 of 1994 states that, as regards contract award procedures within the scope of the public sector Directives, decisions taken by contracting authorities "shall be reviewed in accordance with the conditions set out in [remedies] Directive [89/665]". It is therefore the provisions of the Remedies Directives themselves which largely govern the availability of remedies in Ireland in the field of public procurement.

2. The relevant forum

The Statutory Instruments specify that actions in the procurement field must be brought in the High Court in Ireland. Cases are heard by the High Court in the Four Courts in Dublin, but, on occasion, a judge of the High Court will hear cases on circuit in the other major towns in Ireland. Some useful addresses are set out in Annex 1 to this chapter.

3. Available remedies

In accordance with the Remedies Directives themselves, the remedies potentially available in Ireland fall into the three categories described below.

3.1 Interim orders

A complainant may apply to the High Court in Ireland for an interim order (otherwise known as an injunction) which suspends the award procedure for the contract in question or the implementation of any decision taken by the awarding authority. An application for an interim order must be brought "at the earliest opportunity" and in practice such an order is only likely to be available where the contract in question has not yet been entered into.

The Statutory Instruments do not give any guidance on the principles governing the availability of interim measures. Instead, they simply cross-refer to the Remedies Directives. In accordance with those Directives, the Irish court:

> "may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits"[29].

The general principles governing the availability of interim orders in Irish law will also apply in procurement cases. Case law in the Irish (and UK) courts indicates that the general rule in Ireland is that the grant of an interim order must be ancillary to a main, substantive action. In order to obtain an interim order, the complainant must firstly show that he has a good arguable case in the substantive action. In other words, his case must be capable of serious argument but not necessarily one which the judge considers would have a better than 50% chance of success. In general this is not a difficult requirement to overcome.

Whether or not a court will grant an interim order usually depends on whether the complainant can satisfy the High Court on the following matters:

i whether the complainant has established a prima facie case;

ii if so, whether damages would provide an adequate remedy to the complainant if the injunction were not granted; and

iii if damages would not provide an adequate remedy, does the balance of convenience lie with the complainant? For example, the Court might consider that an order suspending the award procedure would cause serious harm to the public interest which outweighs any prejudice likely to be caused to the complainant, in which case the Court would refuse to grant the Interim Order.

3.2 Set-aside orders

The Irish courts have the power to set-aside or ensure the setting-aside of unlawful decisions taken in a procurement procedure. The court may also order the amendment of any documents relating to the award procedure (such as the invitation to tender) in order to remove discriminatory specifications. The court clearly has the power to make such awards prior to the contract in question being entered into. Whether it may also do so after a contract has been concluded depends on whether the procurement is governed by the public sector rules or the utility rules.

As regards procurement under the public sector rules, Statutory Instrument No. 309 of 1994 provides that, when a contract has been concluded subsequent to its award, the High Court may:

i declare such contract, or any provision of such contract, to be void;

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[29] Article 2.4 of Directive 89/665 and Article 2.4 of Directive 92/13.

ii declare that the contract may have effect only subject to such variation as the court shall think fit, including any variation required to protect the interests of a party to the contract who is not responsible for the infringement (ie. the third party to whom the contract has been awarded); or

iii make such other order concerning the validity of the contract or any provision of it as the court shall think fit.

As regards procurement in the utilities sectors, statutory instrument No. 104 of 1993 does not give the same authority to the High Court to declare contracts void or subject to variation or to make any other order concerning the validity of the contract. It may therefore be implied that set-aside and amendment orders are not available as against utilities once the contract in question has been entered into.

As yet there are no judgements in Ireland expanding on the principles governing the availability of these orders in a procurement context. It may be speculated that the courts are likely to apply a balance of interests test similar to the one applied when assessing applications for interim order.

3.3 Damages

The Statutory Instruments in Ireland confirm that the High Court may, where a contract has been concluded subsequent to its award, award damages to any person harmed by an infringement of the procurement rules. They do not, however, expand upon the principles governing the availability or quantum of damages. These matters therefore continue to be governed by general principles and case law in Ireland regarding damages.

Under general principles, the complainant will have to prove that a breach of the procurement rules has in fact been committed and that he has suffered or will suffer loss as a result. A breach of the Directives and the Statutory Instruments is a breach of statutory duty and thus a tort. Under general principles, tort damages operate to put the plaintiff in the position he would have enjoyed had the tort not been committed. This could be interpreted to mean that, in order to recover damages in a procurement context, a complainant must prove that he would have been the successful tenderer if the infringement of the procurement rules had not occurred. However, it will usually be very difficult to prove that a particular tender is the one which should have been successful. A requirement to do so could well impede the effectiveness of remedies in the field of procurement. It may therefore be speculated that the Irish courts will allow recovery of damages even where the complainant is only able to prove that he had a reasonable chance of winning the contract. The damages would be to compensate the complainant for the loss of that chance.

As regards the measure or quantum of damages, it appears that a plaintiff ought to be able to recover all or part of his costs in participating in the tendering procedure. Indeed, Remedies Directive 92/13 (for the utilities sectors) confirms that such costs are recoverable if the complainant can prove that he had a "real chance" of winning the contract and that, as a consequence of the infringement, that chance was adversely affected.

It appears that a plaintiff may also be able to recover damages for loss of the potential profit which he stood to make on the contract in question. It will of course be up to the complainant to prove the amount of profit (if any) which it would have made had it been awarded the contract. It is possible that a court would reduce that amount by a particular percentage in order to reflect the possibility that the complainant might not have been awarded the contract even if the procurement rules had not been infringed.

4. Who may apply?

The remedies described above may be sought by any person having or having had an interest in obtaining a particular public or utility contract and who has been or risks being harmed by an alleged infringement. Hence, an action could be brought by any party which participated in an award procedure or who would have liked to have participated in such a procedure.

5. Time limit for bringing actions

The Statutory Instruments do not set any time limits for bringing an action. The Remedies Directives (to which the Instruments refer) are also silent on the question of timing, except for a statement that applications for interim orders should be made "at the earliest opportunity".

It is not clear what time limits should apply, but a complainant would be well advised to adhere to the three-month time limit within which applications for judicial review may be made, particularly as a complainant seeking relief under the Statutory Instruments may also decide to seek judicial review (see section 6.5 below). The rules of the High Court specify that an application for leave to apply for judicial review must be made *promptly and in any event within three months* from the date when grounds for the application first arose (or six months where the relief sought is certiorari) unless the court considers that there is good reason for extending the period.

It appears that a court would extend the said period where there is some delay between the occurrence of the breach and the time when the application could reasonably be expected to become aware of that breach. For example, where the breach consists of a failure to advertise a relevant contract, the time limit might only start to run from the date when the complainant knew (or could reasonably be expected to have known) that the awarding authority had placed a contract without properly advertising it.

6. Procedure

6.1. Duty to give notice

The Statutory Instruments stipulate that a complainant seeking to bring a review action under the procurement rules must first notify the awarding authority or utility of the alleged infringement and of his intention to seek a review under the statutory instrument.

6.2 Applications for interim orders

A complainant who seeks an interim measure such as an injunction will deal with the matter by an application (summons) to the Court together with a supporting affidavit (sworn statement). This may initially be dealt with by the Court before the summons and affidavit are served on the other party (ie. ex parte) but will then be dealt with at a subsequent hearing at which the other party may be present (inter partes). A claim for an interim injunction will not normally involve oral evidence but will, instead, involve lawyers making submissions to the judge on the basis of the affidavit evidence.

The applicant for an injunction will invariably be required to give an undertaking to the Court that he will pay damages for any loss suffered by the defendant if, at the final hearing of the proceedings, the applicant for the injunction loses the case.

6.3 Ordinary court procedure

For actions brought pursuant to the Remedies Directives, the appropriate way to commence proceedings appears to be by way of Special Summons. Once the Summons has been issued in the Central Office of the High Court, an initial hearing date within a number of weeks is allocated in the Master's List. A sworn statement (affidavit) by the complainant, verifying the claim in the Special Summons, is filed in the Central Office and a copy is given to the defendant. Unless the Court directs otherwise, proceedings commenced by Special Summons are heard on affidavit.

Public procurement matters are likely to be placed in the High Court list for hearing after initially appearing in the Master's List. Additional time may be allowed for the filing of further affidavits. However, it may be appropriate to request the Court that the matter be dealt with by way of plenary hearing, with the exchange of pleadings and examination and cross examination of witnesses. Even if the matter is to be dealt with on affidavit, any party desiring to cross-examine anyone who has sworn an affidavit in the proceedings may serve a Notice of Cross Examination.

The Rules of the Superior Courts allow the parties to apply to the High Court for discovery of documents. An application must be preceded by a letter to the other party requesting voluntary discovery. If, within 21 days of such notification, agreement to give voluntary discovery is not forthcoming, the applicant may then seek an Order for Discovery from the High Court. Discovery comprises two stages: disclosure by way of

a list of documents appended to an affidavit by one party to the other of all relevant documents and an inspection by the other party of such of those documents that are not legally privileged. The scope of discovery is very wide and extends to all documents that are or have been in a party's possession, custody or power relating to any matter in question in the case, save for those which are legally privileged (for example, communications between a party and a Solicitor). Where they are privileged, the existence of the documents must be disclosed, but they are not required to be made available for inspection.

Expert evidence may be appropriate in some procurement proceedings. Experts will be able to give opinion evidence on any relevant matter on which they are qualified to speak. Any witness statements are usually furnished to the other side in advance of the trial, although this is not compulsory.

The case will normally be tried in public by a single judge of the High Court without a jury. The parties are normally represented by lawyers (usually barristers, instructed by solicitors) who make submissions on their behalf and cross-examine witnesses based on their affidavits. In some cases, where parallel judicial review proceedings have been brought (see section 6.5 below), and the judge has directed that the matter proceed by way of plenary hearing, it is likely that both sets of proceedings will be heard together.

6.4 Duration of proceedings

Interim measures can be sought and obtained almost immediately in the High Court in cases of urgency. The applicant is required to set out the urgent circumstances in the affidavit setting out the application. The time taken for the matter to proceed to full trial and final judgment varies greatly from case to case and depends to some extent upon the time taken by the parties to exchange pleadings and/or affidavits and to complete discovery of documents. Once a case is certified as being ready for hearing, the hearing date will depend on the workload of the High Court. As a very general estimate, the time allowed between initiation of the proceedings and the trial itself can be anything from one to three years. If judgement is reserved, there may be a further delay in learning the outcome.

If the case raises difficult questions of EU law, the High Court may refer questions of interpretation to the European Court of Justice for a "preliminary ruling". Such a reference would be likely to add at least two years to the duration of the proceedings in the national court.

Finally, it should be noted that any appeal against the High Court decision to the Supreme Court will add a further period of delay before the case is finally decided.

6.5 *Judicial review*

A party may wish to proceed by making an application for judicial review, in addition (or as an alternative) to proceedings brought pursuant to the Remedies Directives (see section 6.3 above).

The applicant for judicial review must first seek leave of the High Court to commence proceedings. Any application for leave must be made promptly and, in any event, within 3 months from the date when the grounds for the application first arose (or 6 months where the relief sought is certiorari), unless the High Court considers that there is a good reason for extending the period. An applicant is required to demonstrate an "arguable" or "stateable" case.

If leave is granted, the applicant is directed to proceed by way of an originating Notice of Motion in most cases. The defendant is usually given a relatively short period after service (about four weeks) within which to file opposition papers. In practice, time is extended for anything up to a further two months (usually by consent) to allow the defendant to prepare its affidavits.

The substantive application will be heard by a judge of the High Court, usually in public. Judicial review proceedings are usually determined by reference to affidavit (rather than oral) evidence, without some of the other formal procedures which apply in ordinary civil cases. In certain cases, other formal procedures (such as discovery of documents) may apply, by agreement of the parties or by order of the Court.

The following remedies are available in judicial review proceedings: an order restraining the decision-making body from acting outside its jurisdiction (prohibition); quashing the decision and requiring it to reconsider the matter (certiorari); an order requiring the body to carry out its judicial or other public duty (mandamus); the granting of an injunction; and, depending on the type of claim, an award of damages against the decision-making body.

An applicant may wish to consider bringing an action alleging an infringement of the public procurement Directives by way of, or in combination with, an action for a judicial review. Given the complexity of this choice, the complainant may well wish to seek legal advice.

6.6 *Is it necessary to engage a lawyer?*

It is normal practice in High Court litigation for both parties to instruct solicitors to act on their behalf, both in order to deal with the complicated procedural requirements and to present each sides' arguments on the law and merits. While solicitors usually instruct a barrister (complainants cannot do so directly themselves on contentious issues), a solicitor is entitled to act as advocate in the High Court. The cost implications of instructing lawyers are considered in section 7 below.

It is possible for a Complainant to represent himself in proceedings, but this is the exception rather than the rule.

7. Costs of proceedings

A fee, by way of Stamp Duty of £60, is payable upon the issue of a Summons. Smaller amounts of duty are payable on a Notice of Motion and any affidavits.

The most important cost factor to be borne in mind by complainants is the expense of engaging lawyers. The amount of legal fees likely to be incurred will vary according to the gravity, complexity and duration of the case.

It is normal practice for the High Court to order the losing party to pay a large proportion of the legal costs of the successful party. This is an important risk factor which must be taken into account when commencing the litigation. Moreover, if the complainant succeeded in obtaining an interim order but ultimately lost the case at the final hearing, he might find himself liable to pay damages to the defendant under the terms of an undertaking in damages. Complainants should expect to be required by the High Court to give such an undertaking in order to obtain the interim injunction.

At present, legal costs are normally awarded by a court on a "party and party" basis, which essentially means that they only cover those costs reasonably or properly incurred in order to enable the (successful) party to conduct the case. If the parties cannot agree on the amount of legal costs on a "party and party" basis between themselves, then the matter is determined (pursuant to arguments by each side) by the Taxing Master.

Costs associated with the time spent by the complainant in instructing legal advisors, preparing submissions and participating in the proceedings, will not be recoverable as part of the legal costs. This is a further factor to be taken into account at the outset.

8. Rights of appeal

Once the High Court has given its decision, the unsuccessful party may seek to appeal to the Supreme Court. In some cases, the leave of the High Court judge or the Supreme Court may be needed. Appeals may only be brought on a point of law; an appeal does not involve a re-hearing of the High Court action. The appeal will usually be heard by three (or, exceptionally, five) judges of the Supreme Court.

9. Enforcement of judgements

In the event that an awarding authority or utility fails to observe the terms of an interim order or a set-aside order, the officers of that body would be in contempt of court. In the first instance, they are likely to be required to attend the court in order to explain the contempt and to rectify it. If the relevant officers failed to do so, they would face the risk of committal to prison. In reality, awarding authorities and utilities are most unlikely to take steps in contravention of a Court order.

Where an award of damages is made, it is again unlikely in practice that an awarding body, particularly a public authority, would fail to pay them. If it did so, it would be open to the complainant to commence enforcement proceedings. In particular, the complainant could:

i seek to register the judgement as a charge over the assets of the awarding authority;

ii commence proceedings seeking to wind up the authority for failure to pay a debt following a demand to discharge the debt within 21 days of that demand; or

iii have the court Sheriff seize goods or assets of the authority in order to discharge the amount of the debt.

In reality, an awarding authority would be unlikely to risk the embarrassment of the publicity attaching to any default proceedings.

ANNEX 1

Useful addresses

High Court Central Office
The Four Courts
Inns Quay
Dublin 7

Chartered Institute of Arbitrators, Irish Branch
8 Merrion Square
Dublin 2

Tel: 01 662 7867
Fax: 01 662 7891

ITALY

Prepared by Herbert Smith (Brussels and London)
and Avv Antonio Appella (Rome), 1997

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ITALY

1. Implementation of the Remedies Directives

Remedies Directive 89/665 has been implemented by Articles 12 and 13 of Law No. 142 of 19th February 1992 ("Law 142/92"). Article 12 concerns the procedure whereby the European Commission may intervene in respect of a clear and manifest infringement of the procurement rules by an Italian public authority (see section 11 below). Article 13 of Law 142/92 introduces into the Italian legal system the principle that a contractor has a right to damages where the EU procurement rules have been infringed by a public authority.

As regards enforcement against utilities, Remedies Directive 92/13 has been implemented by Article 11(1) of Law No. 489 of 19th December 1992 ("Law 489/92"). This simply stipulates that Articles 12 and 13 of Law 142/92 will also apply to the procurement procedures of utility entities operating in the water, energy, transport and telecommunications sectors. Further provisions for the implementation of Directive 92/13 are expected to be introduced in due course but in the meantime the European Commission has opened infringement proceedings against Italy for failure properly to implement Directive 92/13.

The Italian Parliament has not considered it necessary to lay down any specific rules in relation to the powers of the review bodies to grant interim measures and set-aside unlawful decisions. The traditional system of administrative law already afforded great protection in the event of an unlawful contract award procedure. Even prior to the implementation of the Remedies Directives, it was possible for disappointed contractors to obtain the interim suspension and then the annulment of unlawful administrative decisions in breach of procurement rules. At the time of the adoption of Law 142/92, the parliamentary debates show that the existing system was regarded as sufficient to afford protection to the interests of individual suppliers who are adversely affected by a breach of the EU procurement rules.

2. The relevant forum

The powers to grant remedies in the field of procurement are conferred on separate systems of courts which are responsible for different aspects of the review procedure. On the one hand, under the traditional system of Italian administrative law, the powers to grant interim measures and to set aside unlawful decisions are entrusted to the administrative courts. On the other hand, Article 13 of Law 142/92 has granted the power to award damages to the ordinary courts.

Administrative courts comprise the *Tribunali Amministrativi Regionali* (TARs) at first instance, and the Council of State (*Consiglio di Stato*) on appeal. The TARs have a general jurisdiction over the legitimacy of administrative measures which violate protected interests (*interessi legittimi*) and have the exclusive power to annul an unlawful administrative act. The territorial competence of the TARs is defined on a regional basis: there is a TAR in each regional capital, but in some regions there may also be other decentralised sections in other centres. Each TAR has a President and at least five administrative judges.

The system of ordinary courts comprises *Giudici di Pace* (Justice of the Peace), *Preture* and Tribunals at first instance, Courts of Appeal at second instance, and the Court of Cassation as the final and last court of review on points of law only. With regard to administrative measures, ordinary courts have jurisdiction to hear only cases involving breach of individual rights (*diritti soggettiri*) as opposed to protected interests; their powers are limited to declaring the administrative measure illegitimate and to disapplying it in the particular case. As regards the power to award damages for breach of the Community rules on procurement, see section 3.3 below.

3. Available remedies

3.1 Interim orders

In procurement cases, interim orders have to be sought from the administrative courts and in particular the *Tribunali Amministrativi Regionali* ("TARs"), as explained in section 2 above. The principles and procedures governing the availability and grant of interim orders by the administrative courts are laid down in a 1974 law[30].

Under general principles, a complainant has traditionally had to show two elements in order to obtain an interim measure:

i the existence of a prima facie case: and

ii the risk of serious and irreparable injury, although it appears that the courts will be prepared to grant the interim suspension of an administrative act even where the injury in question is not irreparable.

In the reasoning for decisions on the grant of interim measures, the administrative courts will usually apply the balance of interests test. In other words, they will weigh on the one hand the detriment to the public interest which is likely to result from a delay to the procurement process against, and on the other hand, the interests of bidders.

[30] Article 21 of Law No. 1034 of 1971: *Legge TAR*, ie. the law establishing the TARs.

The case law has extended the availability of interim measures to so-called "negative" administrative acts, whereby the public administration does not take a positive measure but simply makes a refusal to adopt an act. This means that, in the field of procurement, disappointed bidders can apply for the interim suspension of administrative decisions whereby the public administration rejects their bid to participate in the procurement process. This remedy is available in relation to any procurement contract, whatever the value.

Moreover, the case law has gradually extended the powers of the administrative courts in terms of the orders which they may make in the context of interim applications. It was originally thought that the only power of the administrative courts was the suspension of the contested act. This position contrasted with Article 700 of the Code on Civil Procedure, which provides a more flexible tool for the grant of interim remedies by ordinary courts. Article 700 in fact provides that, in cases of imminent and irreparable injury and where there are no specific provisional remedies available, the court may grant appropriate provisional relief in order to render effective any future judgement on the merits.

In recent years the case law has established that, by analogy with Article 700 of the Civil Procedure Code, administrative courts also have the power to grant any appropriate provisional relief (other than the mere suspension of the act). In the field of procurement, these developments mean that administrative courts are prepared to order, on an interim basis, the admission of the excluded bidder to the tender, subject to confirmation by the final review proceedings.

3.2 Set-aside orders

As outlined below, the administrative courts have general jurisdiction over any dispute involving the legitimacy of an administrative measure which violates a protected interest. This jurisdiction is limited to illegitimacy on three specific grounds:

(i) incompetence, where an administrative organ invades the sphere of competence of another administrative organ which belongs to the same administrative body;

(ii) violation of the law; and

(iii) excess of power, which covers matters such as an erroneous evaluation of the facts; illogical, insufficient or contradictory reasoning; and unequal/discriminatory treatment.

Experience shows that the most common grounds for annulment invoked in the context of procurement is excess of power, especially in relation to the "reasonable" assessment of the factual requirements for participation in the award procedure.

The final decisions which may be taken by the administrative courts are:

(i) the annulment of the administrative measure and a reference back to the competent authority (this is available only in cases of incompetence);

(ii) the total or partial annulment of the administrative measure in cases of violation of the law or excess of power;

(iii) the payment of costs by the public administration.

In addition to this general jurisdiction, in exceptional circumstances the TARs also have jurisdiction on the merits of the administrative measure (that is, its conformity with the norms of good administration). This head of jurisdiction enables the TARs to adopt a decision which will replace the contested administrative measure. The TARs' jurisdiction to review the merits of an administrative act is exceptional and strictly limited by law to specific subject matters, which include public loan agreements, the establishment of public education institutions, and State expenditure in the field of public health. It appears that these matters have little direct relevance to public procurement.

It should be pointed out that the TARs may only review the "acts and measures" of the administrative bodies; that is, measures which are administrative both in form and in substance. This means that, in the context of procurement, the jurisdiction of the administrative courts is limited to acts adopted by the public administration during the award procedure (eg invitation to tender, award decision, etc). A concluded contract is not an administrative contract and is governed by the rules of private law. Thus, it cannot be set aside or annulled in the context of administrative proceedings.

A different question is whether the annulment of the award measure may result in the nullity of the concluded contract based on the unlawful measure. Article 2(6) of Directive 89/665 leaves it to the Member States to decide whether the review body should also be given the power to set aside a contract, or decisions relating to the contract, once that contract has actually been concluded. This issue is not addressed by the Italian implementing legislation. It is submitted that in principle, further to the annulment of the award by the administrative courts, the contract concluded on the basis of the unlawful decision may arguably be declared null and void by the ordinary courts for lack of its essential legal requirements and/or breach of mandatory rules. But if execution of the procurement contract has already commenced, the courts will not invalidate the contract and disappointed contractors will be confined to ordinary damages.

The question of the effect on a contract, which has already been concluded, of any defects relating to acts in the course of the administrative procedure is a controversial one and there are no unanimous opinions among the legal writers in that respect.

On the one hand, the disappointed bidder may rely upon Article 1418 of the Civil Code which provides that a contract is void if it is contrary to mandatory rules. On this ground it is arguable that the infringement of the procurement rules affects the validity of the contract and enables the disappointed bidder to institute judicial proceedings before the ordinary courts claiming the nullity of the contract, but this view remains untested in the case law.

On the other hand, it should be noted that there is some authority in the case law to suggest that only the public administration (and not the disappointed bidder) may rely upon infringements in the contracting procedure for the purposes of annulling the contract. This view is based on Article 1425 et seq. of the Civil Code which provides that a party may apply for annulment of the contract on the ground that its contractual will was imperfectly formed. Thus the public administration may argue that the breach of the procurement rules affected the formation of its contractual will. On this ground, only the public administration may apply for annulment of the contract, with the result that the disappointed bidder may be left without a remedy.

At the end of the day, given the difficulties surrounding both constructions and the delays affecting Italian proceedings, it appears that the most effective remedy in practice will be a claim for damages before the ordinary courts. This will particularly be the case when execution of the works has already commenced.

Finally, it should be noted that the administrative court has the power to set aside the award decision and at the same time award the contract to the claimant (if the court is satisfied that the contract would have been awarded to him in the absence of the breach). In this case, the interests of the claimant will be satisfied and damages will not be granted.

3.3 Damages

Article 13 of Law 142/92 provides for damages in respect of breaches of Community rules on procurement, as follows:

> "Anybody who has been harmed by an act done in breach of the Community rules concerning public supply and public works contracts, or in breach of the national implementing rules, may claim damages from the authority which has awarded the contract. Damages may be claimed before the ordinary courts only after the decision taken unlawfully has been set aside by a judgement of the administrative court."

This provision breaks new ground because it introduces into the Italian legal system the principle that a contractor has a right to damages as a result of a breach of procurement rules by the public administration. It should be explained at this point that, under Italian law, a disappointed contractor holds only a protected interest (*interesse legittimo*) and not an individual right (*diritto soggettivo*) in relation to the public administration. Prior to the adoption of Article 13 of Law 142/92, it was commonplace that damages were recoverable only in the event of injuries to individual rights (*diritti soggettivi*) and not for injury to protected interests (*interessi legittimi*). In the procurement framework, the provision for compensation for infringement of situations which had traditionally been classified as *interessi legittimi* (protected interests) and not as *diritti soggettivi* (individual rights) constitutes nothing less than a cultural revolution.

It is clear from the Italian implementing provision that a damages claim is only possible where the awarding authority has taken an unlawful administrative decision in breach of the procurement rules and that decision has been set-aside by an administrative court. Law 142/92 does not expand upon the principles governing availability and quantum of damages. Applying the principles laid down in the Civil Code in relation to extra-contractual liability, it appears that a damages award may in principle be expected to cover both the actual loss suffered (i.e., tender costs and legal costs) and loss of profits (including loss of opportunity). It seems clear that damages for costs of preparing a bid or participating in the award procedure are recoverable when the claimant shows that he had a real chance of winning the contract. On the other hand, the standard of proof to recover damages for loss of profits is likely to be much higher. It is possible that such a claim would be successful only when the disappointed contractor is able to prove that the contract would have been awarded to him in the absence of the infringement of the procurement rules.

With regard to the issue of quantification of damages, there are no difficulties in determining the loss suffered in terms of tender costs, while the loss of opportunity appears to be far more problematic. The difficulty of proving what profits a contractor would have made from the contract will vary according to the nature of the contract in question. It is likely that in these circumstances the court will resort to the provisions laid down in Articles 1226 and 2056 of the Civil Code and exercise its discretion in assessing damages for loss of earnings on an "equitable" (and fairly unpredictable) basis.

4. Who may apply?

The Italian implementing legislation does not expressly provide for the *locus standi* of complainants. However, the basic principle of Italian procedure requires that an applicant must show an interest in commencing proceedings. This principle seems to satisfy the requirements laid down in Article 1(3) of the Remedies Directive, whereby review procedures must be available to any person having or having had an interest in obtaining a particular supply or public works contract, and who has been or risks being harmed by an alleged infringement.

An *actio popularis* brought by a person who was not affected by the contested measure is not admissible. Similarly, it appears that an action may not be brought by an organisation representing contractors who did not take part in the procurement procedure and therefore were not affected by the contested measure.

5. Time limit for bringing actions

The time limit for bringing applications for interim measures and annulment actions before the administrative courts is 60 days from the communication of the measure to the applicant.

With regard to claims for damages before the ordinary courts, the issue is unclear. The limitation period will be of either ten or five years depending on whether the liability of the public administration is regarded as contractual or extra-contractual. The better view appears to be that the right to compensation for damages for breach of procurement rules is subject to the rules governing extra-contractual liability and therefore the limitation period will be of five years, running from the date of the judgement of the administrative court setting aside the contested decision.

6. Procedure

6.1 Duty to give notice

There is nothing in Italian law to oblige the complainant to inform the awarding authority or utility of his intention to commence proceedings before actually doing so. Nevertheless, it may well be sensible for the complainant to do so, particularly if he wishes to explore the possibility of reaching an amicable settlement without resorting to litigation.

6.2 Applications for interim orders

The application for an interim order is usually contained in the application to set aside the contested administrative act, but can be brought separately. It is served upon the public administration which issued the contested measure (or the State Attorney - *Avvocatura dello Stato* - in the case of public ministries) and at least one of the counter-interested parties within 60 days of the communication of the measure to the applicant.

The procedure is very simple. The TAR decides by reasoned order in chambers (without a public hearing), but the lawyers representing the parties usually request to be heard. The decision on application for interim orders is taken in a short period of time: that is, between 60-90 days from the application or the hearing (if any).

6.3 Other applications in the administrative courts

An application to set aside an administrative act is commenced by serving a *ricorso* (equivalent to an application for judicial review) upon the public administration which issued the contested measure (or the State Attorney - *Avvocatura dello Stato* - in the case of public ministries) and at least one of the counter-interested parties within 60 days of the communication of the measure to the applicant.

The proceedings are divided into two stages: the instruction stage and the decision-making stage. The underlying principle of the instruction stage is that the applicant must prove that his claim is not manifestly unfounded, while the administrative judges can order whatever measures are necessary in order to obtain evidence, in particular by

requesting production of new documents as well as any necessary verification and clarification. A recent law, enacted to improve transparency of the administrative proceedings (Law No. 241 of 1990), also provides that anyone having an interest in the protection of relevant legal situations has a right of access to administrative documents, subject to specific exceptions. This if of particular importance to enhance the judicial protection of disappointed bidders who wish to challenge the decisions taken by the public administration.

The final decisions that may be taken by the administrative courts are described in section 3.2 above.

6.4 Procedures in the ordinary civil courts

Proceedings in the ordinary civil courts are commenced by serving a *citazione* (equivalent to a writ with a full statement of claim endorsed) upon the defendant. The *citazione* must comply with the requirements set out in Article 163 of the Civil Procedure Code and the methods of service set out in Article 137 et seq of that Code. In particular, the *citazione* must contain the following elements:

i a statement of the relief sought;

ii the facts and rules of law giving rise to the claim;

iii a specific indication of the evidence on which the complainant is going to rely;

iv the retainer (power of attorney) whereby the complainant appoints his lawyer to represent him in the proceedings; and

v the date of the first hearing, together with the invitation to the defendant to enter a Defence within either 20 days before the date of the first hearing (or within 10 days if the terms of appearance are abbreviated) and to appear before the appointed judge on the date of the first hearing. It will also warn that failure to appear within the specified terms results in the forfeitures laid down in Article 167 of the Code of Civil Procedure.

Failure to comply with the above requirements and the proper methods of service may result in the nullity of the *citazione* and subsequent inadmissibility of the proceedings.

The Defence must contain any counterclaims and an indication of the evidence on which the defendant is going to rely to rebut the allegations of the complainant.

At the first hearing the judge may simply verify the proper notification of the *citazione* and the proper appearance of the defendant. A subsequent hearing will be fixed where he will informally question the parties, seek a possible settlement, clarify any issues and allow amendments to the pleadings. Following the close of the written pleadings, Article 184 of the Code of Civil Procedure provides for the instruction stage, where the judge decides on the admissibility of the evidence proposed by the parties in the pleadings and of any new evidence requested by the parties at the hearing. After this stage, new evidence can be admitted in the proceedings only in exceptional circumstances.

The rules of evidence are laid down in Articles 191-266 of the Code of Civil Procedure and in Articles 2697-2739 of the Civil Code. They deal with the burden of proof, expert evidence, documents, inspection, admissions, formal interrogatories, party oaths, presumptions and witnesses.

At the end of the instruction stage, the parties submit a brief summary of their conclusions and the case is remitted for decision by the single judge. An oral hearing takes place only if requested by the parties.

6.5 *Duration of proceedings*

The decision on an application for interim measures is taken in a short period of time; that is, between 60-90 days from the application or the hearing (if any). Hence, in contrast to the usual length of the judicial proceedings, they take place within a reasonable defined period of time.

With regard to the time taken before the administrative courts for the annulment of an administrative act, the average statistics raise serious concerns in respect of the rapidity of the remedies available to challenge unlawful acts. It has been calculated that the average duration of administrative proceedings is 3,077 days at first instance and 1,105 on appeal before the Council of State. This means an average of about ten years for an annulment decision to become final. An improvement in the length of the proceedings may be achieved under Article 31 bis of Law No 109 of 1994, which provides that the hearing on the merits of an application for annulment be fixed within 90 days from the date of the interim order. But the hearing itself may still take place after a considerable period of time.

As noted above, an action for damages in the ordinary (civil) courts can only be brought once the complainant has obtained an annulment order from the administrative court. Hence, it may be several years before the complainant can even commence his action for damages. Even then, the proceedings before the civil court (at first instance) usually take at least 3-5 years. Further periods of delay may be added if the judgement of either the administrative court or the ordinary court is appealed and/or if a question is referred to the European Court of Justice for a preliminary ruling. Consequently, a complainant may end up having to wait for as long as 10 or even 15 years before obtaining a final award for damages.

6.6 *Is it necessary to engage a lawyer?*

A complainant must be represented by a lawyer before either the administrative or the civil courts. It is normal and recommended practice to instruct lawyers with particular expertise in the procurement field, both in order to deal with the complex administrative procedures and so that the complainant's case can be presented as effectively as possible.

7. Costs of proceedings

The main costs will be legal fees and court fees.

Under Italian law, scales of legal fees are fixed by the Italian legal body called *Consiglio Nazionale Forense* and published from time to time. Those tariffs vary according to the value of the proceedings, but may be disregarded by mutual agreement between the lawyer and the client, thus allowing charging on a time basis. It is estimated that, in a case concerning a contract falling above the relevant EU thresholds, the legal fees for an administrative action from the interim stage until an appeal to the Council of State (including the costs of the proceedings) would amount to approximately ECU 100.000 to 120.000.

As in other jurisdictions, it is normal practice for both the administrative and civil courts to order that the losing party pays all or part of the legal costs of the successful party. This is an important factor to be borne in mind at the outset of any litigation.

8. Rights of appeal

In the administrative courts, a ruling of a TAR may be appealed to the Council of State at second instance within 60 days of the notification of the judgement to the claimant. The case is fully re-heard by the Council of State, which can issue a new decision on the merits replacing the ruling of the TAR. The matter is only referred back to the TAR where:

i the appeal is allowed on the ground of procedural defects;

ii the judgement of the TAR contained formal defects: or

iii the TAR erroneously declared itself incompetent.

The judgement of the Council of State can be appealed before the Court of Cassation only on jurisdictional grounds.

The judgements of the ordinary civil courts may be appealed to the Court of Appeal at second instance within 30 days of the notification of the judgement to the claimant, or within one year of the deposit of the judgement in the Registry (if the judgement has not been notified). The ruling of the Court of Appeal may itself be appealed, on points of law only, to the Court of Cassation, which is the final court of review.

The enforceability of a judgement of a TAR is not automatically suspended by an appeal, but only by a decision of the Council of State where immediate enforcement could give rise to serious and irreparable damage. Similarly, enforcement of a judgement of the ordinary civil courts at first instance may only be suspended by the Court of Appeal for serious reasons.

9. Enforcement of judgements

Where the public administration fails to implement a judgement delivered against it, the interested party may bring enforcement proceedings in the administrative courts (*giudizio di ottemperanza*). These enforcement proceedings are available to enforce both judgements of the ordinary courts and judgements of the administrative courts. The case law has also established that these enforcement proceedings are also available to enforce interim measures.

The procedure in these enforcement proceedings is as follows:

(i) the administrative court will fix a period of time within which the public administration is bound to comply with the judgement;

(ii) failure to comply within that term will lead the court to substitute itself for the public administration and adopt any necessary act to enforce the judgement;

(iii) alternatively, the court may appoint an *ad hoc* officer who is empowered to adopt the necessary administrative acts to enforce the judgement in the place of the public administration.

With regard to judgements of the ordinary courts awarding damages, it should be noted that the recent case law enables the private parties to have recourse directly to the enforcement proceedings available under the Code of Civil Procedure, namely the enforced liquidation of assets. Thus a judgement creditor (eg a contractor who has been successfully awarded damages) will hold an individual right in relation to the public administration and therefore be able to avoid the lengthy proceedings of the *giudizio di ottemperanza* (enforcement proceedings by the administrative courts), while having recourse directly to the usual remedies available before the ordinary courts.

USEFUL ADDRESSES

1. Selected courts

Pretura Civile di Roma Viale Giulio Cesare 54-ang Via Lepanto Roma	Tel:	06 38701
Tribunale Civile di Roma Viale Giulio Cesara 54/c Roma	Tel:	06 35771
Corte di Appelo di Roma Sez Civili-Piazzale Clodio Roma	Tel:	06 38701
Corte Suprema di Cassazione Piazza Cavour Roma	Tel:	06 686001
Tribunale Amministrativo Regionale Lazio Piazza Nicosia 20 Roma	Tel:	06 686091
Consiglio di Stato Piazza Capo di Ferro 13 Roma	Tel:	06 68271

2. Government departments responsible for overseeing public procurement

Ministero dei Lavori Pubblici Piazza Porta Pia Rome	Tel:	06 44121
Consiglio Supermore Presso Il Min.LL.PP. Piazza Porta Pia Roma	Tel:	06 4426 7395

LUXEMBOURG

Prepared by Herbert Smith (Brussels)
and Molitor, Feltgen & Harpes (Luxembourg), 1997

CONTENTS

LUXEMBOURG

1. Implementation of the Remedies Directives

Implementation of Remedies Directive 89/665, dealing with procurement by public authorities, has been achieved in Luxembourg through the Act of 13 March 1993 ("the 1993 Act")[31].

The 1993 Act, until recently, was not applicable to utility entities within the scope of Utilities Directive 93/38 and Utilities Remedies Directive 92/13. However, a new Act was signed by the Grand-Duke on 27 July 1997 and has been applicable since 1 November 1997 ("the 1997 Act"). The 1997 Act provides that the provisions introduced by the 1993 Act are now applicable to all procurement procedures by *public* entities, including those falling within the scope of the Utilities Directive. A separate set of remedies is also introduced as regards utilities in the *private* sector.

2. The relevant forum

2.1 The administrative and civil courts

In Luxembourg, actions regarding procurement by *public* bodies must be brought, at the contentious stage, before the President of the Administrative Tribunal (*Tribunal administratif*). The powers of the Administrative Tribunal in procurement cases were, prior to a reorganisation that took place in 1996, previously exercised by the Conseil d'Etat and its President. As for procurement by *private* entities in the utilities sectors, complainants should apply to the President of the District Tribunal (*Tribunal d'arrondissement*).

As explained in section 3 below, these Tribunals are competent to grant interim orders and annulment orders. The District Tribunal is also competent to grant dissuasive payment orders as against private sector utilities (in accordance with Article 2.1c of Remedies Directive 92/13).

Actions for damages, even as against public authorities, must be made in the District Tribunal rather than the Administrative Tribunal. Under Luxembourg law, the administrative courts have no power to award damages.

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[31] Mémorial A 1993, page 398.

2.2 The Tender Commission

Before resorting to litigation before the Administrative or District Tribunals, complainants may lodge a complaint with the supervisory body known as the Tender Commission (*la Commission des Soumissions*) of The Ministry of Public Works. Article 36(6) of the Act on State accountancy, as modified by the Public Procurement Act of 4 April 1974, provides that the Tender Commission shall guarantee the correct application of the legislation on public procurement. The functions and procedure of the Tender Commission are regulated by Articles 44, 45 and 46 of a regulation of 2 January 1989. It is composed of representatives of public authorities and of professionals (lawyers, accountants, etc).

The Tender Commission may be asked to undertake special tasks. The Commission may issue advisory opinions, although these are not binding and cannot be challenged in judicial review proceedings. Its principal role is dissuasive rather than coercive, but its opinions are normally complied with. The Commission also has a conciliation function and thus plays a role somewhere between judicial review and a claim at the purely administrative level.

Complaints may be lodged with the Commission by the purchasing authority, a tenderer or an interested professional body. After having studied the facts, the Tender Commission delivers its opinion to the public authority. This procedure does not preclude the applicant ultimately from lodging an application with the Administrative or District Tribunal nor from submitting the matter immediately to the relevant minister. In the latter case, the minister himself may take the case to the Commission.

The Commission may be asked to intervene even when the decision to award a public procurement has already been taken. This procedure may be considered as a "non-contentious" remedy.

In this context, it should be emphasised that regulations governing non-contentious administrative procedures provide that the rights of defence have to be respected whenever a decision is taken. These rights include the right to state one's case, the right to have access to the file, and the requirement that administrative acts always have to be reasoned. Some of these provisions relate to public policy, and the Administrative Tribunals often raises them *ex officio* to quash a non-conforming administrative decision.

3. Available remedies

3.1 Interim orders

The power of the Administrative Tribunals to award interim measures was introduced into the Luxembourg legal system by the 1993 Act implementing Directive 89/665. Similar powers were granted to the District Tribunals, as regards private sector utilities, by the 1997 Act.

Article 1 of the 1993 Act provides that any interested party who considers that Community law has been violated in a public procurement procedure, may request the President of the Administrative Tribunal to award interim measures. Such a request may be lodged at any time until the contract in question has been entered into (signed).

Article 2 lays down that the President may order interim measures to correct the alleged infringement of Community law or to prevent further damage to the interests concerned, including measures to suspend or to ensure the suspension of the award procedure until the public authority has corrected the violation as ordered by the President.

Furthermore, Article 3 of the 1993 Act provides that the President, in considering whether to order interim measures, may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefit. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures. The Conseil d'Etat of Luxembourg, in its legal comments on the 1993 Act, states that in cases where interim measures are refused, reasons should be given for the decision.

To date, only one suspension order has been granted (by the President of the Conseil d'Etat).[32] The 1993 Act has created for the first time in the Luxembourg legal system an administrative jurisdiction of summary proceedings. It is therefore unsurprising that the President has been reluctant to grant such measures. The general philosophy of the Administrative Tribunals and the Conseil d'Etat, as evidenced in case law, suggests that the administrative judge will annul or suspend administrative decisions only if it is strictly necessary or if the decision taken is manifestly unlawful. The legal comments made by the Conseil d'Etat regarding transposition of the procurement Directives also suggest that the Presidents of Administrative Tribunals will continue to follow the traditional approach taken in other areas.

3.2 Set-aside or annulment orders

Under the 1993 Act, the President of the Administrative Tribunal may grant an order setting aside decisions taken unlawfully (including the removal of discriminatory specifications) during the course of a contract award procedure. The 1993 Act does not, however, give the President any power to take a definitive decision cancelling the award of a contract by a public authority. Such a definitive annulment decision could only be taken by the Administrative Tribunal itself, pursuant to an application for annulment (*recours en annulation*). The possibility of this type of challenge already existed in the Luxembourg legal system even before the 1993 Act.

In the event of annulment of an administrative decision, the Administrative Tribunal has no power to substitute its own decision. Rather, the matter is sent back to the

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[32] Originally, the review powers under the 1993 Act could be exercised by the President of the Litigation Committee of the Conseil d'Etat. However, by virtue of two Acts enacted in 1996, the Litigation Committee no longer has judicial powers. Instead, these powers are exercised by the Administrative Tribunals.

administrative body and the contract remains in force even though the decision on which it is based is unlawful. It has been suggested by some commentators that an ordinary civil court could, in certain circumstances, give an order by way of interim measures to suspend the execution of the contract itself, or oblige the administrative authority in question, under threat of the imposition of a penalty, to effect the annulment of the contract.

3.3 Damages

The laws implementing the EU procurement Directives in Luxembourg do not lay down specific provisions on the availability of damages. Under general principles of Luxembourg law, damages are potentially available from the civil (District) courts where loss or damage has been caused by an administrative decision which has been taken unlawfully. This jurisdiction derives from a 1988 Act concerning the civil responsibility of the State and other public bodies. It was not therefore considered necessary to introduce any specific new provisions on damages in a procurement context.

In order to bring an action for damages before the civil courts, the complainant must first have obtained the annulment of the challenged decision by an Administrative Tribunal.

It is generally established by case law that the annulment or *réformation* of an individual administrative decision implies *ipso facto* that the public administrative body is liable in a tort action. This principle has already been applied in several procurement cases, where authorities have been held liable in damages. Caselaw regarding damages for tenderers indicates that compensation for the whole loss should be granted and that this could comprise *lost profit*. In order to recover damages, it is generally sufficient for the complainant to prove loss of an opportunity (*perte d'une chance*) and it is not therefore essential to prove that the complainant would necessarily have been awarded the contract if there had been no breach.

In various cases on procurement, Luxembourg courts have relied on Article 36 of the Act of 27 July 1936 concerning State accountancy, rather than EU procurement rules, in order to award compensation for lost profit.

3.4 Remedies as against utilities

Utilities Remedies Directive 92/13 has been implemented by the 1997 Act. This Act draws an important distinction between utilities in the public sector and those in the private sector.

For utilities in the *public* sector, the 1997 Act effectively applies the existing provisions of the 1993 Act. Hence, against public sector utilities, the President of the Administrative Tribunal is given the same power to grant interim suspension orders and set aside orders.

As regards utilities which are *private* entities, powers to grant interim orders and other measures are given to the President of the District Tribunal, sitting as a judge of summary proceedings. This civil judge is given the power to award interim orders and set aside orders, as set out in Articles 2.1(a) and 2.1(b) of Utilities Remedies Directive 92/13. Importantly, the President of the District Tribunal is also empowered to order dissuasive payments, as provided for in Article 2.1(c) of Directive 92/13.

Hence, the civil judge in summary proceedings will have the choice between:

- suspending the award procedure or modifying or deleting technical specifications; and
- imposing a payment order upon the private awarding entity if a wrongful or illegal clause, which would cause damage, is not modified or deleted.

Regardless of the option chosen by the civil judge in the summary proceedings, the award of damages by the civil court is always possible according to the general principles of tort actions under Luxembourg law. This contrasts with the power of the President of the Administrative Tribunal, who is not competent to grant either damages or dissuasive payment orders.

Finally, it may be noted as regards utilities that the 1997 Act makes express provision for the conciliation procedure laid down in Articles 9 to 11 of Directive 92/13. Details of this voluntary form of dispute-resolution were given in Chapter 1 above.

4. Who may apply?

According to the Conseil d'Etat, in order to have standing to challenge an administrative decision, the applicant's interest in the matter must be personal, direct and current. The 1993 and 1997 Acts do not add any new conditions regarding the standing of complainants. The Conseil d'Etat has confirmed that the statutory provisions confer *locus standi* on each tender participating in an award procedure (provided the tenderer also fulfils the requirements for admissibility to that award procedure). It has not yet been clarified whether other third parties, who did not participate directly in the award procedure, may have standing to bring an action.

5. Time limit for bringing actions

The time limit for lodging an application with the Administrative Tribunal is three months after the notification of the decision in question. If the applicant is not a resident of Luxembourg, the time limit is extended to four months. These time limits may, however, be interrupted by a non-contentious application to the Minister or the Tender Commission to reconsider the negative decision which has been taken.

As has been specified in several cases by the Conseil d'Etat, the deadlines run from the date of the formal notification of the decision, even if the recipient of the notification had knowledge of the irregularity before the decision has been notified. However, it has to be stressed in this context that a non-reasoned decision is not considered to be a proper notification, so that the time limit only starts to run when the reasons for the decision are communicated to the recipient.

As mentioned above, any application for interim measures must be brought before the date on which the contract in question has been entered into (ie. signed).

As regards actions for damages in the ordinary civil courts, the time limit under general Luxembourg civil law is 30 years.

6. Procedure

6.1 Applications to the Administrative Tribunal

The recent re-organisation of the administrative jurisdictions in Luxembourg was dealt with by an Act of 7th November 1996. That Act (Article 98) specifies that the procedure for lodging applications before the new Administrative Tribunal will remain the same as the previous procedure before the Conseil d'Etat, until the procedure is modified by any new regulations specifically for the Administrative Tribunal. Such regulations have been set out in a draft statute which is being discussed in the Luxembourg Parliament, but none have been adopted to date.

The procedure before the Administrative Tribunal is largely a written one, involving the exchange of written pleadings. The procedure is introduced by the complainant filing a petition (*requéte*) in writing with the Tribunal. The parties then exchange their written pleadings, known as *mémoires*, with each party being entitled to submit a maximum of two *mémoires*. After these have been exchanged, an oral hearing is fixed by the Tribunal, where the parties generally only give a few supplementary oral explanations regarding factual details. An oral hearing will always be held, although the most important part of the procedure remains the written pleadings.

6.2 Applications to the District Tribunal

The procedure before the District Tribunal is again largely a written one. The complainant introduces his action by a writ of summons (*assignation*). This is delivered by way of a bailiff (*huissier de Justice*) to the defendant. The parties then set out their arguments and counter-arguments by way of written pleadings, known as *conclusions*. Before the District Tribunal, there is no limit to the number of *conclusions* that may be put forward. Oral explanations are given in a court hearing only if this is necessary for the understanding of technical details.

6.3 *Duration of proceedings*

Interim orders by the President of the Administrative Tribunal can be granted within a few weeks of the application. The suspension and interim measures ordered to date by the President of the Conseil d'Etat have virtually all been granted between 3 and 18 days after the application was lodged. The time necessary to obtain a final decision in an ordinary case varies between 8 months and 3 years, according to the necessity for investigative measures, such as examination of expert evidence or visits to the scene.

Actions for damages in the ordinary civil courts are likely to last between one and two years, providing no major difficulties occur.

6.4 *Is it necessary to engage a lawyer?*

In contentious matters before either the administrative and civil courts, the complainant must usually be represented by a lawyer belonging to one of the two bars of Luxembourg (Luxembourg and Diekirch). However, legal representation is not compulsory for applicants for interim orders before the President of the District Tribunal, although even here complainants are usually represented by counsel.

7. Costs of proceedings

Under the Luxembourg legal system, a distinction is made as between lawyer fees, which have to be paid by each party to its own lawyer, and court costs, which have to be paid in their entirety by the losing party. The amount of the lawyer fees will vary according to the lawyers instructed and also depending on the length and complexity of the case. The court costs, on the other hand, are calculated by reference to the value in dispute under the proceedings.

8. Rights of appeal

Following the reorganisation of the administrative jurisdictions in Luxembourg in 1996, the judgements of the Administrative Tribunal can be appealed to the newly-created Administrative

Judgements of the ordinary civil courts (the District Tribunals) can always be appealed to the Court of Appeal in Luxembourg, provided the value in dispute in the case exceeds LUF30,000.

9. Enforcement of judgements

The annulment of an administrative decision by the Administrative Tribunal is binding and has to be followed by the administrative body, as does any interim suspension order granted by the Tribunal's President. Nevertheless, since 1986, the Luxembourg administrative law system has conferred limited powers on complainants to enforce the judgment of the Administrative Tribunal (previously the Conseil d'Etat) after the challenged administrative decision has been set aside. This Act provides that if the public authority does not comply with the judgement, the applicant may apply to the Administrative Tribunal after 3 months have expired from the delivery of the judgement for the nomination of a special commissioner who will then take a new decision in lieu of the administrative body in question.

Until now, no practice exists concerning the application of this procedure in a public procurement context and it is thus difficult to appraise the practical implications of this possibility. It is doubtful whether this procedure is helpful in procurement matters, given that the contract remains in force even if the award decision has been annulled. One author specialising in administrative matters defends the view that in the case of an annulment of an award decision, no commissioner can be nominated and that the only remedy possible is a tort action. However, after the transposition of Directive 89/665, it may be speculated that the nomination of such a commissioner could be required under an interim order by the President of the Administrative Tribunal.

USEFUL ADDRESSES

Administrative Tribunal

Tribunal administratif
1 rue du Fort Thuengen
Nouvel Hémicycle
L-1499 Luxembourg

District Tribunal of Luxembourg

Tribunal d'arrondissement
BP 15
L-2010 Luxembourg

District Tribunal of Diekirch

Tribunal d'arrondissement
BP 164
L-9202 Diekirch

Court of Appeal

Cour Supérieure de Justice
12 côte d'Eich
L-1450 Luxembourg

Tender Commission

Ministère des Travaux Publics
Commission des Soumissions
L-2940 Luxembourg

THE NETHERLANDS

Prepared by Herbert Smith (Brussels)

and Wieringa Advocaten (Amsterdam), 1997

CONTENTS

NETHERLANDS

1. Implementation of the Remedies Directives

Alleged infringements of the EC procurement Directives can be challenged in the Netherlands before an ordinary civil court or a special arbitration tribunal. In most circumstances, this possibility is based on pre-existing provisions of Dutch law rather than measures introduced specifically to implement the Remedies Directives.

Directive 89/665 has been partially implemented by Article 6.2 of the Regulation on the Procurement of Works.[33] This Article stipulates that central government authorities in the Netherlands (but not other public bodies) have to apply the Uniform Regulation of Procurement EC 1991 ("URP-EC 1991")[34] when awarding works contracts within the scope of the Works Directive. Paragraph 67 of the URP-EC prescribes that any dispute arising from the application of URP-EC will be dealt with by arbitration before the Arbitration Board for the Building Industry in the Netherlands ("ABBI").[35] Other (non-central) authorities may voluntarily declare the URP-EC (including paragraph 67) applicable to a procurement procedure, including one outside the scope of the Works Directive. The ABBI is also competent in these cases.

Further implementation has not taken place. Consequently, Directive 89/665 has not been implemented as regards supplies and services contracts. Moreover, there are no national measures implementing Directive 92/13 as regards procurement in the utilities sectors. According to the Dutch Government, specific implementation measures are not necessary because the existing remedies available before the ordinary civil courts already satisfy the requirements of the Remedies Directives.

2. The relevant forum

The normal situation in the Netherlands is that actions for breaches of the EC procurement rules have to be brought before the ordinary civil courts, which in practice means the relevant District Court. By way of exception, the ABBI is competent to hear disputes in those limited circumstances when the URP-EC 1991 applies. Where the URP-EC does not apply (either compulsorily or voluntarily), alleged breaches of the procurement Directives have to be pursued in the ordinary courts on the basis that the awarding entity has committed an unlawful act in breach of the Dutch laws implementing each of those Directives.

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33 [*Besluit aanbesteding van werken*]

34 [*Uniform Aanbestedingsreglement EG* 1991]

35 [*Raad van Arbitrage voor de Bouwbedrijven in Nederland*]

If the URP-EC does apply, actions concerning alleged infringements of the procurement rules must be brought (in the first instance) before the ABBI and the ordinary courts are not competent.

Public authorities other than the central government often declare voluntarily that URP-EC 1991 applies to a particular procurement procedure (including those outside the scope of the Works Directive). In this type of case, an action alleging a breach of the procurement Directive in question again has to be taken before the ABBI (and an ordinary court would declare itself not competent).

A Statute of 1 September 1995 lays down detailed rules governing the composition of the ABBI, its procedures, its arbiters and their appointment.

3. Available remedies

3.1. Interim orders

The President of the District Court and the President of the ABBI are both competent to order interim measures, pursuant to interlocutory proceedings. *Interlocutory* proceedings for interim measures should be distinguished from *accelerated* proceedings on the substance of the case. The latter is available in the civil courts provided the court's President grants leave, which he will do if the complainant establishes prima facie that the matter is urgent.

In procurement cases before the ABBI, the leave of the ABBI's President is deemed to be granted if the complainant requests accelerated proceedings. Interim orders are not generally requested before the ABBI, because a ruling on the substance of the case can be obtained within weeks using accelerated proceedings. In the ordinary courts, on the other hand, the possibility of obtaining interim orders is still very important, given that accelerated proceedings last at least 6 months.

Complainants may apply to the court (or ABBI) for an interim order suspending a contract award procedure, on the ground that an infringement of the procurement rules has occurred. Case law before the ordinary district courts indicates that the court's President might also order that the procurement procedure be terminated and recommenced in conformity with the procurement rules. He might also rule that a complainant who has been unfairly excluded shall be re-admitted to the tendering procedure and/or that the awarding authority is prohibited from awarding the contract to a third party. Moreover, in principle, there is nothing to prevent the President from suspending or setting aside a contract which has already been entered into but not yet performed.

According to the Code of Civil Procedure, an interim order can be granted if the balance of interest lies in favour of doing so and the case is sufficiently urgent from the point of view of the complainant, for example because he might otherwise suffer irreparable harm. However, certain rulings in the case law on procurement suggest that judges may apply a less strict test when deciding whether or not to grant interim orders in the field

of the procurement rules. These rules are considered to be of a higher "public" order and judges may therefore be willing to grant an interim order solely on the grounds that an infringement of the procurement rules has been established as probable. Judges may do so without considering in detail the balance of interests or the possible irreparable harm to the complainant.

3.2 Set aside orders

The ordinary civil courts and the ABBI have the power to set aside unlawful decisions taken in the course of a procurement procedure. They may also order the annulment of a concluded contract awarded pursuant to such a procedure, provided the contract has not been performed.

Case law suggests that the ordinary courts may be willing to grant set aside orders solely on the basis that there has been an infringement of the procurement rules and without carrying out a detailed analysis of the balance of interests. A ruling of the ABBI suggests that this body will only annul a concluded contract if the award was made in breach of the procurement rules and, following the set aside, the contract ought to be awarded to the complainant.

3.3 Damages

A complainant who has suffered loss as a result of a breach of the procurement rules may apply to either the ordinary court or (where the URP-EC applies) the ABBI for an award of damages. The awarding authority is in principle liable to compensate the complainant for any damage he has suffered as a result of the unlawful act.

Under the general principles of the Civil Code, damages can cover losses and expenses incurred, as well as loss of profit. However, it appears that recovery of loss of profit is possible only if the complainant can establish that, in the absence of the breach, the contract would have been awarded to him. For compensation of tender costs, it is necessary to establish that as a result of the unlawful breach of the procurement rules these costs were incurred in vain.

In one case a district court granted gross compensation amounting to 10% of the price specified in the complainant's tender, after having established that the contract would have been awarded to the complainant had there been no breach. The court considered that 10% was a reasonable estimate of the profit which the complainant could have expected to make upon execution of the contract.

Compensation for damages such as loss of goodwill, publicity and experience is also possible, although there are no examples in the case law on public procurement to date. In practice, it may prove difficult to substantiate such losses.

4. Who may apply?

4.1 The ordinary courts

There are no particular requirements for standing, save that (under the Civil Code) the complainant must have an interest in his claim. Complaints by rejected candidates or tenderers are clearly admissible. If the contract is awarded without publicity, every party which could have been a candidate if the procedure had been properly advertised, may lodge a claim. On the other hand, parties who have not been candidates in the award procedure and who cannot substantiate that there is a justification (such as an infringement of the advertising rules) for their non-participation, will probably not be admitted at the ordinary court. There are no examples of such complaints in the case law.

A sectoral organisation (such as a trade association) can bring an action before an ordinary court if the organisation is a legal entity and its articles of association affirm that one of its objectives is to protect the interest concerned.

4.2 The ABBI

The situation is different before the ABBI. Not only must the complainant have an interest in his claim but, according to Article 67.1 of the URP-EC 1991, the ABBI is only competent in disputes between parties directly involved in a procurement procedure which is subject (compulsorily or voluntarily) to the URP-EC 1991. A party must have participated in the award procedure if he wants to lodge a claim which is admissible. If the awarding authority failed to follow the open or restricted procedure at all, the URP-EC 1991 does not apply and the ABBI is not competent. In such a case, a complaint would have to be brought before the ordinary courts.

Article 67.2 stipulates that organisations representing building contractors are considered to be parties involved in the procurement procedure and that complaints by such parties are admissible. Complaints by other organisations appear not to be admissible.

Claims by complainants that are not registered in the Netherlands are allowed, both by the ABBI and by the ordinary courts.

5. Time limit for bringing actions

A civil action must generally be brought to court within a period of five years from the day following the day that both the damage, as well as the identity of the public authority liable for the damage, have come to the knowledge of the complainant. In any event, this period cannot exceed 20 years from the date of the event complained of.

Where the URP-EC 1991 applies, an action is allowed if it is brought before the ABBI within a period of three months after the written confirmation of the assignment of the work (Article 67.3 of the URP-EC 1991). Any later action is only allowed if the dispute arises from circumstances which have come to the knowledge of the complainant subsequent to the three month period.

6. Procedure

6.1 Applications to the civil courts

An action in the civil courts is commenced by a writ of summons which must be served by a bailiff/process server. For accelerated proceedings, an authorisation of the President of the District Court is compulsory. In interlocutory proceedings, once the writ of summons has been served, a hearing is held. In the other proceedings, the parties deliver one or two written memoranda and a hearing is held only if one or both parties request it.

In interlocutory proceedings, the President of the relevant District Court lays down his decision in an enforceable preliminary judgement which may contain an order to take interlocutory measures. Other proceedings lead to an enforceable judgement on the substance of the case given by the relevant District Court.

6.2 Applications to the ABBI

Actions are commenced before the ABBI by way of a written request. The requesting party (the complainant) has to pay a deposit for the costs of the proceedings. The president of the ABBI appoints either one or three arbitrators from the list of members of the ABBI if the parties do not reach an agreement on the arbitrators. The language of the proceedings is Dutch. It is not compulsory to be represented by a lawyer.

After delivering one or two written memoranda, the parties appear in a hearing where each side presents its arguments. Besides the normal proceedings, the Statute of 1st September 1995 lays down rules for acceleration proceedings and interlocutory proceedings. The joiner of parties and/or of claims is possible. Also, third party intervention is allowed.

The decision of the ABBI is made in the form of an arbitrations award. It is legally binding and can be enforced by an enforcement order of a civil court.

6.3 Duration of proceedings

As mentioned above, the rulings of the ABBI are almost always given pursuant to accelerated proceedings. These proceedings usually lead to a decision on the substance of the case within a period of around four weeks, so that interlocutory proceedings are not usually considered necessary.

Before the ordinary courts, on the other hand, interlocutory proceedings are usually chosen. These normally last around one or two months but, if the matter is sufficiently urgent, the period may be much shorter. By contrast, accelerated proceedings in the ordinary courts tend to last at least six months and so would usually only be chosen where the contract in question has already been concluded. Normal proceedings before the civil courts tend to last for a year or more.

6.4 Is it necessary to engage a lawyer?

For proceedings before the civil courts it is compulsory to be legally represented by a lawyer admitted to the Dutch bar. Only the defendant in interlocutory proceedings may appear in person. In proceedings before the ABBI, legal representation is not compulsory. It is, however, usual practice and generally recommended to seek representation by an expert.

7. Costs of proceedings

When commencing proceedings before the civil courts or the ABBI, a complainant has to pay a court registry fee. For example, for interlocutory proceedings in the district court, the fee for a monetary claim above NLG 25,000 is 1.9% of the amount claimed, up to a maximum of NLG 6,625. If there is no monetary claim, the fee is NLG 350. An even higher fee is payable upon an appeal.

At the conclusion of the proceedings, a civil court must order the losing party to pay the legal costs of the other party. It does not have any discretion in the matter and must fix the amount of legal costs in accordance with an established rate. The fixed rate of compensation does not cover the full amount of legal costs actually incurred.

In general, the ABBI will order the losing party to pay compensation for the legal costs of the other party. The ABBI, however, does have a discretion and can decide otherwise. Furthermore, the ABBI is not bound to fix legal costs by reference to any prescribed rate. It decides on the amount of compensation (*ex aequo et bono*).

8. Rights of appeal

All judgements of the District Court can be appealed to the Court of Appeal.

Article 1065 of the Code on Civil Procedure stipulates that a civil court can annul decisions of arbitrators (such as the ABBI) if, amongst other things, the decision and/or its proceedings are contrary to "the public order" or good morals. As both the ABBI and a civil court regard compliance with the procurement Directives as a matter concerning public order, one may assume that a decision of the ABBI can be appealed to a civil court on the ground that a Directive has been breached.

9. Enforcement of judgements

The orders of a civil court are enforceable, being executory titles within the meaning of the Code on Civil Procedure. It is the normal practice for public authorities to respect such orders in any event and not to await their enforcement. In view of this practice, a civil court often refuses to impose a conditional penalty in anticipation of a possible breach of the order. In the event that an order is infringed and no conditional penalty was imposed in advance, it is possible to demand the imposition of a penalty in interlocutory proceedings.

The decisions of the ABBI can be enforced with an enforcement order (*exequatur*) of a civil court (Article 1062 of the Code on Civil Procedure). An ordinary court can refuse to grant such an order if it considers the decision of the ABBI to be evidently contrary to public order. The ABBI will usually grant any request for the imposition of a conditional penalty, which becomes payable in the event that its order is not respected, even if it concerns a public authority.

Useful addresses

District Courts in principal cities:

Parnassusweg 220-228
Postbus 84500
1080 BN
Amsterdam

Wilhelminaplein 100
3082 AK
Rotterdam

Juliana van Stolberglaan 2
2595 CL
Den Haag

Hamburgerstraat 28
3512 NS
Utrecht

The ABBI:

Raad van Arbitrage voor de Bouwbedrijven in Nederland
Stationsplein 29
Postbus 19290
3501 DG Utrecht

Tel: 030 234 32 22
Fax: 030 230 01 25

Dutch Ministry responsible for overseeing public procurement:

Ministerie van Economische Zaken
Bezuidenhoutseweg 30
2594 AV Den Haag
Postbus 20101
[2500 EC Den Haag?]

Tel: 070 379 89 11
Fax: 070 347 40 81

PORTUGAL

Prepared by Herbert Smith (Brussels)

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PORTUGAL

1. Implementation of the Remedies Directives

Remedies Directives 89/665 and 92/13 have not yet been implemented into Portuguese law. Nevertheless, under pre-existing Portuguese laws and principles, an aggrieved tenderer or other interested party may challenge the award of a public contract or any other relevant administrative decision within the scope of the substantive EU procurement Directives.

The EU Directives on public works contracts have been implemented by Decree No. 405/93 of 10th December 1993, while Decree No. 55/95 of 29th March 1995 implements the Directives on public supplies and services contracts. Both of these implementing decrees include provisions regarding the formalities for bringing complaints and legal challenges.

Utilities Directive 93/38 (like its predecessor Directive 90/531) has not yet been implemented into Portuguese law. Consequently, this chapter focuses principally on the availability of remedies in relation to procurement in the "classic" public sector rather than in the utility sectors of water, energy, transport and telecommunications.

2. The relevant forum

Before being entitled to commence legal proceedings in the courts, a complainant aggrieved by an alleged infringement of the procurement rules must first exhaust certain preliminary complaints procedures. In particular, the complainant must:

i lodge a formal complaint with the awarding authority; and

ii if the complaint is not satisfactorily resolved within 15 days, lodge a "hierarchical" appeal (*recurso hierárquico*) to the higher authority which supervises the awarding authority.

These pre-judicial stages are described in section 3 below. Once they have been exhausted (and assuming the breach is not rectified), the complainant may bring an action before the administrative courts. Such actions should be brought before either the Administrative "Circle" Courts (*Tribunais Administrativos de Circulo*) or the Administrative Supreme Court (*Supremo Tribunal Administrativo*). Actions should be taken to the latter Court when the authority which supervises the awarding authority is the Portuguese Government, one of its members, the regional governments of the autonomous regions of Azores and Madeira or one of their members, or by a Commander-in-Chief of the Portuguese army.

3. Pre-judicial complaints

3.1 Complaints

Before being able to take the matter further, any complainant in a procurement matter must first lodge a formal complaint with the awarding authority. There is an 8-day time limit for the filing of any complaint. The complaint must take the form of a written application (in two copies) addressed to the awarding authority and, if it is sent by post, the letter should be registered.

The authority is under an obligation to deal with the complaint within 15 days. If the complaint is not resolved (or if the authority simply ignores it), it is deemed to be tacitly refused after 15 days. On the other hand, if the authority accepts the complaint, it may remedy the infringement in question and, if necessary, annul any subsequent formalities that have occurred pursuant to that infringement.

3.2 Hierarchical appeals

According to Decree 405/93, the refusal of a complaint regarding a procurement procedure must be the subject of a hierarchical appeal before the matter can proceed to the courts. Hence, such an appeal must be made to the higher authority which (under Portuguese law) has the responsibility of supervising the awarding authority. For example, a Local Environmental Authority is subject to the supervisory authority of the Ministry of Environment. The only exception is where the awarding authority is not subject to supervision by any superior body, but this will only rarely be the case.

Hierarchical appeals must be submitted within 8 days from the notification to the complainant of the refusal of his complaint to the awarding authority. Where that earlier complaint is tacitly refused, the hierarchical appeal must be lodged within 8 days of the expiry of the 15-day time limit within which the awarding authority was obliged to deal with the original complaint. The hierarchical appeal should again take the form of a written application addressed to the supervising authority.

If the hierarchical appeal is successful, the awarding authority must conform with the decision of its supervisory authority and, accordingly, remedy the infringement in question. If necessary, the awarding authority must also revoke or annul steps that have been taken pursuant to the said infringement. If the appeal is refused, the matter may only be reviewed further by way of an appeal to the administrative courts.

In general, complaints and hierarchical appeals do not have the effect of suspending the administrative procedure. The only exception relates to the special regime, described below, governing the "public session" of a procurement procedure.

3.3 *Special rules for the "public session"*

Both of the decrees (405/93 and 55/95) implementing the substantive procurement rules in Portugal contain special provisions for the "public session" of a procurement procedure (*acto público do concurso*). The public session is the stage when the bids are publicly opened and the bidders are either admitted or excluded. The public session is presided over by a committee ("the Committee") composed of at least 3 members, one of them being appointed as President.

The bidders taking part in the procurement procedure (and attending the public session) may file a complaint if they wish to contest their exclusion from the list of accepted bidders (or the inclusion of certain other bidders) or the refusal of his tender (or the acceptance of another bidder's tender). Any such complaint must be addressed verbally or in writing by the complainant to the Committee during the public session. If the aggrieved party fails to make such a complaint immediately, no further appeal (either a hierarchical appeal or an eventual action in the administrative courts) will be possible.

Under Article 95(3) of Decree no. 405/93 and Article 64(1) of Decree no. 55/95, the decisions of the Committee may be subject to hierarchical appeals to the proper administrative authority (*o dono da obra*). A hierarchical appeal must be made before any further appeal could be taken to the administrative courts. In tenders for works under Decree no. 405/93, hierarchical appeals must be submitted by the interested bidders during the public session.

Unlike complaints and hierarchical appeals raised at other stages of a procurement procedure, hierarchical appeals under the special regime for decisions taken during the public session do have suspensive effects. This means that the award is blocked until all the hierarchical appeals filed against decisions of the Committee, pursuant to complaints submitted by the bidders during the public session, are expressly or tacitly decided upon by the proper administrative authority.

Within 5 days following receipt of a certified copy of the minutes of the public session, the appellant must file its appeal brief with the proper authority. This hierarchical appeal is tacitly refused if no decision is notified to the appellant within a period of 15 days (for works contracts under Decree no. 405/93) or 10 days (for supplies and services contracts under Decree no. 55/95) from the date of filing the appeal.

If the hierarchical appeal is successful, the infringement or irregularity concerned will be remedied and the legitimate rights and interests of the appellant will be duly satisfied: if necessary, the public tender will be annulled.

4. Remedies available in the administrative courts

The decisions of administrative authorities in Portugal, including those taken during procurement procedures, are subject to the exclusive jurisdiction of the administrative courts. The decrees implementing the substantive public procurement rules (decrees 405/93 and 55/95) place two specific limitations on the availability of remedies from the administrative court in procurement cases.

Firstly, the infringement in question must have been the subject of a formal complaint followed by a hierarchical appeal, neither of which has succeeded in resolving the matter. These non-judicial formalities have already been discussed fully above.

Secondly, Decree no. 405/93 specifies that actions may only be filed in the administrative courts in respect of "the final decision of the public tender". This requirement may appear to mean that only the final contract award decision can be challenged, and not any interim decisions or formalities taken during the award procedure. Although interim decisions or formalities cannot be the subject of a specific appeal, Article 55(2) of Decree no. 405/93 indicates that it is possible to discuss, in the appeal against the final award decision, any infringements or irregularities that have occurred in the course of the award procedure, provided that these had a direct influence on the final award decision. Jurisprudence in the Supreme Administrative Court has also indicated that a decision to exclude a particular bidder is in itself final and may, therefore, be subject to a specific appeal.

4.1 Interim orders

The commencement of an action in the administrative courts does not have the effect of suspending the contested procurement decision and does not therefore prevent its implementation or enforcement. Exceptionally, however, a special proceeding may be instituted before the administrative court with a view to obtaining the suspension of the implementation or enforcement of an administrative decision which is under appeal. Such suspension will only be granted on the following grounds:

(a) implementation might cause damage that cannot easily be remedied (*prejuízo de difícil reparação*);

(b) suspension will not seriously damage any public interest; and

(c) *prima facie* the appeal complies with the applicable legal provisions.

If the suspension is granted, it will be duly notified to the awarding authority, in order to block the implementation or enforcement of the decision until the administrative court has taken a final decision on the subject matter. The authority may nevertheless initiate or proceed with the implementation of its decision, while the appeal is pending, if it can show an urgent need to do so, in terms of the public interest or the need to avoid more considerable damage. If the refusal to suspend the decision is not duly justified by the authority, the administrative court may, at the request of the complainant, reinstate the required suspension.

In practical terms, in the field of public procurement, it is extremely difficult to obtain suspension of an award or exclusion decision, because the administrative courts are inclined to consider that, in the event of annulment, the appellant can always be duly indemnified through an award of damages.

Administrative courts have a very strict understanding of the concept of damage that is "difficult" to remedy (*prejuízo de difícil reparação*). In principle, irreparable damages do not exist. Since the suspension of the award or exclusion decision in public tenders is unlikely, bidders rarely bring actions in administrative courts. This explains the small number of court decisions which have been delivered in Portugal in respect of breaches of procurement rules.

4.2 Set aside and annulment orders

A complainant may seek the annulment of the final award decision taken by the awarding authority. It also appears that the administrative courts may annul other decisions or acts taken during the course of the procurement procedure, to the extent that those decisions or acts may directly influence the final award decision.

The administrative courts may annul the final award decision even if the contract in question has been entered into (ie. signed). In cases where the award of a contract is annulled, the existence of such contract is terminated and the awarding authority will be free to launch a new public tender. However, where the contract has already been partially performed, the awarding authority could successfully put forward grounds for non-execution of the annulment decision, namely impossibility or serious damage to the public interest.

4.3 Damages

A complainant in a procurement case has the option of bringing an action for damages against the awarding authority. Such actions must be brought in the Administrative Circle Courts.

There are no specific rules governing the availability and quantum of damages in public procurement cases. The applicable rules are therefore those laid down in the Civil Code. Consequently, a damages award could be expected to cover direct damages (*danos emergentes*) comprising of all the bid costs directly related to the tender. A damages award might also cover loss of profit (*lucros cessantes*), being the net profit which the bidder would have made in the event that the contract had been awarded to him.

Direct damages and/or loss of profit will only be available to the extent that there is a sufficient connection between the infringement of the procurement rules and the damages/loss in question.

There have not as yet been any awards of damages in the Portuguese courts in respect of infringements of the procurement rules. Judicial guidance is therefore still awaited regarding the availability and measure of damages in this field.

5. Who may apply?

Under general principles of Portuguese law, all "directly interested parties" enjoy a right of action to challenge an administrative act. In procurement cases, such parties would clearly include all those who submit bids for the contract in question. It appears that other potentially interested parties who did not take part in the bidding process will have no right of action.

6. Time limit for bringing actions

Under the Law on Administrative Procedure (the "LPTA"), any action for annulment in the administrative courts must be brought within 2 months if the complainant is domiciled in Portugal or within 4 months if the complainant is domiciled abroad. These periods normally start to run from the date of notification or publication of the relevant administrative decision. However, in cases where an authority fails to take (or communicate) a particular decision, the time period is one year and begins to run from the date on which it is tacitly understood that an application has been refused. In the context of procurement, the time limit starts to run from the date on which the necessary hierarchical appeal is (expressly or tacitly) rejected.

Any action for damages in the administrative courts is subject to the usual principle (under civil law) that the action must be commenced within 3 years of the cause of action arising.

7. Procedure

7.1 Applications for interim orders and annulment orders

Articles 24 to 58 of the LPTA lay down all the procedural requirements and steps for bringing an action to annul an administrative decision, including the possibility of obtaining an interim suspension order. The entire procedure is conducted in writing and there are generally no oral hearings before the court.

An action to annul an administrative decision begins with the filing of a written claim (*recurso contencioso*) in the competent court. In that claim, the complainant must (*inter alia*) set out the grounds for the complaint, referring to the rules and legal principles that have allegedly been infringed by the administrative decision. As well as giving details of the parties, the claim should name any interested third parties who would be harmed if the administrative decision in question were annulled, such as the successful bidder to whom the contract in question has been awarded.

The awarding authority must submit its defence within one month after the claim has been served upon it and, within the same time limit, deliver to the court the original or a certified copy of its administrative file for the award procedure in question. After the authority's defence has been served (or after the one-month time limit for doing so has elapsed), the interested third parties are requested to submit their defences within 20 days.

After the defences have been submitted and before the court's decision is taken, the parties are requested to present their written allegations of law. Except in certain particular cases (such as those involving administrative decisions of local or regional authorities), the only admissible evidence is documentary evidence and, when the court so allows, expert evidence. During the proceedings, the administrative judges are assisted by the Public Prosecution Service.

7.2 Actions for damages

The procedure for an action for damages in the administrative courts is governed by Articles 71 and 72 of the LPTA. Article 72 specifies that the general provisions of civil procedure shall apply. These necessarily entail the possibility of hearings, except where the facts are accepted without opposition by the defendant authority.

In general, the procedure for a damages action will involve three main stages: exchange of written pleadings; interim hearing and the presentation of evidence; and final hearing and allegations. The administrative court will hear any witnesses put forward by the parties but will only hear either party itself (the complainant or the awarding authority) if the other party so requests.

7.3 Duration of proceedings

The administrative courts are generally slow. While an interim suspension order may be granted within 3 months, an action to annul will take at least 2 years, and a damage action at least 3 years, before a final ruling is given.

7.4 Is it necessary to engage a lawyer?

With the exception of administrative authorities, which may be represented either by a qualified lawyer or by a graduate in law, the parties in litigation before an administrative court must be represented by a qualified lawyer.

8. Costs of proceedings

The costs of the administrative proceedings, when the request is for the annulment of procurement decisions, are not excessive. The maximum exposure, in the event that the interested party (bidder) does not obtain a favourable decision, would not exceed the payment of court fees amounting to PTE 120,000 plus expenses.

However, if the bidder wishes to claim damages, the court fees laid down for Civil Courts, which are estimated on the basis of the value of the damages claimed, will apply. In general terms, the maximum exposure in these cases is approximately 1% of the total amount of the claim. For instance, in a case where the excluded bidder claims

in Court the payment of total damages (effective damages plus loss of profit) of PTE 100 million, the full cost of the court fees will be just over PTE one million.

The losing party will be ordered by the court to pay the legal costs of the winning party. The amount of these costs is fixed by the court at between 30% and 80% of the total amount of the court fees, depending on the complexity and value of the case.

9. Rights of appeal

The Administrative Circle Courts are courts of first instance and their rulings may be appealed to the Administrative Supreme Court. The Administrative Supreme Court is both a court of first instance and a court of appeal. When exercising appellate jurisdiction, the Administrative Supreme Court is a court of last resort. When a proceeding is initiated before that court, its ruling may generally be appealed to the Full Bench of the Administrative Division of the Supreme Administrative Court (*Pleno da Secção di Contencioso Administrativo do Supremo Tribunal Administrativo*).

An appeal may be submitted by the losing party, by a person directly harmed by the court's ruling or by the Public Prosecution Service, within 10 days following the notification of the court ruling. The appellant must file its appeal brief within 20 days following the notification of the court's acceptance of its appeal.

10. Enforcement of judgements

Under the Portuguese constitution and the LPTA, administrative authorities are under a general duty to execute any decision by an administrative court which annuls an administrative decision. A duty to execute such a ruling requires the replacement of the decision in question by a valid one and the correction of the effects of the annulled act. If the court's annulment order is not executed within 30 days, the complainant may (before 3 years have elapsed) request the execution of that decision. The authority is then obliged to execute the court's decision within 60 days of that request. If it fails to do so, the complainant may revert to the administrative court in order to seek further remedies, including the possible payment of an indemnity.

It is always open to an authority to claim that there are good grounds for not executing a court decision, such as the risk of serious damage to the public interest. In the absence of such grounds, continued non-execution of court decisions may ultimately result in civil, disciplinary or criminal sanctions as against the persons representing the awarding authority.

Useful addresses

1. Selected administrative courts in Portugal:

Administrative Circle Court of Coimbra Rua da Sofia 149-4 3000 Coimbra	Tel: Fax:	039 20 140 039 28 191
Administrative Circle Court of Lisbon Escadinhas de S Crispin 7-3 1100 Lisboa	Tel: Fax:	01 887 6741 01 888 3455
Administrative Circle Court of Opporto Rua Santo Ildefonso 501 4000 Porto	Tel: Fax:	02 510 2391 02 510 2395
Supreme Administrative Court Rua S Pedro de Alcântara 75 1250 Lisboa	Tel: Fax:	01 346 7797 01 346 6129

2. Government Ministries responsible for overseeing public procurement:

Ministry of Equipment, Planning and Territorial Administration Rua de São Mamede ao Caldas 21 1100 Lisboa	Tel: Fax:	01 886 1119 01 886 7622
Ministry of Finance Rua da Âlfandega 1100 Lisboa	Tel: Fax:	01 888 5176 01 886 2360

3. Recognised bodies of independent arbitrators in Portugal:

Associação Comercial de Lisboa Rua das Portas de Santo Antão 89 Lisboa	Tel:	01 342 3277
Cento de Arbitragem de Conflitos de Consumo da Cidade de Lisboa Largo do Chão do Loureiro Lisboa	Tel:	01 888 3535
Ordem dos Advogados Largo de São Domingos 14-1 Lisboa	Tel:	01 886 7152

SPAIN

Prepared by Herbert Smith (Brussels)
and Buffete Armero (Madrid), 1997

CONTENTS

SPAIN

1. Implementation of the Remedies Directives

The substantive procurement rules of Directives 93/36 (public supplies contracts), 93/37 (works) and 92/50 (services) have been implemented in Spain by Law 13/1995: *Ley de Contratos de las Administraciones Públicas* (the "LCAP"). However, the Spanish government believes that the legal system in Spain adheres to the contents of the Remedies Directive 89/665 by way of various procedural provisions already in force and that specific implementing measures are not therefore necessary.

Spain has a long tradition of review of administrative acts issued by administrative authorities in formal procedures for public contracts. Hence, the remedies available in Directive 89/665 are already provided for, principally by virtue of two laws:

i *Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (Law No. 30/1992 - the "LRJPA"), which regulates the remedies and appeals procedures against the acts of an administrative body in an initial "administrative phase"; and

ii *Ley Reguladora de la Jurisdicción Contencioso-Adminitrativa* (the "LJCA"), which regulates appeal proceedings before the administrative courts once the non-judicial remedies have been exhausted.

Remedies Directive 92/13, applicable to bodies in the utilities sectors, has not yet been implemented into Spanish law, despite the requirement for Spain to do so by 1st January 1996. This state of affairs reflects the fact that the substantive rules of the "Utilities" Directives 90/531 and 93/38 have themselves not yet been implemented into Spanish law. Directive 92/13 will require specific implementation in order to ensure that remedies are available as regards the procurement procedures of utilities which are in the private sector and hence outside the scope of the above-mentioned administrative laws. The remainder of this chapter focuses on the remedies available as against public administrative authorities, including utility entities which satisfy the definition of a public authority.

2. The relevant forum

Under Spanish law, persons wishing to oppose acts and decisions taken by an administrative body must, as a general rule, firstly appeal directly either to the administrative body itself or to the superior authority which supervises that body. This is the preliminary administrative phase described in section 3 below.

Once the preliminary administrative phase has been exhausted, a complainant in a procurement case may bring an action against the awarding authority in the Spanish administrative courts. The branch of the administrative courts to which the action should be addressed will depend on the nature of the administrative body and its contested decision. For example, actions against decisions taken by the Council of Ministers and bodies of the central government should normally be brought before the Third Chamber of the Supreme Court (*Sala Tercera del Tribunal Supremo*) or the Chamber of Contentious Administrative Matters of the National Audience (*Sala de lo Contencioso-Administrativo de la Audiencia Nacional*). Actions against the decisions of local or regional administrative authorities, on the other hand, should generally be brought before the Chambers of Contentious Administrative Matters of the Superior Courts of Justice (*Salas de lo Contencioso-Administrativo de los Tribunales Superiores de Justicia*) in the region in question.

3. The preliminary administrative phase

In most cases, a complainant who is aggrieved by an alleged infringement of the procurement rules must, as a first step, file a formal complaint with the administration. The complaint should be lodged either with the awarding authority itself or with the superior administrative body which supervises the awarding authority. It is usually the latter which is competent to adjudicate on the administrative complaint.

There are only a few special circumstances where it is not necessary to go through this preliminary administrative complaints phase. One such circumstance is where the administrative act in question is taken by a body which is not supervised by any superior administrative body. This is the case, for example, where the contested decision is taken by the Council of Ministers or a minister of the central Government. In such cases, it is possible for the complainant to take action directly in the administrative courts without first having to go through the administrative complaints phase.

An administrative complaint can be brought by any person whose rights or legitimate interests may be affected by the contested administrative decision. Any person who has participated, or would have liked to have participated, in any stage of a contract award procedure will generally be recognised as having standing to lodge a complaint.

The time limit for filing the complaint is generally one month from the date of notification or publication of the contested decision. In the context of procurement, where the alleged breach consists of a failure to public a notice in the Official Journal, the one-month period would not start to run until the complainant becomes aware of the fact that a specific act (eg. an award decision) has taken place without such publication.

The filing of an administrative complaint does not of itself have any suspensive effect and nor does it oblige the awarding authority to suspend the implementation or effects of the contested act or decision. Nevertheless, it is open to a complainant to request such provisional suspension. In deciding whether to grant such suspension, the authority is required to balance, on the one hand, the harm which suspension may cause to the public interest or to third party interests as against, on the other hand, the harm

which the complainant is likely to suffer if the contested decision is given immediate effect. In general, suspension should only be granted where implementation of the contested act may cause harm which is impossible or at least difficult to rectify (*perjuicios de imposible o difícil reparación*). If the authority fails to respond within 30 days of the request for suspension, the contested act is deemed to be suspended.

In general, administrative bodies are reluctant to grant requests for suspension in relation to administrative complaints. Such authorities generally decline to suspend the effects of decisions they have taken. Consequently, the lodging of an administrative appeal will not delay implementation of the contested decision. Thus, in a procurement context, the administrative complaint will not prevent the awarding authority from continuing with the award process and ultimately taking the award decision and entering into the contract.

Once the administrative complaint has been lodged, the authority has a further three months within which to decide either to accept the complaint (and rectify its procedure accordingly) or to reject the complaint. The authority's decision must be notified to the complainant and give reasons. If the authority fails to notify a decision, the complaint will be deemed to have been tacitly rejected (or, exceptionally, accepted) by way of "administrative silence". In most cases, a complaint shall be deemed to have been implicitly rejected if it receives no express reply from the authority within 3 months.

When the authority rejects the complaint, whether by express decision or tacitly by way of administrative silence, the preliminary administrative phase is brought to an end. It is only at this point that the complainant may take action in the administrative courts with a view to obtaining judicial remedies. The remainder of this chapter focuses on actions for remedies in the administrative courts.

4. Judicial remedies available

4.1 Interim suspension orders

Under the LJCA, a complainant in the administrative courts may apply for the grant of an interim order suspending the implementation of the contested administrative decision. In the field of public procurement, the suspension may relate to any administrative act or decision taken at any stage of the award procedure. The court may grant such a suspension if the execution of the decision would cause damage which is impossible or difficult to remedy (*perjuicios de imposible o difícil reparación*).

Case law indicates that the administrative courts in Spain approach the suspension of administrative acts on a case by case basis. Given the principle of due execution and the importance attached to the public interest, the award of interim relief has traditionally been seen as an exception to the general rule. Nevertheless, some recent rulings indicate that the courts are willing to take a less rigid approach and to be more even-handed in balancing the interests of the complainant against those of the public administration and of the public at large.

To date, there have been very few recorded cases of applications to suspend decisions in the field of public procurement. At least one case suggests that, in relation to public works contracts, the courts will be reluctant to disturb the public interest in having the works completed.

Aggrieved tenderers who bring complaints will need to establish that, if the contested act is not suspended, they will suffer damage which is impossible or very difficult to remedy. The basis of this argument will usually be that, without a suspension, the contract will be awarded and concluded and the plaintiff will thereby lose forever his chance of winning the contract. The response of the courts to such an argument may well be to find that the loss of that chance can be adequately compensated through financial damages, particularly as the supplier's interest is essentially an economic one. However, this is an issue which remains to be developed further by the courts.

If a suspension order is granted, the court may demand a cross-undertaking or bond from the complainant. This is basically an undertaking by the complainant to compensate the authority for any damages that may be caused to the public interest or to third parties, in the event that the administrative court rules against the complainant in the final hearing.

4.2 Set aside or annulment orders

A complainant may apply to the court for the annulment of any administrative act taken during an award procedure which breaches the procurement rules laid down in the LCAP. Under the theory of "separable acts" (*actos separables*), such acts are reviewable exclusively by the administrative courts, even if the contract to be awarded would be one subject to private (rather than public) law.

Faced with an action for annulment, the awarding authority usually has the option of validating that act by rectifying its earlier breach. For example, if the infringement consisted of the unfair exclusion of a bidder from a restricted invitation to tender, the authority could correct that breach by belatedly inviting the excluded party to submit a bid. It is only where one of the grounds for "absolute nullity" apply that an authority will be unable to validate its acts in this way. In a procurement context, the grounds for absolute nullity will rarely apply.

Where the contract has not yet been entered into, the annulment of any of the severable acts would mean that the contract may not be awarded until the infringement has been corrected. The declared invalidity of an administrative act in a procurement procedure means, in theory, that any contract entered into pursuant to that act will also be void. The awarding authority is, however, entitled to declare that the contract must temporarily continue to be respected and performed if its annulment would involve a "grave disturbance" to public services.

4.3 Damages

A complainant in a procurement case may seek an award of damages from the awarding authority. The complainant must claim damages in the first instance from the authority itself, as part of the preliminary administrative phase (see section 3 above). Assuming that the administrative claim is unsuccessful, the complainant may bring an action before the contentious administrative courts.

In order to recover damages, the complainant will need to show that he has suffered real damage or loss and that this was caused by the conduct of the awarding authority. The damages may cover both direct losses, such as wasted bid costs, and/or loss of profit. The latter covers the profits which the complainant would have obtained in the normal course of events, if the breach of the procurement rules had not occurred.

Spanish law would normally allow compensation for loss of profits only in situations where the bidder ought legally to have been awarded the contract, because only then would the bidder suffer a real and direct loss. In other words, to recover lost profits, the plaintiff would have to show that he would have won the contract had the award procedure been lawfully conducted. Damages cannot usually be awarded for mere expectations.

A typical procurement case might involve a firm claiming that it has been unlawfully excluded from an award procedure after properly presenting a tender, or that it has been unfairly discriminated against at the final award stage, even though its tender was the lowest one. In such a case, the complainant ought to be able to demonstrate that he has suffered real, economic damage as a result of an infringement of the procurement rules. Under Spanish law, the court might first consider whether the complainant's legal position can somehow be restored, for example by re-admitting that complainant to the award procedure. However, such restoration might not be possible, because the contract has been definitively concluded with a third party and it is not in the general interest for that contract to be rescinded. Consequently, damages would have to be awarded as an alternative means of redress, in accordance with the Spanish law principles described above.

One situation where a plaintiff may have greater difficulty in recovering damages is where the infringement consisted of a failure to publish a notice in the EC Official Journal . Even if that firm had a potential interest in taking part in the un-publicised award procedure, it would not yet have incurred any bidding costs or suffered any direct loss as a consequence of the infringement. In that sort of case, it may prove difficult for a plaintiff to establish that he has suffered real and individual damage as a result of the lack of publication. These issues will only become clearer once they have been dealt with by the courts in specific cases.

5. Who may apply?

Any party who has had a direct interest in the consequences of an administrative decision may seek to challenge that decision in the administrative courts, provided the preliminary administrative phase has first been exhausted. In relation to public procurement, any party which has taken part in the award procedure (for example as a bidder) will be regarded as having the necessary direct interest in its outcome. There is some jurisprudence to suggest that those who have not participated in the award procedure are not to be regarded as directly interested. Nevertheless, where a breach consists of a failure to publish a notice in the EC Official Journal, firms specialising in the products or services concerned should be able to show the necessary interest in challenging an award procedure that was not advertised.

6. Time limit for bringing actions

The time limit for commencing an action in the administrative courts depends on the way in which the preliminary administrative phase is concluded. If the administrative complaint is expressly rejected, the deadline is two months following the date on which that rejection is notified to the complainant. In the event that the administrative complaint is rejected tacitly (by administrative silence) the period within which an action may be filed in the courts is one year from the date on which tacit rejection is deemed to have taken place.

In those cases where the contested decision is not subject to an administrative complaints phase (for example, where the awarding authority is not supervised by any superior authority), the time limit is two months from the date on which the contested administrative decision is notified or published.

7. Procedure

7.1 Applications for interim orders

Article 123 of the LJCA provides that once the suspension has been requested from the court, the Government attorney (who represents the administration), the parties and any joined parties shall be heard by the court within five days. If the Government attorney opposes the suspension on the basis of harm to the public interest, the court may not grant a suspension without giving prior notice to the Ministry or authority which issued the contested act.

After the Government attorney has delivered its report (opposing the suspension) or once 15 days have elapsed without such a report being received, the court will give its ruling. If suspension of the act is ordered, the court will demand a bond from the complainant to cover the possibility of damage being caused to the public interest or to a third party. The bond will consist of a deposit of funds with the court or some similar form of guarantee from the complainant. It is difficult to predict the time which it will take for a court to give its ruling, but a fair estimate would be two to three months.

7.2 Other applications in the administrative courts

The appeal to the contentious administrative courts is begun with a short writ referring to the subject matter of the case. Together with the writ, the following documents must also be filed: the power of attorney of the court *procurador* or attorney representing the complainant, a copy of the act being appealed and a copy of the complainant's prior communication to the awarding authority of the complainant's intention to file the appeal.

As soon as the appeal has been correctly filed, the court will give notice of it in the relevant official bulletin. It will also demand a copy of the administrative file from the awarding authority, which the latter must then submit within 20 days.

Once the court has received the administrative file, it will deliver it to the complainant. The complainant then files its claim within 20 days, following which the awarding authority and any other joined parties are given 20 days to file their reply. The claim and the reply must state the facts, the legal grounds relied on and the demands of the parties, attaching or referring to any relevant documentary evidence.

A hearing will take place if it is requested by both parties or if the court deems that one is necessary. Otherwise, each side will submit a brief giving their respective conclusions regarding the facts, the evidence put forward and the legal grounds on which each side's demands are based. According to law, the court must issue its ruling within 10 days after the hearing or after the date set for a ruling on the basis of written conclusions.

7.3 Duration of proceedings

An interim suspension order can usually be obtained from the administrative court within two to three months. The period of time that elapses before the court gives its final decision varies from case to case. If the matter is determined at first instance, the decision may be obtained within approximately one year. This period of time is also dependent on the court. It should be noted that the courts in Spain are currently overloaded with cases and the backlog appears to be worsening. If there is an appeal to the Supreme Court even more time would be involved.

7.4 Is it necessary to engage a lawyer?

There is no obligation to engage a lawyer when bringing a preliminary administrative complaint before an administrative body or its supervisory authority. On the other hand, it is compulsory to be legally represented by a lawyer in all contentious proceedings before the administrative and civil courts in Spain. The appointment of a court *procurador* (see below) is highly convenient but not compulsory in the contentious administrative courts, whilst such an appointment is mandatory in the civil courts and the Supreme Court.

8. Costs of proceedings

The main costs of any court action will comprise the fees of each side's lawyers and *procurador*. The *procurador* is the representative of the parties before the court: he files and receives documents (prepared by the lawyers) on behalf of the party that he represents.

Legal fees will of course vary according to the complexity and duration of the proceedings. The administrative courts will not generally order the unsuccessful party to pay the legal costs of the successful one. Under the LJCA, such an order is only allowed where the complainant has brought the action in bad faith.

The position is different in the civil courts, where the general rule is that legal costs will be imposed on the unsuccessful party in the litigation. If an action is only partially successful, it is likely that each party will bear its own costs. The amount of legal costs to be awarded is subject to valuation under the rules laid down in civil procedural laws.

9. Rights of appeal

The rulings of the National Audience or the Superior Courts of Justice issued at first instance can be appealed to the Supreme Court. Such appeals are only possible on certain legal grounds, such as abuse of jurisdiction, violation of essential procedural requirements or violation of the legal provisions or jurisprudence applied in resolving the case.

The appeal must be filed within 10 days before the court which issued the contested ruling, briefly setting out the reasons. Only parties which took part in the proceedings at first instance can file an appeal. Once the Supreme Court receives the file, it will call upon the parties to file full pleadings within 30 days.

10. Enforcement of judgements

Public authorities are under a general duty to take all measures necessary in order to comply with judgements without delay. They may fail to execute or delay in doing so only in certain highly exceptional circumstances. Any such action must be approved by the Council of Ministers. If the judgement entails the payment of a monetary amount (eg. damages), the authority is allowed one month (as from notification of the court decision) within which to take any necessary budgetary steps.

If the provisions of the law regulating enforcement are not respected, relevant employees of the authority can be rendered personally and directly liable for the non-compliance. The court will generally begin by issuing orders designed to encourage compliance, but more stringent measures may be laid down if the judgement is still not respected after a further 6 months have elapsed. The most common sanction is an order obliging the authority to compensate the complainant in respect of the non-compliance with the judgement. The court is not, however, empowered to place any charge over publicly-owned property.

In a majority of cases, the awarding authority is likely to comply without any undue delay with a judgement made against it. However, in those cases where the authority is not inclined to comply, ensuring enforcement of the judgement can take many months.

Useful addresses

1. Selected administrative courts

Sala Tercera de lo Contencioso del Tribunal Supremo
Plaza Villa de Paris, s/n
28004 Madrid

Sala de lo Contencioso Administrativo de la Audiencia Nacional
c/ Prim 12
28004 Madrid

Sala de lo Contencioso Administrativo del Tribunal Supremo de Justicia de Madrid
c/ General Castaños no 1
28004 Madrid

Sala de lo Contencioso Administrativo del Tribunal Supremo de Justicia de Barcelona
c/ Paseo Luis Company s/n
08071 Barcelona

Sala de lo Contencioso Administrativo del Tribunal Supremo de Justicia de Valencia
c/ Plaza Puerta del Mar s/n
46003 Valencia

Sala de lo Contencioso Administrativo del Tribunal Supremo de Justicia de Bilbao
c/ Buenos Aires no 4 4-6
48007 Bilbao

2. Government ministry overseeing public procurement

Junta Consultiva de Contratación Administrativa Ministerio de Economia y Hacienda
c/ Velazquez no 50
29001 Madrid

SWEDEN

Prepared by Herbert Smith (Brussels)
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CONTENTS

SWEDEN

1. Implementation of the Remedies Directives

The EU directives on Public Procurement are implemented in Sweden by the Public Procurement Act which took effect on 1st January 1994[36] and applies to award procedures commenced after that date. The Remedies Directives 89/665/EEC and 92/13/EEC are implemented in Chapter 7 of the Public Procurement Act.

The Public Procurement Act applies in principle to all public procurement in Sweden, even where a contract falls outside the scope of the EU Directives (eg. contracts below the relevant threshold value).

2. The relevant forum

Actions for measures to counter infringements of the Public Procurement Act ("actions for review") must be brought before the competent County Administrative Court (*Länsrätt*). The Act specifies that the action shall be brought before the County Administrative Court in the area where the contracting entity is domiciled.

Actions for damages, on the other hand, have to be brought before the competent District Court (*Tingsrätt*), being the District Court where the contracting entity is domiciled.

While actions for review or damages have to be taken to the courts in Sweden, a new body known as the National Board for Public Procurement (*Nämnden för Offentlig Upphandling*) has been given responsibility for the overall supervision of public procurement procedures which are subject to the Public Procurement Act.

Various powers are vested in the National Board for the purpose of fulfilling its supervisory task. The National Board may request the submission of information, subject to such information being necessary for its supervisory function. The information shall, primarily, be requested in writing but (exceptionally) can also be procured by way of visits to the site. A contracting entity is obliged to submit the information requested.

The important aim underlying the supervisory role of the National Board for Public Procurement Board is to provide the Swedish Government or the European Commission, as the case may be, with adequate information. This is for example the case should the latter request information from the Swedish Government for the purpose of reviewing Sweden's implementation of the EU legislation on public procurement. In any event, the

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[36] Lag (1992:1528) om offentlig upphandling, as amended by Lag 1993:1468, 1994:614, 1995:704 and 1996:433. Further amendments entered into force on 1st January 1998 (Lag 1997:1068).

Swedish Government has a general interest in receiving information on public procurement practices. Moreover, the National Board assists contracting authorities and entities but also firms and individuals by providing information on the interpretation and application of the rules related to public procurement.

All judgements and decisions made by the courts pursuant to the Public Procurement Act shall be submitted to the National Board.

3. Available remedies

3.1. Interim orders

Under Section 7:2 of the Public Procurement Act[37], complainants may apply to the Country Administrative Court for an interim order suspending the award procedure in question, pending the Court's final ruling. Such orders are available only prior to the conclusion of the contract: orders for the suspension amendment or annulment of concluded contracts are not available. Article 7.1 in the Public Procurement Act, as amended by Lag 1997:1068, provides for the "conclusion of the contract" as the crucial time before which applications for interim orders must be made.

The Public Procurement Act originally provided that interim orders were not available after the awarding authority had taken its award decision, even if the contract had not yet been entered into. However that unsatisfactory situation was overturned by a landmark ruling of the Supreme Administrative Court (*Regeringsrätten*) in June 1996[38]. That ruling stipulated that interim measures (and other forms of review - see section 3.2 below) had to be available until the date when the contract is actually entered into (ie. signed).

An interim suspension order is available in relation to acts by the contracting entity which (allegedly) constitute an infringement to any provision of the Public Procurement Act. It follows from the general principles of Swedish law that a complainant seeking an interim measure must establish that he is likely to suffer serious damage unless the measure is granted. The Court may refuse to grant an interim order if the damage or inconvenience which the order would cause (to the awarding entity) is considered by the Court to be greater than the damage which the complainant will suffer if the order is refused. According to the preparatory works of an earlier version of the Act, the Court should, in balancing the interests, make an assessment of the costs likely to be incurred as a result of the interim order. The public interest could also be considered when applying the test. It is submitted that these principles should continue to apply.

There is no express requirement for the complainant to show that he has a *prima facie* case. Nevertheless, it follows from the general principles mentioned above that the complainant will have to establish as probable the potential or existing damage caused to him and also that there has been an infringement of a provision of the Public Procurement Act.

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37 As amended by Lag 1997:1068.

38 RÅ 1996 ref. 50.

3.2 Set aside orders

There are no express procedures for set-aside or annulment orders in the administrative or civil courts. However, any order by the administrative courts on the substance pursuant to the Public Procurement Act would result in the automatic setting aside of any unlawful decision. The orders which the complainant may ask the County Administrative Court to grant are:

i an order that the award procedure be re-commenced;

ii an order that the award procedure must not be concluded until the infringement has been corrected; and/or

iii as against utilities only, a conditional fine order prohibiting the utility from continuing with the award procedure without correcting the infringement. The preparatory works leading to the Public Procurement Act[39] indicate that the conditional fine should not be set below 1% of the contract value[40].

The Act indicates that these orders may be requested where the awarding authority has violated the fundamental requirement to carry out its award procedures in an objective, commercial and non-discriminatory manner[41] or has breached any other provision of the Act. The available orders are particularly relevant where the complainant considers that it is excluded from the award procedure because, for example, the conditions of participation, the contract notice or any supporting documents supplied by the authority have been drafted in a discriminatory way which infringes the Public Procurement Act.

The Act was amended in 1996[42] in order to clarify that the balance of interests tests may only be applied when the courts are considering whether or not to grant an interim order. Hence, the County Administrative Court should not have regard to the balance of interests when deciding whether or not to grant one of the orders listed above at the final assessment of the case.

As indicated in section 3.1 above, a concluded (ie. signed) contract cannot be set aside or annulled.

3.3 Damages

3.3.1 Availability of damages

A complainant may bring an action for damages in the competent District Court against an awarding authority which it believes to have infringed the Public Procurement Act. The set aside or annulment of unlawful decisions is not a pre-condition for the award of damages, nor are such orders available in the civil courts.

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39 Proposition 1992/93:88. page 101.

40 A reference is also made to such a minimum in the explanatory memorandum which accompanied the introduction of Remedies Directive in the Utilities sectors 92/13/EEC.

41 Article 1:4 of the Act.

42 Lag 1996:433.

The basic principle governing availability of damages under the Act is that the awarding authority should compensate the complainant for the damage he has incurred as a result of the infringement. Under Article 7:6 of the Act, for a court to consider that a complainant has incurred damages because of an infringement, it must be satisfied that the complainant (in principle) lost the contract as a result of that infringement. This requirement expresses the need to establish a causal link between the infringement and the damage incurred. Consequently, a complainant claiming damages must prove that he would have been awarded the contract if the infringement had not taken place.

By way of exception, a less strict test is applied where a complainant, in cases involving procurement in the utilities' sectors, is seeking to recover the costs of preparing a bid or participating in the award procedure ("bid costs"). In order to recover bid costs as against a utility, the complainant need not prove that he would have been awarded the contract in the absence of the infringement. It is sufficient that he proves that his chance of winning the contract has been adversely affected as a result of the infringement.

The special rule for utilities is embodied in Section 7:7 of the Act, which reads as follows:

> "A tenderer or an applicant for submitting a tender, who has participated in an award procedure according to Chapter 4, is entitled to compensation for costs of preparing a bid and otherwise participating in the award procedure, provided that the violation of the provisions of this Act has adversely affected his chances of winning the contract."

This provision represents a somewhat unclear implementation of Article 2(7) of Directive 92/13/EEC. Under that Article, a complainant claiming bid costs shall be required only to prove (i) that there has been an infringement of Community law or, in this case, the Public Procurement Act; (ii) that he would have had a real chance of winning the contract; and (iii) that, as a consequence of the infringement, that chance was adversely affected. The second requirement (that the complainant had a real chance of winning the contract) is not articulated in the said Section 7:7 but such a requirement can probably be implied. This view is supported by the following statement in the preparatory works to the Act:

> "even though the infringement may have had an impact on the award procedure in general, compensation should generally not be awarded in cases where the contracting entity, on its part, can prove that the supplier would not have had a chance of winning the contract because of other reasons, e.g. lack of technical skills to fulfil the requirements laid down for the procurement"[43].

3.3.2 Quantum of damages

According to Section 7:6 of the Act, damages include not only "unnecessary costs" but also compensation for direct losses incurred and loss of profit. The Act does not define "unnecessary costs", but it may be anticipated that this term covers bid costs. The complainant should, in principle, be put in the financial position he would have been in, had he won the contract. The Act does not expand on how quantum of damages should be assessed.

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[43] Proposition 1992/93:88, page 103.

To date, there have been very few damages claims under the Public Procurement Act. In one case, the District Court stated that damages for loss of profit should be calculated as:

> "the difference between the revenue the tenderer could have expected to derive from the contract, had he won it, and the costs saved by the tenderer owing to the fact that he did not need to carry out any work on the assignment".

4. Who may apply?

Any supplier, service provider or works contractor who is, or would have been, interested in being awarded the contract in question *and* who has been harmed or risks being harmed by an alleged infringement of the Public Procurement Act, is entitled to bring an action for review in a County Administrative Court. The complainant need not have taken part in the award procedure itself. It should be noted, however, that it may be difficult for complainants who have not participated in that procedure to prove that they have been harmed or risk being harmed because of the alleged infringement.

Furthermore, any interested supplier, service provider or works contractor who has allegedly been harmed by an infringement of the Public Procurement Act is also entitled to bring an action for damages before a District Court. Again, the complainant need not have taken part in the award procedure itself but, where it has not done so, the complainant may find it difficult to prove that it incurred damages. In fact, for a court to consider that a complainant has incurred damages because of an infringement, the court must be satisfied that the complainant (in principle) lost the contract as a result of that infringement (see section 3 above).

5. Time limit for bringing actions

Prior to a ruling of the Supreme Administrative Court in June 1996, it appeared that actions for review in the County Administrative Court could only be brought during the contract award procedure and not after the decision to award the contract had been taken. However, that ruling indicated that actions for review may be brought until the date of signing of the contract, even if a decision on the award has already been made. The Act amending the Public Procurement Act, which entered into force on 1st January 1998, stipulates that the conclusion of the contract is the critical time before which any action for review must be brought. There are no other time limits applicable.

Pursuant to the above-mentioned Act amending the Public Procurement Act, actions for damages currently have to be brought before a competent District Court within one year of the date of the conclusion of the contract. Failure to bring the damages action within the one-year time limit eliminates the right to bring such a claim.

6. Procedure

6.1 Duty to give notice

There is no express requirement to give prior notice to the awarding authority of the alleged infringement or of the complainant's intention to bring an action before the courts. It appears that such provision was considered superfluous, as prior notification can be anticipated in any event. Nevertheless, the authors recommend that such notification is made.

6.2 Applications to the County Administrative Court (Länsrätt)

Actions for review, including requests for interim measures, brought in the County Administrative Court shall be lodged by way of a written complaint specifying what order is sought and the grounds for the request. The initial complaint does not have to be accompanied by any supporting evidence. However, in order to expedite the procedure, the authors recommend that supporting evidence be included from the outset in the case of requests for interim measures. Furthermore, the complaint shall include detailed information on the complainant and the defendant, such as organisation number or equivalent, address, telephone number, etc. The court is responsible for communicating written submissions between the parties.

The procedure shall, primarily, be held in writing but court hearings may be held if requested by the complainant. It is, however, ultimately in the court's discretion to decide whether or not to hold such hearings. It should be noted that court hearings are in fact rarely used.

6.3 Actions in the District Court (Tingsrätt)

Actions for damages in the District Court shall be made in writing by way of an application for a summons which shall include a statement of the claim, the grounds on which it is based and any supporting evidence. The application should specify what the evidence is supposed to prove. Moreover, it shall include quite detailed information on the applicant and the defendant, such as organisation number or equivalent, address, telephone number etc. The court is responsible for communicating all written submissions between the parties.

The procedure will be held both in writing and by way of court hearings. The latter are generally held both at the preparatory stage of the proceedings and at the final stage. Since an action for damages may not be brought before the contract is concluded, and since a signed contract cannot be set aside or annulled, there is no real scope left for interim orders. Indeed, court hearings in conjunction with requests for interim measures are very rare.

6.4 *Duration of proceedings*

There are no express time limits within which actions for interim orders shall be heard, but the general principle is that review shall be made promptly. In addition, a complainant may require that the review be handled with priority. In practice, an application for interim measures will usually be decided upon within a few days or at the most two weeks. The exact period depends partly on whether or not the court decides to communicate the request to the other party.

The time within which the administrative courts lay down their final rulings is, generally, considerably shorter than the time taken by the district courts. The major reason for the shorter time required by the administrative courts appears to be that it is vital from a general economic point of view and in the interests of the parties involved that a contract can be concluded as soon as possible. The same reasoning does not apply to actions for damages before the district courts. Whereas administrative courts may lay down their rulings within days or weeks, district courts may take one to three years. As always, the time required will ultimately depend on the circumstances of each case and the resources available at the courts.

6.5 *Is it necessary to engage a lawyer?*

Although it is not compulsory, it is generally recommended that complainants be legally represented in proceedings before the County Administrative Court or the District Court. The fact that Sweden, unlike some EU countries, lacks any formal requirement that ordinary persons and companies be legally represented in the courts, does not mean that the Swedish court proceedings are less complicated than in other countries. Engaging a lawyer reduces the risk that the case is lost because of procedural mistakes or a failure to invoke relevant points of law. Moreover, the Public Procurement Act is an implementation of EC Directives on public procurement, which makes interpretation of it more difficult than regular Swedish legislation. The cost implications of instructing a lawyer are considered in section 7 below.

7. Costs of proceedings

There are no court fees applicable in actions for review brought before the administrative courts. A court fee of SEK 450 is, however, payable in actions for damages brought in the civil courts.

In actions for review before the County Administrative Court, neither the complainant nor the awarding authority is entitled to compensation from the other party for its costs of proceedings (including legal costs). In proceedings for damages in the District Court, on the other hand, the general rule is that the party losing the case shall be ordered to compensate the winning party for its legal costs.

8. Rights of appeal

The decisions of the County Administrative Court may be appealed to the competent Administrative Court of Appeal (*Kammarrätt*). The decisions of the latter may in turn be appealed to the Supreme Administrative Court (*Regeringsrätt*). Except for orders of an interim character, decisions by the Administrative Courts do not apply forthwith but may be appealed by either party to the proceedings within 3 weeks from the date when the decision was received by the party in question.

The ruling of a District Court may be appealed to the competent Court of Appeal (*Hovrätt*) and ultimately to the Supreme Court (*Högsta domstolen*). Appeals must again be lodged within 3 weeks from the date of the Court's decision.

All appeals shall be lodged with the court that rendered the contested award or decision. Appeals to the Supreme courts require a leave of appeal which, in principle, is granted only in cases turning on points of law. Appeals to the Court of Appeal (*Hovrätten*) may also be subject to a leave of appeal if the amount of the requested damages is less than SEK 37,000.

9. Enforcement of judgements

Rulings by the administrative and civil courts in procurement cases may, it appears, be enforced by the Swedish Enforcement Authority (*Kronofogdemyndigheten*). A prerequisite for enforcement is that no appeal has been made and that the deadline for appeal has expired. Only then is the judgement or decision considered to have legal effect.

The Enforcement Authority may order the contracting entity to act in accordance with the judgement or decision and may combine such an order with a conditional fine order. Should the contracting entity not comply with the Enforcement Authority's conditional fine order, even if its first order had not acquired legal effect, the Authority may make an additional conditional fine order. It is in the Enforcement Authority's discretion to decide the amount of the conditional fine order. Action for imposition of the fine may be brought only by the Enforcement Authority and shall be lodged with the District Court in the county where the Enforcement Authority is situated.

Informal contacts with the Enforcement Authority confirm that it has not yet reviewed any action for enforcement of decisions or judgements pursuant to the Public Procurement Act.

10. The Act on Enforcement against undue procurement practices

The Act on Enforcement against undue procurement practices[44] ("the Enforcement Act"), in force since 1st July 1994, provides a means whereby the Swedish Competition Authority (primarily) may take steps to prohibit undue procurement practices applied in procurement procedures covered by the Public Procurement Act. The term "undue procurement practice" means, in short, a practice by a contracting entity in an award procedure which discriminates against particular undertakings or which in other ways appreciably distorts competition in the award procedure.

Under the Enforcement Act, the Competition Authority may seek an order from the Market Court prohibiting a contracting authority from applying undue procurement practices. Such a prohibition may be combined with a conditional fine order. Prohibition and conditional fine orders may be of an interim nature. In addition, actions for the imposition of a conditional fine may be brought before any competent County Administrative Court. The prohibition is applicable immediately but pertains only to the future conduct of the contracting entity. Consequently, the Market Court may not make orders relating to a particular award procedure like those available under the Public Procurement Act. It follows from this important distinction that the Enforcement Act is intended to complement the Procurement Act and that both Acts can be applied simultaneously.

While this right of action lies primarily with the Competition Authority, if that Authority should fail to act, an action may be brought by a group of consumers, employees or undertakings or by an undertaking concerned by the undue practices. Hence, there may be opportunities for aggrieved tenderers to invoke the Enforcement Act. Nevertheless, given that the orders available only concern the awarding entity's future conduct, the more tangible remedies available under the Public Procurement Act remain the principal means of redress for such parties.

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[44] Lag (1994:615) om ingripande mot otillbörligt beteende avseende offentlig upphandling.

Useful addresses

ADMINISTRATIVE COURTS IN THE THREE LARGEST CITIES:

Gothenburg

Länsrätten i
Göteborgs och Bohus län
Box 2524
403 17 Göteborg

Malmö

Länsrätten i
Malmöhus län
Box 4522
203 20 Malmö

Stockholm

Länsrätten i
Stockholms län
Box 17106
104 62 Stockholm

DISTRICT COURTS IN THE THREE LARGEST CITIES

Gothenburg

Göteborgs tingsrätt
404 83 Göteborg

Malmö

Malmö tingsrätt
Box 265
201 22 Malmö

Stockholm

Stockholms tingsrätt
Box 8307
104 20 Stockholm

USEFUL ADDRESSES

The National Board for Public Procurement:
Nämnden för offentlig upphandling (NOU)
Box 2012
103 11 Stockholm

Recognised Body of independent arbitrators:

Stockholms Handelskammares Skiljedomsinstitut
Box 16050
103 21 Stockholm

Government ministry responsible for managing the procurement rules:

Finansdepartement
Regeringskansliet
103 33 Stockholm

Conciliator

Gösta Westring
Advokatfirman Cederquist KB
Box 1670
111 96 Stockholm

THE UNITED KINGDOM

Prepared by Herbert Smith (Brussels and London), 1997

CONTENTS

UNITED KINGDOM

1. Implementation of the Remedies Directives

In the United Kingdom, implementation of the EU Directives on procurement has been achieved by way of the following statutory instruments:

i the Public Works Contracts Regulations 1991[45];

ii the Public Services Contracts Regulations 1993[46];

iii the Public Supplies Contracts Regulations 1995[47]; and

iv the Utilities Contracts Regulations 1996[48].

The first three sets of Regulations listed above govern the procurement practices of Central Government, local authorities and other public sector bodies. The Utilities Contracts Regulations 1996, on the other hand, apply to "utility" companies (most of them privatised) operating in the water, energy, transport and telecommunications sectors. An indication of when the procurement rules are likely to apply and the types of infringement that may occur was given in Chapter 1 above.

As well as setting out the substantive rules on procurement procedures, the above regulations (collectively "the Regulations") each include a section dealing with rights of recourse to the British courts. The remedies potentially available are described below.

2. The relevant forum

Proceedings under any of the Regulations must be brought in:

i the High Court in England and Wales; or

ii the Court of Session in Scotland; or

iii the High Court in Northern Ireland.

Such a court is located in most large or medium-sized towns and cities throughout the United Kingdom. The exact choice of court will depend on the location of the authority and the complainant, but it would be usual for the action to be brought in the court located nearest to the authority in question or in London (if the proceedings are to be commenced in England or Wales). Addresses of the regional headquarters of the High Court and Court of Session are given in Annex I of this chapter.

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45 S.I. 1991/2680

46 S.I. 1993/3228

47 S.I. 1995/201

48 S.I. 1996/2911

3. Available remedies

The remedies potentially available to a complainant under the procurement Regulations fall into three categories, which are each described in turn below.

3.1 Interim orders

The complainant may ask the court to issue an interim order (or "injunction") which suspends the allegedly defective award procedure or suspends the implementation of any decision or action taken by the awarding authority in the course of such a procedure. It is important to note that such interim measures may only be granted if the contract in question has not been entered into between the authority and a third party. After the contract has been entered into, the only remedy available is damages (see 3.3 below). It is therefore in the interests of the complainant to lodge his request for interim measures as rapidly as possible.

In order to obtain an interim order, a complainant must first show that there is a serious case to be tried (though not necessarily that he has a better than 50 per cent chance of succeeding) at the final trial. This is not in general a difficult hurdle to overcome. More importantly, the complainant will need to persuade the court that the "balance of convenience" lies in favour of granting such an order. In applying this test, the court is likely to consider various factors, including the following:

i whether it would cause greater hardship to grant or refuse the order. The court might decide, for example, that suspending the contract procedure would be against the public interest because it would delay the provision of important services to the public;

ii whether damages would provide an adequate remedy to the complainant if the injunction is not granted;

iii the relative strength of each party's case.

As the name suggests, interim measures are granted at an interim or "interlocutory" stage in the proceedings, without there being a full trial of the issues in question. These issues remain to be ruled upon at the subsequent, full trial.

3.2 Set-aside and amendment orders

The High Court has the power to order the setting aside (or annulment) of any decision or act taken unlawfully in a procurement procedure. This could be the decision to award the contract to a particular supplier or any earlier decision in the procedure, such as the one pre-selecting a shortlist of candidates to tender. The set-aside order would take the form of a final injunction: that is, one that is given at the full trial (rather than at an interim or interlocutory stage) and which is intended to be permanent in effect. The factors determining whether the Court will grant such an order are likely to be similar to the ones set out in 2.1 above in relation to interim measures.

Where there has been an infringement of the procurement rules, the High Court may also order the awarding authority to amend any documents. This power could be used, for example, to require the alteration of discriminatory technical specifications or the extension of unduly short time limits.

Set-aside and amendment orders, like interim measures, may only be granted if the contract in question has not yet been entered into.

3.3 Damages

Regardless of whether or not a contract has been entered into, the High Court is empowered to award damages to a supplier who has suffered loss or damage as a consequence of a breach of the procurement rules. The Regulations do not expand upon the principles governing the availability and amount of damages. The only exception is under the Regulations applicable to utilities which state that, where the complainant establishes that an infringement deprived him of "a real chance" of winning a contract, he shall be entitled to damages covering his costs of preparing a tender and participating in the award procedure ("bid costs"). Otherwise, British courts are likely to apply existing principles of domestic law when considering claims for damages.

In order to obtain damages, complainants will be required to prove that the authority has committed a breach of the Regulations and that this breach has caused him harm or damage. Depending on the facts of the case, the damages award may cover all or part of the complainant's bid costs and/or the loss of the potential profit that he would have made on the contract.

It appears that a complainant will not be required to prove that, in the absence of the breach, he would necessarily have won the contract at stake. A reasonable chance of winning the contract ought to be sufficient. On the other hand, the damages award might be reduced by a certain percentage in order to take into account the possibility that the complainant's bid would have been unsuccessful in any event.

4. Who may apply?

The rights of action laid down in the Regulations are available to any person who sought, or who seeks, or who would have wished, to be the person to whom a relevant contract is awarded. In other words, the remedies are potentially available to any supplier who had an interest in being engaged to carry out the contract in question. This will include suppliers who participated in the award procedure, as well as any others who would have done so but for the infringement.

The only further qualification is that the complainant must be a national of and established in an EU Member State or in certain other European countries listed in the Regulations.

5. Time limit for bringing actions

Under each set of Regulations, legal actions must be brought *promptly and in any event within three months* from the date when the grounds for bringing the proceedings first arose, unless the Court considers that there is a good reason for extending the period within which proceedings may be brought.

The time limit begins to run from the date when the challenged conduct occurred. For example, if the plaintiff is complaining that he was improperly disqualified in a pre-qualification exercise, he would have (at most) three months to commence any court action as from the date of the authority's decision to exclude him. The Court might, however, exercise its discretion to extend the three month time limit if, for example, the authority fails to inform the complainant immediately of its decision to exclude him. In such a case, the time limit ought to start to run only from the date on which the complainant became aware (or ought to have become aware) of the decision to exclude him.

6. Procedure

6.1 Duty to give notice

Proceedings under the Regulations may not be brought unless the complainant has first informed the awarding authority of the breach or alleged breach and of his intention to bring proceedings in respect of it. A ruling of the High Court[49] has indicated that this is a strict procedural requirement and that any failure to inform the authority both of the alleged breach and the intended action will render the action inadmissible. It is advisable that such notice is given in writing.

6.2 Applications for interim orders

A complainant who seeks an interim measure such as an injunction will deal with the matter by an application by a summons to the Court together with a supporting affidavit (sworn statement). This may initially be dealt with by the Court before the summons and affidavit are served on the other party (ie. ex parte) but will then be dealt with at a subsequent hearing at which the other party may be present (inter partes). A claim for an interim injunction will not normally involve oral evidence but will, instead, involve lawyers making submissions to the judge on the basis of the affidavit evidence.

The summons for interim relief may be issued prior to, simultaneously with, or after the issue of a writ (see section 6.3 below) but where the summons is issued prior to the issuing of a writ it would be usual for the complainant to have to give an undertaking to

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[49] *The Queen v Portsmouth City Council, ex parte Bonaco Builders and others*, 6 June 1995; The Times 16.1.96. Confirmed by the Court of Appeal on 8 November 1996.

issue and serve a writ. The applicant for an injunction will usually have to give an undertaking that he will pay damages for any loss suffered if at the final hearing of the proceedings the application for the injunction loses the case. Similar (but not identical) procedures apply in relation to interim injunctions in the context of judicial review proceedings (see section 6.5 below).

6.3 Ordinary court procedure

Proceedings in the High Court are normally commenced by writ. This must be endorsed with either a full statement of the plaintiff's claim or a concise statement of the nature of the claim and the relief or remedy being sought. Once the court has issued the writ, it must be served on the defendant within 4 months. A series of formal documents (pleadings) then pass between the parties setting out their respective cases. The pleadings should contain only material facts and should not normally contain statements of law. The plaintiff's first pleading is his Statement of Claim (which may be part of the writ). The defendant subsequently answers with a Defence, and other pleadings may follow. Pleadings are deemed to close 14 days after service of the last pleading in the action, although the court may permit further amendments.

After the close of pleadings, the rules of the High Court provide that discovery shall automatically take place between the parties to the action. Discovery comprises two stages: disclosure by way of a list of documents by one party to the others of all relevant documents; and inspection by the other party of such of those documents as are not legally privileged. The scope of discovery is very wide and extends to all documents that are or have been in a party's possession, custody or power relating to any matter in question in the case, save for those which are legally privileged (eg. communications between a party and his solicitor).

Within one month of close of pleadings the plaintiff must take out a summons for directions. This provides an opportunity for the court to consider the preparations for trial of the action. Among other things, the directions will deal with witness statements and expert evidence.

Witness statements are prepared in order to support a case and are the equivalent of the factual oral evidence that is to be given if the witness is called at trial. They should therefore be comprehensive, as evidence of matters not covered in the statement will only be permitted at trial with the leave of the court. Expert evidence may be appropriate in some procurement proceedings. Experts will be able to give opinion evidence on any relevant matter on which they are qualified to speak. Witness statements and the reports of expert witnesses must normally be disclosed to the other parties in advance of the trial.

The case will normally be tried by a single Judge of the High Court without a jury and is usually in public. At the trial the parties are normally represented by lawyers (usually barristers) who make submissions on their behalf and examine and cross-examine witnesses, who give oral evidence.

6.4 *Duration of proceedings*

Interim measures can be sought and obtained almost immediately in the High Court in cases of urgency. The applicant would be required to set out the urgent circumstances in an affidavit to the Court. The time taken for the matter to proceed to full trial and final judgment varies greatly from case to case and depends to some extent upon the workload of the division of the High Court in which the case is lodged. As a very general estimate, the time lag between initiation of the proceedings and the final judgment can be anything from one to two years.

If the case raises difficult questions of EU law, the national court may refer questions of interpretation to the European Court of Justice for a so-called "preliminary ruling". Such a reference would be likely to add at least two years to the duration of proceedings in the national court. In practice, this kind of reference is only made in a small minority of cases.

Finally, it should be noted that any appeal against the High Court ruling to the superior courts (see 8.2 below) will add many more months of delay before the case is finally decided.

6.5 *Judicial review*

An alternative, and completely distinct, approach is to proceed by way of judicial review. This is the traditional procedure by which third parties have been able to challenge the actions and decisions of public authorities in the UK. The existence of the Regulations means it is no longer obligatory to challenge public procurement decisions by way of judicial review, but this option is still open (as confirmed by the statement in the Regulations that their application is without prejudice to the availability of other remedies).

The aggrieved person wishing to bring judicial review proceedings must initially apply to a Judge of the High Court for leave to do so. This is perhaps the main drawback of using judicial review rather than bringing an ordinary action under the Regulations. Indeed, the existence of the latter avenue could be one reason why a judge refuses to grant leave for judicial review. Any application for leave must be made promptly and, in any event, within 3 months from the date when the grounds for the application arose unless there is good reason for extending the period. If leave is granted (which may involve consideration of papers only or a hearing open to the public), the substantive application proceeds and the matter is heard by a Judge or Judges of the High Court (and is normally open to the public).

Judicial review proceedings are usually determined by reference to affidavit (rather than oral) evidence without some of the other formal procedures which apply in ordinary civil cases. There is often little or no discovery.

The following remedies are available in judicial review proceedings: an order restraining the decision-making body from acting outside its jurisdiction (prohibition) or quashing and requiring it to re-consider the matter (certiorari); an order requiring the body to carry out its judicial or other public duty (mandamus); the granting of a declaration as to the rights of the parties; the granting of an injunction; and, depending on the type of claim, in limited circumstances, an award of damages against the decision-making body. It can be seen that these remedies closely overlap with those available under the Regulations, although the right to damages is much more limited.

There may be circumstances in which it is advantageous for a complainant to bring an action alleging infringements of the Regulations by way of, or in combination with, an action for judicial review. This is a complex issue upon which the complainant may well need to take legal advice.

6.6 Is it necessary to engage a lawyer?

It is normal practice in High Court litigation for both parties to instruct solicitors to act on their behalf, both in order to deal with the complicated procedural requirements and to present each side's arguments on the law and merits. Furthermore, under the rules governing High Court practice, most oral submissions can only be presented by counsel (ie. a barrister rather than a solicitor). Consequently, it is usually necessary for the instructed solicitors to instruct counsel (complainants cannot usually instruct a barrister directly themselves). The cost implications of instructing lawyers are considered in section 7 below.

It is possible for a complainant to represent himself in the proceedings, but this is very rare and not generally recommended.

7. Costs of proceedings

A relatively small court fee, in the sum of £500 in this type of case is payable upon the commencement of proceedings. More importantly, a complainant will need to bear in mind the cost of instructing lawyers in order to pursue litigation. The overall cost of doing so will depend on the gravity, complexity and duration of the case and is difficult to predict at the outset.

It is normal practice for the High Court to order the unsuccessful party in the litigation to pay a large part of the legal costs of the successful party. This is an additional risk to be taken into account when embarking upon litigation. Moreover, if the complainant was successful in obtaining an injunction at an interim stage but ultimately lost the case at the final hearing, he might find himself liable to pay damages to the defendant under the terms of a cross-undertaking in damages. Complainants are often required to give such a cross-undertaking in order to obtain the injunction.

8. Rights of appeal

Once the High Court has laid down its judgment, the unsuccessful party may seek to appeal the ruling to the Court of Appeal. In some cases the leave of the judge or the Court of Appeal may be needed. This means that permission is required before the appeal can be brought and courts will consider a number of matters, including the prospect of success, when deciding whether or not to grant leave. The judgment of the Court of Appeal may in turn be appealed, with leave, to the House of Lords, which is the highest judicial authority in the UK.

9. Enforcement of judgments

It is highly unlikely that an awarding authority would choose deliberately to contravene a High Court order made against it, particularly in view of the severe penalties that may follow. If an authority disobeyed the terms of injunction, the complainant could apply for the committal of its officials to prison (although the court would probably give the authority a warning at first hearing in order to induce compliance). In the case of judgments for damages, the complainant could apply for an order to appropriate the authority's assets.

USEFUL ADDRESSES

The High Court in London:

Royal Courts of Justice
Strand
London WC2A 2LL

The Court of Session in Scotland:

Parliament House
Parliament Square
Edinburgh EH1 1RQ

The High Court in Northern Ireland:

Royal Courts of Justice
Chichester Street
Belfast BT1 3JF

In addition, district registries of the High Court (and Court of Session in Scotland) are located in numerous towns and cities throughout the United Kingdom.

Address of the UK Government department responsible for overseeing implementation of the EU procurement rules:

HM Treasury
Procurement Policy
Allington Towers
19 Allington Street
London SW1E 5EB

Tel: 0171 270 1648
Fax: 0171 270 1653