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Remedies

6 December 2018

Technical explanation of the acquis
Chapter 5: PUBLIC PROCUREMENT
Brussels

These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union

Remedies in public procurement

- Procurement Directives set common principles and procedures across the Single Market.

- Their objectives could not be entirely achieved if economic operators were unable to ensure that their rights were observed across the EU through access to clear, rapid and effective review procedures.

Remedies in public procurement (II)

Directives 89/665/EEC and 92/13/EEC, as amended by Directive 2007/66/EC

- Require that decisions on contracts falling within the scope of the Procurement Directives taken by contracting authorities/entities may be reviewed effectively and as quickly as possible
- Enable economic operators to enforce the rights conferred by Public Procurement Directives everywhere in the EU
- Establish minimum EU review standards

Remedies in public procurement (III)

- Most of the provisions in the Remedies Directives are mandatory - 'minimum conditions to be satisfied by the review procedures established in the national legal systems'

- Member States may introduce conditions that go beyond those laid down in the Remedies Directives

  - E.g. review procedures for public procurement under the EU thresholds, the right to organisations that do not act as economic operators to bring an action

Remedies in public procurement under EU law

Remedies at EU level

Infringement proceedings against a Member State following a complaint lodged with the European Commission or COM own initiative

Remedies at national level

Case brought against awarding authority before national court or independent review body

EU framework for national remedies

- Remedies directives 89/665/EEC and 92/13/EEC
- Key objective: ensuring that in the area of public procurement effective and rapid remedies are in place and available national level
- Requirements to be transposed into national law
- Pre-contractual and post-contractual remedies

Basic requirements under the directives

Availability of review procedures

- material scope
- personal scope
- administrative barriers

Independent review body (administrative or judicial)

- Independence from contracting authorities/government
- Full independence regarding decision-taking

Main features

Directive 2007/66/EC *of the European Parliament and of the Council of 11 December 2007* ***amending*** *Council Directives 89/665/EEC and 92/13/EEC* ***with regard to improving the effectiveness of review procedures*** *concerning the award of public contracts*

Main features

- Pre-contractual remedies:
  - **Interim measures**
  - **Setting aside of decisions taken unlawfully by CA/CE**
  - **Standstill period**
  - **Automatic suspension**

- Post-contractual remedies:
  - **Ineffectiveness**
  - **Alternative penalties**
  - **Compensation/damages**

- *Additional elements:*
  - **Automatic debrief**
  - **Time limits for bringing an action**

Interim measures

take**, at the earliest opportunity and by way of interlocutory procedures**, interim measures to correct the alleged infringement or prevent further damage to the interests concerned, including measures to suspend the procedure for the award of a public contract or the implementation of any procedural decision taken by contracting authorities

Setting aside of decisions taken unlawfully by CA/CE

including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure

The standstill period

- Cases C-81/98, *Alcatel* and C-212/02, *Commission v. Austria*

  a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract in order, in particular, to allow an application to be made for interim measures prior to the conclusion of the contract

- Allows for effective pre-contractual remedies
- Communicating award decision and its reasons
- Waiting period of 10 calendar days
- Automatic suspension in case of review

Automatic suspension

According to Article 2, paragraph 3, of Directive 89/665/EEC, as modified by Directive 2007/66/EC, '*when a body of first instance which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The* suspension *shall end no earlier than the expiry of the standstill period'.*

Sanctions for violating the standstill

- Ineffectiveness of contract
- Alternative penalties

Fight against illegal direct awards

- Availability of post-contractual remedies
- Time limit for application: 30 days / 6 months

Sanctions for an illegal direct award

- Ineffectiveness of contract
- Alternative penalties
  - alternative penalties must be effective, proportionate and dissuasive

Derogations to ineffectiveness

- Overriding reasons related to a general interest
- Voluntary ex-ante transparency mechanism

Sanctions for an illegal direct award

- Ineffectiveness of contract
- Alternative penalties
  - alternative penalties must be effective, proportionate and dissuasive

Main features

- Pre-contractual remedies:
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- Post-contractual remedies:
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Time limits

- Time limits for **pre-contractual remedies**

  at least 10 calendar days (or 15 calendar days if means of communication other than fax or electronic means are used) with effect from the same triggering events as for the standstill period.

- Time limits for bringing an **action for ineffectiveness**

  (a) 30 days with effect from the day following the date on which contracting authorities published a contract award notice (provided that it contains reasons for a direct award) or the contracting authorities informed the tenderers concerned of the conclusions of the contract (provided that this information contains a summary of the relevant reasons); or

  (b) in other cases before the expiry of at least six months with the effect from the day following the date of the conclusion of the contract.

Other aspects related to remedies

- Costs of proceedings
- Time-limit for the duration of the review procedures

Contracts outside the scope of the directives

- Certain contracts (e.g. of minor value) are not covered by Remedies Directives

- Nevertheless, if award of such contracts violates basic principles of equal treatment and transparency, effective remedies must be available

Evaluation of the Remedies Directives

Evaluation of the Remedies Directives carried out by the EC

24 January 2017:

- Report from the Commission to the European Parliament and the Council
- Commission staff working document
- http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/remedies-directives_en

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Evaluation of the Remedies Directives carried out by the EC

- Mandate for the evaluation
- Sources of information
- Challenges
- Implementation by Member States
- Stakeholders' perception
- Actual usage of the provisions
- Nature of the review body
- Costs
- Clarity of the Remedies Directives
- National approaches
- Relevance
- Coherence with other EU policies

http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/remedies-directives_en

Conclusions

- The Remedies Directives largely **meet their objectives**

- **Neither major nor urgent need to amend** the Remedies Directives identified and therefore, no legislative proposal from the Commission to amend the Directives

- Despite the overall positive conclusion, **shortcomings** identified:
  - certain aspects of the Remedies Directives need further clarification
  - information on national remedies systems not collected in a structured manner and is rarely used for policy making purposes

What do we propose?

- Promotion of **cooperation between first instance review bodies: Network of First Instance Review Bodies**
- Improved data gathering and promotion of transparency via the **Remedies Scoreboard**
- **Guidance**: e.g. the interplay between the Remedies Directives and the new legislative package, criteria to lift the automatic suspension
- Consistent **enforcement** activities and monitoring (Art. 258 TFEU)

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Case-law of the CJEU of the EFTA Court 2017-2018

Orders 2017/2018	-	Concept of a "court or tribunal of a MS"	**C-102/17**, Secretaria Regional de Saúde dos Açores (PT)
Judgements 2017 & 2018: Preliminary rulings	89/665/EEC	Articles 1(1), 2(1)	**C-391/15,** Marina del Mediterráneo e.a. - Judgment of the Court of 5 April 2017 (ES)
	92/13/EEC 2004/17/EC	Article 1(3) Article 10	**C-131/16**, Archus et Gama - Judgment of the Court of 11 May 2017 (PL)
	- 2004/18/EC	Concept of a "court or tribunal of a MS" Articles 2, 23(2)(8)	**C-296/15**, Medisanus - Judgment of the Court of 8 June 2017 (SI)
	89/665/EC	Article 2(6)	**C-300/17,** Hochtief – Judgement of the Court of 7 August 2018 (Hungary)
	2014/24/EU 2015/25/EU	-	**C-518/17,** Rudigier – Judgement of the Court of 20 September 2018 (Austria)
	2014/24/EU 89/665/EEC	Article 10(g) Article 1(1)	**C-260/17**, Anodiki Services EPE, Judgement of the Court of 25 October 2018 (Greece)
	89/665/EEC	Article 2(1)(c)	**E-16/16,** Fosen-Linjen - Judgement of the Court of 31 October 2017 (Norway)
Pending cases	- **C-328/17 -** Request for a preliminary ruling from the Tribunale Amministrativo Regionale per la Liguria (Italy) lodged on 31 May 2017 — Amt Azienda Trasporti e Mobilità SpA and Others v Atpl Liguria — Agenzia regionale per il trasporto pubblico locale SpA, Regione Liguria - **C-54/18** - Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Piemonte (Italy) lodged on 29 January 2018 — Cooperativa Animazione Valdocco S.C.S. Impresa Sociale Onlus v Consorzio Intercomunale Servizi Sociali di Pinerolo, Azienda Sanitaria Locale To3 di Collegno e Pinerolo - **C-333/18** - Request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 23 May 2018 — Lombardi Srl v Comune di Auletta and Others		

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Case-law of the CJEU 1995-2016

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COMMISSION STAFF WORKING DOCUMENT

EVALUATION OF THE MODIFICATIONS INTRODUCED BY DIRECTIVE 2007/66/EC TO DIRECTIVES 89/665/EEC AND 92/13/EEC CONCERNING THE EUROPEAN FRAMEWORK FOR REMEDIES IN THE AREA OF PUBLIC PROCUREMENT/ REFIT EVALUATION

Accompanying the document
REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE EFFECTIVENESS OF DIRECTIVE 89/665/EEC AND DIRECTIVE 92/13/EEC, AS MODIFIED BY DIRECTIVE 2007/66/EC, CONCERNING REVIEW PROCEDURES IN THE AREA OF PUBLIC PROCUREMENT

{COM(2017) 28 final}

Annex 1 — Case-law concerning remedies in the area of public procurement

References

***389 L 0665**: Council Directive 89/665/EEC of 21 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 (OJ No L 395, 30.12.1989, p. 33) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31989L0665, as corrected by OJ L 63, 10.3.2016, p. 44, as amended by:*

> ***32007 L 0066**: Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ L 335, 20.12.2007, p. 31), https://eur-lex.europa.eu/eli/dir/2007/66/oj*
>
> ***32014 L 0023**: Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ L 94, 28.3.2014, p. 1), as corrected by OJ L 114, 5.5.2015, p. 24. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL_2014_094_R_0001_01*

***392 L 0013**: Council Directive 92/13/EEC of 25 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 (OJ No L 76, 23.3.1992, p. 14) https://eur-lex.europa.eu/eli/dir/1992/13/oj, as amended by:*

> ***32007 L 0066**: Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ L 335, 20.12.2007, p. 31), https://eur-lex.europa.eu/eli/dir/2007/66/oj*

***32014 L 0023**: Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ L 94, 28.3.2014, p. 1), as corrected by OJ L 114, 5.5.2015, p. 24. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL_2014_094_R_0001_01*

***32009 L 0081**: Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0081, as amended by:*

> ***32013 L 0016**: Council Directive 2013/16/EU of 13 May 2013 (OJ L 158, 10.6.2013, p. 184), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0016*

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Thank you for your attention!