SIGMA Papers No. 41

Public Procurement Review and Remedies Systems in the European Union

OECD

https://dx.doi.org/10.1787/5kml60q9vklt-en

OECD

For Official Use **GOV/SIGMA(2007)5**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **06-Apr-2007**

English - Or. English

PUBLIC GOVERNANCE AND TERRITORIAL DEVELOPMENT DIRECTORATE

SIGMA - A JOINT INITIATIVE OF THE OECD AND THE EUROPEAN UNION, PRINCIPALLY FINANCED BY THE EU

PUBLIC PROCUREMENT REVIEW AND REMEDIES SYSTEMS IN THE EUROPEAN UNION

SIGMA PAPER NO. 41

This study provides a comparative analysis of the public procurement review and remedies systems of Member States.

Twenty-four separate overviews of public procurement systems in the 24 participating Member States were produced on the basis of national responses to a detailed questionnaire. An in-depth review of these country system overviews provided the comparative analysis portion of this study.

For further information please contact Mr. Peder Blomberg or Mr. Piotr-Nils Gorecki, Sigma. Peder Blomberg: Tel: (33 1) 45 24 85 51 - Email: peder.blomberg@oecd.org; Piotr-Nils Gorecki: Tel: (33 1) 45 24 79 93 - Email: piotr-nils.gorecki@oecd.org

JT03225206

GOV/SIGMA(2007)5

SIGMA

Support for Improvement in Governance and Management

A joint initiative of the OECD and the European Union, principally financed by the EU

PUBLIC PROCUREMENT REVIEW AND REMEDIES SYSTEMS IN THE EUROPEAN UNION

SIGMA PAPER NO. 41

This document has been produced with the financial assistance of the European Union. The views expressed herein can in no way be taken to reflect the official opinion of the European Union, and do not necessarily reflect the views of the OECD and its member countries or of the beneficiary countries participating in the Sigma Programme.

THE SIGMA PROGRAMME

The Sigma Programme — Support for Improvement in Governance and Management — is a joint initiative of the Organisation for Economic Co-operation and Development (OECD) and the European Union, principally financed by the EU.

Working in partnership with beneficiary countries, Sigma supports good governance by:

- Assessing reform progress and identifying priorities against baselines that reflect good European practice and existing EU legislation (the *acquis communautaire*)
- Assisting decision-makers and administrations in setting up organisations and procedures to meet European standards and good practice
- Facilitating donor assistance from within and outside Europe by helping to design projects, ensuring preconditions and supporting implementation.

In 2007 Sigma is working with the following partner countries:

- **New EU Member States** — Bulgaria and Romania
- **EU candidate countries** — Croatia, the former Yugoslav Republic of Macedonia and Turkey
- **Western Balkan countries** — Albania, Bosnia and Herzegovina (State, Federation of BIH, and Republika Srpska), Montenegro, Serbia and Kosovo (governed since June 1999 by the UN Interim Administration Mission in Kosovo – UNMIK)
- **Ukraine** (activities financed by Sweden and the UK).

The Sigma Programme supports reform efforts of partner countries in the following areas:

- Legal and administrative frameworks, civil service and justice; public integrity systems
- Public internal financial control, external audit, anti-fraud, and management of EU funds
- Public expenditure management, budget and treasury systems
- Public procurement
- Policy-making and co-ordination
- Better regulation.

For further information on Sigma, consult our website:
http://www.sigmaweb.org

FOREWORD

An unsuccessful tenderer who believes that the public procurement process was conducted in violation of relevant laws must have access to review and remedies. Public procurement review procedures are intended to provide effective remedies for aggrieved tenderers. This paper aims to provide a better understanding and knowledge of **how EU Member States**[1] **organise their complaints review and remedies systems.** It includes a discussion on the rationale for the choice of various models. It is hoped that the paper will stimulate current and future candidate countries, other partner countries of Sigma, and EU Member States to take action, where needed, to improve the quality of their review and remedies systems. Special emphasis will be placed on the availability of remedies as part of the implementation of the EC Public Sector Remedies Directive 89/665 and the EC Utilities Remedies Directives 92/13, from both legal and institutional perspectives. Moreover, the paper will shed light on the review and remedies culture and on the operation of these systems in practice.

In 2000 Sigma published a paper on *Public Procurement Review Procedures* (Sigma Paper No. 30), which was well received and highly appreciated by the candidate countries in their work to set up organisations and procedures for complaints, review, and remedies in accordance with the relevant Community rules. It appears that the paper has also been used as reference documentation and guidance to a wider circle of governments, including the new member states, in their work to put in place effective compliant review mechanisms. However, based on an ongoing dialogue with Sigma's partner countries, it seems that the area of review and remedies still remains a key concern for most countries. They have shown an interest in learning more about how other countries have organised their review systems and how they have operated certain review mechanisms. Thus in recent years one of the priority aims of Sigma's cooperation with partner countries has been to provide expert assistance, conduct peer reviews and organise conferences and seminars on this topic.

The situation has changed considerably since the publication in 2000 of Sigma Paper No. 30, *Public Procurement Review Procedures*. The most important changes are as follows:

- The sphere of countries with direct or indirect interest in EU public procurement remedies systems has grown and today numbers almost 40 countries (EU Member States, EEA (EFTA) countries, EU candidate countries and Western Balkan countries).
- Several new judgements of the European Court of Justice in public procurement cases, in particular the *Alcatel* case[2], have affected the review process in Member States significantly.
- Countries not only strive to establish review procedures that are compliant with Community law (which previously had often been the key priority) but are now particularly interested, in the light of their experiences, in making review more rapid and effective in practice through the development of more appropriate structures and administrative procedures. Member States are free to choose the organisation and procedures for review as long as the rights and corrective measures are implemented in accordance with the EC Directives. This has led to the emergence of a great variety of

---

1 In view of their imminent accession to the European Union on 1 January 2007, Bulgaria and Romania have been treated as EU Member States for the purposes of this study.

2 According to these judgements (C-81/98 and C-212/02), a reasonable standstill period between the award of the contract and its conclusion is required to allow the award to be effectively challenged in review proceedings.

review mechanisms among Member States, from the use of the court system in all stages of the contract award process to the reliance on arbitration and tribunal models, with or without judicial capacity. There are different explanations and justifications for the choice of a specific model, but its development and the experiences drawn from its use constitute a valuable source of information for Sigma's partner countries in their efforts to improve their review systems.

- With recent developments in EU public procurement, there is a growing need for training and information for a large group of actors in the area of procurement review, such as judges, arbiters, lawyers, policy-makers and others engaged in reviewing complaints.

Consequently, the updating of Sigma Paper No. 30, but with a wider set of objectives, should fulfil a useful function by providing information to countries in their work to reform and improve their public procurement review and remedies systems. This study provides a comparative analysis of the review and remedies systems of Member States but does not attempt to evaluate their respective advantages/disadvantages or to recommend particular institutional arrangements.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Public procurement review and remedies systems of EU Member States must be established and developed on the basis of the specific requirements of the EC Public Procurement Remedies Directives 89/665/EEC and 92/13/EEC, the EC Treaty, and the case law of the European Court of Justice. In particular, these systems must provide aggrieved bidders with **rapid**, **effective**, **transparent,** and **non-discriminatory** review and remedies. There are a number of additional requirements, but they do not cover every detail of a review and remedies system and leave considerable room for the choice of options by the Member States.

There is substantial **common ground** but also considerable **differences** between the public procurement review and remedies systems of the 24 Member States[3] included in this study. These similarities and differences relate to institutional frameworks, available remedies, legal frameworks regulating scope and procedure, and review culture.

With regard to **institutional frameworks**, i.e. how Member States have organised their review systems, the common ground is that most Member States provide for **direct complaints to the contracting entity** that committed the alleged breach of public procurement law as a direct or indirect first stage of review. However, this possibility is not regarded as a first stage of the review process required by the relevant EC Directives. Therefore differences can be found in terms of whether such a complaint is set as a compulsory first stage of review and whether tenderers actually use this possibility in practice, and with regard to procedural details, such as time limits. All Member States operate a first-instance **judicial or quasi-judicial review** of procurement decisions.

Some countries are classified in accordance with the principles of a ***dual*** system and others with the principles of a ***single*** system of public procurement review. Countries with single systems have one path of review bodies (first through third instances), whereas those countries with dual systems are characterised by two separate paths of review. Frequently, the conclusion of the contract is the factor that separates the two paths in dual systems. However, they can also be separated by the public or private nature of the "defendant" contracting entity. Member States use both ordinary and administrative courts as well as **specialised public procurement review bodies** as review institutions. With few exceptions, the first-instance review through a specialised review body can be appealed in an ordinary or administrative court. Only a minority of countries have special public procurement senates or chambers in these ordinary or administrative courts. In some Member States the second instance is the last instance, whereas a group of Member States even allows a third instance of judicial review.

All last-instance review bodies appear to fulfil the requirements of a court of law, as set out in the *Dorsch* and *Salzmann* judgements of the European Court of Justice.[4] Many Member States have set up **alternative dispute settlement bodies**, such as arbitration panels, and even the ombudsman may play a role.

---

[3] For the purposes of this report, Bulgaria and Romania have been included in the category of EU Member States, although their accession did not take place until 1 January 2007.

[4] According to this judgement, to qualify as a court of law a body must be founded on the basis of a law or by a law, it must be permanent, its decisions must be taken on the basis of legal rules and be legally binding, and its procedure must be an *inter partes* procedure. A court is independent from the executive and from the administration or any other part of government, and its decisions are of a jurisdictional nature.

Finally, a number of Member States have non-judicial advisory bodies, composed of representatives of both sides reviewing procurement cases, which normally do not render a binding decision.

Member States also have common points and differences in relation to the **available remedies**. These remedies include the setting aside of unlawful procurement decisions, interim measures, compensation for damages, and in some Member States in the Utilities, periodic penalty payments. First, Member States allow their review bodies to **set aside unlawful public procurement decisions** prior to the conclusion of the contract. The conclusion of the contract is a crucial point in a procurement procedure, after which many Member States allow only compensation for damages. To allow the setting aside of the contract award decision and in accordance with the *Alcatel* judgement[5] of the European Court of Justice, many jurisdictions have introduced a **standstill period** of 7-30 days between the award decision and the conclusion of the contract. However, the effectiveness of this standstill period differs between jurisdictions since there are differences as to whether the initiation of proceedings suspends the award procedure, whether the conclusion of a contract during the standstill period renders the contract null and void, and in terms of the time limits within which judges have to take a review decision. In general, a concluded contract can only be annulled, if at all, when strictly defined requirements are met.

Second, **interim measures** are available, but in application subject to national differences. In a limited number of Member States, filing a lawsuit has an automatic suspensive effect, interrupting the procurement procedure. In most countries tenderers have to specifically request the review body to apply interim measures, for example the discontinuation of the procedure. The review body can then apply interim measures pending a final decision, taking into account the probable consequences of interim measures for all interests likely to be harmed, including the public interest, and decide against awarding such measures whenever their negative consequences would outweigh their benefits. In principle all remedies can be awarded as interim measures and there is common ground regarding the requirements. Furthermore, there is common ground regarding the availability and generally also the requirements of compensation for damages, which are normally considered after the conclusion of the contract. **Periodic penalty payments** enforce judgments or constitute remedies in the Utilities in some Member States.

There are also similarities and differences in relation to the **legal framework** of the review systems of Member States. First, the legal framework concerns the **scope** of the system. In the largest group of Member States, the system applies equally to **contracts above and below the thresholds** of EC Public Procurement Directives 2004/17 and 2004/18. In a small group of Member States the review and remedies system applies only to contracts above the thresholds, whereas in others there are different remedies, review bodies and procedural requirements for contracts below these thresholds. Similarly, in many Member States, the review and remedies system applies equally to all contracting authorities and entities, while in some there are different legal bases and different review bodies depending on whether the contract was awarded by a public entity or a utility, or on whether the contracting entity is public or private. Second, the legal framework relates to the **procedural law** for review, covering such questions as: who may bring proceedings, within which time limits, at what cost, how can experts be involved, whether confidentiality can be taken into account, and how applicants learn about the outcome of proceedings.

[5] Cases C-81/98 and C-212/02.

Finally, there are similarities and many differences with regard to the **review culture** of Member States, a notion which includes training, attitudes, credibility, and the use of the system in practice. **Training** opportunities for judges and review panel members, lawyers, tenderers and contracting officers on public procurement law; the technological and economic background of procurement; and how procedures work in practice all differ considerably. Many Member States have a wide spectrum of training opportunities – ranging from teaching and research that is relevant to public procurement at universities and other institutions of higher education, conferences, legal and other journals, and privately organised seminars – whereas opportunities are very limited in other countries. Tenderers actively use their review systems to correct mistakes and promote their own interests. However, in many jurisdictions tenderers feel deterred by the high cost or by apprehension concerning the next contract, while in some countries some tenderers are seen by contracting authorities to abuse the system in order to obstruct procurement procedures or to force competitors out of the contract. The attitude of most judges is described as being fair and balanced. The national systems differ considerably with regard to the success of complaints and lawsuits in the first instance. In the second and third instances tenderers are predominantly less successful. In some countries non-governmental organisations get involved in the review system, normally by giving advice to tenderers and sometimes by funding proceedings. In a small number of Member States these NGOs may even initiate proceedings.

METHODOLOGY

In each EU Member State the study focused on four main areas: legislative framework, institutional framework, review and remedies culture, and operation of the review and remedies system in practice. While an effort was made to investigate and discuss these issues separately, this was not always possible. The legislative and institutional frameworks, for example, inevitably have an impact on the review and remedies culture and on the operation of the system.

The study was carried out by the Sigma Project Team and reviewed by a Peer Team. The necessary data was collected by means of a detailed questionnaire, which was sent out to contact points in the 25 Member States and in Bulgaria and Romania. The study reflects the situation in Member States as prevailed in the first half of 2006. All contact points within the public administrations of the Member States had the opportunity to comment on and approve the draft country reports once they were completed by the Sigma Project Team.

The prime responsibility of the **Sigma Project Team** was to carry out all of the activities associated with the planning, organisation, and management of the study up to the successful completion of the report and publication of the Sigma Paper. The members of the Project Team were Martin Trybus, Peder Blomberg, and Piotr-Nils Gorecki.

A **Peer Team** was established with the purpose of providing comments on the methodology and on the draft and final reports of the study. The team was composed of Joël Arnould (France), David d'Hooghe (Belgium), Jens Fejö (Denmark), and Tomaž Vesel (Slovenia).

A **Network of Contact Points** within Member States' public administrations was created and given the task of providing the Sigma Project Team with the requested documentation and information on how the review system was organised and perceived, including complaint statistics, where available. The contact points were selected or recommended from among those of the **European Public Procurement Network (PPN**), which is a co-operation network of public procurement expert officials in all EU Member States, all acceding countries, EEA Members, Switzerland, EU candidate countries and other European countries.

The Sigma Project Team prepared a detailed questionnaire, which was to be sent to the network of contact points for completion, including statistics on remedies, if available. Insofar as possible, the Sigma Project Team and the Peer Team analysed the legal texts referred to directly in the questionnaires, either in the original version or in available translations. A total of 24 questionnaires were returned to the Sigma Project Team between March and August 2006, namely by Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden and the United Kingdom

A number of points need to be clarified with regard to the **limits of this methodological approach**. First, as three Member States did not return the questionnaire, the study does not constitute a complete overview of the review and remedies systems of all Member States. However, 24 of 27 possible returns represent a positive response, which should provide a sufficient basis for a meaningful overview.

A number of national review and remedies systems provide a wider coverage than required by the relevant EC Directives by also including, to a varying degree, contracts outside the scope of the EC Directives. The study provides useful information on the scope of such extended coverage, but due to limitations in the methodology it has not been possible to discuss the issue of extended coverage systematically in the study.

The study does not make any distinction on the basis of the nature of contracts (public or concession contracts), which may have an impact on the conclusions drawn in the comparative overview section of the study. This is in particular relevant with regard to Member States where the responsibilities for remedies in the concessions area are handled in a different way than for public contracts.

The study thus lacks systematic information on the how Member States organise remedies with specific reference to the nature of contracts.

1. Introduction

The main objective for the establishment of a public procurement complaints review and remedies system is to enforce the practical application of substantive public procurement legislation. Such a system gives this legislation its "teeth": the possibility of review and remedies serves as a deterrent to breaking the law and thus encourages compliance. Moreover, violations of the law and genuine mistakes can be corrected. Therefore, a functioning public procurement review and remedies system may ultimately contribute to the achievement of the objectives of the substantive rules, such as non-discrimination and equal treatment, transparency, and value for money. The public procurement review and remedies systems of EU Member States need to comply with the requirements of European Community law: the EC Treaty, the EC Public Sector Remedies Directive 89/665/EEC and the EC Utilities Remedies Directive 92/13/EEC. The two directives are currently in a process of revision.[6] Moreover, these review and remedies systems normally seek to comply with aspects that are outside the application of the Remedies Directives, such as relevant case law of the European Court of Justice, article 47 of the Charter of Fundamental Rights of the European Union regarding the respect for the right to effective remedy and to a fair hearing and the obligation to ensure a fair trial resulting from article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and aspects related to national good practice.

1.1 The Remedies Directives

The EC Public Sector Remedies Directive 89/665/EEC and the EC Utilities Remedies Directive 92/13/EEC set certain minimum requirements regarding the procurement review and remedies systems of the Member States. These minimum requirements concern contracts awarded within the scope of application of the EC Public Sector Procurement Directive 2004/18/EC and the EC Utilities Procurement Directive 2004/17/EC respectively. The requirements involve principles, standing, remedies, review bodies, and limitations. Nevertheless, a national review and remedies system may also cover contracts outside the scope of the Public Procurement Directives, such as contracts below their thresholds of application and service concessions.

As a general rule, EU Member States must ensure that decisions taken by the contracting authorities can be reviewed effectively and as rapidly as possible in the event that such decisions may have infringed Community law in the area of public procurement or national rules implementing that law. The notion of the "**effectiveness"** of a review and remedies system has been clarified by ECJ case law (see e.g. case C-92/00, paragraph 67 and Case C-390/98 *Banks* v *Coal Authority and Secretary of State for Trade and Industry* [2001] ECR I-6117, paragraph 121; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 29). More concretely, it appears that the system must comprise operational review bodies, rules on standing in review bodies, costs, rules on the effect of filing a protest, scope, the possibility to set aside individual procurement decisions including the award decision, damages, and interim measures. Moreover, aspects of effectiveness include questions of access and of satisfaction of tenderers with the system (frequency of proceedings, appeals against first instance decisions, etc.), and possibly the general transparency and even simplicity of the system.

---

[6] Commission proposal for a Directive 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 [COM(2006) 195 final/2] of 4 May 2006: see http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm.

Moreover, the interrelated notion of "**rapidity"** requires proceedings to be conducted and decided quickly. In addition to being effective and rapid, remedies must not discriminate as a result of the distinction made by the Directives between national rules implementing Community Law and other national rules. The review procedures provided in both Remedies Directives include the following powers: to take interim measures by way of interlocutory procedures, to either set aside or ensure the setting aside of decisions taken unlawfully, and to award damages to persons harmed by an infringement. Member States may decide to use review bodies that are not judicial in character but they must ensure that the decisions of these bodies are subject to judicial review. This judicial review needs to be conducted by a court of law or by a review body that is necessarily independent of both the initial review body and the contracting authority, and this body must adhere to standards that are almost identical to those of a court of law.

The Remedies Directives do not comprehensively regulate the procurement review and remedies systems of Member States. For example, there are no requirements as to whether the review is to be conducted through ordinary, special, or administrative courts or as to the type of law in which the review and remedies system is to be enshrined. Moreover, the Remedies Directives also contain "options", thereby giving Member States room for manoeuvre when implementing remedies. For example, under the Utilities Remedies Directive, Member States can choose between giving review bodies the power to set aside public procurement decisions and giving them the power to impose penalty payments. Hence there is room for considerable variations in the review and remedies systems of the 24 countries included in this study.

However, to be more precise with regard to interpretation of the Directives, according to article 2 (1) of Directive 92/13/EEC, Member States have the power to 1) take interim measures and 2) set aside decisions or 3) take other measures than those indicated in 1) and 2), in particular the payment of a particular sum. Thus such a payment is only one possible measure that can be taken.

1.2 EC Treaty and the Case Law of the European Court of Justice

The basic principle derived directly from the EC Treaty with which the remedies and review systems of EU Member States have to comply is that of **non-discrimination** on the grounds of nationality (Article 12 of the EC Treaty). While the EC Public Procurement Directives specifically provide for certain aspects of this principle, the wider general principle applies to all cases that are not specified in these legal instruments. Other relevant principles of the EC Treaty are transparency and proportionality. Very often the practical application of these principles has been clarified in judgements of the European Court of Justice.

While there is no *expressive* doctrine of **legal precedent** in Community law as such which would require the European Court of Justice to follow its previous case law, the jurisprudence of the Court is of considerable importance. The Court follows its previous decisions in almost all cases and very often quotes from its own previous judgments. Furthermore, the Court's authority as the ultimate interpreter of Community law permits it to clarify the law and if necessary to even fill the inevitable gaps left by the legislator. Some of the Court's many judgements on public procurement law clarify the EC legislation in light of its stated objectives. Thus the Court's landmark decisions relevant to review and remedies need to be added to the legal framework with which the remedies and review systems of Member States need to comply. In addition, it should be noted that a number of judgements of the Court concerned general aspects of remedies that were not specifically covered by Directives 89/665/EEC and 92/13/EEC.

The procedural rights provided in article 6 of the European Convention on Human Rights have a considerable effect on public procurement review and remedies systems.

1.3 Other National Practices

As mentioned above, the EC Remedies Directives 89/665/EEC and 92/13/EEC do not comprehensively regulate the procurement review and remedies systems of Member States. Neither does the case law of the European Court of Justice cover all questions arising in this context. Certain practices regarding review and remedies that have evolved in many countries are not specifically addressed in the Remedies Directives. However, the borderline between these "national practices" and the general principles of effective and rapid review required by the Remedies Directives and the case law of the European Court of Justice is not always clear. Nevertheless, certain practices, such as giving reasons when deciding on complaints, hearing the parties involved, or confirming the receipt of complaints, can be classified as good practice without being specifically and explicitly required by Community law other than in more general terms.

2. Institutional Frameworks: How Member States have Organised their Review and Remedies Systems

The study does not make any distinction on the basis of the nature of contracts (public or concession contracts), which may have an impact on the conclusions drawn in the present section. This is in particular relevant with regard to Member States where the responsibilities for remedies in the concessions area are handled in a different way than for public contracts.

This section covers the various institutions (courts of law, quasi-judicial review bodies, and other review bodies) dealing with public procurement review and remedies in EU Member States. Substantial common ground can be found among these public procurement review institutions, but they also display considerable differences. For detailed information on the institutional set-ups of individual Member States, please refer to the country reports provided in the Appendix.

2.1 Complaints to Contracting Authorities

Firstly, there is a need to clarify the distinction between a prior administrative complaint, whereby a tenderer by lodging a complaint directly with a contracting authority seeks a resolution of a dispute, and the prior notification of the intention to seek review under article 1(3) of the Remedies Directives. The prior notification obligation, which is optional in the Remedies Directives, is merely an information given to the contracting authority that a review will be lodged before the competent review body of the first instance.

The study has revealed that a common element of the public procurement review and remedies systems of Member States is the possibility to **complain directly to the respective contracting authority or entity** that is awarding the contract or to their superior institutions about the alleged violation of public procurement law. However, there are considerable differences concerning the use of this option in practice, related to whether it is a precondition for judicial review and in terms of its detailed regulation. A prior complaint to the contracting entity itself is an **obligatory first stage of review** in some countries, such as Cyprus and Germany. In Portugal such a prior complaint is not a requirement but is nevertheless the most frequent way of settling disputes in public procurement cases, and most complaints do not go any further. In Latvia a prior complaint is a precondition for judicial review only in the case of irregular contract documents. A complaint to the contracting authority may offer clear **advantages**, especially in cases where a genuine and obvious mistake rather than a deliberate breach of public procurement law is the reason for the dispute or when the case involves "delicate" interpretations of the law. This is one reason why some Member States, such as Finland and Hungary, require tenderers seeking quasi-judicial or judicial review to send a copy of their complaint or lawsuit to the contracting authority in question. Moreover, the contracting entity would thereby have the chance to correct a genuine mistake (if

this can be done without hurting anyone). The tenderer can **avoid confrontation** with the contracting authority involved when using quasi-judicial or judicial review. Moreover, this might be the **quickest way to correct** the violation. Finally, the **costs** involved in review proceedings can be avoided. On the other hand, time-consuming complaint proceedings can prolong the overall review procedure if it is only the prelude to quasi-judicial or judicial review. In such a situation, valuable time could be lost by waiting for a contracting entity to decide on a complaint. In the context of a direct complaint to the contracting entity as a precondition for quasi-judicial or judicial review, the requirement of "rapid" remedies, as set out in the EC remedies directives, needs to be taken into account, especially when regulating how quickly the entities need to decide on such a complaint. In many Member States contracting authorities need to decide on complaints within a few days. However, in the case where a genuine prior notification has been issued in parallel, there is no obligation to wait for the decision of the contracting authority.

In Ireland the necessity for complaints and judicial review is reduced by the practice of **debriefings** in which contracting entities explain and discuss the strengths and weaknesses of individual tenders with the tenderer concerned. These debriefings are not required but are encouraged as a way of promoting **constructive and transparent dialogue** between contracting entities and tenderers.

2.2 The Classification of Review Systems into Dual and Single Systems

The institutional frameworks of the 24 Member States included in this study can be divided into two broad groups: dual systems and single systems, which in turn can be subdivided into two subgroups each. These subgroups will be explained further below.

Very often, but not always, it is the Member States with a clear division between public law and civil law which have a **dual system of public procurement review**. The majority of Member States (see Table 1) have such a dual review system. In a country with a dual system, certain remedies (normally damages) can only be claimed in the ordinary or civil courts. Moreover, this remedy is usually available only after the conclusion of the contract. Hence the conclusion of the contract is often a crucial event separating the jurisdictions of two review bodies, each with a maximum of three instances. Remedies other than damages, in particular the suspension and setting aside of public procurement decisions, are reviewed by a separate set of review bodies. This can be the normal administrative courts, such as in Sweden. Alternatively, specialised public procurement review bodies review cases in the first instance, subject to an appeal to the highest administrative court, such as in Austria, Cyprus and the Czech Republic. In France and Luxembourg the clear division of public law from civil law is particularly important. Contracting authorities and publicly owned utilities in France can seek review in the administrative courts, whereas in Luxembourg this applies only to contracting authorities. In France the ordinary or civil courts review the procurement decisions of privately owned utilities, whereas in Luxembourg they review all utilities.

Other Member States fall within the category of **single path public procurement review bodies** awarding all available remedies (see Table 1), which includes, among others, Bulgaria, Ireland, Latvia and the United Kingdom. Denmark is a special case, since damages can be awarded by both the ordinary courts and by a specialised public procurement review body. The type of review body and the number of instances vary considerably in this type of system. As for the dual review system, the single system group can be divided into two subgroups depending on whether the first instance is a specialised public procurement review body or a more general court. Moreover, in some Member States these courts are the general **civil courts**, whereas in others they are **administrative courts**. Another substantial difference concerns the level of the first-instance review body. In Portugal, for example, the first-instance review bodies are the lowest instance of (regional) administrative courts, whereas in other countries, such as Ireland or the United

Kingdom, the high court is the first-instance review body. The level of the first instance may have implications on costs, speed, and proximity to the parties. Proceedings in a high-level court may be costly, time-consuming, and detached from the region of the procurement contract. This may deter tenderers from bringing proceedings. In contrast, proceedings in a low-level, first-instance court may be cheaper, quicker, and closer to the region of the procurement contract. On the other hand, these bodies may lack experience and expertise.

Table 1. Summary of Review Systems in Member States

System/Court	Ordinary Courts	Specialised Review Body
Single system	Ireland, Lithuania, Netherlands, Portugal, United Kingdom	Bulgaria, Latvia, Malta, Romania, Slovakia
Dual system	Belgium, France, Sweden	Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Luxembourg, Poland, Romania, Slovenia

2.3 General Courts and Specialised Review Bodies

The majority of Member States, whether or not they have a single or a dual system, have established **specialised public procurement review bodies to manage the review procedures**:

- Austria: Federal Public Procurement Offices and regional institutions
- Bulgaria: Commission on the Protection of Competition
- Cyprus: Tenders Review Authority
- Czech Republic: Office for the Protection of Competition
- Denmark: Complaints Board for Public Procurement
- Estonia: Public Procurement Commission
- Germany: 17 Public Procurement Chambers
- Hungary: Public Procurement Council with its specialised arm, the Arbitration Committee
- Latvia: Procurement Monitoring Bureau
- Malta: Appeals Board of the Department of Contracts
- Poland: Public Procurement Office (managing the system of arbitrators)
- Romania: National Council for Solving Legal Disputes
- Slovakia: Office of Public Procurement
- Slovenia: National Review Commission for the Review of Public Procurement Award Procedures

These review bodies normally consist of panels of procurement experts chaired by a qualified lawyer, such as in Austria, Bulgaria or Germany. **Panel members** are often appointed under the same or a comparable procedure to that of judges. Moreover, they must fulfil the same requirements, such as being a citizen of the Member State in question, speaking its national language(s), and not having been convicted for a criminal offence. Furthermore, they cannot assume other paid occupation except in institutions of higher education, and they may not benefit in any form whatsoever from private enterprise resources. However, these panels may include

public procurement experts with an economic, transport, construction, or engineering background as well as stakeholders who are not lawyers.

The study reveals that decisions of specialised public procurement review bodies are **binding**, subject normally to an appeal in ordinary or administrative courts, but there are exceptions. In some Member States, such as Malta, Poland or Slovakia, the specialised public procurement review bodies are an independent part of a public procurement office that is also dealing with other public procurement issues, such as drafting legislation, publication of tender notices, or policy development. An appeal against the decisions of the review panels of these offices to their respective **chairman** or president can be a distinct stage in the review proceedings. This is the case in the Czech Republic and Poland. The procedural law is often regulated in the public procurement law or act rather than in the general codes of civil or administrative procedure. The advantage of specialised public procurement review bodies is that public procurement expertise can be concentrated and its legal, technological, economical and practical implications are dealt with by experts in these areas. A number of Member States have no specialised public procurement review body at all, but rely on administrative or civil courts (see Table 2). In Belgium, France, Ireland, Lithuania, the Netherlands, Portugal, Sweden and the United Kingdom, the review of public procurement decisions is the exclusive task of the **regular courts**. In Portugal, the administrative courts deal with public procurement disputes; in Ireland, Lithuania, the Netherlands, Sweden and the United Kingdom it is the civil courts; and in France and Luxembourg it is both the administrative and civil courts. The Market Court in Finland is specialised in public procurement but deals with other areas of economic law as well.

In most Member States with specialised public procurement review mechanisms, administrative and civil courts still have an important role to play, since decisions of these specialised public procurement review bodies are subject to an appeal to the **Supreme Administrative Court** or even to the **Supreme Court**. In Slovakia, appeals are made to two instances of ordinary courts, in Germany and Denmark to the State High Courts, and in Hungary and Poland to **lower-instance ordinary courts**. In many Member States the **compensation for damages** is excluded from the jurisdiction of the specialised public procurement review bodies and is subject to consideration by the civil or ordinary courts.

Table 2. First-Instance Review before and after the Conclusion of the Contract

	Specialised Review Body	Civil or Ordinary Court	Administrative Court
Prior to conclusion of the contract	Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Latvia, Malta, Poland, Romania, Slovakia, Slovenia	Belgium (utility), Denmark, France (private utility), Ireland, Lithuania, Luxembourg (utility), Netherlands, United Kingdom	Belgium (public), Estonia, France (public), Luxembourg (public), Portugal, Sweden
After conclusion of the contract (damages)	Denmark	Belgium (utility), Cyprus, Czech Republic, Denmark, Estonia, Finland, France (private utility), Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg (utility), Malta, Netherlands, Poland, Slovakia, Slovenia, Sweden, United Kingdom	Belgium (public), France (public), Luxembourg (public), Portugal, Romania

2.4 Appeals

Most Member States allow an appeal against a first-instance review decision; in other words, they allow a **second instance** that may annul or change the decision of the first-instance review bodies, as discussed above under the last heading. Only Belgium, Malta and Slovenia do not appear to allow an appeal in relation to review decisions taken before the conclusion of the contract.

The second instances differ depending, *inter alia,* on whether the Member State has a single or dual system of review. In many Member States where damages after the conclusion of the contract have to be sought in civil courts, the **civil courts of appeal** are available to tenderers who are not satisfied with the decision following the review process.

The civil courts of appeal are also the second instance in Member States with a single review system, such as **supreme courts** or **courts of appeal.** In Cyprus, Ireland, and Denmark, the supreme courts are the second and last instance. In Austria, Bulgaria, the Czech Republic, Finland, and Portugal, tenderers appeal directly to the **supreme administrative court**, in Austria also to the **Constitutional Court**, whereas in France and Sweden there are second-instance **administrative courts of appeal** before the third-instance supreme administrative courts.

Countries with a specialised public procurement review body as a first instance normally have a court of law as a second (appeal) instance. In contrast to this norm, in the Czech Republic and Poland, the Chairpersons of the Office for the Protection of Competition and of the Public Procurement Office respectively act as a separate “second instance” of review against first-instance decisions of their own appeal boards.

In Romania and Germany, specialised public procurement review bodies are in charge of the first-instance review. However, as second instance, an appeal to a general court is open to tenderers. In Romania the Court of Appeal has a special procurement panel and in Germany the State High Courts have special procurement senates dealing with these appeals.

2.5 Last-Instance Review Bodies

There is common ground between the public procurement review and remedies systems of all of the countries included in this study regarding their **last-instance review bodies**. The highest and last instance of public procurement review, both before and after the conclusion of the contract, is an administrative or ordinary court of law. With some exceptions, such as in Malta and Slovenia, specialised review boards are the last instance for disputes prior to the conclusion of the contract, whereas disputes after the conclusion of the contract are heard by ordinary courts. All of these courts have been established on the basis of the respective Constitutions and Acts of Parliament, and they fulfil the requirement for a court of law set in the *Dorsch* and *Salzmann* judgements of the European Court of Justice. They are founded on the basis of a law or by a law, are permanent, their decisions are legally binding, their procedure is an *inter partes* procedure, and they take decisions on the basis of legal rules. All courts are independent from the executive, administration, or any other part of government, and their decisions are of a jurisdictional nature. Their judges must be experienced and recognised lawyers. They are normally the most senior judges in their court systems. Judges are appointed according to a general procedure. The national laws of Member States require that judges be independent, and they may not be dismissed or only in very special cases and under strictly defined conditions, if at all. The chairpersons or presidents of all courts are appointed by the government, parliament, or a specific appointment committee, or elected by the courts themselves. It should be pointed out, however, that also the various first and second-instance review bodies of Member States described above under the last two headings fulfil the requirements for a court of law.

Differences apply with regard to the **number of instances** open to tenderers. With regard to the review of decisions prior to the conclusion of the contract, one instance is provided for tenderers in Belgium, Malta, and Slovenia, whereas their colleagues in Lithuania, the Netherlands, Slovakia and the United Kingdom can go through three instances. All other Member States have a two-instance review of public procurement decisions prior to the conclusion of the contract. The actual use in practice of the possibilities of appeal up to the last-instance review bodies will be discussed below in the context of review culture.

Table 3. Instances of Review of Procurement Decisions prior to the Award of the Contract

Instance	Special Review Body	Administrative Court	Ordinary Court
1st instance	Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Latvia, Malta, Poland, Romania, Slovakia, Slovenia	Belgium, Estonia, France (public), Luxembourg (public), Sweden	Denmark, France (private utility), Ireland, Lithuania, Luxembourg (utility), Netherlands, United Kingdom
2nd instance		Austria, Bulgaria, Czech Republic, Estonia, Finland, France (public), Latvia, Luxembourg (public), Portugal, Sweden	Cyprus, Denmark, France (private utility), Germany, Hungary, Ireland, Lithuania, Luxembourg (utility), Netherlands, Poland, Romania, Slovakia, United Kingdom
3rd instance		Latvia, Portugal, Sweden	Estonia, France (private utility), Hungary, Lithuania, Netherlands, Slovakia, United Kingdom

2.6 Attestation and Conciliation

In accordance with EC Directive 92/13/EEC, **attestation** and **conciliation** mechanisms are available for the utilities sector in Member States. However, the study reveals that these mechanisms are rarely used in practice. It appears that the abolition of these instruments is under consideration in the framework of the current revision of the remedies directives.

2.7 Ombudsman and Advisory Bodies

In some Member States, for example the Netherlands, the national **ombudsman** can play a role in public procurement disputes. This independent institution with access to all branches of government may be able to resolve disputes between tenderers and contracting authorities, thereby avoiding costly and time-consuming legislation.

In Germany tenderers are allowed to challenge procurement decisions before **Public Procurement Review Boards**. Such boards may be established at the level of both the federal states and the federation and have the power to order the contracting authorities, whether upon petition or ex officio, to cancel an unlawful decision or to take a lawful measure. The boards do not have the power to suspend a tendering procedure. A review procedure before such a board is not a prerequisite to filing an application for review before the Public Procurement Chambers. Similarly, the **Danish Competition Authority** and the **Luxembourg Tender Commission** are advisory bodies, and their decisions are neither binding for contracting authorities nor may they

be challenged in judicial review proceedings. The out-of-court settlement opportunities may allow for a less confrontational, constructive, and even less costly and time-consuming alternative to classical litigation.

2.8 The Main Forums of Review

Considering the **main forum of public procurement review in practice**, there are great differences between Member States regarding the institutional set-up of their review and remedies systems, and any classification into major groups therefore becomes more difficult. The notion of "main forum" describes the review institution or type of review body where the majority of public procurement disputes are settled in practice. This can be the contracting authorities and entities themselves, their superiors in the administration (Portugal), independent public procurement review boards (Denmark, Estonia, Germany, Hungary, Latvia and Poland), the competition authority (Czech Republic), first or second-instance administrative courts (France and Sweden), first or second-instance ordinary courts (Lithuania and the Netherlands), or the high courts (Ireland and the United Kingdom).

3. Available Remedies

The study does not make any distinction on the basis of the nature of contracts (public or concession contracts), which may have an impact on the conclusions drawn in the present section. This is in particular relevant with regard to Member States where the responsibilities for remedies in the concessions area are handled in a different way than for public contracts.

A further important question concerns the remedies that the review bodies and the courts of law can actually award to the aggrieved tenderer if his/her claim is found to be justified. The available remedies that can be awarded by the respective review bodies normally in most jurisdictions include the (i) **setting aside** of any individual public procurement decision, including the award decision, (ii) **interim measures,** (iii) the **annulment of a concluded contract** (in some jurisdictions), and (iv) **damages**. **Periodic penalty payments** in the Utilities are a remedy which is not available in all Member States.

3.1 Setting Aside of Public Procurement Decisions

The setting aside of an individual public procurement decision that has been taken in the course of a procurement procedure prior to the conclusion of the contract is a common remedy available in all Member States. Individual award decisions to be set aside can concern an unlawful contract notice, discriminatory specifications or tender documents, an illegal qualification decision, illegal shortlisting decisions, and even the contract award decision itself. Moreover, review bodies may, for example, order the removal or amendment of specifications and other tender documents or the recommencement of the procurement procedure in total or from a specific point in time. This kind of remedy is available in all Member States. Legal protection is admissible against decisions **prior to the conclusion** of the contract, and in some Member States this legal protection is also admissible after the conclusion of the contract, although it is less effective in practice. Normally this requires a **violation** of public procurement law or of other regulations concerning the decision that the applicant wants to be set aside. There are various conceivable violations, such as discrimination of tenderers, breach of the principles of equality of treatment, lack of transparency, or discriminatory award criteria. The burden of proof is normally on the applicant – but in a few jurisdictions tenderers only claim such a violation and either the contracting authority or entity must prove that no violation actually occurred or the review body must provide some evidence (inquisitorial system of gathering evidence).

In countries with a specialised public procurement review body, it is normally that body which can set aside or suspend individual public procurement decisions, but for example in Denmark the ordinary courts can also do so. In countries without such a specialised review body, this remedy is normally available in the first instance. The setting aside of an individual public procurement decision can make it necessary to recommence all or part of the procedure. In some jurisdictions a contract concluded despite and against the rule of a review body concerning the contract award decision or another decision taken in the course of the procedure renders the contract null and void and may lead to the award of damages. This is the case in Bulgaria, Estonia, Poland and Romania.

The legal basis for this remedy can often be found in the public procurement law or act itself. However, in some Member States it can be found in the Civil Code, the Civil Procedure Code, and case law (the Netherlands), in particular when the Member State does not have a specialised public procurement review body.

3.2 Interim Measures

In most Member States, filing a complaint or lawsuit against a public procurement decision does not automatically suspend the continuation of the procurement procedure. Only a minority of Member State review systems — for example, in Estonia, Germany, Poland, Romania and Slovenia — provide for such an automatic **suspensive effect** of initiating review proceedings. The availability of interim measures is a precondition for the effectiveness of the review and remedies system, since without a suspensive effect the procurement procedure may continue until the conclusion of the contract, without providing for the correction of any unlawful actions or decisions. As outlined above under the previous heading, the conclusion of the contract can only be annulled in very limited and strictly defined cases, if at all. Damages after conclusion of the contract are thus often the only remaining available remedy. It is interesting to note that in Estonia the new 2006 Public Procurement Act abolishes the automatic suspensive effect. Therefore, in most Member States a tenderer who considers that his/her interests would be harmed by the continuation of a procurement procedure needs to specifically apply to the review body for interim measures, ordering for example the discontinuation of the procedure. Then the review body can order interim measures pending a final decision, taking into account the probable consequences of interim measures for all interests likely to be harmed, including the public interest, and deciding against the award of such measures where their negative consequences would outweigh their benefits. In principle all remedies can also be awarded as interim measures. The **requirements** for such a “preliminary ruling” or “injunction” in all jurisdictions are: a well-founded interest of the complainant, and a suspected or likely breach of law. Additional requirements may apply in individual Member States.

The **standstill period** of usually around 10 days between the contract award decision and the conclusion of the contract, outlined above under the previous heading, is connected to the suspensive effect. If there is no automatic suspensive effect or if the suspension of the procurement procedure cannot be quickly and easily ordered by the judges or review panel member, the standstill period and the time limits for rendering a decision have to be synchronised to ensure the effectiveness of the review. For example, if the standstill period is 10 days but the judge has 20 days to decide on a lawsuit brought within the standstill period, it could be too late by the time he/she renders the decision because the contract may be lawfully concluded by then.

In Germany and Slovenia, as outlined above, the filing of a complaint has an automatic suspensive effect. Hence the situation is the **reverse** to that in most other Member States, as in Germany the contracting authority or entity may ask the review body for permission to enter into the contract during review proceedings. The Chamber may grant the permission, after a two-week period has elapsed since the announcement of the decision, if it considers – after

having taken into account all interests likely to be harmed, including the public interest – that the negative consequences of the suspension outweigh its benefits. In Slovenia, the National Review Commission can decide to allow the continuation of the procurement procedure, except for the conclusion of the contract.

3.3 Annulment of a Concluded Contract

The annulment of an already concluded contract or a declaration that the contract is null and void by a third party to the contract is an available remedy in some Member States, which applied at least if the contract is concluded during the standstill period. The possibility to annul a concluded contract is a crucial remedy since in jurisdictions without this possibility damages remain the only available remedy after this event. Partly in view of this fact, many Member States have followed the European Court of Justice in the *Alcatel* judgment and introduced a **standstill period** of around ten days between the contract award decision and the conclusion of the contract (see Table 4 below). This standstill period allows tenderers to initiate review proceedings that seek to set aside the contract award decision. Before the introduction of this period, the award and the conclusion of the contract constituted a single act or at least happened at the same time, thereby making it impossible to challenge the contract award decision and limiting the available remedies for damages. The most important reason for the annulment of a concluded contract is therefore that a contracting authority concluded the contract during the standstill period although this does not appear to be the case in all Member States. In all cases other than conclusion during the standstill period, it is difficult to obtain the annulment of a concluded contract, if it is possible at all. For example, in Cyprus, the Czech Republic and Latvia such an annulment can only be obtained in a court of law, whereas the setting aside of other procurement decisions is available in specialised review bodies. Under French administrative law, only the prefect may apply for the annulment of a concluded contract. Parties to a contract may ask the competent court to declare the contract null and void. Third parties may not do so, but if they obtain the annulment of an act relating to the award of the contract, they may ask the court to order the contracting entity to apply for a declaration of nullity of a contract concluded on the basis of an annulled act. In Lithuania annulment is only possible where clauses of the contract establish illegal conditions. In Austria the annulment is theoretically possible but it has never happened in practice, whereas in Belgium an annulment can take four to five years. In the Netherlands the conclusion of the contract can be **annulled** by the court only if there is a breach of public order (*ordre public*). In Sweden and the United Kingdom annulment is possible only in the case of fraud or illegal circumstances. In Ireland it is possible in theory for the Court to declare a public contract void if it has been awarded in violation of the national laws transposing the Public Procurement Directives. However, in practice, this has never occurred.

Table 4. Standstill Periods between the Award Decision and the Conclusion of the Contract (in days)

Austria	7 or 14	Lithuania	10
Bulgaria	10	Luxemburg	15
Czech Republic	15	Malta	10
Denmark	7-10	Netherlands	15
Estonia	14	Poland	7
Finland	21 or 28	Portugal	10
France	10	Romania	15
Germany	14	Slovakia	14
Hungary	8	Slovenia	20
Ireland	14	Sweden	10
Italy	30		

3.4 Damages

In many cases the tenderer may have suffered a disadvantage as a result of the violation of public procurement rules by the contracting authority or entity, which was only discovered by the tenderer after the contract had been concluded, at a stage where no remedies were available in terms of setting aside or suspending an individual procurement decision or even annulling a contract. In these cases, the loss can only be made good by awarding compensation for damages. Such compensation is available in most Member States.

The **requirements** for the award of compensation for damages, common to most jurisdictions, are as follows: a loss (pecuniary or otherwise) suffered by the claimant, a breach of the law by the contracting authority or entity, causality (cause and effect – meaning the loss must be caused by the breach of law). Additional requirements apply to individual jurisdictions. For example, in Denmark, Finland, France, Germany and Sweden, the claimant has to prove that he/she would have had an actual chance of winning the contract if the procedure had been conducted lawfully. The legal basis for damages can most frequently be found in the general civil law (civil code, civil procedure code, law of obligations, case law) or, in the case of France and Romania, in administrative law. The specific public procurement law or act is the source in Finland and Hungary. The specific public procurement law or act is the source in Denmark, where the Complaints Board for Public Procurement decides the case, whereas the ordinary courts award damages on the basis of the ordinary law of obligations. Otherwise it is normally the civil courts, and in some jurisdictions – such as in France and Romania – also administrative courts which have the power to award damages, not specialised public procurement review bodies. In most Member States it is not necessary that the contested decision be set aside before damages may be claimed.

With regard to the **calculation of damages,** the tender costs (*damnum emergens*) can be reimbursed in all Member States. Differences apply to lost profits (*lucrum cessans*). At least in Denmark, Finland, Germany, Hungary, Latvia, Lithuania, the Netherlands, Portugal, Sweden and the United Kingdom, lost profits can be awarded, and in France if the claimant had a *serious* chance of winning the contract (more than just a chance). As mentioned above, usually the tenderer has to prove that he/she would have had a real chance of winning the contract that was affected by the unlawful decision. If complainants do not satisfy this condition, they are merely entitled to the reimbursement of tender costs. In Latvia damages very rarely go beyond tender costs, and in most Member States it is very difficult to provide the evidence required for damages for lost profits. Consequently, the number of requests for damages is relatively low in most countries, as are judgments in favour of the complainants.

3.5 Pecuniary Penalties and Periodic Penalty Payments

According to 92/13/EEC, article 2 para. 1c), in order to force contracting authorities and entities to comply with their judgements, courts of law and other review bodies may impose periodic penalty payments prohibiting the contracting authority or entity to continue with the award procedure until it has rectified the infringement. This possibility is provided for at least in Cyprus, Denmark and Luxembourg; in France it is provided in relation to utilities. Moreover, in the Czech Republic, Hungary, the Netherlands, Poland and Slovenia, various penalty payments and fees can be imposed on contracting authorities and units. These payments are not an available remedy for aggrieved tenderers but form part of the public procurement review systems of these Member States.

4. Legal Frameworks governing the Review Systems of Member States

The legislative framework of the review and remedies system is another point of reference of this study. The notion "legislative framework" describes a wide concept covering the legal foundation for the establishment of review bodies, coverage of the system, and procedural law. Procedural law regulates, *inter alia,* questions such as who is allowed to take proceedings (legal standing), how quickly he/she has to initiate them (time limits), the effects of taking proceedings on the procurement procedure (suspensive effect and standstill period), and how costly these proceedings are. Compliance with the general and specific requirements of the Remedies Directives 89/665/EEC 92/13/EEC and with Community law in general will be an important issue in this context since it should provide the common ground for all national systems. This includes the question of whether and to what extent the review and remedies system extends to contracts falling outside the scope of the public procurement directives and whether the same system applies to public authorities and utilities.

4.1 Scope of the Review and Remedies System

As long as reference is made only to the provisions of the Remedies Directives, the national public procurement law in general and the review and remedies system in particular might apply to all contracts awarded by both **contracting authorities** and **public and private utilities**. Alternatively it might only apply above the thresholds of the EC public procurement directives or only to contracts awarded by public authorities, with a separate system for those awarded by utilities and by bodies governed by public law with a status of private company. Finally, the review and remedies systems of some Member States have been extended to also apply to contracts outside the field of application of the EC Public Procurement Directives, for example to service concessions.

4.1.1 Contract Coverage — above and below the Thresholds of the EC Public Procurement Directives

There are essentially three different answers to the question of whether the public procurement review and remedies system applies equally to contracts below and above the thresholds of the EC Public Procurement Directives. First, in the largest group of Member States, the review and remedies system **applies equally** to contracts above and below the thresholds. This group consists at least of Cyprus, Estonia, France, Hungary, Lithuania, the Netherlands, Portugal, Romania, Slovenia and Sweden. Second, in a small group of Member States, the review and remedies system **applies only to contracts above the thresholds**. This group consists at least of Germany, Ireland and the United Kingdom. Third, in a small number of Member States there are **substantial differences** of the review and remedies system with regard to contracts below the thresholds. For example, in the Czech Republic additional requirements have to be fulfilled with regard to certain remedies, in Denmark in some situations there is a different legal foundation for remedies, and in Finland there is an entirely different path for judicial review.

4.1.2 Differences in Organisational Coverage – Contracting Authorities vs. Utilities

Differences in the review and remedies systems of Member States may arise depending on whether a contract is awarded by a public authority or by a utility. Moreover, there may be different rules applicable to publicly and privately owned utilities. However, in many Member States, such as Bulgaria, Estonia, Lithuania and the Netherlands, the review and **remedies system applies equally** to all contracting authorities and entities. In France there are different legal bases and **different review bodies** depending on whether the contract was awarded by a public entity or by a private body under French law; in Luxembourg these depend on whether the

contracting entity is a public or a private utility. In Latvia the review and remedies carried out by the Procurement Monitoring Bureau is not available for contracts below the thresholds awarded by utilities. Similarly in Poland there is no review at all for contracts below the thresholds awarded by utilities.

4.2 Procedural Law

Procedural law regulates the proceedings in courts of law and other review bodies. It covers issues such as legal standing – i.e. the right to initiate review proceedings, time limits – i.e. deadlines for the initiation of proceedings, fees and costs, the publication of judgments, and appeals. Ultimately procedural law determines crucial issues, such as access to review proceedings (legal standing) and their speed (time limits). The locus for the regulation of the procedural law of the review body depends on its institutional character. Broadly speaking, the procedural law for ordinary or civil courts is regulated in (i) the national **civil court procedures codes**, while the procedural law for administrative courts is regulated in (ii) the national **administrative court procedure codes**, and the procedural law of specialised public procurement review bodies is regulated in (iii) the **public procurement law or a specific procedural code**. In many Member States it is often a combination of the various legal sources, such as:

- In Bulgaria, the Czech Republic, Estonia, Latvia, Portugal and Romania, the relevant procedural law is regulated in the public procurement law or regulation combined with the regular administrative procedure code governing the proceedings in administrative courts.
- In Germany, Lithuania, the Netherlands, Poland and the United Kingdom, the public procurement law or regulation and the civil procedural law regulate the relevant procedural law.
- In France, Hungary, Luxembourg and Sweden, it is both the administrative and civil procedural codes which govern proceedings.
- Finally, Slovenia has a special public procurement review procedure code, which governs review procedures in all instances of the process.

4.2.1 Legal Standing

Normally not just anyone is allowed to disrupt public procurement procedures by challenging them in review proceedings. Rules on *locus standi* or legal standing regulate **who may take proceedings**. These rules can be complex and differ depending on the type of remedy sought, on the review body, and on the point in the procurement procedure in which the proceedings are initiated, most notably before or after the conclusion of the contract. Reference can be made to article 1(3) of the Remedies Directives, which sets out the admissible requirements regarding *locus standi*.

In most Member States tenderers wishing to challenge tender procedures by initiating review proceedings have to show a **special interest** in the context of the contract in question. Otherwise they will not be allowed to initiate proceedings. It is normally the tenderers who may prove such an interest in the procedure, but in some cases economic operators who are not tenderers may have *locus standi* (e.g. see the Grossmann case C-230/02). Hence it appears that, for example, in Estonia only tenderers for the contract in question can bring proceedings. Being a tenderer will normally require having submitted a tender for the contract to be challenged. In Bulgaria, Cyprus, Germany, Hungary, Ireland, Latvia and Poland, applicants for judicial review have to show an interest in the tender procedure, whereas in the Netherlands it must be a “well-founded interest”

and in Romania a “legitimate interest”. Any supplier or provider that has an interest in being awarded the contract, even if he/she had not submitted a tender, may initiate a case in Sweden. In Germany, where an applicant has not actually submitted a tender, it must be shown that he/she had been prevented from tendering as a consequence of the conduct of the contracting authority. In Luxembourg any person who has met the requirements of participating in a tender procedure and considers to have been harmed by an infringement may initiate proceedings. Finally, in Slovenia the applicant needs to show a genuine interest in the award of the contract and to give evidence of the real probability that he/she may have suffered a loss.

In **France** legal standing depends on the type of proceedings. In pre-contractual summary proceedings, only actual candidates and tenderers, or those who would have been illegally prevented to tender, for example through a lack of publicity, have *locus standi*. However, in ordinary applications for annulment, other parties may have standing, such as members of the local council or even local taxpayers.

Moreover, in a number of Member States **third parties** other than actual or likely tenderers or contracting entities have legal standing in review proceedings. For example, the Slovak Office for Public Procurement can initiate proceedings at its discretion and does so frequently. Complaints to the Danish Complaints Board for Public Procurement may be submitted in writing by any person having a legal interest therein and by the Danish Competition Authority, the Minister of Housing and Urban Affairs, and (professional) organisations and public authorities which have been granted access to proceedings before the Board by the Minister of Economic and Business Affairs. Access of these organisations and public authorities to these proceedings was introduced to allow the review of procurement decisions in the event that no individual tenderer wished to lodge a complaint. Proceedings at the Market Court in Finland may be initiated by the party concerned, the Ministry of Trade and Industry and the Ministry of Finance in matters relating to contracted work or in a number of other matters, and the public authority that has granted contract-specific state aid for the implementation of the works contract in question. The main advantage of giving standing to many of these actors is that it resolves the problem faced by many tenderers, who are afraid that a complaint or lawsuit could compromise their chances for a subsequent contract.

4.2.2 Time Limits

In some Member States, public procurement review proceedings may not be brought at any given point in time. In other Member States there are no time limits or they are interpreted in such a flexible manner that any decision taken during the award procedure may be challenged after the award decision has been notified. Applicants for review normally have to initiate proceedings within certain time limits, counting from the moment in time when they learned about the alleged infringements of procurement law. With regard to **remedies other than compensation for damages,** these time limits serve to achieve a balance between the private interests of tenderers on the one hand and the public interest in **legal certainty** needed to commence the execution of the contract on the other hand. Complaints directly to the contracting authority or entity have to be brought within very short time limits, within 10 days for example. In many Member States, there is a general time limit of 10-15 days for filing a complaint with the relevant review body. In compliance with the general rules of civil law and due to the fact that this type of remedy normally does not affect the validity and execution of the contract, time limits for seeking compensation for **damages** are often very generous, for example one year in Sweden, five years in the Netherlands, and 30 years in Luxembourg.

A related issue are the time limits within which the courts of law and review bodies have to render a judgement or decision. In many Member States the time limits for **contracting authorities** and entities to deal with a complaint against one of their procurement decisions are very tight. For

example, in Slovenia it is 15 days, in Poland 10 days, in Lithuania five days, and in Latvia only two working days.

Specialised public procurement review bodies normally have to take decisions rather quickly: for example, the Estonian PPO within 10 days, their Bulgarian colleagues within 14 days, and the Cypriot Tender Reviews Authority within 30 days. The Hungarian Public Procurement Council decides within 15 days when there is no hearing and within 30 days if a hearing is necessary. In Poland the review panels of the Public Procurement Office have 15 days and the Chairman of the PPO a month to reach a decision; the complexity of the case may allow an extension of these time limits. The Czech Office for the Protection of Competition decides within 30 days and in complex cases within 60 days, the Romanian National Council for Solving Legal Disputes decides within 10 days and in complex cases within 20 days, and the German procurement chambers normally decide on all cases within five weeks.

Courts of law normally require considerably more time to issue a judgement. For example, the Cypriot Supreme Court takes 75 days, the Polish regional courts 2-3 months, all three instances of the Latvian administrative court system two years, the Finish Market Court on average 6.2 months but in complex cases about one year. The Swedish civil and administrative courts are particularly quick, since they take about three to four weeks to decide. Similarly, the Irish High Court normally decides within a few weeks.

It is noteworthy that in some countries, such as Finland, Sweden and the United Kingdom, there are no mandatory time limits for the relevant bodies to make decisions, whether the decision refers to the process before the award of contracts or after the conclusion of contracts (request for damages).

4.2.3 Effect of Filing a Complaint or Lawsuit

The public procurement review systems included in this study can be divided into two broad groups depending on whether the initiation of proceedings in a public procurement review body has an automatic suspensive effect or not. In Estonia, Germany, Poland, Romania and Slovenia, the initiation of proceedings has an automatic suspensive effect on the contract. In other Member States the tenderer needs to apply a preliminary ruling, as discussed above in section 3.2.

4.2.4 Standstill Period

As outlined above, many Member States have introduced a standstill period between the contract award decision and the actual conclusion of the contract, after which the tenderer has often only access to compensation for damages. During this period of between 8 and 28 days in Member States, tenderers have the opportunity to challenge the contract award decision through review proceedings. Whether this standstill period is effective depends on whether the initiation of proceedings has a suspensive effect (see above, section 4.2.3.) and whether the conclusion of a contract during the standstill period renders the contract void, and on the time limits within which judges need to render their judgement. If, for example, the standstill period is 10 days, there is no suspensive effect of initiating proceedings, a contract is not rendered void by being concluded during the standstill period, and judgements are normally rendered within 20 days (see above, section 4.2.2.), then the standstill period is not effective.

4.2.5 Communication of Judgments

Tenderers filing a complaint or lawsuit but also contracting authorities and entities need to be informed of the outcome of review proceedings. The most frequent way to inform the parties of a complaint or lawsuit against a public procurement decision in a specialised review body or court

of law in Member States is by regular **mail**. Moreover, many review bodies publish their decisions and judgements on their own **websites**. Furthermore, it is common to publish the most important decisions, most notably the decisions of the higher instance courts, in yearbooks, journals, official **bulletins** and the legal press. This practice can apply to all relevant judgements or only to a selection of the most important landmark decisions. With regard to the lower courts in Lithuania, the parties must ask for a copy of the decision, which is subject to a special fee. However, generally parties to public procurement review proceedings learn about judgements and decisions by mail and through websites, and the most important decisions of a more general interest are often published in official bulletins or in the legal press.

4.2.6 Costs, Fees and Deposits

In many Member States tenderers initiating review proceedings have to pay court fees, deposits, and fees of experts and legal representation. The rules on these financial implications of review vary considerably in Member States. Moreover, they may vary depending on the review body, the remedy in question, the value of the contract, whether the contract value is above or below the thresholds of the EC public procurement directives, and whether the proceedings concern a supply, services, or works contract. The only common feature is that in most Member States the complaint to the contracting authority or entity itself is free of charge. In a number of Member States, there are **no court fees** in the relevant review bodies and courts. Tenderers only run the risk of having to pay for additional costs, such as fees for legal representation or experts. In some Member States, there are "**flat fees"** for all proceedings, irrespective of the type or value of the contract, namely in Denmark (€500 for the Claims Board), Finland (€204) and Lithuania (€30). In Slovenia there is a flat fee of about €420 for supplies and services contracts and a flat fee of about €840 for works contracts below the thresholds of the EC Public Procurement Directives. These amounts are doubled with respect to contracts above the thresholds. There are also different fees in Hungary for contracts below and above the thresholds of the Directives. However, in other Member States there is a deposit of a certain **percentage of the contract value** to be paid as a fee, for example 3% in Estonia, 5% in the State High Courts of Germany, 1% in the Czech Republic, or 1% for an injunction in Bulgaria. Finally, in many Member States the fee can more generally depend on the contract value, for example in Cyprus or the United Kingdom. The Polish Public Procurement Office has a registration fee that depends on the value of the contract, whether it is above or below the thresholds of the EC Public Procurement Directives, and whether it is a services, supplies or works contract.. With regard to fees and other costs (legal representation, travel, experts, etc.), many Member States have a rule whereby the losing party has to bear all or part of the costs of the winning party.

4.2.7 Model Forms

Review bodies need to have some minimal information, such as the name and address of the applicant, the object of the dispute, the subject matter of the tendering procedure, the factual and legal grounds and proofs. Therefore, the public procurement laws of many Member States stipulate that minimum mandatory information is to be provided in complaints and lawsuits. Moreover, there are arguments for mandatory or optional model forms for lawsuits and complaints. There is only limited information available on a mandatory or optional model form used in public procurement review proceedings. However, mandatory model forms are not required in a large number of Member States. In the Netherlands and the United Kingdom, there is no specific form for public procurement proceedings, but the general forms for all kinds of litigation are also used for public procurement cases. In the Netherlands a model form for informing the contracting authority that a lawsuit has been filed against it is also in use, although

again this is a general form rather than a document specifically designed for public procurement. In Cyprus specific model forms for public procurement proceedings are in use.

4.2.8 The Issue of Confidentiality — an Overview

While there is a need for **openness** and **transparency** with regard to review proceedings in courts of law and other public procurement review bodies, this needs to be balanced with requirements of confidentiality in relation to personal, state, and business secrets. Therefore many Member States accommodate the need for confidentiality in their review and remedies systems. Normally a general principle of open and transparent review proceedings will be subject to clearly prescribed and strictly limited exceptions. Within the field of application of these exceptions, the procedural law may allow *in camera* proceedings (sessions excluding the public), the restriction of access to documents, or placing participants of proceedings under an obligation of confidentiality. Issues of confidentiality may have wider implications. For example, in a review system that does not accommodate confidentiality, a tenderer might decide not to initiate proceedings if he/she would have to reveal business secrets.

The **Austrian** Federal Procurement Office can take any adequate measure to protect the confidentiality interests of the parties involved in a procurement procedure, including restricting or excluding access to the relevant files and documents, as well as discussing a case in closed session. In **Belgium** there are no specific procedural possibilities to take into account the need to protect confidential business information, but by an auditor's advice to the Conseil d'Etat nevertheless acknowledged that the need to protect confidential business information could be taken into consideration. In such cases pieces of evidence can be submitted only to the Conseil d'Etat and not to competitors. The staff and external experts of the **Czech** Office for the Protection of Competition are obliged to keep confidential all issues arising during proceedings. This obligation does not apply should these persons be invited to give testimony before a court of law or state investigation authorities or to supply evidence in writing to these authorities by virtue of the Penal Code. Should the Office become aware of a fact falling within the scope of trade secrecy, it is to adopt any appropriate measure that will avoid a violation. The tenderer's right to inspect contract documentation is subject to the Office's obtaining the agreement of all involved tenderers. There are also possibilities for *in camera* proceedings in **Slovenia**, but not in **Estonia** and **Poland**. In **France** they are possible in exceptional circumstances, if they are necessary to preserve law and order, the intimacy of private life or the secrets protected by law (this could apply in the context of military contracts). However, *in camera* proceedings are a very recent possibility in administrative courts and would not be easily applied in practice. In **Finland** the court may decide that the hearing is to be held, when necessary, without the presence of the public whenever a confidential document is presented or when information covered by the duty of non-disclosure is disclosed during the hearing. The **German** Procurement Chambers must deny access to the files of the case in order to protect secrets or to preserve trade or business secrecy. As a matter of principle, hearings of the **Hungarian** Public Procurement Council are held in an open session, but the Council may decide to conduct *in camera* proceedings should this be necessary for reasons of state or of professional or business secrecy. Subject to a few exceptions, basically due to business secrets, access to the procurement file is fully guaranteed to all parties involved in the proceedings.

According to the **Lithuanian** Law on Public Procurement, all information is considered as confidential which is identified as such by the tenderer or contracting authority and cannot be revealed to any third party without their consent, subject to exceptions, in particular regarding criminal activities. Proceedings "behind closed doors" are possible if necessary to protect confidential business in the **Netherlands**. The court can also prohibit the parties from giving any information about the proceedings to the public during and after such proceedings. In **Slovakia**

supervision is a procedure that is not open to the public, and civil servants are obliged to keep private any information they obtain during the procedure. However, the final decision is accessible to the public, although identification data are deleted. Similar principles apply to protest proceedings as well. In **Slovenia** procedural possibilities also take into account the need to protect confidential business information, for example through *in camera* proceedings. However, the transparency principle is paramount, and the procedural possibilities are subject to legislation on public access to information. In the **United Kingdom** an applicant may seek to obtain **access** to the procurement file under the normal disclosure procedure applicable to court actions in England and Wales. However, a request may be made to the court for confidential information not to be disclosed outside of the court proceedings. The decision is made by the judge. Alternatively, the applicant may apply for information under the Freedom of Information Act 2000. The contracting authority, however, may refuse access under the Act in the event that information in the procurement file had been received with specific instructions to preserve the confidential nature of that information, such that disclosure of the relevant information would constitute a breach of confidence actionable by the relevant bidder or that the disclosure of the procurement file would be prejudicial to another person's commercial interest.

4.2.9 Involvement of Experts in the Review Proceedings

In all Member States judges, including those on public procurement review bodies, are normally lawyers. Nevertheless, for at least some of the cases there is a need for special expertise beyond the legal education and experience needed for public procurement review proceedings. This expertise includes finance, engineering, business administration and technology. One way of accommodating this need is to include these experts as (lay) judges in court chambers or senates or on review panels. Another possibility is to hear independent experts during the review proceedings as evidence. However, for the inclusion of experts consideration has to be given to the additional time and costs involved.

In **Germany**, for example, technical and other experts are involved in review proceedings as members of the Public Procurement Chambers. In particular, one of the three members of the Chamber is always an honorary associate member with several years of ascertained experience in the field of public procurement. As required by the **Austrian** Public Procurement Law, the laypersons in the review senate of the Federal Procurement Office are experts in the field of procurement and are appointed by tenderers and contracting entities.

Experts may be heard, *inter alia,* in **Austrian**, **Estonian**, **French** and **Hungarian** review bodies. In **Belgian** courts it is always the judge who may appoint experts. The costs are advanced by the interested party but are ultimately paid by the losing party. This is also the principle for expert costs in proceedings before the **Bulgarian** Commission for the Protection of Competition, the **Netherlands** courts, the **Romanian** review bodies, and the courts in the **United Kingdom**. In proceedings before the **Czech** Office for the Protection of Competition, the involvement of experts (such as lawyers or interpreters) may be decided by the Procurement Section in co-operation with the Economic Section, should it prove to be necessary. Expert costs are paid through a special budget of the Office. This is also the case in proceedings before the **Danish** Complaints Board for Public Procurement, the Appeals Board of the **Maltese** Department of Contracts, and the **Slovak** Office for Public Procurement.

5. The Public Procurement Review Environment and Culture

The notion of “public procurement remedies and review environment and culture” of the Member State includes various issues relating to the operation of the system in practice.

First, this notion relates to the **personnel** involved in conducting the review proceedings. Aspects include the general level of knowledge of judges and lay judges regarding public procurement law in particular and Community law in general, their knowledge of the public procurement process, and the technical and financial considerations involved. Moreover, the attitudes towards the public interest on the one hand and the private interests of tenderers on the other, and how the two are balanced, are important points influencing the outcome of review proceedings.

Second, it relates to the **tenderers** seeking review of public procurement decisions. Relevant aspects include the knowledge of the legal, financial, and administrative background of the public procurement process. Furthermore, the general attitude towards review proceedings is important here. This can range from a "don't bite the hand that feeds" approach to a "let's sue to be on the safe side" attitude. This general attitude will have an impact on the number of successful claims.

Third, the remedies and review culture relates to the **contracting authorities and entities** facing review proceedings. Aspects here include their knowledge of the legal background of public procurement and their attitude towards tenderers filing complaints or seeking judicial review of public procurement decisions.

Fourth, this notion relates to the **lawyers,** advocates, solicitors and barristers advising and representing both tenderers and contracting authorities and entities in review proceedings. Aspects include in particular their knowledge of EC law and public procurement law.

Fifth, it relates to **policy-makers** in governments and legislatures. Aspects here include government policies raising the awareness of the review and remedies system or these proceedings being a topic in parliamentary debates.

Sixth, this notion relates to the monitoring and lobbying of other players by **civil society**. The question here is whether there are any associations or organisations that take a specific interest in the remedies and review system. This interest could have an immediate effect on the effectiveness of the system. For example, an association might pay for the fees and other costs of proceedings or take proceedings in order to create precedents. Possible players here are NGOs, such as chambers of commerce, associations of construction industries, or anti-corruption movements.

5.1. Training

The crucial issue with respect to the knowledge of judges and review panel members deciding public procurement review cases, tenderers seeking review proceedings, contracting officers in contracting authorities and entities, and lawyers advising and representing them in review proceedings is whether training is available in Member States – on EC requirements, legal background to the national review and remedies system, and economic, financial, and technical backgrounds to public procurement. Moreover, the question as to whether these sources of training and information are used in practice is important. Relevant sources of training and information are the economic, law, and other faculties of universities and colleges; training provided by public procurement offices, individual ministries, and national administrative academies; training courses provided by the private sector, the EU and other international organisations; and information obtained from seminars and conferences, national procurement associations or other trade associations, academic and practitioner journals, and websites.

A very wide range of training opportunities for judges, lawyers, tenderers, and contracting officers is offered in all Member States, although with significant differences in terms of the extent and manner in which the training is organised and provided from country to country. In some Member States legal studies at university level comprise public procurement law as part of education in administrative law and EC law; there are books, websites and specialised journals on public

procurement, national associations on public procurement, and research in the field. In France, Germany, and the United Kingdom postgraduate programmes are offered in public procurement law, and economics and policy and research institutes are specifically dedicated to public procurement. Part of procurement training is offered by private institutions, in co-operation with universities and government institutions, and conference and seminars are organised by national or regional public procurement associations.

In some Member States there are no university or college courses or private training centres for public procurement, and there is no journal or national association. However, some seminars and conferences are held on procurement issues. It is interesting to note that Luxembourg lawyers and contracting authorities take advantage of training opportunities in Belgium, France and Germany.

In other Member States, the central public procurement office plays a considerable role in the provision of public procurement training.

However, all Member States reported that most judges, tenderers, and contracting officers— who represent the main source of competence in the field — acquire the necessary knowledge in public procurement through experience “on the job”, i.e. through “learning by doing”.

5.2 Attitudes and Credibility in relation to Review Proceedings

Another issue to be addressed in the context of the review and remedies cultures in Member States is the attitude of tenderers, contracting officers and judges towards review proceedings.

In many jurisdictions the tenderers see review proceedings only as a **matter of last resort**. This was reported from Austria, the Czech Republic, Denmark, Finland, Germany, Luxembourg and Romania. It applies to at least some tenderers in Hungary, Portugal and Slovakia.

However, for some tenderers **other considerations** influence their decision to initiate review proceedings or to refrain from doing so. For example, some tenderers do not wish to initiate review proceedings at all because they do not want to compromise their chances for the next contract.

Moreover, it was reported by quite a large number of Member States that frequently the tenderer’s only purpose in filing a complaint was to **obstruct** procurement through review proceedings. In Slovakia some tenderers “do not hesitate to undertake any available legal steps to succeed in contract award procedure, even at the price of possible consequent deterioration of the business relations with the contracting authority involved.”

Furthermore, some tenderers seek **financial gains** through review proceedings, trying to make a profit from a contract that was not awarded to them. This was reported as happening with a small number of tenderers in Germany, Portugal and Slovakia.

The exact cost levels are not available to the Study, nevertheless, some tenderers were reported as being **deterred** from seeking judicial review by the high court fees and by the high costs in general (including legal representation) or, in some cases, by the long duration of the proceedings.

The **attitude of judges and panel members** of review bodies towards the private interests of tenderers, seeking review on the one hand and public interest on the other hand, is widely described as fair and balanced.

The **attitude of contracting authorities** varies considerably in Member States. In Austria there is a certain reservation towards review proceedings since they delay the execution of the contract, but there is also a general acceptance since they are considered to create legal

certainty. In Belgium it is assumed that contracting officers are inclined against proceedings, and in Poland they are "not encouraged". In other Member States a more positive picture is reported: their attitude is judged as "fair" in the Czech Republic, "normally fair" in Sweden, "neutral" in Estonia and Latvia, "balanced" in Germany, and "mainly positive" in France. Irish contracting officers and their superiors dealing with complaints towards tenderers filing complaints or seeking judicial review of public procurement decisions were described as generally very confident of their procedures and willing to defend them. There is "a general sense of respect and awareness of the legal rights regarding complaints and fairness of procedures towards the tenderers" in Portugal. In Slovenia contracting officers and their superiors were described as being aware of the ever-present possibility of the contractor's judicial protection. Generally, they do not bear a grudge against a complainant but are nevertheless averse to the review of public procurement decisions. As an example, the United Kingdom reports that contracting officers have a duty to act in accordance with public procurement rules and to act fairly and reasonably, respecting ordinary public law principles. Any complaint is to be treated in accordance with these rules and principles.

5.3 The Operation of Review and Remedies Systems in Practice

A crucial issue in the context of the review and remedies culture of Member States is how the system operates in practice. This includes questions such as how frequently the review and remedies system is "used" by tenderers, whether first instance decisions are appealed in a second or even third instance, whether tenderers are successful and satisfied with the outcome of proceedings overall, and which remedies are actually awarded in practice. Many of these aspects are difficult to measure. However, the number of complaints, lawsuits, and appeals can be interpreted as an indication of trust in the review and remedies system. A very low number of cases considered by the respective review bodies might be an indication of a lack of trust or credibility, costs being too high, judges seen to be biased towards the public interest, or other defects in the review system, such as strict time limits and/or deadlines imposed to introduce claims, self-restriction of tenderers for business reasons, or the lack of a challenging culture. On the other hand, it might also indicate that most procurement contracts are carried out lawfully and that review proceedings are therefore simply not necessary. A very high number of proceedings might indicate many unlawful procurement contracts, but could simply be the reflection of a very litigious society or of business interests [resulting from high investments (financed by EU funds) that are launched in new Member States after the date of accession]. About half of the 24 Member States that returned the questionnaire also provided figures on the operation of the system in practice, namely Austria, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Latvia, Poland, Romania, Slovakia and Sweden. These figures vary with regard to detail and focus but provide a limited overview of a representative number of Member States. For further information on the figures of the system in practice in Member States, reference can be made to the Impact Assessment Report for the year 2002 prepared by the Commission. This report (SEC(2006) 557) is available on the Internet: http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm.

As the main review body on the federal level, the **Austrian** Federal Procurement Office (BVA) considers about 200 applications per year (a total of approximately 1,100 between 1 September 2002 and 31 December 2005). Of its 723 decisions during this period, 52 were appealed to the Federal Constitutional Court and 30 to the Supreme Administrative Court. Only nine of the latter were not fully confirmed.

The **Czech** Office for the Protection of Competition recorded 334 proceedings in 2005, 184 upon the petition of tenderers and 152 at the initiative of the Office. There were 228 decisions, with 104 proceedings terminated and 64 ending in penalties for the contracting entities in question.

A total of 281 protests were submitted to the **Estonian** Public Procurement Office (PPO) in 2005, out of a total of 7,569 award procedures. Of these, 65 were not decided, 67 satisfied the procedural requirements, 52 did not satisfy the procedural requirements, 66 were admitted by the contracting authority, 28 were withdrawn, and in only four cases did the PPO decide to set aside the award procedure. The frequency of review of public procurement decisions through the Office as the main review body is 4%.

In 2005 about 500 complaints were made against the procurement decisions of the **Finnish** contracting entities and the Market Court ruled on 206 cases. Of these cases, 26% were approved, 33% rejected, 8% dismissed, and 33% dropped or expired.

The number of procurement cases (including contract performance-related disputes) before **French** administrative courts has been growing since 2001: in the first instance, 4,365 cases in 2001, 4,627 in 2002, 4,743 in 2003 and 5,048 in 2004; in the second instance, 499 cases in 2001, 683 in 2002, 724 in 2003 and 755 in 2004; before the Council of State as the last instance administrative court, 165 cases in 2001, 128 in 2002, 180 in 2003 and 133 in 2004. However, it should be underlined that the great majority of these cases relates to contract performance, which are matters governed by French law and not related to award procedures.

Regarding decisions prior to the conclusion of the contract, the number of decisions issued, totally or partially, in favour of the applicant is significantly higher than that of decisions rejecting applications. In 2004, 2,538 favourable decisions were issued by first-instance administrative courts whereas 1,515 applications were rejected. Appeals before the administrative courts of appeal and the Council of State normally have a negative outcome. The reason for the confirmation by administrative courts of the higher instance of decisions rendered in the lower instance is the special attention paid by administrative judges towards tendering and contractual obligations of contracting authorities. The number of applications in pre-contractual summary proceedings before first-instance administrative courts has also been growing since 2000: 149 applications in 2000, 173 in 2001, 265 in 2002, 290 in 2003, 474 in 2004. This increase shows that irregular awards can be corrected rapidly and easily and that the application of the Alcatel judgement regarding the standstill period allowed more effective remedies. In 2004, 139 decisions of administrative courts partially or totally granted the remedies sought and 174 decisions rejected the applications. Moreover, the figure of 139 also includes partially favourable decisions condemning the contracting entity to pay only very limited sums.

In 2004, there have been 1,493 applications lodged before the **German** Public Procurement Chambers and 314 immediate complaints before the State High Courts. Decisions of the **Hungarian** Public Procurement Council are for the most part not challenged in the courts. It appears that in **Ireland** most complaints are dropped before they can be decided, and contracting authorities are normally prepared to defend their procedures.

There have been more than 200 complaints per year to the **Latvian** Procurement Monitoring Bureau over the last few years, of which 70% proved to be unfounded. In 30% of the complaints the Bureau prohibits the conclusion of the contract if it has determined that the violations are significant and may influence the decision regarding the granting of procurement rights. Reasons for the outcome of complaints include most notably a biased attitude of contracting authorities to tenderers and restrictive technical specifications. About 10 to 18 decisions of the Bureau are appealed in the courts every year. While the majority of cases are yet undecided, the outcome almost always corresponds to the previous decision of the Bureau.

About 60 to 70 cases were decided by the **Luxembourg** review bodies between 1997 and 2005. In 2005, a total of 4,094 appeals were lodged to the **Polish** Public Procurement Office (PPO), of which 308 have been withdrawn, 1,714 upheld, 1,226 dismissed, 440 rejected and 406 not examined due to omission to pay the registration fee. In 2005, 506 petitions were lodged with the

Polish regional courts. Only 12.5% of the judgements resulted in the annulment of decisions made by the PPO.

The administrative courts are the main forum for public procurement review in **Sweden**. Overall 1,280 cases were initiated in 2005 – the vast majority in the administrative courts. Only very few cases were brought by tenderers from other Member States, but most international companies have a Swedish subsidiary. Less than 1% of all public procurement contracts resulted in complaints. About 30% of the judgements order the contracting authority or entity to correct (13%) or recommence (17%) the procedure. Many cases do not result in a judgement because the authority or entity terminated or corrected the procedure or already concluded the contract. Most review cases concern the evaluation process.

In 2005 there were 1,089 protests to the **Slovak** Office of Public Procurement (OPP), including 83 from abroad and 108 protests concerning contracts above the EC thresholds (up 50% in comparison to 2004). The Office issued 500 *in merito* decisions on protests prior to the conclusion of the contract and nine decisions after the conclusion of the contract (pursuant to the 2006 Public Procurement Act, a protest after contract conclusion is no longer admissible). Of these decisions, 44% were in favour of the applicants and 56% were rejected as unsubstantiated. For 578 filed protests the proceedings were discontinued. A total of 18 decisions of the OPP on protests were challenged in the courts. The supervision focused mainly on the unlawful use of the negotiated procedure without prior notification. Of a total of 856 contract award procedures, 489 various violations of the law were recorded. In 2005 fines were imposed against 21 contracting authorities and one contracting entity. In 2005 the hearings in most court cases had commenced in 2004. Thirty judgements of the first instance court were delivered to the Office, and in 25 cases the action (accusation) was rejected or the court proceedings were terminated. In three cases out of the five that were not decided in its favour, the Office appealed to the court of second instance. In the cases decided by the court of the first instance in favour of the Office, 11 appeals with the court of the second instance were initiated, 10 of which were decided in favour of the Office.

While not all Member States sent data on the operation of their national review and remedies systems, the data sent by some of the Member States is incomplete, and procurement markets, legal traditions, and sizes of Member States differ enormously, a number of general points can nevertheless be made about the operation of public procurement review and remedies systems in practice.

Only in a limited number of cases do tenderers and at times other actors **appeal** the decision of the first-instance review bodies in second and third instances. .

5.4 Civil Society

The involvement of civil society in the form of lobbying groups or NGOs in the public procurement review and remedies systems appears to be rather limited in most Member States. Many Member States reported not to have a specific public procurement association. Public procurement associations do exist at least in France, Germany, Hungary, Ireland and the Netherlands. Moreover, in many Member States the Chambers of Commerce cover public procurement.

The respective national sections of Transparency International were mentioned by Bulgaria, the Czech Republic, Lithuania, Slovakia and the United Kingdom. Other relevant organisations include industry federations, specialised associations of the construction industry,, architects,, small business organisations,, specific sector associations, environmental groups, and associations of local authorities. While the main focus of these associations is to influence public procurement legislation, they often provide training and organise conferences. They also advise

their constituents on public procurement in general and to varying degrees give advice on initiating proceedings.

The press and television cover public procurement review proceedings regularly in Bulgaria, the Czech Republic and Slovenia and occasionally in France and the United Kingdom. There is growing media interest in Denmark but no special media attention in Finland.

6. Conclusions

Most countries included in this study appear to have an **operational public procurement review and remedies system** comprised of specialised review bodies, ordinary courts, civil or administrative courts, or a combination of both. The majority of Member States provides possibilities of appeal in second and often third instances. Normally not only the last-instance review bodies but all instances of review institutions fulfil the requirements of a court of law as established by the European Court of Justice. There are single systems with one path of review and dual systems with review available in two separate kinds of court; normally damages have to be claimed in a different forum to that for all other remedies. Aggrieved tenderers have the possibility or obligation to complain to the contracting entity directly, prior to or simultaneously with seeking judicial or quasi-judicial review.

The **scope** of the public procurement review and remedies systems of Member States included in this study always covers contracts above the thresholds of the EC public procurement directives. In many countries the system applies equally to contracts below the thresholds. However, some Member States have a different and often more basic or limited review path for these procurement contracts. Many countries do not differentiate between public contracting authorities and utilities, whereas in others there are different review bodies, procedural requirements, and remedies for the latter. Moreover, the public or private nature of a utility can involve differences.

The national systems allow the **setting aside** of various individual decisions taken in the course of a procurement procedure, including the contract award decision. The annulment of a concluded contract is only possible, if at all, in accordance with strictly defined requirements, which are difficult to meet. Therefore, in order to allow tenderers to challenge the award of a contract, as a result of the Alcatel case law, most Member States have introduced a standstill period between the time of the award and the conclusion of the contract. Member States also provide interim measures pending a final decision, and in some countries lawsuits have an automatic suspensive effect on the continuation of the procurement procedure. All Member States appear to allow compensation for damages. Remedies are available under roughly comparable requirements.

Whereas the **attitude** of judges and other review panel members toward the interests involved in proceedings is described as fair and balanced, the attitude of tenderers seeking remedies varies considerably in the jurisdictions included in this study. In many countries tenderers see review proceedings as a matter of last resort for enforcing their legitimate interests or an equitable solution and for remedying mistakes. However, in some jurisdictions it is alleged that some tenderers abuse the system in order to obstruct the procurement procedures or to force competitors out of the contract. Many of the respective review systems try to prevent this abuse through time limits, limitations of legal standing, court fees and deposits, and at times even through penalties for frivolous claims.

EC law requires the public procurement review and remedies systems of Member States to provide **rapid and effective remedies**. While in most of the countries included in this study all remedies, including compensation for damages, are available within reasonable time limits, in some Member States certain remedies, such as compensation for damages or the annulment of

a concluded contract, can take years. This is rarely due to time limits but to the workload of the review body in question and at times to the behaviour of the parties, for example when they exchange briefs for months or even years. Effectiveness is a more complex issue. It includes questions of access of tenderers to the system, satisfaction of tenderers with the system, the availability of suitable remedies for disadvantages suffered as a result of breaches of the law, and possibly the general transparency and even simplicity of the system. The effectiveness of the review and remedies system is enhanced, *inter alia,* by its wide scope, a clear attribution of cases between review bodies and rules on standing, reasonable (or no) fees and deposits, access to interim measures or an automatic suspensive effect of filing a lawsuit, possibilities to appeal first-instance decisions, knowledgeable and fair judges and review panel members, an open dissemination of decisions, the possibility to accommodate confidentiality, and the involvement of experts. The public procurement and review remedies systems of most of the countries included in this study have all or many of these elements in place.

APPENDIX: INDIVIDUAL COUNTRY REPORTS OF THE PUBLIC PROCUREMENT REVIEW AND REMEDIES SYSTEMS IN THE MEMBER STATES

1. Austria

The Austrian public procurement review and remedies system is based on a **dual system of judicial review** through a specialised public procurement review body subject to an appeal to the Supreme Administrative Court or the Constitutional Court on the one hand, and claims for damages through the civil courts on the other hand. The system applies to public authorities and utilities and to contracts above and below the EC thresholds. The most important recent changes include the implementation of the procurement law (1993), the introduction of uniform procurement legislation (2002), the extension of the specific public procurement review system to contract below the EC thresholds and the regulation of preclusive time limits for the lodging of complaints. An older version of the relevant law can be found at www.ris.bka.gv.at.

1.1 Complaint to the Contracting Authority

The handling of protests and complaints against public procurement decisions is part of the internal organisation of the respective **contracting authority** and therefore is not regulated in the federal public procurement act (BVergG). There is no legal requirement to inform the contracting authority before launching a review procedure and no legal instrument regulates complaints to contracting authorities and entities in Austria.

1.2. Judicial Review

Under the federal system set forth in the Austrian Federal Constitution, there are ten different review bodies for appeals against procuring entities. Hence the procedures to be followed are laid down in nine different federal state (*Länder*) laws on procurement review at the regional or municipal level (*Landesvergabekontrollgesetze*) on the one hand and the BVergG on the other hand. As the laws of the *Länder* are harmonised with the BVergG to a large extent, the following description will focus on the regulations at the federal level. The fact that the federal system results in ten different review bodies applying the same BVergG is considered a main disadvantage of the Austrian system. The BVergG provides for a single formal review system on the federal level, run by an independent special administrative tribunal meeting the requirements of the EC remedies directives and Article 6 ECHR. The **Federal Procurement Office** (*Bundesvergabeamt* – BVA, Praterstraße 31, 1020 Wien, www.bva.gv.at) forms part of the judicial review system as laid down in the Federal Constitution and is composed of independent administrative judges (nominated first for a three-year term; after that, with the possibility of nomination for life) and laypersons who are nominated on equal terms for a certain period at the suggestion of contracting authorities and tenderers. BVA decisions are generally rendered in tribunals called senates consisting of one administrative judge and two laypersons. The BVA has the legal powers as required by the directives (annulment of decisions of contracting authorities, granting of interim measures). According to the BverG, the BVA is competent for the legal protection of bidders in the pre-contractual phase (i.e., the time before the actual contract has been awarded) of a procurement procedure, and should decide within six weeks. After a contract has been awarded, BVA competence is restricted to statements about the conformity or non-conformity of a procurement procedure with the BVergG. This statement constitutes an essential requirement and therefore the basis for **damages claims before the civil courts**. The BVA's decisions are published on the Internet (see http://www.bva.gv.at) and can be challenged before the **Supreme Administrative Court** and the **Constitutional Court**, both in Vienna (see http://www.vwgh.gv.at and http://www.vfgh.gv.at, Judenplatz 11, 1010 Wien). The BVergG regulates the organisation and internal structure of the BVA according to Article 6 ECHR. The independence of the administrative judges (permanent members – *Senatsvorsitzende*) is

guaranteed by constitutional law. The permanent members are appointed by the Federal President of Austria; the chairperson and deputy are nominated for life. There are professional-qualification requirements for an appointment to the BVA (specific knowledge of public procurement and legal experience).The chairperson, deputy and permanent members must be qualified lawyers with at least have five years of professional experience as a lawyer, or at least five years of professional experience in public procurement. The BVA, Supreme Administrative Court and Constitutional Court fulfil the requirements of the *Dorsch* and *Salzmann* judgements. The BVA decided 208 of 285 applications for review in 2003, 195 of 266 in 2004, and 183 of 257 in 2005. Between 1 September 2002 and 31 December 2005, the BVA dealt with 1,092 of 1,126 applications. Of its 723 decisions during this period, 52 were appealed to the Federal Constitutional Court and 30 to the Supreme Administrative Court. Only nine of the latter were not fully confirmed. Under the federal system set forth in the Austrian Constitution, there are ten different review bodies, either administrative courts (*Unabhängige Verwaltungssenate* in seven *Länder*) or specific public procurement review courts (in two *Länder* and at the federal level). The bodies are listed at http://www.bka.gv.at/DesktopDefault.aspx?TabID=5100&Alias=bka. The review bodies are established on the basis of the Federal Constitution (*Bundes-Verfassungsgesetz*), an act of Parliament (*Bundesvergabegesetz*), and the constitutions (*Landesverfassungen*) and laws *(Landesvergabekontrollgesetze*) of the individual states of Austria.

1.3 Alternative Dispute Settlement

Two *Länder*, namely Carinthia (*Kärnten*) and Lower Austria (*Niederösterreich*) have established alternative dispute settlement bodies. The rules are set forth, respectively, in the *Kärntner Vergaberechtsschutzgesetz* (Carinthian Procurement Protection Act http://www.bka.gv.at/2004/4/20/kaernten-vergabe.doc) and the *NÖ Vergabe-Nachprüfungsgesetz* (Lower Austrian Procurement Review Act http://www.bka.gv.at/2004/4/20/noe-vergabe.pdf).

1.4 Remedies

Any procurement decision listed in Article 2 § 16 BVergG rendered before the conclusion of a contract can be challenged before the BVA ("separately contestable decision"). Any other decision before the conclusion of a contract not listed in this article can be challenged in combination with a preceding decision that is listed and therefore contestable. The range of separately contestable decisions covers **all the basic decisions** that a contracting entity may take before the conclusion of the contract (tender notice, contract documents, short listing, elimination of bid, award decision, etc.). The BVA has the power to annul decisions of contracting authorities and to grant **interim measures** in the pre-contractual phase. After a contract has been awarded, the BVA's competence is restricted to **statements about the conformity** or non-conformity of a procurement procedure of a contracting authority with the BVergG. This statement constitutes an essential requirement and therefore the basis for **damages** claims before the civil courts. In one special circumstance -- when a contracting authority awards a contract directly, in evident breach of the law -- the BVA can annul the contract itself. The BVA's competences are regulated in Article 312 of the BVergG, i.e. the procedures in Articles 320 to 327 (annulment of decisions), Articles 328 to 330 (interim measures) and Articles 331 to 334 (statement on conformity). The **setting aside** or suspension of an awarded contract can be made only by civil courts on the basis of the general conditions laid down in civil law. Thus far, no such case occurred in practice. The lodging of a complaint has in principle **no suspensive effect**. The complainant has to ask for interim measures. **Only in certain cases (listed in the BVergG) does the application for interim measures have a suspensive effect** (opening of bids, award of a contract and withdrawal of the procedure).The BVA can grant any interim measure required by an economic operator as long as it is appropriate and necessary to prevent the pending damage (see Article 328 BVergG).The court of law or other review body can take into account

the probable consequences of interim measures for all interests likely to be harmed, including the public interest, and decide not to award such measures where their negative consequences would outweigh their benefits. The award of damages is regulated in the *Allgemeines Bürgerliches Gesetzbuch* (ABGB, Civil Code). After a contract has been awarded, the BVA's competence is restricted to statements about the conformity or non-conformity of a procurement procedure of a contracting authority. **This statement constitutes an essential requirement and therefore the basis for damages claims before the civil courts.** The damages are **not limited to tender costs**; they may in certain cases include the interest of the contract or the profit. There are no provisions for periodic penalty payments. Case law is limited but of considerable importance, due to a system consisting of both codification and case law.

1.5 Procedure

The procedural issues are regulated in the **BVergG** and the above-mentioned federal state laws (*Landesvergabekontrollgesetze*). If the BVergG does not provide a regulation, the *Allgemeines Verwaltungsverfahrensgesetz* – AVG (**General Administrative Procedure Act**, see http://www.ris.bka.gv.at/englische-rv/) is applicable. Cases may be brought by tenderers, bidders and economic operators under the condition that they state an interest in the conclusion of the contract at stake, and that the petitioners suffer or are in danger of suffering damages by the alleged breach of (procurement) law. Tenderers must complain before the BVA within **14 days**. In special cases (procedures below the thresholds, urgent procedures, etc.), these time limits are **shortened to seven days**. As required by the BvergG, the laypersons in the review senate are experts in the field of procurement. Special experts can be involved at the request of the BVA. The refund of costs is regulated in the AVG (see Article 52 **et seq.**) according to the Fees Entitlement Act. For every complaint brought the BVA, **lump sum fees** have to be paid according to Annex XIX BVergG. The minimum fee is €200 for direct awards and €5000 for works contracts above the EC thresholds. No other legal fees have to be paid before the BVA. There will be a minor change in the regulations concerning the lump sum fees for review due to a ruling of the Constitutional Court. Additional administrative fees have to be paid before the federal state review bodies. Tenderers are free to seek legal representation but must bear the costs themselves. A successful tenderer is entitled to **refund** of the lump sum fees. The BVA decides on these costs. The BVA can take any adequate measure to protect the confidentiality interests of the parties involved in a procurement procedure, including restricting or excluding access to the relevant files and documents, as well as discussing a case in closed session. The decisions are disseminated either in written form, by fax or e-mail to the parties, and are further published on the Internet (see http://www.bva.gv.at).The BVA is to render its decision in annulment cases within six weeks, and concerning interim measures within one week. The relative speed of the BVA in comparison to a civil court system when it comes to rendering decisions is seen as the main advantage of the Austrian review system. There are no mandatory model forms or other mandatory documents for review procedures.

1.6 Review Culture

There is no official (governmental) **training** for public procurement issues or EC law. Legal university studies include public procurement law as part of an education in administrative law and EC law. The major part of procurement training is offered by private institutions in cooperation with universities (*Vergaberechtslehrgänge*) and special programs/vocational training (concerning the use of framework agreements, Public-Private Partnerships, etc.). The **attitude of judges** and panellists on public procurement review bodies towards the public interest on the one hand and the private interests of the bidders on the other is considered as generally balanced, with a slight tendency towards the interests of the tenderers. Some tenderers do not wish to initiate review proceedings because they do not wish to compromise their chances for the next contract (this applies especially for low-value contracts). Some tenderers intend to obstruct

procurement through review proceedings, while some are deterred from seeking judicial review by the high costs (including legal representation, etc.). Contracting officers' knowledge of the legal and other background of public procurement differs, depending on the respective contracting authority. Whereas at the federal level the big contracting authorities can afford adequate training, there are problems at the municipal/local level to provide trained staff. Generally, contracting officers are opposed to review procedures because they delay the award of the contract at stake. Nevertheless, there is general acceptance of review procedures, as they provide legal certainty. There are two legal journals dealing with public procurements issues: *Zeitschrift für Vergaberecht und Beschaffungspraxis* (ZVB, see www.manz.at) and *Recht und Praxis der öffentlichen Auftragsvergabe* (RPA, see www.verlagoesterreich.at). Public procurement law is discussed at academic and professional conferences and seminars in Austria. The most important conference is the *Vergabeforum*, which is organised on an annual basis by a private institute for vocational training, and the *Vergaberechtstag*, also organised annually by the BVA; the latter mainly serves as a forum for judges and administrative judges who deal with public procurement cases. There is a national association on public procurement law and policy called Tender Club Austria (see www.tenderclub.at). There is no specific lobbying organisation for procurement issues, but the Chamber of Commerce (see www.wko.at) and Federation of Austrian Industry (see www.iv-net.at) work, inter alia, as lobbies for tenderers' general interests in public procurement. Generally, ECJ rulings have a direct impact on procurement proceedings because the wording of the BVergG is in large parts aligned with the wording of EC directives; therefore, almost each interpretation of the directives by the ECJ constitutes an interpretation of the BVergG as well. The rulings are implemented in the national procurement legislation as well (i.e., the BVergG and the *Landesvergabekontrollgesetze*). In practice, the parties often make reference to the respective judgements. A current report on most of these issues is included in the annual activity report – *Tätigkeitsbericht* of the BVA (see www.bva.gv.at, in German).

2. Belgium

Individual administrative decisions, such as a public procurement decision, can be challenged both before the **civil courts** and tribunals and before an **administrative court**, i.e., the Council of State. A distinction has to be made between the possibilities of national review before and after the procurement decision has been notified to the chosen tenderer (conclusion of contract). **Before the notification of the decision**, an aggrieved tenderer can challenge the decision either before the Council of State via a request for suspension by urgent necessity, or before the civil courts and tribunals by urgent appeal. Thanks to these pre-contractual summary proceedings, the tenderer has the possibility to prevent the signature of the contract. **After the notification of the decision**, an aggrieved tenderer can challenge the decision before the Council of State only by means of a request for annulment (which can take four to five years or even longer) or before the civil courts and tribunals. The latter proceedings can also be used to compensate a wrongly rejected tenderer, provided he or she proves that he or she was deprived of a real chance of winning the contract and, in certain cases, to suspend or to declare null and void any contract awarded irregularly. The Council of State is competent only to judge the decisions of administrative authorities. Some contracting authorities cannot be qualified as an administrative authority. In such cases, an aggrieved tenderer can challenge a public procurement decision only before the civil courts and tribunals. There is no difference between contracts to which the directives apply and contracts to which they do not apply. Likewise, there is no difference in the system for utilities.

2.1 Complaint to the Contracting Authority

In Belgium, it is not compulsory for tenderers to formally object/protest/complain to the contracting authority directly as a precondition to seek review. There are no specific rules. A

tenderer can complain directly to the contracting authority. Every contracting authority can decide, however, how to deal with such complaints. There are no specific legal instruments regulating formal complaints of tenderers.

2.2 Judicial Review

The Belgian review bodies were established on the basis of Articles 144-161 of the Constitution. There is a last instance general/ordinary court of law reviewing public procurement decisions, the *Cour de cassation* (Palais de Justice, Place Poelaert 1, 1000 Brussels; Phone +32 508 61 11, website: http://www.cass.be). According to Article 152 of the Belgian Constitution, judges are irremovable. In the *Cour de cassation*, which is the court of last instance for appeal, there are five *Cours d'appel* (details on http://www.cass.be), which are appellate level, and 27 *Tribunaux de premier instance*, which are the first instance courts. There is a last-instance administrative court of law reviewing public procurement decisions, the *Conseil d'Etat* (Rue de la Science 37, 1040 Brussels; Phone +32 2 234 96 11, website: http://www.raadvst-consetat.fgov.be). According to Article 70, § 4 of the coordinated laws on the Council of State of 12 January 1973, the administrative judges of the *Conseil d'Etat* are also irremovable. There are no administrative courts below the level of last instance (*Conseil d'Etat*). The presidents and the other members of the last-instance review bodies in both administrative and ordinary courts have a qualified legal experience and must pass exams organised by the *Hoge Raad voor Justitie* (ordinary) or by the *Conseil d'Etat* (administrative). All these mentioned courts fulfil the requirements of the *Dorsch* and *Salzmann* judgements. There are no general **alternative dispute settlement bodies** tasked with the review of public procurement decisions in Belgium. However, regarding the utilities sector, Belgium has transposed the attestation mechanism (Arts. 3 to 7 of the Directive 92/13/EEC) and the conciliation mechanism (Arts. 9 to 11 of the Directive 92/13/EEC) with Articles 113-121 Royal Decree of 10 January 1996.

2.3 Remedies

Every decision with legal effect related to public procurement can be challenged by tenderers (specifications, award, etc.).However only decisions which can be qualified as enforceable administrative legal acts can be challenged before the Council of State. Both the ordinary judges (ordinary courts and tribunals) and the administrative judges, namely the Council of State, are responsible for implementing the provisions of the EC remedies directives. The organisation and functioning of the Council of State are regulated by the organic laws on the Council of State, coordinated by the Royal Decree of 12 January 1973 (http://raadvst-consetat.fgov.be/En/whatwedo_en.htm) and its implementing decrees. The expertise of the Council is considered a major strength of the Belgian system. The Council of State has the power to *annul* decisions of the administration, including contracting authorities. Due to the overload at the Council of State, the term for decision in case of a request for annulment is often four to five years. This long period is considered a major weakness of the Belgian system. Besides an appeal for **annulment**, an *appeal for suspension*, possibly even by urgent necessity, can be introduced before the Council of the State. In order to obtain a suspension, the complainant must prove serious grounds and serious harm that is difficult to repair. In case of **suspension** by urgent necessity, the urgent necessity has also to be proved. The Council of State can also impose **periodic penalty payments**. An aggrieved bidder cannot obtain financial **damages** at the Council of State. This is considered another weakness of the Belgian system. Damages can be obtained only in the ordinary courts and tribunals. The remedies which can be ordered by the ordinary courts and tribunals are cited in the Judicial Code. Only the ordinary courts and tribunals have jurisdiction to deal with tort actions. Financial damages can be obtained only in the ordinary court and tribunals. There is no particular legal system for the assessment of the damages with respect to public procurement. Art. 1382 *et seq*. of the Civil Code state the general principles of tort law, and are also applicable to the award of

damages in the field of public procurement. This legal concept is extensively developed in jurisprudence and doctrine. According to Art. 1382 of the Civil Code, damages can be claimed when three requirements are met: existence of a fault, existence of damages and existence of a causal link between the fault and the claimed damages. Under Belgian law the remedies which apply for damages are independent of applications to suspend or annul "pre-contractual" administrative decisions concerning public procurement. However, an annulment of the decision regarding public procurement by the Council of State proves *ipso facto* the fault of the contracting authority before the courts and tribunals. In that case the complainant will only have to prove damages and the link of causation between the fault and the damages. The complainant does not have to await the decision on the request for annulment of the Council of State in order to ask damages before the court and tribunals, but in this case the complainant is obliged to prove the fault of the contracting authority, in addition to the damages and the link of causation. Regarding damages calculation, the complainant has to evaluate and justify the amount of damages sought, and judges weigh it depending on the case. Mostly the awards of damages which are granted due the complaints concerning public procurement are merely the compensation for the loss of a chance. **However, Art. 15 of the Law of 24 December 1993 sets out a system of a fixed compensation of 10% of the tender price for claims introduced by a qualified tenderer whose bid is "the lowest price", when this base for awarding is compulsory** ("aanbesteding"). Furthermore, it has to be noted that since agreements cannot be considered unilateral acts, they do not fall within the scope of the Council of State's jurisdiction. Only the ordinary courts can order remedies in this context. The possibilities to suspend and/or annul concluded contracts are subject to discussion. Moreover, an *urgent appeal* (Art. 584, Judicial Code) introduced before the courts and tribunals can be used to ask for a prohibition or an injunction towards the contracting authority. In this way the contracting authority can be **ordered** to act, not to act or to take a certain decision. Thus, the court can order certain measures pending the decision of the judge on the merits or of the Council of State on the request for suspension. Compliance with this order can be assured by means of periodic penalty payments. Recently a new Public Procurement Act was adopted (4 May 2006), which introduces some innovations. Concerning remedies, a **legal standstill** has been emphasised. During this fixed delay the complainant can ask for the suspension (to the Council of State, subsidiary to the ordinary courts and tribunals) of the awarding of the contract, without a serious harm that is difficult to repair. The public interest can be taken into consideration, although there is no legal requirement for this. The recently published new Public Procurement Act explicitly mentions this possibility, however. If the contract has been awarded before the standstill period has expired, the complainant can ask the president of the ordinary tribunal to annul the contract. This possibility is considered an important advantage of the Belgian system and its most important innovation over the last several years. Once the contract has been awarded, it cannot be annulled or suspended due to an irregularity in the awarding procedure (immunity of the contract). Periodic penalty payments can be imposed both by the judicial judge (ordinary courts and tribunals) and the administrative judge (Council of the State). The legal concept of the periodic penalty payment which can be imposed by the courts and tribunals has been specified in the Judicial code (Art. 1385 bis *et seq.*). The conditions for the periodic penalty payments ordered by the Council of State are cited in the Royal Decree of 2 April 1991, concerning the judicial procedure of the Council of State's administration in the section on the periodic penalty payment.

2.4 Procedure

The legal instruments regulating the procedural law of the public procurement review bodies are the Judicial Code ("code judiciaire") and the organic laws on the Council of State, coordinated by the Royal Decree of 12 January 1973 and its implementation decrees (translation: http://www.raadvst-consetat.be/En). Only parties having an effective interest to conclude the

contract and that can be harmed by the alleged irregularity, as well as the contracting authorities themselves, have **standing** to bring cases to remedy pre-contractual irregularities. Parties to the contract, potential or ousted tenderers and some third parties can petition for the annulment of any decision preliminary to the conclusion of the contract. It has to be noted that it is contested if third parties can request for annulment of the contract to the judge (cf. supra, e.g., the new Public Procurement Act establishes the immunity of the contract in some cases). Parties to the contract can mostly ask only for damages in such cases. A petition for annulment or suspension (by urgent necessity) must be introduced before the Council of State within 60 days after notification of the enforceable decision. For a claim before the courts and tribunals, the general terms of prescription are applicable. In some cases the standstill period, which prescribes the time limit within which tenderers have to initiate review proceedings is defined by law (10 days, extendible, cf. also Public Procurement Act). The lodging of an action has **no suspensive effect**. There are no specific provisions relating to *mandatory* time limits for decisions regarding public procurement. The applicable regulations set forth different time limits, but none of them is mandatory (if the judge exceeds the time limit, the issued decision remains in place). Due to the judicial delays at the Council of State, the term for a decision in case of a request for annulment will be four to five years. The term for a decision concerning an ordinary request for suspension is about two to ten months. It is always the judge who considers the opportuneness of appointing an **expert**. The costs are advanced by the interested party, but the losing party eventually bears them. The conditions for the Council of State are cited in the Decree of the Prince Regent of 21 August 21 1948, in particular Articles 20 to 25. The provisions that apply to the experts designated by the courts and tribunals are set forth in the Judicial Code, in particular Articles 962 to 991. **Costs** related to the issuing of a summons and procedure indemnity (courts and tribunals), stamp duties (Council of State) and survey fees have to be paid by applicants. There are no other specific additional costs than in common judicial review for tenderers seeking judicial review in the context of public procurement cases. When legal representation is required, every party to the review proceedings has to pay its own lawyers, but the other judicial costs are in principle borne by the losing party. Nevertheless, under certain circumstances the lawyer fees are also borne by the losing party. There are no specific procedural possibilities to take into account the need to protect confidential business information; however, it is acknowledged by an auditor's opinion ("auditoraatsverslag") at the Conseil d'Etat that the need to protect confidential business information can be taken into consideration. In such cases pieces of evidence can be submitted only to the Conseil d'Etat, and not to the competitors. There are no mandatory model forms and documents used for public procurement review and remedies, but some mandatory mentions and formal rules have to be observed in any petition. The decisions of the review bodies are notified to the parties by post. The decisions of the Council of State are available on its official website (http://www.raadvst-consetat.be). For the decisions of the courts and tribunals, there is no systematic publication. Case law is limited but of considerable importance due to a system consisting of both codification and case law.

2.5 Review Culture

Judges and panellists on public procurement review bodies, and public procurement lawyers representing tenderers or contracting entities in review proceedings, acquire their knowledge of public procurement law in particular and Community law in general, and of how public procurement works in practice as well as the technical and financial implications involved, through university studies or continuous education, books and articles on public procurement, experience lawyers, courses provided by the Ministry of Justice or by private organisations, and websites such as http://www.simap.eu.int/, http://www.jepp.be, http://www.binnenland.vlaanderen.be/overheidsopdrachten/index.htm. The same applies to tenderers, who also receive information through lawyers, consultants or professional organisations. The Tijdschrift voor Aannemingsrecht (T.Aann.) is a journal dealing specifically

with public procurement law. Public procurement law is discussed at many academic and professional conferences and seminars. The Vlaamse vereniging voor aanbestedingsrecht (http://www.vva-vzw.be) and Esimap, Centre d'études, de services et d'information en matière de marchés publics et domaines connexes (www.esimap.be) are national associations on public procurement law and policy. A civil society on public procurement monitoring and lobbying the other players or getting involved in any other way consists, e.g., of the Nationale Confederatie van het Bouwbedrijf and the Vlaamse Confederatie Bouw, which organise conferences on public procurement, inform and advise. Public procurement officers, for example, can follow some of the training programmes of the Vlaamse vereniging voor aanbestedingsrecht.

3. Bulgaria

With the amended public procurement law (PPL), which entered into force on 1 July 2006, the public procurement review system consists of a first-instance hearing before the **Commission on Protection of Competition (CPC)** and a second- and last-instance of judicial review before the **Supreme Administrative Court (SAC)**.. A wide range of remedies can be awarded regarding contracts above and below the thresholds. Since these arrangements are rather new, there is little operational experience thus far.

3.1 Complaint to the Contracting Authority or Entity

A complaint to the contracting authority or entity itself is not a compulsory stage of the remedy system. The only obligation of the claimant is to send a copy of the claim to the authority or entity.

3.2 Quasi-judicial Review

The **CPC** is a special first-instance public procurement review body that is independent from the government. Every decision, action or lack of action on the part of the contracting entities in the public award procedure **prior to the conclusion** of the public contract or the framework agreement shall be subject to legal review before the CPC. The CPC has no jurisdiction after the conclusion of the contract. Its members do *not* have a status comparable to that of judges. According to the Law for the Protection of Competition, the entity consists of seven persons elected and discharged by the National Assembly for a period of five years. They can be re-elected for another five years. The chairperson must be a qualified lawyer having specialised in the area for at least ten years. All members of the CPC must be Bulgarian citizens with a degree in law or economics, and in practice for at least five years, with high professional ethical qualities who have not been convicted of a premeditated crime of general nature. They cannot assume other paid occupation except other than a scientific or lecturing activity, nor may they benefit in any form whatsoever from enterprises.

3.3 Judicial Review

The SAC is a **last-instance administrative court** of law reviewing public procurement decisions. Before 1 July 2006, the civil courts had jurisdiction over public procurement contracts. The decisions of the CPC are subject to appeal before a three-member committee of the SAC. The SAC guarantees its **independence** by determining the appointment, mandate, qualifications of the members, funding and etc. The SAC was established on the basis of the Constitution and Acts of Parliament and fulfils the requirements for a court of law set forth in the *Dorsch* and *Salzmann* judgements. It is independent from the executive, administration or any other part of government, and its decisions are of a jurisdictional nature. Its judges must be experienced and recognised lawyers. Judges are appointed according to a general procedure. The **chairperson** of the SAC shall be appointed for a period of seven years by the order stipulated by the Law for the Judicial System (LJS), without a right of re-election. Along with their managing functions the judges shall carry out legal capacities related to the implementation of the judicial authority,

assigned to them by the Constitution and the laws (Art. 125a, paragraph 4 LJS). The chairperson shall have at least eight years' experience in legal practice.

3.4 Remedies

The available **remedies** are all stipulated in the PPL. According to Article 120, every decision, action or lack of action on the part of contracting entities in the public award procedure prior to the conclusion of the public contract or the framework agreement shall be subject to legal review before the CPC. There is **no automatic suspensive effect** from initiating proceedings with the CPC. However, according to Article 121a, paragraph 1, under a reasonable request from the claimant and in the case of real danger for serious harm to the public interest or the interests of the parties, and considering unfavourable consequences of the delay of the public award procedure, the **CPC may impose suspension** of the public award procedure as an interim measure. An appeal against a CPC decision in the SAC must be filed within 14 days from the communication of the decision to the parties, and the review shall not suspend the execution. According to Article 120a, paragraphs 1 and 2, of the PPL any person having or having had an interest in obtaining a particular contract may make a claim for **declaring null and void** a public contract and request **damages** if he or she was harmed as a result of violations of the PPL under the rules of the Civil Procedure Code. A public contract is declared null and void if the public contract is concluded without the parties' having followed the prescribed procedure. Bulgaria has a codified legal system, but case law is of limited importance due to interpretations of legislation provided in court judgements. The impact of the judgements of the European Court of Justice on public procurement is limited but will increase due to the accession of Bulgaria to the EU.

3.5 Procedural Law

Procedural law is regulated in the PPL, the Law for the SAC and the Code of Administrative Court Proceedings. Written evidence, oral explanations and expert opinions shall be permitted in the proceedings before the CPC. When expert opinions are presented in the proceedings before the CPC, the resources for payment to the experts shall be provided in advance by the party that has requested the expertise. When the expertise is initiated by the CPC, the costs for the experts' fees shall be awarded to the claimant, if the claim is not granted or the proceedings have been suspended, and they shall be awarded to the contracting entity. So, the claim may be submitted by any person having or having had an interest in obtaining a particular contract within a ten-day period after his or her notification of a decision or an action, which is subject to review, or, if the person has not been notified, from the date he or she learned of the decision or the date on which the deadline for the particular action expired. The PPL envisages that for the imposition of interim measures, the claimant has to present a **deposit** of 1% of the value of the public contact, but not more than 50,000 BGN as a monetary deposit in a CPC bank account or a bank guarantee. The CPC shall set the amount of the deposit up to 50,000 BGN when the value of the public contracts cannot be determined. If the parties (claimants) decide to be legally represented (by lawyers) they have to pay the required fee, but this representation is optional. The CPC expresses an opinion on the claim within a two-month period from the initiation of proceedings. The decision, accompanied by the motivation, is drawn up and announced within 14 days of the expression of an opinion on the claim. The decisions of the review bodies are announced and **published** on the website of the respective review body. The SAC disseminates its decisions under the rules of the Law for the SAC.

3.6 Review Culture

Judges, CPC members and its administration, and public procurement lawyers representing tenderers or contracting authorities/entities in review proceedings acquire their knowledge of public procurement law in particular and Community law in general mainly as part of their university studies, but also through courses organised by the EU or international organisations or

the PPA, as well as “on the job”/“learning by doing”. They receive their knowledge of how public procurement works in practice, in addition to the technical and financial considerations involved, in courses provided by the EU or international organisations, with learning by doing; some of them participate in courses provided by the government and the PPA. The attitude of judges and representatives of public procurement review bodies towards the public interest on the one hand and the private interests of the bidders on the other are considered balanced yet sometimes biased towards the public interest or the interests of the tenderers. Tenderers seeking a review of public procurement decisions gain their knowledge of the legal, financial and administrative background of how public procurement works in practice in courses provided by the government and by the EU or international organisations and through their professional organisations, for example chambers of commerce. Under the system previously in place, until July 2006 some tenderers did not wish to initiate review proceedings because they did not wish to compromise their chances for the next contract and some were deterred from seeking judicial review by the long duration of the proceedings.

There is no specific journal for publications in the field of public procurement. Public procurement law is discussed at academic and professional conferences and seminars. There are no national associations on public procurement in Bulgaria, but other relevant national interest groups such as chambers of commerce, the association of national construction industries, the Confederation of Bulgarian Industries, the Bulgarian Industrial Chamber, the Bulgarian International Business Association, the Bulgarian Chamber of Commerce and Industry and NGOs – such as the national section of Transparency International – lobby, inform, teach and/or advise on public procurement litigation. The press and television cover public procurement review proceedings if there is an emphasized public interest.

4. Cyprus

The public procurement review and remedies system in Cyprus can be subdivided into three elements: a complaint to the contracting authority, non-judicial review through the Tenders Review Authority (TRA) and judicial review through the Supreme Court of Cyprus.

4.1 Complaint to the Contracting Authority

Cypriot law explicitly states that before filing an application for review at the TRA (described below), any interested person shall, within five days of the date that such act or decision came to his or her knowledge, **notify in writing the contracting authority** and send a copy of the notice to the competent authority (the Treasury of the Republic), in respect of the alleged infringement and his or her intention to file an application for review. The contracting authority shall examine the allegation and issue a reasoned decision within five days of receipt of the notification. If the allegations are found to be justified, the authority shall take appropriate measures. If the TRA takes no action within five days, it will be presumed that the authority has rejected the allegation. An application for review shall be filed within ten days from the date the decision comes to the knowledge of the applicant or the expiration of the period of five days referred to above. The law does not specify who within the contracting authorities deals with the applications for review to the TRA. However, the established practice is that the contracting officers of the tender in question, who are familiar with the issue, deal with the internal examination of the allegations.

4.2. Non-judicial Review

A non-judicial review body, the **TRA** was set up on 1 December 2003 based on a Council of Ministers decision, with the power to review any decisions taken by contracting authorities prior to the conclusion of any public contract for an alleged infringement of the law. Hence, there is a specific public procurement review body independent from the government. However, the

members of this body do not have a status which is comparable to that of judges. The TRA has five members, including the chairperson.

4.3 Judicial Review

Furthermore, Cypriot law provides that any person aggrieved by a decision of the TRA or by any decision taken by a contracting authority before or after the conclusion of the contract can challenge such decision before the **Supreme Court of Cyprus**. Damages can be awarded only by the court. These issues are governed by the Constitution of the Republic. Any interested person may exercise his or her right to file an application to the Supreme Court of Cyprus instead of applying for review to the TRA, provided that these two procedures do not run concurrently. The members of the Supreme Court and its chairperson are judges, and their status is governed by the Constitution. The Court fulfils the requirement for a court of law set forth in the *Dorsch* and *Salzmann* judgements.

4.4 Remedies

The TRA may **set aside** an unlawful decision taken before the conclusion of the public contract and order the deletion of an amendment of discriminatory technical, economic or financial specifications in the contract documents or in any other document related to the contract award procedure. Additionally, the TRA may, upon the filing of an application for review and at the request of the applicant, order **interim measures** in order to prevent further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure leading to the award of a public contract or the implementation of any decision taken by the contracting authority, until a final decision is reached. In the context of interim measures the TRA may take into account their probable consequences to the interests of the parties likely to be harmed, including the public interest, and decide not to award such measures where their negative consequences would outweigh their benefits. The Supreme Court may take decisions like any court, including interim measures, **damages**, the setting aside of the call for tender, the setting aside of the contract award decision, annulment of the contract or periodic penalty payments, the award of damages. The conclusion of a contract can be annulled only by a court decision.

4.5 Procedure

Any person having or having had an interest in obtaining a particular public contract and who has been or risks been harmed by an alleged infringement by an act or decision of a contracting authority may, prior to the conclusion of any such public contract, apply for review to the TRA. This does not prejudice the right of the interested person to file an application for judicial review to the Supreme Court of Cyprus instead of applying for review to the TRA. There is no difference between contracts to which the directives apply and contracts to which they do not apply. For the TRA, parts of the laws on the coordination of procedures for the award of public contracts (Part IV of Laws N11(I)/2006 and N12(I)/2006) regulate the procedure for review. Regulation no. 745/2003, regarding the establishment and operation of the TRA, also must be mentioned in this context. The prescribed fees are based on the value of the tender which has been selected. More specifically, from CYP £1-£100 000 the fee is £500, from CYP £100 001-£500 000 the fee is £1 500, from CYP £500 001-£1 000 000 the fee is £2 000, from CYP £1 000 001-£5 000 000 the fee is £3 000 and from CYP £5 000 001 and above the fee is £4 000. The costs for an application for interim measure is £1000. If the application for review precedes the submission of tenders, the fee is £1 000. The TRA may order any applicant whose claims are dismissed to bear the costs of the proceedings, in addition a fine as it may deem appropriate in view of the circumstances of the case. TRA fees are not refundable. The TRA shall take a decision within 30 days from the filing of the application for review. According to Section 146 of the Constitution, any interested person may file a petition for judicial review to the Supreme Court of Cyprus within 75

days of the date the action or decision was published or the person learned of it if no such publication took place. The decisions of the TRA are disseminated to the parties and to the public by publication on its website (www.tra.gov.cy) and in writing to the contracting authorities, to the tenderer and to the competent authority (the Treasury of the Republic). The decisions of the Supreme Court are issued in bound volumes that can be bought from the Governmental Printing Office. Additionally, there is a firm, Leginet Ltd. (www.leginet.com), which is the host of two large subscription-based databases of legislation and cases of the Republic of Cyprus. However, all recent cases are available only in Greek, except from the older cases released in 1883-1989, which are available in English. Furthermore, in approximately two years' time, the Supreme Court will have its own electronic database containing, among others, its cases/decisions. A new law on the coordination of procedures for review is currently being prepared.

4.6 Review Culture

Model forms for public procurement review at the TRA are available at www.tra.gov.cy. The knowledge of contracting officers of the legal and other background of public procurement is described as very good. Public procurement law discussed at academic and professional conferences and seminars. There is some professional training on public procurement law, and policy for public procurement officers is learned via training on the job and some relevant seminars and conferences. The judgements of the European Court of Justice are used as an instrument to find solutions to complicated issues.

5. Czech Republic

Public procurement (PP) in the Czech Republic was regulated by Act 40/2004 Coll. on Public Contracts (English translation on http://www.compet.cz/English/VZ/Zakony/Rozcesti.htm), but the new EC Procurement Directives have already been implemented through Act 137/2006 Coll. (Zákon o veřejných zakázkách), which came into force on 1 July 2006. Act 139/2006 Coll. regulates the award of concessions. The Czech reviews and remedies system is based on a mixed system of administrative, quasi-judicial and judicial control. The main actor is the **Office for the Protection of Competition** (Úřad Pro Ochranu Hospodářské Soutěže, Joštova 8, 601 56 Brno; Phone +420 542 161233; Fax +420 542 210023, E-mail: posta@compet.cz, Website: www.compet.cz), which succeeded the former Ministry for Competition and was established as an independent government authority by Act 273/1996 Coll. (English translation on http://www.compet.cz/English/LEGI/Zakon273_en.htm). Extrajudicial control is also available in the utilities sector since both the former and the current PP Acts have implemented the conciliation mechanism introduced by EC Directive 92/13 (§ 124 of the 2006 PP Act). There is no specific arbitration body entrusted with an alternative dispute settlement mission in the field of public procurement.

5.1 Review of Procurement Decisions

Under the 2004 Act, there are four stages for the review of decisions in relation to a tendering procedure. At the **first stage**, before the contract has been concluded, any bidder is entitled to file in writing a complaint to the contracting authority within 15 days from the notification of the contract award or the decision of exclusion from the procedure. Below the EC thresholds, the bidder's right to lodge a complaint is subject to showing that he or she has or has had an actual interest in obtaining the contract and that he or she has been or is likely to be harmed by the alleged infringement of the 2004 Act. In both cases, lodging a prior complaint to the contracting authority is a precondition to seeking review of the alleged infringement before the Office for the Protection of Competition. This obligation does not apply where the contract has already been concluded. Within 10 days from the receipt of the complaint, the contracting authority shall notify the complainant of a reasoned decision. The contracting authority may uphold or reject the complaint, or suggest a different solution than that advocated by the complainant. Should the

contracting authority reject the complaint or fail to adopt the measures requested by the complainant, the contract shall not be concluded within a period of 30 days from the receipt of the complaint. A contract concluded in violation of the aforementioned obligation is deemed to be void. The provisions relating to the first stage have slightly been amended by the 2006 Act: Henceforth, any bidder is entitled to formally complain to the contracting authority regardless of the estimated contract value, and the period of 60 days has been amended to 45 days. At the **second stage**, should the outcome of the prior complaint not be favourable to the complainant, disputes may be brought before the Office for the Protection of Competition. The office is established as an independent government authority, whose chairperson is appointed for a six-year mandate by the president of the Czech Republic upon a proposal of the government. In addition, the chairperson cannot be member of any political party and does not necessarily have to be a qualified lawyer. Bidders may challenge any act of the contracting authority likely to breach transparency and non-discrimination obligations, such as the award conditions, the contract notices/invitations to tender, the type of the tendering procedure, the decision of exclusion and the contract award (§ 97.3 of the 2004 Act). The petition has to be lodged within ten days after the decision of the contracting authority once the prior complaint has been notified to the complainant. In any case, the petition shall be lodged no later than 25 days from the lodging of the prior complaint to the contracting authority. The 2004 Act also allows the office to initiate proceedings at its own initiative no later than three years after the infringement of the Act has actually occurred. In 2005, 334 proceedings were initiated, from which 184 upon petition and 152 at the initiative of the office. Once proceedings have been initiated and the contracting authority has been required to supply the necessary documentation (such as the procurement file), the office has 30 days (in difficult cases, 60 days) to issue a decision on the petition. Under the 2006 Act, this time limit starts as from the initiation of proceedings before the office. The petition is dealt with by the office's Procurement Section, which is chaired by a lawyer. At the **third stage** the decision of the Procurement Section may be appealed against before the chairperson of the office, who issues a decision on the basis of a proposal made by the "Appellate Committee", an advisory board established within the office and composed of officials of the body as well as external experts. There are no specific provisions in the 2004 Act dealing with this stage, but the general provisions in the Act 500/2004 Coll. – the Administrative Procedure Code – are applicable. There is no further appeal against decisions rendered by the office, but an exceptional remedy is available at a **fourth stage**. In particular, the Supreme Administrative Court may, upon petition for revision (cassation), review the decisions of the office. The Supreme Administrative Court is an independent and permanent constitutional organ as well as review body of last instance in administrative cases (Nejvyšší správní soud, Masarykova 31, 657 40 Brno; Phone +420 542 532 311; Fax +420 542 532 361, E-mail: podatelna@nssoud.cz, Website: http://www.nssoud.cz/en/index.php).

5.2 Remedies

Under the 2004 Act and regardless of the estimated contract value, remedies against acts of contracting authorities may be awarded before or after the conclusion of the contract, whether by the Office for the Protection of Competition (interim and corrective measures, suspension of contract performance, penalties) or the ordinary courts (damages). Prior to the termination of proceedings and to the extent necessary for maintaining the purpose thereof, the Office is entitled to grant **interim measures,** whether upon application of the petitioner or on its own initiative, in order to prevent further damage or an immediate risk to the petitioner's interests. In particular, the office may, for a period specified in the relevant order but not later than the date of issuance of a final decision, 1) require the contracting authority not to conclude the contract after a tendering procedure has taken place; 2) suspend the tendering procedure and 3) suspend the performance of a concluded contract. The office may take into account the probable consequences of interim measures for all interests likely to be harmed, including the public

interest, and decide not to grant such measures where their negative consequences would outweigh their benefits. As a matter of principle, the lodging of the petition has no suspensive effect on the ongoing tendering procedure, but where the outcome of the first stage (prior complaint to the contracting authority) is not favourable to the complainant, the contract shall not be concluded for a period of 30 days (under the 2006 Act: 45 days) from the receipt of the complaint. In addition, the 2004 Act states that where the contracting authority deliberately violates tendering obligations in bad faith, the procedure shall be deemed **invalid** from the very beginning. Appeals against orders granting interim measures have no suspensive effect on the enforcement of such orders. Through its final decision and before the contract has been concluded, the office, after having confirmed in writing that an infringement of the PP Act actually occurred, shall impose a **corrective measure** on the contracting authority, i.e., set aside the contract award decision, where such an infringement has actually affected or has been likely to affect the evaluation of bids. After the conclusion of the contract and on the same grounds as those referred to in the aforementioned case, the office is entitled to **ban the performance** of a concluded contract and impose a **penalty** in joint proceedings for breach of a duty referred to in § 102 of the 2004 Act (for instance: no compliance with tendering obligations; conclusion of a contract in violation of the 2004 Act; unjustified abandonment of a tendering procedure; failure to record the tendering procedure or to dispatch information on contract awards). Sixty-four penalties of a total amount of CZK 2 569 000 were imposed in 2005. The annulment of a concluded contract shall, however, solely be pronounced by an ordinary court upon proposal of one of the contracting parties. **Damages** may solely be awarded by an ordinary court under conditions set forth in the Commercial Code. As a matter of principle, there must be an adequate link between the alleged infringement of the PP Act and the (actual or potential) damage to the claimant's interests. The award of damages is, however, not subject to a prior decision of the office setting aside the alleged act of the contracting authority. Finally, there are disciplinary measures (such as periodic fines) that may be taken against the contracting authority or procurement officials by the competent administrative body (§ 104 of the 2004 Act).

5.3 Procedure

Proceedings before the Office for the Protection of Competition are governed by the 2004 Act (since 1 July 2006: the 2006 Act) as well as the Administrative Procedure Code (Act 500/2004 Coll.). Initiation of proceedings is subject to the prior submission of a **deposit** into the office's account, as well as the payment of an **administrative fee** of CZK 30 000 (about €1 000). The deposit amounts to 1% of the tender price but shall not exceed CZK 1 000 000. Should the petition be upheld, the deposit is refunded to the petitioner (together with interests). In case of rejection/dismissal, the deposit is considered as income of the state budget. The administrative fee is not refunded. Under the 2006 Act, there is no obligation to pay an administrative fee, but the deposit amount is now 1% of the tender price and shall not exceed CZK 2 000 000. Initiation of proceedings before the courts does not require the involvement of a professional (i.e., legal representation) but is subject to the payment of a court fee. In case of claims for damages, the court fee amounts to 1% of the calculated damage amount. In case of proceedings before the Supreme Administrative Court, the court fee is CZK 2 000. In the latter case, the Code of Administrative Justice applies. Court fees, as well as other relevant costs, may be reimbursed by the unsuccessful party upon decision of the courts. In proceedings before the office, the involvement of **experts** (such as lawyers or interpreters) may be decided by the Procurement Section in cooperation with the Economic Section should this prove necessary. Expert costs are paid through a special budget of the office. The office's staff, as well as external experts, are bound to keep **confidential** all issues arising during proceedings. This obligation does not apply should these persons be invited to give testimony before a court of law or to state investigation authorities, or to supply evidence in writing to the aforementioned authorities by virtue of the Penal Code. Should the office become aware of a fact falling within the scope of **trade secrecy**,

it shall adopt any appropriate measure to avoid a breach of trade secrecy. The bidder's right to inspect the contract documentation is subject to the office obtaining the agreement of all involved bidders. The office's decisions are disseminated to the parties in proceedings by mail and are published in an annual collection of office decisions, as well as on the office website.

5.4 Remedies Culture

Officials of the Office for the Protection of Competition may have studied public procurement law as part of their university curricula, or in seminars held by government authorities (such as he Ministry for Regional Development) or the EU (especially within the context of twinning projects). The attitude of the officials, as well as of members of the judiciary, is considered to be fair. Case law is limited but of considerable importance due to a system consisting of both codification and case law. Bidders may familiarised themselves with procurement policy through courses provided by government authorities, the office itself, the EU, lawyers or consultants, as well as private training institutions. Most bidders are willing to initiate review proceedings in order to get a fair solution, but some of them simply wish to obstruct the tendering procedure. Others seem to be reluctant to accept judicial protection either because they do not wish to compromise their chances for the next contract or because they consider the applicable fees too high. Others intend to obstruct procurement through review proceedings. Even though there is no special professional training, the background knowledge of contracting officers is considered to be adequate. Generally, review of tendering procedures is seen as an efficient method of monitoring the legality of award decisions. There is a specialised journal in the field of PP as well as a recently founded national association. The civil society also takes a more active role in the evolution of public procurement rules. For instance, recent changes of the PP Act originated in discussions launched by the association of national construction industries and the national section of Transparency International. The media regularly cover PP review proceedings. The impact of ECJ rulings is very important and is reflected in the petitions submitted by bidders. The reviews and remedies system has significantly evolved following the accession of the Czech Republic to the EU.

6. Denmark

Public procurement in Denmark is regulated by two governmental orders of 16 September 2004 implementing the new EC Procurement Directives and having come into force on 1 January 2005 (See generally: http://www.ks.dk/english/procurement/legislation/pro/). Below the EC thresholds, public procurement is governed by the 2005 Act on Tender Procedures for Public Works as well as by a ministerial circular of 2002 in relation to supplies and services. The Danish review and remedies system is based on both judicial and extrajudicial control. The main actors are the **Complaints Board for Public Procurement** (Klagenævnet for Udbud, Sekretariatet, Kampmannsgade 1, DK-1780 Copenhagen V; Phone +45 3330 7621; Fax +45 3330 7799, Website: http://www.klfu.dk), an independent quasi-judicial administrative body, and the **Competition Authority** (Konkurrencestyrelsen, Nyropsgade 30, DK-1780 Copenhagen V; Phone +45 7226 8000; Fax +45 3332 6144, E-mail: ks@ks.dk, Website: http://www.ks.dk/english), an agency placed under the Ministry of Economic and Business Affairs. Ordinary courts also have jurisdiction over public procurement cases, but they rarely intervene in practice.

6.1 Extrajudicial Control

The Danish Competition Authority (DCA) operates an **informal "problem-solving" system**. Even though the DCA is not empowered to issue legally binding decisions or to suspend/correct a tendering procedure, many bidders prefer to refer a case to the DCA rather than the Complaints Board. The "informal" system seems to be advantageous, since it is considered to be on an equal footing with the formal system (issuance of **recommendations,** which are mostly

complied with), ensures a rapid and less bureaucratic settlement of disputes (approximately two months per case), is more flexible (cases may be brought by any person/corporation or at the initiative of the DCA itself; there is no need for legal representation) and is free of charge. As a consequence, the DCA deals with almost 30 procurement cases annually. The contracting authority may be requested to respond to the allegations and grant access to the procurement file, subject to the exceptions provided for by general administrative law (business secrets, etc.). The recommendation is decided upon by the legal experts of the DCA. Where a contracting authority fails or refuses to comply with the recommendation issued by the DCA, the latter has the power to refer the case to the Complaints Board. The contracting authority may challenge the recommendation before ordinary courts. In addition to this system, the conciliation mechanism established by the EC Directive 92/13 has been implemented in domestic law but is never used in practice. Bidders may also file a protest directly to the contracting authority, but there are no specific provisions as to who within the authority is entitled to deal with such protests. Direct protest is not a prerequisite to seek judicial review. Finally, resolution of problems occurring in cross-border procurement is possible within the context of the Public Procurement Network (PPN, http://www.ks.dk/english/procurement/network).

6.2 Judicial Control

Regardless of the estimated contract value, decisions of the contracting authorities in relation to a tendering procedure in both the classical and the utilities sectors may be challenged before **ordinary courts** or the **Complaints Board for Public Procurement**. The first option rarely applies in practice. The board was set up in 1991 and is currently governed by Act No 415 of 31 May 31 2000 as amended (hereafter the 2000 Act English translation on http://www.ks.dk/english/procurement/legislation/act/), as well as an Executive Order issued for the implementation of the act, English translation on http://www.ks.dk/english/procurement/legislation/415/.). The board has no jurisdiction over procurement cases involving the use of a geographical area for the purpose of prospecting for or extracting oil, gas, coal or other solid fuel (section 3.2 of the 2000 Act) and has to dismiss complaints brought in this respect (such complaints must be brought before the Maritime and Commercial Court). The board consists of a chairperson, three deputies and a number of expert members with ascertained qualification in the fields of construction, procurement, transport and other associated activities. All members are appointed by the minister for Economic and Business Affairs for a (renewable) four-year mandate. The chairperson and the deputies must be members of the judiciary. The chairperson may authorise a deputy to act in his or her stead and shall define the way in which the decisions have to be published. The decisions of the board (with the exception of those automatically dismissing complaints under section 3.2 of the 2000 Act) may be appealed before the ordinary courts within a limit of eight weeks as from their notification to the parties. If no appeal has been lodged after this time limit has elapsed, the board's decision may no longer be appealed. In the last instance, the **Supreme Court** (Højesteret) may have jurisdiction over procurement cases, which rarely occurs in practice since the decisions of the board are generally complied with. The Supreme Court is a permanent body, independent from the executive (section 64 of the Danish Constitution), whose decisions, issued after an inter partes procedure has taken place, are legally binding. A decision of the board cannot be brought before another administrative authority (section 8.1 of the 2000 Act).

6.3 Remedies

According to section 6.1 of the 2000 Act, the Complaints Board is empowered to dismiss a complaint or determine it wholly or partially on the merits. In particular, before the contact has been signed, the board may 1) **suspend** the tendering procedure; 2) **set aside** an unlawful decision; 3) require the contracting authority to **comply** with its tendering obligations, i.e., correct an irregular procedure, and 4) **award damages**. The award of damages is considered to be a

major innovation of the Danish system; before the adoption of the 2000 Act, bidders had to claim damages before ordinary courts. The board has no power to annul a concluded contract. Such an action must be brought before the ordinary courts, which never occurs in practice. As from October 2006, however, legislation was amended to let a compulsory **standstill** period be introduced between the award and the conclusion of the contract (prompted by the "Alcatel" ruling). Complaints do not have an automatic suspensive effect, but the board may order ad hoc the suspension of the tendering procedure should it prove necessary. The general principles of Danish law remain applicable. The board may, however, take into account the probable consequences of the suspension for all interests likely to be harmed, including the public interest, and decide not to issue an order where its negative consequences would outweigh its benefits. The award of damages is subject to a prior decision on the substance of the case, e.g., a decision upholding the complaint against an infringement of the applicable public procurement rules. Claims for damages are decided according to the general principles of Danish law. Depending on the circumstances of the case, damages may amount to the tendering costs (damnum emergens) or lost profits (lucrum cessans). The board may require the parties to provide all information necessary for the issuance of the decision. Failure to comply with such an order entitles the board to impose **daily fines**, which may be collected pursuant to the rules on the collection of personal taxes.

6.4 Procedure

Proceedings before the Complaints Board are governed by the 2000 Act and the 2000 Executive Order. Complaints may be submitted in writing by 1) any person having a legal interest therein; 2) the Danish Competition Authority; 3) the Minister of Housing and Urban Affairs and 4) the (professional) organisations and public authorities to which the minister of Economic and Business Affairs grants access to proceedings before the board (these entities are listed in an annex of the Executive Order). The fourth category was introduced to allow review of procurement decisions in the event no individual bidder wishes to lodge a complaint. It is not compulsory for bidders to file a prior formal protest to the contracting authority but there is an **obligation to inform** the latter, simultaneously with the submission of a complaint, that legal proceedings have been initiated. There are no mandatory time limits for lodging a complaint before the board, nor are there any model forms. The complaint must be notified to the defendant, who, within a period specified by the board, shall submit a statement on the factual and legal aspects of the case. The board or the chairperson acting on its behalf may allow a third party or public authority to whom the case is considered to be of substantial importance to **intervene** in support of the complainant or the defendant. The board or its chairperson has the power to request the complainant, the defendant or the third party to produce all necessary information in relation to the case. The complainant and any other party intervening in the proceedings shall be given access to the aforementioned statement as well as to other materials, unless access to documents is prohibited by law. They shall be given the opportunity to reply. The parties to proceedings shall be notified of the place and time of the hearings and have the right to be accompanied by a lawyer, accountant or other expert representative. The **hearings** shall not be open to the public, unless all the parties decide otherwise. If the hearing is to be open to the public, the Danish Competition Authority shall be informed accordingly. Cases not argued orally shall be ruled on by the board on the basis of written deliberation, possibly at a meeting. The board is composed of at least two expert members, whom the chairperson appoints from an official list. The 2000 Executive Order also provides that "where a decision requires knowledge of attestation work, certification of persons, systems or products, or inspection, at least one of the expert members must have special knowledge on the area concerned" (Section 5.3). Expert costs are covered by the board budget. There is a 4000 DKK **fee** (about €500). Lawyer costs, where applicable, are covered by the represented party. There is no general principle of success. Under the 2000 Act, where the complaint is wholly or partially upheld, the

board may order the contracting authority to **refund** the costs incurred by the complainant in connection with the initiation of proceedings. There are no mandatory time limits for the issuance of decisions. The board usually decides within five to six months. The decisions are notified directly to the parties and are published on the board website (www.klfu.dk, Danish version). Some of them can be found in legal reviews.

6.5 Remedies Culture

Members of the Complaints Board may have studied public procurement law as part of their university curricula or within the context of seminars and conferences held by public and private institutions. Professional practice is also an important factor. The same applies to bidders, who additionally may be assisted by their respective professional organisation. As a matter of principle, many bidders see legal proceedings as a case of last resort and may prefer directly protesting to the DCA. Even though the Danish procurement system is structured upon a decentralised model and purchasing practices are likely to vary from entity to entity, the general knowledge of procurement officials is considered to be positive. Cases dealt with by the DCA have shown a high degree of professionalisation in public procurement. In addition, professional seminars are organised by the DCA (for instance, on the new EC Procurement Directives) as well as other organisations. There are, however, no national procurement association or specialised publications. The attitude of members of review bodies towards procurement cases is considered to be balanced. Case law has is of limited but considerable importance due to a system consisting of both codification and judicial interpretation. The ECJ rulings have a considerable impact and are usually referred to in the decisions of the Complaints Board as well as in the recommendations of the DCA. Finally there is a growing interest in public procurement cases amongst several interest groups, NGOs and the media.

7. Estonia

The public procurement **remedies and review system** of Estonia includes both independent judicial review and executive-dependent review. An ongoing reform will introduce a combination of independent executive review and judicial review. The system can be divided into remedies before and after a contract has been concluded. There are, however, no differences regarding the review of public sector or utilities contracts or regarding the review of contract above or below the EC thresholds.

7.1 Complaint to the Contracting Authorities

The **contracting authorities** do not deal with complaints, unless the complaint is addressed specifically to them rather than to the Public Procurement Office (PPO). However, it is not compulsory to complain to the contracting authority, and usually the tenderers submit protests directly to the PPO. There are no specific rules in the field of public procurement, which regulate complaints to the contracting authority. However, according to the document-management procedures (of state and local government agencies and legal persons), all letters must be answered within 30 days from the date of receipt.

7.2 Non-judicial Review

Before the contract has been concluded, tenderers can challenge a public procurement decision by filing a protest with the **PPO** within 10 working days from the date of becoming aware of the decision in question. The PPO was established by the Public Procurement Act (PPA) and is an **executive state office**. The members of this body do not have a status comparable to that of judges. The review procedure in the PPO must be completed within another 10 working days. During this period, the procurement procedure **is suspended.** The contracting authority has the choice between written proceedings on the basis of the documents submitted or a public session where at least the representative of the PPO, the person who submitted the protest and the

contracting authority are present. The PPO may annul the challenged public procurement decision. Tenderers can appeal the decision of the PPO to an administrative court, as outlined below. They may also challenge a decision though parallel proceedings in the PPO and the administrative court. The review procedure for the PPO is stated in the PPA (Chapter 9, Paragraphs 61-67). At present the PPO is the main review body: 281 protests were submitted to the PPO in 2005, out of a total of 7569 award procedures. Sixty-five of these were not decided, 67 satisfied the procedural requirements, 52 did not satisfy the procedural requirements, 66 were admitted by the contracting authority, 28 were withdrawn and, finally, in four cases the PPO decided to set aside the award procedure. The frequency of review of public procurement decisions through the PPO is 4%. However, the PPO has also **supervisory functions and does advise contracting authorities**. Hence there is a potential conflict of interest. Nevertheless, the review procedure in the PPO is relatively quick and cheap (as discussed below), so those who are genuinely interested in challenging an unlawful decision can do so without delaying the award procedure. The 2006 Draft PPA states that complaints shall be dealt with by a newly created **Public Procurement Commission** (PPC), independent from the PPO, so there will be no more conflict of interest between executive and review functions.

7.3 Judicial Review

Tenderers can also lodge a suit to the **administrative court** against a decision made by a contracting authority in relation to a tendering procedure or as an appeal against a decision of the PPO. The court may award interim measures, including the suspension of the award procedure. As a next instance, an appeal may be launched against the judgement of the administrative court in the Estonian **Regional Court – the court of appeal**. Finally, the judgements of the Court of Appeal may be annulled by the **National Court of Estonia** in Tartu. This three-instance judicial review can be initiated simultaneously with a protest to the PPO. However, under the new 2006 Draft PPA, a protest to the newly created PPC will become a precondition for judicial review. Moreover, **possibly** the administrative court will no longer be able to award interim measures such as a suspension of award procedures. The procedural law for Administrative Court is regulated in the Code of Administrative Court Procedure. The last-instance review body for public procurement decisions is the National Court of Estonia, which was established under the Constitution and fulfils the requirement for a court of law set forth in the *Dorsch* and *Salzmann* judgements. Its justices must be experienced and recognised lawyers. Damages can be claimed only through the **court** after the contract has been concluded on the basis **of the State Liability Act or the Law of Obligations Act**. On the basis of the PPA a tenderer can demand compensation of the expenses for the preparation of the tender, if he or she can prove that had the contracting authority not violated the law, the contract would have been awarded to him or her. The 2006 Draft PPA newly stipulates that damages can be claimed in the administrative court and may be compensated only if the tenderer can prove that he or she would have been awarded the contract had the contracting authority not violated the law. The contested decision must be declared unlawful, but this does not affect the validity of the contract already concluded. The **independence** of the Estonian judicial system (**county** and administrative courts, **Regional Court**, **National Court**) is based on the Constitution. Judges are appointed for life and can be removed from office only by a court judgement. They must have fulfilled an accredited law curriculum of academic studies, be of high moral standing and have the abilities and personal character required for a judge. So far the **ECJ** has not been involved in the national reviews and remedies system, and there have been no cases subject to infringement proceedings brought by the **European Commission**. A **court of arbitration** dealing with complaints by the **PPO** was abolished in 2001 and was replaced by the judicial review outlined above.

7.4 Remedies

All **remedies** except those available after the conclusion of the contract are based on the PPA and can be awarded by the courts and the PPO. The award procedure can be suspended or set aside, and specific decisions of the contracting authority can be annulled. The legal basis for setting aside or suspending an award procedure is the PPA. Under the current PPA, the award procedure shall always be suspended for the time of the proceedings in the PPO or court. The PPO or court may take into account the probable consequences of interim measures for all interests likely to be harmed, including the public interest, and decide not to award such measures where their negative consequences would outweigh their benefits. However, this is rarely done. The 2006 Draft PPA abolishes this automatic effect. Instead, the contracting authority is prevented from concluding the contract before the procedure in the new Commission has been completed. If the contracting authority does not follow this rule, the contract is automatically null and void. The contract itself cannot be annulled on the basis of the PPA in any other cases. However, this may be done on the basis of contract law (Law of Obligations Act). After the contract is concluded, no interim measures are available. There is no legal basis to order periodic penalty payments.

7.5 Procedure

Procedural law allows experts to be involved in both PPO and court proceedings. Experts usually give their opinion in writing; sometimes also orally during the review hearings. Whoever loses the case bears the costs. At present, the protest may be submitted by a tenderer or any person who is interested in taking part in the tender procedure. According to the 2006 Draft PPA, the protest may be submitted by a tenderer, a candidate or any person who is interested in taking part and has an opportunity to take part in the tender procedure. The fees for submitting a protest are regulated in the State Fees Act. Currently, the fee for submitting a protest to the PPO is about €192 when the contested decision was a contract award decision and €6 in all other cases. When lodging a suit in the administrative court, in the case of a tender submitted by the person filing the appeal, the fee is 3% of the value of the tender, but no less than €6 and no more than €320. In the absence of a tender submitted by the person lodging a suit, the fee is €6. In the 2006 Draft PPA, the fee when submitting a protest to the PPO is about €639 when the estimated value of public contract is less than the EC thresholds and about €1 278 in case the estimated value of the public contract is equal to or more than the thresholds. When lodging a suit in the administrative court, in the case of a tender submitted by the person filing the appeal, the amount is 1% of the value of the tender, but not less than about €959 and not more than about €12 782. In the absence of a tender submitted by the person lodging a suit, the fee is lower. Legal representation is not required, although it is favoured, especially in courts of law. The cost for hiring lawyers varies greatly. The losing party bears her costs and reimburses the winning party for all the costs: fees, legal representation and experts. Protests to the PPO shall be filed within ten days, suits to courts of law within 30 days as of the date on which the person filing the protest becomes or should have become aware of the violation of the rights or damage to the interests of the person, but not after a procurement contract has been entered into. A protest concerning tender documents shall be filed before the contracting authority opens the tenders. There are no possibilities for *in camera* proceedings in the field of public procurement. All judgements of the PPO and the court decisions are sent to the parties by mail and are published on the respective websites. However, the court may declare a session closed if the interests of a party so require but only in exceptional cases, such as the protection of state secrets or public order. Judgements of the **National Court of Estonia** are also published on the website of the court, as well as in official journal for legislative acts and court judgements of the National Court. Tenderers can challenge calls for tender, tender documents and all decisions made within the award procedure, including qualification decisions and contract award decisions. The 2006 Draft PPA **will possibly also add** all operations made within the award procedure by the contracting authority — for

example, the opening of the tenders — to this list. Contracts already concluded cannot be challenged on the basis of the PPA. However, damages can be claimed on the basis of the Law of Obligations Act. There are mandatory time limits both for the PPO and courts of law to issue a decision. The PPO usually follows the limit unless an opinion from an expert needs to be ordered. Courts of law rarely follow the limits due to the heavy workload of courts in general. There are no legal consequences of not respecting the time limits. No mandatory model forms are used. Case law is of limited importance due to interpretation of legislation provided in court judgements.

7.6 Review Culture

Judges, PPO panellists, and lawyers representing tenderers or contracting entities in review proceedings acquire their knowledge of public procurement law and EC law mainly as part of their university studies. Moreover, judges have an obligation to pursue continuous education, and courses are provided by the Ministry of Finance and a number of private entities. The attitude of judges and PPO panellists on public procurement review bodies towards the public interest on the one hand and the private interests of the bidders on the other is considered fair and balanced. **Tenderers** seeking the review of public procurement decisions gain their knowledge of the legal, financial and administrative background of how public procurement works in practice mainly on the job. Training is provided by Ministry of Finance, and lawyers are also consulted. Tenderers are very well informed about their possibilities to challenge an award procedure. Some intend to obstruct procurement through review proceedings. The national legal framework must make it difficult for those to challenge public procurement decisions who do not act in good faith and try to use it to harm their competitors. **Contracting officers** seek to educate themselves continuously and attend courses frequently. The emphasis of these courses is often of a theoretical nature, so the legal background is well known. The attitude of contracting officers and their superiors dealing with complaints towards tenderers filing complaints or seeking judicial review is neutral. No specific **journals** on public procurement are available. Occasionally, articles on public procurement law are published in the legal journal "Juridica" (www.juridica.ee). Public procurement law is not discussed very often at academic and professional conferences or seminars in Estonia. There is no national association on public procurement law and policy. National interest groups do not get involved in review proceedings. **Professional training** on public procurement law and policy for public procurement officers is provided by the Ministry of Finance and by some private entities. **Judgements of the ECJ** are considered but rarely referred to.

8. Finland

The public procurement **remedies and review system** of Finland is based on independent judicial review. The system can be divided into remedies before and after a contract has been concluded: There are two separate two-instance paths of judicial review for contracts above and below the EC thresholds.

8.1 Contracting Authority

It is not compulsory to complain to the **contracting authority or entity**. There are no specific rules in the field of public procurement, which regulate complaints to the contracting authority. However, it is possible to try to settle the objections in this way. The same legislation applies to public and privatised utilities when they make public procurement decisions. Under the public procurement law (http://www.finlex.fi/en/laki/kaannokset/1992/en19921505.pdf), the petitioner shall, before submitting a petition to the Market Court (discussed below), inform the contracting entity in writing of this intention.

8.2 Judicial Review

Since 2002, the Market Court in Helsinki has been the main forum of public procurement review in Finland. Five hundred and eight complaints were brought before the Market Court against public procurement decisions in 2005, and 206 rulings were delivered. Twenty-six percent of the petitions were approved, 33% were rejected, 8% were dismissed and 33% expired or were dropped. Between 1994 and 2002, the Competition Council had jurisdiction to give rulings in public procurement cases. When the new legislation comes into force, the Market Court will no longer have jurisdiction for cases under national thresholds. In the second and last instance, an appeal can be filed against the decisions of the first-instance courts in the **Supreme Administrative Court** in Helsinki. Claims for damages can be brought to **general courts of first instance**. These courts are independent from the executive, administration or any other part of government, and their decisions are of a jurisdictional nature. All Finnish courts exercise judicial power. They are independent and bound only by the law. No outside party can intervene in the courts' decisionmaking; this independence is guaranteed by the Constitution. The chairperson and the members of the last-instance review body must have broad knowledge and expertise in the field of administrative law. The courts were established on the basis of the Constitution, special legislation on general courts and the Market Court Act (http://www.finlex.fi/en/laki/kaannokset/2001/en20011527.pdf). All judges must be experienced and recognised lawyers. Judges are appointed according to a general procedure.

8.3 Remedies

Legal protection is admissible against any public procurement decisions, e.g., the selection of a particular award procedure, shortlisting decisions or qualification decisions. According to Section 9 PPL, the Market Court may (1) wholly or partly set aside a decision of a contracting entity; (2) forbid the contracting entity to apply a section in a document relating to the contract or otherwise to pursue an incorrect procedure; (3) require the contracting entity to correct its incorrect procedure or (4) order the contracting entity to pay compensation to a party who would have had an actual chance of winning the contract if the procedure had been carried out correctly.

The Market Court may, in order to emphasise the importance of complying with the prohibition referred to in Section 9(1)(2), and with the obligation referred to in Section 9(1)(3), impose a conditional fine, in compliance with the Act on Conditional Fines (1113/1990). The lodging of an action does not have an automatic suspensive effect. After a claim has been brought, the Market Court may, as an interim measure, forbid or suspend the implementation of a decision or otherwise order that the contract award procedure be suspended for the period during which the matter is under consideration. The prohibition referred to above in Section 9(1)(2) and the obligation referred to in Section 9(1)(3) may also be imposed as interim measures for the period during which the matter is being dealt with at the Market Court. When a decision has been taken to adopt a measure referred to in Subsection 2, the Market Court shall ensure that the measure does not cause injury to the opposing party or the rights of other parties, or to the public interest, greater than the advantages which it brings. The chief judge or another judge of the Market Court may, in urgent cases, decide upon an interim measure.

According to Section 8 Subsection 1 PPL, one who has occasioned harm to a candidate, tenderer or contractor by a procedure contrary to the law shall be obliged to pay damages. Under Subsection 2, it is stated that where a claim is made for damages representing the costs of participating in an award procedure, the candidate or tenderer shall, in order to be awarded damages, be required to prove only an incorrect procedure as referred to in Subsection 1 and prove that he or she would have had an actual chance of winning the contract if the procedure had been correct. The damages under Subsection 1 are not limited to the tenderer's costs of participating the award procedure, and can be awarded for the loss of contract. It is not

necessary that the contested decision be set aside before damages may be claimed. Finland introduced the **conciliation procedure** described in Chapter 4 of Directive 92/13/EEC.

Case law is of limited importance due to the interpretation of legislation provided in judgements. The judgements of the ECJ have a big impact on public procurement review proceedings and are often invoked in the proceedings as rules of interpretation. In the last five years, the Market Court has not made any requests for preliminary rulings to the ECJ. In the last two years, the European Commission has delivered some five reasoned opinions against Finland relating to public procurement issues.

8.4 Procedure

The provisions of the Administrative Judicial Procedure Act (http://www.finlex.fi/en/laki/kaannokset/1996/en19960586.pdf) cover mainly the process of appeal in public procurement cases. According to Section 9 b PPL, the right of action lies with, and proceedings may be initiated by, the party concerned, the Ministry of Trade and Industry and the Ministry of Finance in matters relating to contracted work or in matters referred to in Section 5(4), and the public authority that has granted contract-specific aid for the implementation of the works contract in question. The claim must be made within 14 days of the date on which the tenderer has been notified in writing of the decision in question and has received written instructions for referral to the Market Court (petition instructions).The initiator of a case shall pay a general fee of €204 for the hearing of the case at the Market Court. The PPL also contains a provision placing the authorities, i.e., the administrative courts, under an obligation to ensure a proper examination of the case. Thus, the parties to the proceedings are usually able to pursue their cases without professional legal help, which facilitates the filing of appeal and access to legal remedies. There is a principle of success regarding the costs. The principle seldom applies, however, for public authorities. According to Section 74 Subsection 3 Administrative Judicial Procedure Act, a private individual shall not be held liable for the costs of a public authority unless the individual has made a manifestly unfounded claim. The decisions of the Supreme Administrative Court are sent to the parties involved in the case by traditional mail. Decisions that have later relevance for the application of law in identical or similar cases or are otherwise of public interest are published in the Yearbook of the Supreme Administrative Court. It is primarily the parties involved that decide upon the involvement of technical and other experts in review proceedings. In these cases, it is the parties themselves who bear the costs for their involvement. In certain cases, the court can ex officio involve experts in review proceedings. The court may decide that the hearing shall be held, when necessary, in private when a confidential document is presented or information covered by the duty of non-disclosure is revealed during the hearing. Confidential business information is protected by the Act on the Openness of Government Activities. Documents shall be secret unless otherwise specifically provided if they contain information about a private business or professional secret, as shall documents containing other comparable private business information, if access would cause economic loss to the private business, provided that the information is not relevant to the safeguarding of the health of consumers or the conservation of the environment or the promotion of the interests of those suffering from the pursuit of the business, and that it is not relevant to the duties of the business and the performance of those duties. There are no mandatory time limits for the courts to issue a decision; in 2005, the Market Court gave its decisions approximately 6.2 months after the actions had been brought. The time may vary according to the complexity of the case.

8.5 Review Culture

Judges and public procurement lawyers representing tenderers or contracting entities in review proceedings acquire their knowledge of public procurement law in particular and Community law in general as a part of their university studies, vocational training, continuous training, courses provided by public and private units and the study of case law, as well as on the job. The attitude

of judges and panellists on public procurement review bodies towards the public interest on the one hand and the private interests of the bidders on the other is described as fair. Tenderers seeking the review of public procurement decisions gain their knowledge of the legal, financial and administrative background of how public procurement works in practice through lawyers, consultants and their professional organisations. Most tenderers see review proceedings as a matter of last resort. The knowledge of contracting officers of the legal and other background of public procurement is described as "mainly good". The attitude of contracting officers and their superiors dealing with complaints towards tenderers filing complaints or seeking judicial review of public procurement decisions is described as "mainly positive". There are no publications or academic journals dealing specifically with public procurement issues including public procurement review and remedies. Public procurement law is quite frequently discussed at seminars. There is no national association on public procurement law and policy, and public procurement issues do not get special media attention. Normally, different, e.g., consumer- or industry-interest groups, comment on matters concerning their field of interest, which is also the case when it comes to public procurement issues. There is no specific professional training on public procurement law and policy for public procurement officers. The strength of the system is that there are almost no barriers for tenderers to have their case reviewed by the Market Court, which has a very good level of knowledge on issues concerning public procurement law. The long duration of the proceedings is a probable future weakness, as the number of cases brought before the Market Court is expected to increase. The review and remedies system is not considered effective if the duration of the proceedings is as long as the procurement period in the public sector (usually one year).

9. France

The public procurement review and remedies system in France is based on independent judicial review. The division of French law into private and public law plays a major role. Contracts awarded by the state, state public bodies of an administrative character, local authorities and local public bodies are subject to the Public Procurement Code ("**Code des marchés publics" – CMP, Decree No. 2006-975 August 1, 2006**, available on the official website: http://www.legifrance.gouv.fr.). Such contracts always have a public law nature ("contrats administratifs"). Disputes arising from these contracts fall within the jurisdiction of administrative courts. In contrast, contracts awarded by public bodies other than those covered by the CMP, private law bodies meeting the criteria of "bodies governed by public law" in the sense of the EC Procurement Directives as well as certain entities of specific nature (such as the Banque de France) and utilities operators are subject to the **Ordinance No. 2005-649 of 6 June 2005**. Two decrees implement the aforementioned ordinance (Decree No. 2005-1742 of 30 December 2005 for contracting authorities in the classical sector; Decree No. 2005-1308 of 20 October 2005 for utilities operators). According to the public or private law nature of the bodies, these contracts have a public or a private law nature. Disputes arising from such contracts fall within the administrative jurisdiction or the jurisdiction of ordinary (civil) courts. In both cases, aggrieved bidders may initiate pre-contractual summary proceedings to obtain interim measures by the judge. In principle, no prior complaint needs to be notified to the contracting authority. General proceedings can also be used to suspend the award procedure or to declare null and void an irregularly awarded contract. The award of damages can be sought independently in the aforementioned actions, except for the pre-contractual summary proceedings, and depends on proof that the rejected bidder has been deprived of a real chance of winning the contract.

9.1 Extrajudicial Control

Any bidder can address the contracting bodies in order to require an administrative review of the procurement procedure. Moreover, the **Public Procurement Network** (PPN) can help bidders with respect to cross-border procurement: Where a company based in a PPN country and

participating in a procurement procedure launched in another PPN country experiences difficulties, the national PPN contact point may offer assistance before the contract has been awarded and signed. Moreover, in accordance with EC Directive 92/13/EEC, **attestation** (circular of 24 September 2001) and **conciliation** (order of 20 September 2001) mechanisms are available in the utilities sector. These mechanisms are rarely used in practice, however.

9.2 Judicial Review

Before the contract has been concluded, bidders may challenge any decision in relation to the tendering procedure as well as the decision rejecting their offer. They can also seek damages where the contracting authority has abandoned the tendering procedure. **After** the contract has been concluded, rejected bidders may request the annulment of acts relating to the award procedure (e.g., decision of rejection, decision authorising the signature of the contract). The successful bidder may challenge any act of the contracting authority in relation to the implementation, amendment or abandon of the contract. With respect to the (public or private) **nature** of the contract and regardless of the estimated contract value, any of the aforementioned decisions/acts of contracting authorities may be challenged before the administrative or the ordinary courts. The **administrative justice network** is regulated by the Code of Administrative Justice ("Code de justice administrative" - CJA). It entails 37 administrative tribunals (first instance), eight administrative courts of appeal (second instance) and the *Conseil d'État* (last instance, Palais Royal, 75100 Paris 01 SP; Phone: +33 1 40 20 80 00; Website, http://www.conseil-etat.fr). The number of procurement cases discussed before administrative courts has been growing since 2001 (figures include disputes relating to the performance of the contract): in the first instance, 4365 cases in 2001, 4627 in 2002, 4743 in 2003 and 5048 in 2004; in the second instance, 499 cases in 2001, 683 in 2002, 724 in 2003 and 755 in 2004; before the *Conseil d'État*, 165 cases in 2001, 128 in 2002, 180 in 2003 and 133 in 2004. The number of decisions issued, totally or partially, in favour of the applicant is significantly higher than that of decisions rejecting applications (regarding decisions before the conclusion of the contract). In 2004, 2538 favourable decisions were issued by administrative tribunals whereas. 1515 applications were rejected. Appeals before the administrative courts of appeal and, in the last instance, before the *Conseil d'État* usually have a negative outcome. Administrative judges pay special attention to the tendering and contractual obligations of contracting authorities; thus administrative courts of the higher instance tend to confirm the decisions rendered in the lower-instance courts. The **ordinary (judicial) justice network** is regulated by the Code of Judicial Organisation ("Code de l'organisation judiciaire" - COJ). It entails 473 *tribunaux d'instance* (first instance for disputes of a value less than €7600) and 181 *tribunaux de grande instance* (first instance for disputes of a value above €7600), 35 courts of appeal (second instance) and the *Cour de Cassation* (last instance, 5, Quai de l'Horloge, 75055 Paris 01 SP; Phone: +33 1 44 32 50 50; Website: http://www.courdecassation.fr). Both the *Conseil d'État* and the *Cour de cassation* are founded by law, are permanent and are independent from the executive, administration or any other part of government. The procedure before them is *inter partes.* Judges of both last-instance review bodies are irremovable. The presidents and other members are qualified lawyers and civil servants issued either from the *École Nationale de la Magistrature* (judges of ordinary courts) or from the *École Nationale d'Administration* (judges of administrative courts). They are appointed by the executive (president or government of the Republic of France). Review bodies below the level of last instance issue decisions of a jurisdictional nature.

Award decisions may also be reviewed by **criminal courts** (i.e., with some exceptions, the ordinary courts in their criminal law function), where these decisions relate to crime laid down in the Penal Code. In particular, Article 432-14 of the code punishes the "délit de favoritisme" (minor crime of favouritism), which is the provision of an illegal advantage prejudicing transparency and equality in a contract award procedure. Finally, the **fiscal and financial disciplinary court**, with

jurisdiction for all bodies subject to State Audit Office control, may impose sanctions on public officials responsible for irregularities in a contract award procedure.

9.3 Remedies

According to the national rules implementing the EC Remedies Directives, **pre-contractual summary proceedings** may be initiated by persons who have an interest in obtaining a contract and are likely to be harmed by an irregular award, prejudicing transparency and equality, by a contracting authority or a contracting entity. Aggrieved bidders have ten days to initiate proceedings as of the official rejection of their bid (standstill period), but bidders can ask for a pre-contractual summary proceedings from the date of the advertising until the tenth day after the official rejection of their bid. Court jurisdiction depends on the (public or private) nature of the contract. In the case of public law contracts, no prior complaint needs to be notified to the contracting authority. The relevant provisions are the following:

In the **classical sector** (EC Directive 89/665/EEC): Article L. 551-1 of the Code of Administrative Justice (pre-contractual summary proceedings before the administrative tribunal where the contract is public); Article 24 § 1° of Ordinance No. 2005-649 of 6 June 2005 (pre-contractual summary proceedings before the ordinary judge where the contract is private).

In the **utilities sector** (EC Directive 92/13/EEC): Article L. 551-2 of the Code of Administrative Justice (pre-contractual summary proceedings before the administrative tribunal where the contract is public); Article 33 § 1° of Ordinance No. 2005-649 of 6 June 2005 (pre-contractual summary proceedings before the ordinary judge where the contract is private).

These rules provide for referral to a single judge, i.e., the president of the administrative tribunal/the competent ordinary court or his/her representative. Applications do not have a suspensive effect. The judge decides, before the signature of the contract, whether the latter has been awarded in compliance with the advertising and competitive tendering obligations. Should the contract be signed before the decision has been rendered, the case is deemed removed from the judge. This rule is considered to be the main weakness of the French system. Therefore, Articles L. 551-1 and 551-2 of the Code of Administrative Procedure authorise the judge to defer the contract signature as of the referral of the case, for a maximum period of 20 days; this option is used systematically and aims at remedying the weakness. To reach a decision, the judge examines a large variety of grounds (e.g., reasons behind the exclusion of a bidder, legality of the composition of the tendering commission). The judge is not, however, entitled to rule on the respective merits of the bidders or their statutory capacity to bid for a contract. In the **classical sector**, the judge may order the contracting authority to comply with its obligations and suspend the award procedure or the execution of any decision relating to that procedure. He or she may also annul any such decision and cancel the terms and conditions intended to be incorporated into the contract, where these are contrary to the said obligations. In the **utilities sector**, the judge may order the contracting entity to comply with its obligations within a particular time limit. He or she may also impose a provisional daily fine as from the expiry of the specified time limit. The judge shall, nevertheless, take into account the possible impact of this latter measure on the interests involved, including the public interest, and shall refrain from granting the order where the negative consequences are likely to exceed the benefits. If the breach has not been remedied by the time the provisional daily fine becomes due, the judge may impose a definitive fine. The fine, whether provisional or definitive, is independent of the award of damages. The provisional or definitive fine is totally or partially lifted if it is established that failure to comply or late compliance with the judge's order is entirely or partially attributable to reasons outside the influence of the contracting entity. In both sectors, the judge decides in summary proceedings, i.e., expedited, so as not to undermine the progress of negotiations before the award of the contract. The decision must be reached within 20 days from the referral of the case. Any excess of this time limit allows the contracting body to sign the contract, so that the case is deemed

removed from the judge. As far as administrative tribunals are concerned, decisions are rendered within the time limit (on average 24 days in 2001, 20 in 2002, 23 in 2003 and 19 in 2004). The decision may be appealed before the competent review body of last instance (*Conseil d'État* for public law contracts or *Cour de cassation* for private law contracts). The number of applications in pre-contractual summary proceedings before administrative tribunals has been growing since 2000: 149 applications in 2000, 173 in 2001, 265 in 2002, 290 in 2003 and 474 in 2004. This shows that, within the French system, irregular awards can be corrected rapidly and easily. It seems, however, that such proceedings are often initiated as a means of blocking the award procedure. This is probably the reason the outcome is not usually favourable to the applicant (in 2004, 139 decisions of administrative tribunals partially or totally granting the remedies sought; 174 decisions rejecting applications).

General proceedings may also be initiated by contracting parties in order to have an irregularly awarded **contract declared null and void**. Moreover, **contracting parties,** as well as **third parties** having an interest in the contract (such as rejected bidders), are entitled to request the suspension and the **annulment of acts** relating to the award of the contract (e.g., advertising measures, decision authorising the signature of the contract) or its implementation. Requests for annulment must be lodged within two months from the publication or the notification of the alleged acts. This time limit only applies before the administrative judge. Requests for annulment do not have a suspensive effect (Article L. 4 of the Code of Administrative Justice). Decisions must be reached within a "reasonable time limit". In case of unjustified excess, damages may be claimed. In principle, the annulment of acts or decisions linked to the contract is likely to entitle the plaintiff to ask for financial compensation. Before the ordinary courts, third parties may bring actions only if they justify an interest in the contract and a public order motivation (motif d'ordre public, motivation deriving from rules of a compulsory nature) for annulment. The main advantage of general proceedings is that they may be used where initiation of pre-contractual summary proceedings has become impossible due to the signature of the contract.

Under French Law, **applications for damages** due to an irregular decision or act are **independent** of applications in pre-contractual summary proceedings and may be independent of requests to annul acts linked to the contract. With respect to the nature of the contract and court jurisdiction, the award of damages is regulated either by ordinary law (Civil Code) or administrative case law. A prior formal complaint to the contracting authority is needed. The alleged act or decision has to be, in principle, declared illegal before damages are granted. Bidders considering themselves wrongly rejected may obtain compensation provided they prove:

- that the contracting authority has committed an offence; and
- that they had a real chance of winning the contract. Applicants who do not satisfy this condition are merely entitled to the reimbursement of tendering costs.

Applicants have to evaluate and justify themselves the amount of damages sought. Judges control ad hoc this evaluation.

9.4 Procedure

In proceedings before the administrative courts, the Code of Administrative Justice ("Code de justice administrative"- CJA) is applicable. In proceedings before the ordinary (civil) courts, both the New Code of Civil Procedure ("Nouveau Code de procedure civile" - NCPC English translation on the official website: http://www.legifrance.gouv.fr) and the Code of Judicial Organisation ("Code de l'organisation juridiaire" - COJ) are applicable. There are no mandatory model forms/documents in relation to public procurement remedies. Applicants must, however, respect certain mandatory mentions and formal rules. The involvement of experts is possible under conditions of Articles R.621-1 to R.621-14 of the CJA and Articles 232 to 284-1 of the NCPC. There are no specific procedural possibilities to take into account the need to protect

confidential business information, such as in camera (*huis clos*) proceedings, except in cases of military contracts. There are no court fees. There are no additional costs in relation to public procurement remedies. As in common judicial review, when legal representation is required, applicants have to pay their own barrister. They also have to pay costs for procedural acts carried out by lawyers [barrister, solicitor (*avoué*), bailiff (*huissier*)] as well as the travel expenses, if any, of the barrister, expert fees, witnesses compensation, etc. Each party has to pay its own barrister independently. The losing party, however, pays the other costs ("dépenses", such as expert fees) and legal costs. Court decisions, including those issued by last-instance review bodies, are notified to the parties by mail. The most important decisions are published either on line (http://www.legifrance.gouv.fr) or in official bulletins ("Recueil Lebon" for the *Conseil d'État*, "Bulletin civil" for the *Cour de cassation*). Moreover, anyone can ask for a copy of a decision to the office of the relevant court.

9.5 Remedies Culture

Judges and lawyers may have studied procurement and EC law as part of their university curricula. Others have to ask for training, courses and seminars organised by private law firms, government authorities such as the Ministry of Justice, or international institutions such as the EU. In the past years, there has been a growing specialisation in procurement law (specialised Masters degrees, university conferences). Many law periodicals have a procurement section. Three legal reviews deal exclusively with procurement law matters: the monthly review "Contrats publics – Actualité de la Commande et des Contrats Publics" (CP-ACCP) published by the Moniteur Pubications; the monthly "Contrats et Marchés publics" published by the Juris-Classeur Publications; and the bimonthly review "Bulletin juridique des contrats publics" (BJCP) published by the EFE Publications. Companies may make themselves familiar with procurement law, whether through training and conferences or through assistance provided by professional organisations (such as chambers of commerce). Training of public procurement officials is ensured mainly by the Institute for Public Management and Economic Development (*IGPDE*), which is a part of the French Ministry of Finance, as well as by the Association for Purchasing in the Public Sector ("Association Pour l'Achat dans les Services Publics"- APASP, http://www.apasp.com), which is the most important national association on French and EU public procurement. The APASP also organises international conferences and publishes guides and best-practice recommendations. Most procurement officials are members of associations such as the APASP. There are also numerous fora on issues relating to pubic procurement: the French Business Confederation ("Mouvement des entrepreneurs de France"), National Federation of Mixed Public Private Companies ("Fédération nationale des sociétés d'économie mixte"), Assembly of French Chambers of Commerce and Industry ('Assemblée des chambres françaises de commerce et d'industrie'), Confederation of Craft Industry and Small Construction Companies ("Confédération de l'artisanat et des petites entreprises du bâtiment"), General SME Confederation ("Confédération générale des petites et moyennes enterprises"), National Board of Architects ("Conseil national de l'ordre des architectes"), French Construction Federation ("Fédération française du bâtiment"), French Public Works Federation ("Fédération nationale des travaux publics"), Syndicate of the Daily Local Press ("Syndicat de la presse quotidienne régionale"), Association of Communication Consultants ("Association des agences conseils en communication"), etc. Opinions of the aforementioned organisations are solicited for the making of procurement rules. The press and television occasionally cover public procurement review proceedings. The impact of ECJ rulings is considerable. Procurement officials must comply with them, and applicants may invoke them before the courts. Domestic case law is also of importance due to the structure of the French legal system, consisting of both codification and case law.

10. Germany

Public procurement (Vergaberecht) in Germany is regulated by a set of rules structured at three levels: the fourth part of the Federal Act against Restrictions of Competition, known as **GWB** (legislative level, English translation on http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB_7_e.pdf); the Public Procurement Regulation of 2001 as amended, known as **VgV** (infra-legislative level English translation of an earlier version of the VgV in: Lutz Horn, *Public Procurement in Germany*, C.H. Beck, Bruylant, Giuffrè Editore, Ant. N. Sakkoulas, Stämpfi, 2001, pp. 79 et seq.); and three sets of rules in relation to the award of contracts for works (**VOB/A 2006**), supplies and services (**VOL/A 2006**) and professional services (**VOF 2006**) (infra-regulatory level English translation of an earlier version of VOB/A, VOL/A and VOF in: Lutz Horn, *Public Procurement in Germany*, C.H. Beck, Bruylant, Giuffrè Editore, Ant. N. Sakkoulas, Stämpfi, 2001, pp. 91 et seq.). The aforementioned rules implement the relevant provisions of the EC Procurement Directives and are thus solely applicable above the EC thresholds. Below the thresholds, public procurement is regulated by federal and municipal budgetary law as well as by some provisions of the VOB/A and VOL/A. The complicated structure of the German system is attributable to the historical evolution of domestic procurement rules and the federal structure of the Federal Republic of Germany. The review and remedies system is based on both quasi-judicial and judicial control. (See generally: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/06Informationsblatt_E.pdf) Above the EC thresholds and by virtue of the GWB (§ 97 VII), bidders are granted subjective rights to a transparent, competitive and non-discriminatory tendering procedure. These rights may be enforced by a special jurisdiction, the **Public Procurement Chambers** (Vergabekammern, VK) and, on appeal (sofortige Beschwerde), by the **ordinary Courts of Appeal** (Oberlandesgerichte, OLG). Below the thresholds, bidders have no special rights and may claim damages solely before the ordinary civil courts. There is, however, a controversial discussion as to whether decisions regarding contracts not falling within the scope of the GWB can be challenged before the administrative courts. In some states (Länder), administrative courts have already considered themselves competent to rule on such disputes.

10.1 Extrajudicial Review

In the utilities sector, the VgV implements the attestation, conciliation and corrective mechanisms established by EC Directive 92/13. There are no special arbitration bodies, but the GWB allows bidders to challenge procurement decisions before the **Public Procurement Review Boards** (Vergabeprüfstellen). Such boards may be established at the level of both the Länder and the federation and have the power to order, whether upon petition or ex officio, the contracting authorities to cancel an unlawful decision or to take another lawful measure. The boards do not have the power to suspend a tendering procedure. A review procedure before a Public Procurement Review Board is not a prerequisite to file an application for review before the Public Procurement Chambers. In contrast, it is compulsory for bidders to formally protest to the contacting authority as a precondition to seek review before the chambers (§ 107 III GWB). Each contracting authority is responsible for defining the unit dealing with such protests.

10.2 Judicial Review

Before the conclusion of the contract and where the estimated contract value reaches or exceeds the EC thresholds, bidders may challenge **any decision** of the contracting authority before a Public Procurement Chamber. An award already made cannot be cancelled (§ 114 II GWB). There are 29 Public Procurement Chambers. The chamber has to issue a decision within five weeks from the lodging of the application. In duly justified cases, this time limit may be extended; this possibility was used in almost 27% of review proceedings during 2005. Where the chamber fails to respect this time limit, the application shall be deemed to have been rejected. The decision of the chamber may be appealed by means of an immediate complaint (sofortige

Beschwerde) before the Procurement Senate of the competent regional Court of Appeal (OLG) within two weeks from the service of the decision to the parties, or the expiry of the time limit (five weeks) within which the chamber should have issued a decision. There is no mandatory time limit for an OLG to render a decision. Thus there is no single review body of last instance dealing with procurement cases: the OLG of each Land is responsible for dealing with the procurement decisions of contracting authorities located within the state. In addition, the OLG Düsseldorf has jurisdiction over procurement cases involving federal contracting authorities (such as federal ministries). OLGs are permanent bodies established by law, whose decisions are legally binding and whose members are independent from the executive or any other part of the government (Article 97 I of the German Constitution, Grundgesetz). Judges are appointed amongst qualified lawyers having succeeded in a two-stage state examination. Where an OLG wishes to deviate from decisions of other OLGs or the Federal Supreme Court (Bundesgerichtshof, BGH), it is bound to refer the case to the Federal Supreme Court, which renders a decision in place of the OLG. In 2004, there were 1493 applications lodged before the Chambers and 314 immediate complaints before the OLG.

10.3 Remedies

As a matter of principle, German law distinguishes between **primary legal protection** (ensured by the Public Procurement Chambers) and **secondary legal protection** (damages). Should a Public Procurement Chamber decide that the applicant's rights have been violated, it shall take **any appropriate measure** to correct the infringement (e.g., set aside a decision of the contracting authority) and prevent any further damage to the interests affected. There is no provision regarding interim measures. According to § 115 I GWB, after the chamber has served the application for review to the contracting authority, the latter is not allowed to enter into the contract prior to the decision of the chamber or before the time limit for lodging an immediate complaint to the OLG has expired (**automatic suspensive effect**). An application for review shall not be served if it is obviously inadmissible or unfounded (§ 110 II and 115 II GWB). The contracting authority may request permission to enter into the contract during review proceedings. The chamber may grant the permission after two weeks from the announcement of the decision have elapsed, where after having taken into account all interests likely to be harmed, including the public interest, it considers that the negative consequences of the suspension outweigh the benefits. Should the permission be granted, the applicant may request a renewal of the suspension of the tendering procedure before the OLG. Should the permission not be granted, the contracting authority may request the OLG to put an end to the suspension of the tendering procedure. According to § 115 III GWB, the chamber may intervene in the tendering procedure where the applicant's rights are likely to be harmed due to a decision other than that relating to the conclusion of the contract (e.g., a decision to abandon or to cancel the tendering procedure). **Damages** may be awarded by the ordinary civil courts. There are several legal bases for awarding damages, the most important of which are **§ 126 GWB** and §§ 311 II in connection with 280 I of the German Civil Code (Bürgerliches Gesetzbuch, BGB) relating to **pre-contractual liability** (culpa in contrahendo, **CIC**). § 126 GWB applies to contracts falling within the scope of the GWB, i.e., contracts whose estimated value reaches or exceeds the EC thresholds. According to this provision, "where the contracting authority violates a provision intended to protect undertakings, and should the undertaking have had, upon assessment of the tenders and without this violation, a real chance of being granted the contract, which, as a consequence of the infringement, was adversely affected, the undertaking may demand compensation for the costs of preparing the tender or of participating in an award procedure. Further damage claims shall remain unaffected". The provisions of the Civil Code in relation to CIC apply to public contracts irrespective of their value. As a matter of principle, damages awarded on the basis of CIC may cover either the lost profit (lucrum cessans), should the claimant prove that he or she would have certainly won the contract and where the contract has

actually been entered into, or the tendering costs (damnum emergens), where the contract has not yet been entered into. In both cases (§ 126 GWB and CIC), it is not necessary that the alleged decision of the contracting authority have been set aside by a decision of a court or a Public Procurement Chamber. In the case of CIC, however, it is possible that the lack of application for primary legal protection may be seen as contributory negligence according to § 254 III of the Civil Code. Finally, there is no provision in relation to periodic penalty payments.

10.4 Procedure

Proceedings before the Public Procurement Chambers and the regional Courts of Appeal (OLG) are mainly governed by the fourth part of the Federal Act against Restrictions of Competition (**GWB**). Other provisions of the GWB or the Code of Civil Procedure (ZPO) remain applicable. Any party having an **interest** in the contract and asserting that his or her **rights** under § 97 VII GWB have been violated by non-compliance with the rules governing the award of public contracts has the right to lodge an application before a Public Procurement Chamber. The applicant must show that he or she has incurred or is likely to incur a **loss** due to the alleged infringement(s) of the award rules. An applicant who has not actually submitted a bid must show that he or she was prevented from bidding owing to the conduct of the contracting authority (e.g., irregular de facto awards). It is compulsory for parties to **formally protest** to the contracting authority as a precondition to seek review before the Public Procurement Chambers (§ 107 III GWB). This obligation also applies to contracts awarded by privatised utilities. There is no mandatory time limit for submitting a protest to the contracting authority or lodging an application before the chamber. The GWB merely states that both the protest and the application shall be lodged without undue delay (§ 108 I). In addition, Article 13 of the Public Procurement Regulation (VgV) establishes a **standstill period** of 14 days between the notification of the results of the tendering procedure to unsuccessful bidders and the formal conclusion of the contract. A contract concluded in breach of the aforementioned obligation is deemed to be void. The standstill obligation enables unsuccessful bidders to formally protest to the contracting authority and lodge an application to the chamber before the conclusion of the contract. The protest and the application may be lodged at the same time (no obligation to wait for the decision of the contracting authority). After the standstill period has elapsed and no application has been filed, the contract may be legally entered into: Aggrieved bidders are no longer entitled to challenge procurement decisions before the chambers. There are no model forms in relation to procurement cases. The GWB states that the application shall be lodged in writing, together with the reasons for the application. Proceedings before a Public Procurement Chamber are subject to the payment of a fee, the amount of which depends on the personal and material expenses of the chamber, taking into account the estimated contract value. The minimum fee is € 2500 (§ 128 II GWB). Proceedings before an OLG are subject to the payment of court fees, the amount of which is 5% of the gross contract value. In proceedings before a chamber, legal representation costs are refunded by the losing party should the chamber consider that legal representation in the case discussed is necessary. In proceedings before OLG, legal representation is compulsory, and the relevant costs are refunded by the losing party. Both the chambers and the OLG may decide as to whether an expert should be commissioned during review proceedings. Expert costs are to be paid in accordance with the decision of the chamber or the OLG. Technical and other experts are also involved in review proceedings as members of the Public Procurement Chambers. In particular, one of the three members of the chamber is an honorary associate member with several years of ascertained experience in the field of public procurement (§ 105 III GWB). Regarding confidentiality, chambers must deny access to the files of the case in order to protect secrets or to preserve trade or business secrecy (§ 111 II GWB). Chambers shall issue a decision within five weeks from the lodging of the application. After the decision has been served to the parties or where no decision has been issued within the prescribed time limit, any of the parties may lodge an immediate complaint against the (express or implicit) decision of the

chamber before the competent OLG. The immediate complaint shall have a suspensive effect on the chamber's decision. The duration of this effect is two weeks after the time limit for lodging an immediate complaint has expired. In the event the chamber rejects the application for review, the OLG may, upon request of the complainant, extend the suspensive effect until a decision is issued on the immediate complaint. In the event the chamber upholds the application for review by prohibiting the award, the contract shall not be entered into as long as the OLG does not set aside the chamber's decision according to §§ 121 or 123 GWB. The decisions of both the chambers and the OLG are disseminated to the parties by a service of process where the parties are present at the court. Some decisions are published on the websites of these jurisdictions.

10.5 Remedies Culture

There has been an expanding interest in public procurement law following the adoption of the 1998 Act amending the Federal Act against Restrictions of the Competition (GWB). A wide range of **conferences** are organised at academic level (Summer School "Vergaberecht" at the University of Bochum: http://www.ruhr-uni-bochum.de/fvv/summerschool/frmset.html; Düsseldorfer Vergaberechtstag: http://www.ruhr-uni-bochum.de/burgi/vergaberechtstag/frmset.html). The private sector also plays a particularly active role in procurement training. There are at least three specialised legal **journals** in the field of procurement law: Vergaberecht (VergabeR: Werner Verlag), Neue Zeitschrift für Bau- und Vergaberecht (NZBau: C.H. Beck) and Zeitschrift für deutsches und internationales Bau- und Vergaberecht (ZfBR : Bau Verlag). There are also numerous periodical information magazines such as Vergabespezial (http://www.vergabespezial.com) and Vergabenews (published by the Bundesanzeiger Verlag). There is no official national public procurement association, but the most important private institution is the Forum Vergabe e.V. (Breite Straße 29, 10178 Berlin; Phone: +49 (0) 30 2028-1631, Fax: + 49 (0) 30 2028-2631, E-mail: info@forum-vergabe.de, Website: http://www.forum-vergabe.de). The main actors of the reviews and remedies system may have studied procurement law as part of their university curricula. Further, the attitude of judges towards conflicting interests is considered to be balanced. However, the importance of case law is seen as limited due to divergent interpretations of existing statute law. Contracting officers have a relatively adequate but still improvable knowledge of procurement rules, and handle protests submitted by bidders in a balanced way. Bidders may familiarise themselves with public purchasing practices through work experience or assistance provided by private consultants or professional organisations. Regarding the attitude of bidders towards review proceedings, some of them do not wish to initiate review proceedings because they do not wish to compromise their chances for the next contract. Others see review proceedings as a matter of last resort or intend to obstruct procurement through review proceedings. Finally, a small number seek financial gains through review proceedings. The civil society also takes a more active role in the preparation and adoption of public procurement rules. The impact of the ECJ rulings is considerable. More than 170 out of 700 exemplary decisions rendered during 2005 were based on judgements of the Luxembourg Court.

11. Hungary

Public procurement in Hungary is regulated by Act CXXIX/2003 (henceforth: the 2003 Act, which came into force on 1 May 2004). The non-official English translation of the act in a single composition with its subsequent amendments is available on the website of the Public Procurement Council (http://www.kozbeszerzes.hu). The key actor is the **Public Procurement Council** (Közbeszerzések Tanácsa, 1024 Budapest, Margit krt. 85; Phone: 0036 1 336 7748, http://www.kozbeszerzes.hu), established as an independent public authority responsible for different aspects of public procurement policy (commenting the draft legislation, operating the legal remedy system, publication of notices, education, help-desk, etc.), which has an autonomous budget and is answerable to the parliament. The council consists of 19 members.

Review of public procurement procedures is based on a mixed system of quasi-judicial and judicial control (Part 7 of the 2003 Act). This system does not substantially differ from that established by the former Public Procurement Act of 1995. Extrajudicial control is also available. Damages must solely be sought before an ordinary court. In Hungary, justice is administered in a four-level system by the Supreme Court, the regional courts of appeal, the county courts (including the Budapest Municipal Court) and the local courts. In all cases, protection of bidders does not depend on the estimated contract value. Even though bidders shall inform the contracting authority of their intention to seek judicial review, omission to notify does not entail rejection of an application.

11.1 Extrajudicial Control

Under the 2003 Act, two types of conciliation procedures are available. The **special conciliation procedure** is applicable in the utilities sector and implements the relevant provisions of Directive 92/13/EEC (Arts. 369 to 371). This type of conciliation solely applies above the EC thresholds. In contrast, the **general conciliation procedure** (Arts. 352 to 368) applies in both the classical and the utilities sectors regardless of the estimated contract value. Recourse to this type of conciliation is neither compulsory nor a precondition to seek judicial review, but requires the mutual agreement of parties involved in a procurement process. The parties taking part in the conciliation procedure may not request judicial review before the conciliation procedure has been completed. The conduct of general conciliation is entrusted to independent experts with ascertained qualification (in case of law graduates, bar membership is required). They are listed upon their own application in a register kept by the Public Procurement Council under conditions laid down in the 2003 Act. Decisions of the council regarding inclusion in or expulsion from the register may be challenged before courts. Applications for general conciliation shall be submitted to the council within five days from the beginning of the time limit for seeking judicial review and notified to the contracting authority as well as the competing bidders. As a matter of principle, a panel of three experts adjudicates on the dispute. The applicant and the defendant, respectively, appoint one panel member and the third is decided upon by a joint decision. Parties may by a common decision appoint a single expert to adjudicate on the dispute. After the conciliation procedure has been launched, the contracting authority may suspend the award procedure or defer signing the contract. Proceedings are recorded in the minutes. The conciliation procedure comes to an end either after an agreement has been reached or where no agreement is possible or should any party so decide. In any case, the procedure shall not exceed eight days from the submission of the application. Judicial review of the dispute remains possible. Unless otherwise agreed, parties have to bear the costs of the conciliation procedure in an equal proportion. Panel members are entitled to remuneration as well as to reimbursement of other relevant costs.

11.2 Judicial Review

Aggrieved bidders may bring disputes arising from the award procedure before the **Public Procurement Arbitration Board,** established as an independent review body operating alongside the Public Procurement Council. In the field of public procurement, the first instance of legal remedy is the Arbitration Board; judicial review before the court is possible only if the review of the Arbitration Board has taken place. Bidders may challenge **any act** relating to the award procedure, before and after the contract has been concluded; however, the Arbitration Board may not nullify the decisions of the contracting authority after a contract has been signed. The Arbitration Board is financed by the budget of the council and has jurisdiction over the whole state territory. The members of the Arbitration Board ("public procurement commissioners") are civil servants who are appointed (and who may be recalled) by the council under conditions laid down in Articles 398 et seq. of the 2003 Act. The Council determines the number of the commissioners and appoints the chairperson as well as the vice-chair of the Arbitration Board for a (renewable) five-year mandate. Commissioners shall act in an independent and impartial

manner. They are not subject to any kind of instruction but solely to law. Arbitration Board decisions are enforceable and are subject to a two-tiered centralised review system. The 2003 Act distinguishes between decisions rendered in the course of proceedings, such as the award of interim measures, procedural fines, joining of cases, initiating preliminary ruling of the ECJ, etc., and conclusive decisions rendered on the substance of the case. The former may be appealed before the **Budapest Municipal Court** (1055 Budapest, Markó utca 27), provided that the 2003 Act makes it expressly possible; there is no possibility to challenge the court's decision in a higher instance. The latter may be challenged as follows: Any person whose right or legitimate interest has been prejudiced by the conclusive decision of the Arbitration Board, as well as the institution having initiated proceedings before the Arbitration Board, shall be entitled to seek judicial protection before the Budapest Municipal Court (Art. 346 § 1). In this case, the court may decide to a) reject the request as unfounded; b) order the Arbitration Board to initiate a new proceeding; or c) amend the decision rendered by the Arbitration Board, according to the Civil Procedure Code and the special acceleration rules of the 2003 Act. The court's decision may be challenged in the second instance before the **Budapest Appellate Court** (Fővárosi Ítélőtábla, Budapest 1027, Fekete Sas u. 3). In both instances, appeals are examined by the administrative law sections of the aforementioned courts. Exceptionally, a decision of the Appellate Court may be referred to the Supreme Court within the context of an extraordinary remedy (revision) under conditions laid down in Articles 270 to 275, 324 and 340 A of the Civil Procedure Code. The Supreme Court ensures uniformity of case law through judgements that are binding for individual courts. The Budapest Appellate Court is therefore the review body of last instance in public procurement cases. The independence of the judiciary is guaranteed by Chapter X of the Constitution of 1949, Act LXVII/1997 on the legal status and the remuneration of judges, and Act III/1952 (Civil Procedure Code). These rules also provide for the appointment and removal from office of judges, the required qualifications, remuneration, the justice budget and the form of judgements. Any Hungarian citizen with a law degree, having no criminal record, enjoying suffrage, and having passed a higher law examination and of ascertained professional experience may become a judge if there are no grounds for exclusion or incompatibility.

11.3 Remedies

Remedies can be divided into two categories: those awarded by the Public Procurement Arbitration Board and those awarded by courts. The first category includes decisions in the course of proceedings (interim measures: Article 332, or procedural fines, joining of cases, initiating preliminary ECJ rulings, etc.) and remedies awarded through the conclusive decision of the Arbitration Board (Art. 340). As applications before the Arbitration Board do not have a suspensive effect, **interim measures** may be ordered upon request or ex officio before the contract has been concluded, provided there is sufficient evidence of a breach (actual or potential) of tendering obligations. Even though no relevant provision is included in the 2003 Act, the Arbitration Board may take into account the probable consequences of measures sought for all interests likely to be harmed, including the public interest, and decide not to grant such measures where their negative consequences would outweigh their benefits. The Arbitration Board may 1) suspend the award procedure; 2) prohibit the conclusion of the contract (but not declare void the contract itself; only a court may pronounce the invalidity of a concluded contract) and 3) order the contracting authority to invite the applicant to participate in the tendering procedure. The contracting authority may also at its own initiative suspend the award procedure after an application has been filed or defer signing the contract until the Arbitration Board reaches a conclusive decision. Through its **conclusive decision**, the Arbitration Board may 1) solely establish whether an infringement has occurred or not; 2) where an infringement has been established, order the contracting authority to comply with its tendering obligations or to respect a certain conduct; 3) declare void any act of the contracting authority relating to the award procedure or the act declaring the procedure completed, provided that no contract has already

been signed (the contracting authority is, however, solely responsible for declaring void the whole tendering procedure); and 4) impose a pecuniary penalty in case of illegal direct awards, omission to notify the annual statistic summary referred to in Article 16 of the 2003 Act, or illegal amendment or implementation of a contract concluded on the basis of a tendering procedure (Arts. 303 to 306). If the Arbitration Board invalidates the decision declaring the tendering procedure completed, the contracting authority shall make a new decision within 30 days from the date the decision of the Arbitration Board became enforceable, or may announce the award procedure incomplete (and start a new one or give up its procurement). If the Arbitration Board establishes an infringement of tendering obligations, the contracting authority or the successful bidder may determine the concluded contract within 30 days from the notification of the decision of the Arbitration Board. Moreover, the Arbitration Board is entitled to impose **sanctions** on bidders (expulsion from tendering procedures or prequalification lists) where these are found to be responsible of recurrent infringements of public procurement law (Art. 341). Generally, **pecuniary penalties** may be imposed on any person (officials of the contracting authority as well as bidders) responsible for a breach of the 2003 Act. Appeals against a conclusive decision of the Public Procurement Arbitration Board do not have a suspensive effect on the enforcement of this decision. The Budapest Municipal Court may, however, suspend the enforcement at any time upon request or ex officio. The award of **damages** can be sought only before a court and is subject to the prior establishment of an infringement of procurement law by decision of the Arbitration Board or in, case of an appeal against such decision, the court (Art. 350). According to Article 351, aggrieved bidders may seek the reimbursement of their tendering costs should they prove that 1) the contracting authority violated procurement law; 2) they had a real chance of winning the contract and 3) the violation compromised their chance of winning the contract. They also may seek damages for lost profits if they provide sufficient evidence in this respect, subject to the provisions of the Civil Code of 1959 (Art. 339: “a person who unlawfully causes damage to another person shall repair such damage. Liability is excluded should it be proved that the action was one expected under the given circumstances”).

11.4 Procedure

Proceedings before the Public Procurement Arbitration Board in both the classical and the utilities sectors are governed by Chapter IX of the 2003 Act, as well as by Act CXL/2004 on general rules for administrative procedures. Applications may be lodged 1) by the **contracting authority** as well as any **tenderer**, candidate or any other interested person, whose right or legitimate interest has been or is likely to be prejudiced by an act or omission conflicting with the 2003 Act; in the latter case, the contracting authority shall be informed of the intention to initiate proceedings. Failure to comply with this obligation has no effect on the admissibility of the application; 2) **ex officio**, i.e., upon request of any of the following persons/institutions having become aware, in the performance of their duties, of a violation against the 2003 Act: a member or the president of the Public Procurement Council; the State Audit Office; the Government Control Office; the administrative office of the county or the city of Budapest; the State Treasury; the parliamentary commissioner for civil rights, the parliamentary commissioner for rights of national and ethnic minorities, as well as the commissioner for data protection; the entity granting subsidy for a procurement, or the entity participating by virtue of a legal provision in the use of such subsidy; and the central purchasing body. Any act in relation to the award procedure may be challenged (most frequently in practice: conditions of the contract notice as qualification and evaluation criteria, technical specifications, and designation of the winner or unsuccessful termination of the tendering procedure). Applications shall be lodged within 15 days from the occurrence of the infringement, and, in case of decisions declaring the tendering procedure completed, within eight days from the announcement of the results. Should the infringement become known at a later date, the time limit shall begin at that date and, in any case, shall not exceed 90 days as from the date the infringement actually occurred. Failure to respect the

aforementioned time limits implies forfeiture of the right to proceedings. With respect to the State Audit Office, the Government Control Office, the State Treasury, the subsiding entity or the entity participating in the use of the subsidy, proceedings shall be initiated within a year or, in case of illegal direct awards, within three years from the date the infringement actually occurred. There are no model forms for applications before the Arbitration Board. Article 324 § 1 of the 2003 Act merely lists the elements which must appear in applications (name of the applicant and the defendant, date of the infringement, etc.). As a matter of principle, hearings are held in an open session, but the Arbitration Board may decide to conduct in camera proceedings should this be necessary for reasons of a state or professional/business secret (Art. 336 § 2). With some exceptions basically due to business secret considerations, access to the procurement file is fully guaranteed to all parties involved in the proceedings (Art. 337). Upon request or ex officio, the Arbitration Board may ask an expert to give an independent opinion on technical or legal questions. Proceedings before the Arbitration Board are subject to an administrative service fee, the amount of which depends on the value of the public procurement and the type of decision challenged (900 000 HUF in case of tendering procedures above the EC thresholds, with the exception of requesting remedy against the content of the call for tender; 150 000 HUF in all other cases). In view of the facts of the case, the Arbitration Board shall decide which party has to bear the fee as well as other procedural costs. In case of ex officio proceedings where no infringement has been established, all costs shall be borne by the state. Expert fees are advanced by the party having requested expertise but are eventually paid by the losing party. Should the Arbitration Board appoint en expert ex officio, expert fees are paid by the state. The Arbitration Board shall reach a conclusive decision within the following time limits: 1) in the absence of hearings, 15 days from the initiation of proceedings; 2) should hearings take place, 30 days from the initiation of proceedings. In duly justified cases, these time limits may be extended by up to ten days. The conclusive decision is notified to the parties as well as to other interested persons/institutions. Conclusive decisions are published in the “Public Procurement Bulletin”, which the official press support of the Public Procurement Council (on-line version on www.kozbeszerzes.hu). Publication is also possible after in camera proceedings have taken place or an appeal against the decisions of the Arbitration Board has been filed.

Proceedings before the Budapest Municipal Court are governed by Chapter XX of the Civil Procedure Code (Arts. 324 to 341), save as otherwise provided in Articles 347 to 349 of the 2003 Act. **Appeals against decisions rendered by the PP Arbitration Board in the course of proceedings** may be lodged within eight days from the issuance of such decisions. Appeals of this type must be filed to the Arbitration Board itself, which is responsible for forwarding them, together with the file of the case, to the court without delay (Art. 345 § 2). **Appeals against conclusive decisions of the Arbitration Board** may be lodged by any person whose right or legitimate interest has been prejudiced by the decision, as well as the institution having initiated proceedings before the Arbitration Board, within 15 days as from the notification of the conclusive decision (Art. 347 § 1). In this case, appeals shall be treated as having priority over other cases, but there is no provision as to the time limits within which the court must render its judgement. In camera proceedings shall take place under conditions laid down in the Civil Procedure Code (state or business secret considerations; privacy). The judgement of the Budapest Municipal Court may further be appealed before the Budapest Appellate Court by the party concerned, third parties intervening in the proceedings or any person affected by a provision of the judgement (Art. 233 of the Civil Procedure Code). Legal representation is required solely before the Appellate Court. Expertise is available under conditions similar to those applying before the Public Procurement Arbitration Board. Court judgements are pronounced publicly, shall be notified to the parties in writing within 30 days from their issuance and are published in the “Public Procurement Bulletin”. According to Act XCIII of 1990, the stamp duty for all court proceedings requested against administrative decisions (such as the resolution of the Arbitration Board) is 16 500 HUF. Generally, court costs include expenditures in relation to rational and

"bona fide" proceedings (in particular: fees of witnesses, experts and interpreters; translation costs; costs of on-site visits; costs relating to access to documents; costs of legal representation or counsel; travel and postal costs). As a matter of principle, the losing party is ordered to pay the costs relating to the initiation of proceedings, as well as other procedural costs.

11.5 Remedies Culture

Judges and procurement officials may have acquired knowledge of public procurement law as part of their university curricula or through seminars organised by government institutions. There is a special training of 220 hours (by "public procurement desk officers"), recognised by the state. General EC law is compulsorily taught to law students. Bar examinations also include this field. The Public Procurement Council offers the possibility to officials, including the public procurement commissioners, to attend post-graduate training courses as well as conferences with the participation of judges specialised in the field of public procurement law. The officials of the Public Procurement Council regularly attend seminars organised by international organisations such as the European Institute of Public Administration (EIPA). Seminars are also held by the private sector (consultants, training organisations). Bidders may have familiarised themselves with public procurement through work experience and may also attend the aforementioned training and conferences. They are assisted by a help desk established by the Public Procurement Council. The attitude of judges and commissioners towards conflicting interests is considered to be fair and balanced. Procurement officials are considered to have sufficient knowledge of procurement law. Some bidders see review proceedings as a matter of last resort. Others intend to obstruct procurement through review proceedings. In some cases, bidders do not turn to the Public Procurement Arbitration Board but ask the delegate of the relevant professional organisation which is represented at the Public Procurement Council to request that an ex officio procedure be lodged. There are numerous publications, including the "Public Procurement Bulletin", as well as other reviews published by private organisations (e.g., "Public Procurement Letters", issued by the Public Procurement Society). Numerous handbooks have also been published. There are various procurement associations operating independently (Foundation for Public Procurement Culture, Association of Official Public Procurement Consultants) or within a parent organisation (such as the Public Procurement Section of the Chamber of Lawyers).Case law is of particular importance. Some 20% of Arbitration Board decisions are challenged in a higher instance. The press occasionally covers public procurement cases, especially where important financial interests are at stake. ECJ rulings are also taken into account by the Arbitration Board and the courts.

12. Ireland

The public procurement **remedies and review system** of Ireland is based on independent judicial review. There is a two-instance path of judicial review for contracts, only above the EC thresholds.

12.1 Complaint to the contracting authority

It is not compulsory to complain to the **contracting authority or entity** first. There are no specific rules in the field of public procurement, which regulate complaints to the contracting authority. However, it is possible to try to settle the objections in this way. The National Public Procurement Policy Unit (NPPPU) tries to keep the need for formal proceedings to a minimum by encouraging authorities to provide a constructive debriefing voluntarily to unsuccessful candidates and tenderers. Guidelines on disclosing information and informing candidates, which can be viewed on the national public procurement website (www.etenders.gov.ie) under Guides/General Procurement Guidance, promote this practice.

12.2 Judicial review and remedies

If not satisfied with the decision of the contracting authority or entity, the tenderer may seek judicial review in the **High Court**, a general or ordinary court of law, the decisions of which are of a jurisdictional nature. In 2003 the High Court set up a special arm to deal quickly with commercial cases, including public procurement cases. This Commercial Court uses the speediest methods to expedite the process and aims to take a decision on whether there are valid grounds for review within a matter of weeks, rather than many months as was the case in the past. In many cases, the claimant drops proceedings following a response from a contracting authority. Contracting authorities normally defend their conducting of public procurement procedures. The High Court may annul or modify a contract and award compensation for costs or loss or damages. Any procurement decisions may be reviewed and annulled. On the basis of Statutory Instrument No. 309 of 1994, even a concluded contract may be annulled. All these remedies can also be awarded as interim measures taking into account their probable consequences for all interests likely to be harmed, including the public interest; the High Court may decide not to award such measures where their negative consequences would outweigh their benefits. The award of damages is based on case law, and it is not necessary for an award decision to be set aside before the court orders damages to be paid. On the other matters the courts have discretion. There are no provisions for periodic penalty payments. Technical and other experts can be involved on a case-by-case basis at the discretion of parties to the proceedings. The costs are determined by the courts. Any party that feels his or her rights have been infringed may bring a case. There are no fees to be paid. Lawyers' fees vary considerably, but the court may order the contracting authority or entity to pay the tenderer's lawyer fees if the former loses the case. Tenderers normally have three months from learning about the alleged violation to bring an action, but this limit can be extended at the court's discretion. There is no automatic suspension of the procurement procedure once an action has been brought to the High Court, but the guidelines advise the need for the respective contracting authority to exercise caution before proceeding. There is no time limit for the High Court to issue a decision. The time elapsed between filing a lawsuit for judicial review and the final decision is normally a few weeks. There are no arrangements for utilities that deviate from those for contracting authorities. There are no model forms to be used. Decisions are published by the courts themselves. The review system can deal with cases of clear and manifest infringements. These are generally unintentional and, when brought to the attention of the contracting authority, will generally be corrected. The cases which go the full course are generally technical infringements which relate to interpretation of the rules. The existence of the system is considered a deterrent to contracting authorities not to infringe the rules and should thereby give some confidence to tenderers. The court system, however, is considered expensive for tenderers. If not satisfied with outcome, a High Court ruling may be appealed to the **Supreme Court** in Dublin. The independence of the Supreme Court is guaranteed by the mandate of the qualified lawyers who serve as its judges. Its decisions are read in open court and are published. Most of the requirements of the *Dorsch* and *Salzmann* judgements are fulfilled, but it appears that the procedure is not an *inter partes* one. The tenderer may also request the EU Commission to investigate a tendering procedure.

12.3 Review culture

Judges and public procurement lawyers representing tenderers or contracting entities in review proceedings acquire their knowledge of public procurement law in particular and Community law in general as part of their legal studies and ongoing vocational training. The attitude of judges and panellists on public procurement review bodies towards the public interest on the one hand and the private interests of the bidders on the other is described as balanced. Tenderers seeking the review of public procurement decisions gain their knowledge of the legal, financial and administrative background of how public procurement works in practice from National Public Procurement Policy Unit guidelines**,** in public procurement fora and networks, and at seminars

and similar events organised by professional, commercial and trade organisations. The knowledge of contracting officers of the legal and other background of public procurement is described as well-informed at this stage. Contracting officers and their superiors dealing with complaints towards tenderers filing complaints or seeking judicial review of public procurement decisions were described as generally very confident of their procedures and willing to defend them. Since 1992, there have been no publications or academic journals dealing specifically with public procurement issues, including public procurement review and remedies. The Forum on the Construction Industry and the Forum on Public Procurement in Ireland deal with public procurement issues. The Institute of Public Administration offers a diploma course in conjunction with a private sector procurement consultancy body. A professional third-level course was to be organised by the National Public Procurement Policy Unit for September 2006, and there are short training courses provided by private sector consultancy and training bodies. Quarterly two-day public procurement courses are part of the training programme of the Central Government Training Centre. The judgements of the ECJ have an impact on public procurement review proceedings. The parties or the review bodies make reference to them.

13. Latvia

Latvia has a system of non-judicial and judicial review. First, complaints are reviewed by the Procurement Monitoring Bureau (PMB). The PMB is a "direct state administrative institution" subordinate to the ministry of finance and operating in accordance with the Latvian Public Procurement Law (PPL). In order to examine complaints, the PMB, which also deals with other public procurement-related matters, established a complaints-examination commission (CEC) consisting of at least three members. Second, as a second instance the parties to CEC proceedings may appeal its decision in the administrative court. Such an appeal does not prevent the contract from being concluded.. With regard to contracts awarded by public contracting authorities, there is no difference between contracts inside or outside the field of application of the EC Directives. With regard to utilities, only contracts above the EC thresholds are reviewed by the PMB; there is no special review body regarding contracts below these. The Latvian public procurement review system has been in compliance with the Remedies Directives since 2002. Before that, certain types of decisions of contracting authorities and entities could not be challenged, namely the decision on the choice of the procurement method, the choice of award, the selection criteria and the rejection of all tenders. Before 2002 the CEC of the PMB was not operational. Complaints were reviewed by a department of the ministry of finance.

13.1 Complaint to the Contracting Authority

A complaint to the contracting authority itself is compulsory only against unlawful procurement documents. Such a complaint shall be submitted to the contracting authority no later than six working days before the deadline for submitting of tenders. If within a period of two working days after receipt of the complaint the contracting authority does not correct the violation indicated in the complaint or has not provided a written reply to the complainant, the latter may, until to the deadline for the submission of tenders, submit a complaint to the PMB. Other special complaints to the contracting authorities themselves are not specifically regulated.

13.2 Non-judicial Review

Complaints are reviewed by the CEC of the PMB. The PMB is a direct state administrative institution **subordinate to the ministry of finance**. The CEC formed by the PMB does not have a status comparable to that of judges. However, as discussed below, decisions of the PMB can be appealed over three more instances in the administrative courts. In order to examine complaints, the PMB shall invite procurement **specialists or experts**. These specialists and experts participate in CEC meetings without voting rights and express to the complaints examination commission an independent professional opinion regarding the facts determined

during the examination of the complaint. Moreover, they may submit an opinion regarding specific questions of the CEC. Persons who have previously provided consultations with respect to the procurement mentioned in the complaint, or who are interested in obtaining the right to perform the procurement, or who are associated with the submitter of the complaint or another tenderer **may not be members of the CEC** or experts participating in its meetings. There are at times difficulties in finding suitable experts for these proceedings. Prior to the examination of the complaint, all members of the CEC and the experts sign a relevant declaration. There are more than **200 complaints per year**. The PMB permits the conclusion of a contract if the complaint is unfounded (~70% cases during the last few years) or **prohibits its conclusion** if it has determined violations that are significant and that may influence the decision regarding the granting of procurement rights (~30% of all cases during the last few years). Reasons for the outcome of complaints against public procurement decisions include most notably an unequal attitude of contracting authorities to tenderers and restrictive technical specifications. The time elapsed between the filing of a complaint or a lawsuit and the final decision is normally **one month**. This relatively short period is seen as a strength of the Latvian system.

13.3 Judicial Review

The decisions of the CEC of the PMB can be appealed in the **administrative courts**. These courts are **not special tribunals for public procurement** but deal with all aspects of administrative law generally. An appeal against the decision of the CEC does not suspend its implementation. In other words, if, for example, the commission permits the conclusion of a contract, the conclusion of the contract is not suspended in case of an appeal. But a court may rule that a contracting authority may not conclude a contract, although this has never happened in practice. The Law on Judicial Power states that an **independent judicial power** exists in the Republic of Latvia, alongside the legislative and the executive powers and that a judge is independent and subject only to the law. This provision refers also to the administrative court of third instance (the Supreme Court). Applications to the office of a judge on the Supreme Court are open to qualified judges of a district (city) court or a regional court, or a person who has at least 15 years of total length of service in a position as an academic in a legal field at an institution of higher education, a sworn qualified advocate or a prosecutor. The administrative courts fulfil the requirements for a court set forth in the *Dorsch* and *Salzmann* judgements. **About 10-18 decisions of the PMB per year are appealed in the courts.** While the majority of cases are yet undecided, the outcome almost always corresponds to the previous PMB decision. The time elapsed between the filing of a complaint or a lawsuit and the final decision is normally one **month**. Going through all three instances of the administrative courts usually takes more than **two years**

13.4 Remedies

The CEC of the PMB shall **prohibit the conclusion** of a contract if it has determined violations of the PPL that are significant and that may influence the decision regarding the granting of procurement rights. In such cases, the commission shall issue a decision regarding the measures to be taken to correct the violations. If the contract has already been concluded, only the court can **annul the contract** and **award damages** on the basis of the Law on Judicial Power and the Administrative Procedure. It is not a requirement for the award of damages that the contested decision be set aside. The damages may be claimed also after the conclusion of a contract. Very rarely do damages go beyond the **tender costs**. The court of law (and the PMB) take the probable consequences of **interim measures** for all interests likely to be harmed into account, including the public interest, and decide not to award such measures where their negative consequences would outweigh their benefits.

13.5 Procedure

The PPL–Chapters XI and XII and the Law on Procurement for the Needs of Public Service Providers–Chapter XV regulate the procedural law with regards to the PMB, whereas the Administrative Procedure Law–Part C (English available) is the basis for proceedings in the administrative courts. A person who is or was interested in being awarded a procurement contract, or who claims entitlement to winning the procurement procedure and who under the specific procurement procedure to which the PPL and the Law on Procurement for the Needs of Public Service Providers refers, claims that his or her **rights have been violated** or that there is a possible violation of such rights due to a possible violation of EU legislation or other legislation has the right to make a complaint about candidate or tenderer selection regulations, technical specifications and other requirements relating to the specific procurement procedure or about the activities of the contracting authority or procurement commission during the conduct of the procurement procedure. There are **no fees** or other costs in the PMB. Under Article 124 Administrative Procedure Law, only when a CEC decision is appealed in the administrative court, a state fee of ten LVL shall be paid in regard to the submission of an application regarding initiation of a matter in court and a state fee of five LVL shall be paid with regard to an appellate complaint. No payment is required with regard to cassation complaints (third instance) or ancillary complaints. In addition, tenderers seeking judicial review in the context of public procurement cases have to pay the costs for lawyers, in particular when legal representation is required in court proceedings, depending on each case. There is a principle of success: The winning party gets the costs reimbursed by the losing party. Complaints may be submitted until the conclusion of the procurement contract. After conclusion, the complainant may appeal decisions of the contracting authority in a court within a **one-month period**. The CEC of the PMB shall examine a complaint within one month after receipt of the complaint. If, for objective reasons, it is not possible to observe this time period, the commission may extend it, notifying the complainant and the contracting authority at the same time. The proceedings in the administrative court in all three instances can take more than a year. The PMB shall examine the complaints regarding the utilities sector also after the contract has been concluded but no later than two month after its conclusion. After that term, it is subject to the courts. The PPL states that the complaint is to be submitted in writing and is to include the title and address of the complainant; the title and address of the contracting authority about whom the complaint is being submitted, and facts justifying submission of the complaint, indicating the violation and the claim of the complainant. The CEC decisions are published on the PMB website: www.iub.gov.lv. With regard to court proceedings, if a matter has been adjudicated by way of a written procedure, the parties to the proceedings shall be notified in good time of the date when an official copy of the judgement may be collected from the office of the clerk of court. On the basis of a petition by the participants in the proceedings, the official copy of the judgement may be sent by post or, if this is not possible, by other means. A copy of a judgement shall be sent to parties to the administrative court proceedings who did not participate in the court sessions within three days after the judgement is pronounced.

13.6 Review Culture

There is no special institution for training the members of the CEC of the PMB or judges dealing with public procurement cases, only seminars in the PMB and the State Administration School. However, the civil servants in the PMB attend EU-organised seminars on public procurement frequently. “On the job”/“learning by doing” is the most important knowledge base. The **attitude** of judges and panellists on the PMB CEC towards the public interest on the one hand and the private interests of the bidders on the other is described as fair and balanced. Tenderers seeking the review of public procurement decisions gain their knowledge of the legal, financial and administrative background of how public procurement works in practice in seminars and consultations (in writing and by phone) provided by the PMB and also through lawyers and

consultants. Tenderers are considered to be **quite active**. Only a minority is reluctant to initiate review proceedings because they do not wish to compromise their chances for the next contract. Sometimes litigation is used as a possibility to prevent competitors concluding contracts. The knowledge of contracting officers depends on the kind of contracting authority they work for, e.g., a big ministry versus a kindergarten. As procurement in Latvia is decentralised, many contracting authorities (especially small ones) have only a limited knowledge of public procurement matters. The attitude of contracting officers and their superiors dealing with complaints towards tenderers filing complaints or seeking judicial review of public procurement decisions is described as neutral. There are no publications or academic journals dealing specifically with public procurement issues. Occasionally some articles about procurement problems appear in magazines. Public procurement law is discussed in provided by the PMB and some private organisations. There is no specific national association on public procurement law and policy; the PMB is the only national focal point. Some organisations, such as the Latvian Building Association, the Latvian Association of Local and Regional Governments, the Latvian Authorized Automobile Dealers Association, the Latvian Insurers Association and the "Green Liberty" organisation are interested in participating in preparing procurement documents or in the legislative process. Public procurement law is discussed in the special procurement seminars provided by the PMB, the State Administration School and some private organisations. As ECJ judgements are binding, they have a very big role in development of Latvian public procurement legislation. Review bodies and parties make reference to them. There have been no Article 234 or 226 EC Treaty proceedings involving public procurement from Latvia so far.

14. Lithuania

The public procurement **remedies and review system** of Lithuania is based on an independent three-instance path of judicial review. This applies to contracts above and below the EC thresholds. There is a compulsory complaint to the contracting authority or entity itself as a precondition for judicial review. Moreover, there is a conciliation procedure for utilities. The role of the Public Procurement Office (PPO) is limited to a possible decision on the suspension of the procurement procedure while the complaint to the contracting entity is pending.

14.1 Complaint to the Contracting Authority

It is compulsory to complain to the **contracting authority or entity**. Every supplier or service provider who has an interest in the contract and believes that the contracting authority or entity has violated the Public Procurement Law (PPL) may file such a complaint. All types of decisions may be challenged, until the conclusion of the contract. According to Article 121 PPL "[…] upon receiving the supplier's written claim, the contracting authority shall suspend procurement procedures until the claims are fully examined and a decision is taken. Procurement procedures shall not be suspended upon receipt of the authorisation of the PPO if, upon suspension of the procurement procedure, the supplier would sustain much heavier losses than those which could be sustained by the supplier who filed the claim." The contracting authority must take a decision on the complaint within five days from receipt and notify the complainant of the decision by the next working day. There is no information on whether this time limit is usually respected. Until March 2003 a complaint to an "Independent Disputes Commission" was a precondition for judicial review, instead of the current compulsory complaint to the contracting authority or entity.

14.2 Judicial Review

In the event of a negative or partly negative decision of the contracting authority or entity, or failing such a decision within the time limits, the supplier or service provider may bring proceedings in the **ordinary (civil) regional courts** in Vilnius, Kaunas, Klaipėda, Šiauliai, or Panevėžys in the first instance, subject to an appeal to the Court of Appeal in Vilinius in the second instance. As the third and last instance, the **Supreme Court of Lithuania** in Vilnius is the

only court of cassation. All courts were established on the basis of the Constitution and Acts of Parliament and fulfil the requirements for courts of law set forth in the *Dorsch* and *Salzmann* judgements, except that their procedures are not *inter partes*. All courts are independent from the executive, administration or any other part of government, and their decisions are of a jurisdictional nature. The judges must be experienced and recognised lawyers. Judges are appointed according to a general procedure. The Constitution, the Law of Courts and other laws guarantee the independence or the judges; they may be dismissed only in very special cases. Justices of the Supreme Court – as well as its president, who is chosen among them – must be highly qualified lawyers, and are appointed (and may be dismissed) by the Seimas (Parliament) upon a proposal of the president of the Republic of Lithuania. The supplier or service provider may file an application for **reconciliation** if the procurement falls under the requirement of Directive 2004/17/EC. Every candidate or tenderer who believes that the contracting authority has not complied with the requirements of the PPL and has violated or will violate his or her lawful interests has the right to approach, prior to the adoption of the decision on the successful tender, the European Commission and request reconciliation (as it is described in Directive 92/13/EEC). The request for reconciliation may also be filed with the PPO, which will forward this request to the European Commission. The reconciliation is an additional procedure to judicial review.

14.3 Remedies

Remedies include the annulment of any public procurement decision, interim measures and damages. A supplier or service provider who has been harmed by an infringement of the PPL through the contracting authority or entity can be awarded damages in compensation for proven harm. This will normally cover the tender costs but may also cover lost profits if the applicant can prove this. The conclusion of the contract can be annulled in cases where clauses of the contract establish illegal conditions. Furthermore, according to the PPL the contract may not be concluded until the expiry of the time limits for filing the suppliers' claims and complaints.

14.4 Procedure

With regard to public authorities and publicly owned utilities, the procedural law is regulated in the Code of Civil Procedure and partially Chapter V of the PPL (for example, time limits; English version http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=273790). Any potential tenderer may bring proceedings. The fees are regulated in the Code of Civil Procedure. The stamp duty is fixed at about €30. In disputes of pecuniary interests, the fees are set as a lump sum depending on the particular complaint. The losing party then reimburses the winning party for fees and other related costs. Claims shall be filed with the contracting authority in writing within five days from the day the tenderer became aware or should have become aware of the violation of his or her lawful interests. The tenderer has to bring proceedings within ten days from the day he or she became aware or should have become aware of the complaint decision of the contracting authority or entity. In case of a failure of the latter to review the complaint within the established time, tenderers may bring court proceedings court within ten days from the day when the claim had to be reviewed. According to the LPP, all information is considered confidential which is identified as such by the tenderer or contracting authority and cannot be revealed to any third party without the consent of the tenderer or contracting authority. There are some exceptions requiring confidential information to be divulged in the cases clearly described in laws, particularly regarding criminal activities. The PPL regulates formal and informal complaints with regard to privatised utilities. There is no automatic suspensive effect when a party brings proceedings; the court decides this on a case-by-case basis. The court must review the claim or appeal within 60 days from the day of institution of the proceedings or acceptance of the appeal. Case law is of limited but considerable importance due to a system consisting of both codification and case law. Court of Appeals and the Supreme Court decisions are published in the official

bulletin and on website. However, access to this information is subject to a fee. Except for the parties to the case, the regional courts' decisions are available upon request, also subject to a fee.

14.5 Review Culture

Judges and lawyers acquire their **knowledge** of public procurement law on the job. The PPO publishes a quarterly bulletin on public procurement and continuously informs all interested parties about news in public procurement on its official website. International seminars are occasionally organised in cooperation with different international bodies, for example OECD/SIGMA, TAIEX etc. Local seminars are organised by the PPO and the private sector. There is no national public procurement association. The national section of Transparency International monitors public procurement proceedings. More specifically, this body deals with the anti-corruption issues.

15. Luxemburg

Public procurement in Luxembourg is regulated mainly by the Act of 30 June 30 2003 (as amended), as well as by a number of implementing regulations. The review and remedies system is based on independent judicial review. The Act of 13 March 1993 (as amended) and the Act of 27 July 1997 implement, respectively, EC Directives 89/665/EEC and 92/13/EEC. Extrajudicial control is also available. There is an official procurement website in French (http://www.marches.public.lu).

15.1 Extrajudicial Control

Aggrieved bidders may protest against an act of the award procedure directly to the official of the contracting authority as well as to his/her superior ("recours gracieux"). This is not a precondition to seek judicial review. The persons responsible for legally representing and binding the authority shall deal with such protests. The attestation and conciliation mechanisms of Directive 92/13/EEC have also been implemented in domestic law with respect to contracts above the thresholds referred to in EC Directive 93/38/EEC. The Ombudsman may also be asked to adjudicate on a dispute relating to an award procedure (36, rue du Marché-aux-Herbes, L-1728 Luxemburg; Phone: +352 26 27 01 01, Fax: +352 26 27 01 02, www.ombudsman.lu) under conditions set forth in the Act of 16 July 2003. The most important institution, however, is the Tenders Commission, seated within the Ministry of Public Works (Commission des Soumissions, Ministère des Travaux Publics, 4 Bd F.D. Roosevelt, L-2450 Luxemburg; Phone: +352 478 3312/ 478 3315, Fax: +352 46 27 09, E-mail: commission.soumissions@tp.etat.lu). The commission is composed of nine members, of whom five, including the chairperson, represent contracting authorities and four the professional organisations. The commission's tasks include control of compliance of tendering procedures with legal provisions, adjudication of disputes brought by parties involved in a procurement process and consultative activities upon request of the contracting authority or ex officio (in particular where the conduct of a negotiated procedure is envisaged or where the contracting authority intends to abandon a tendering procedure or rule on a contract). The initiation of adjudication does not have a suspensive effect on the award procedure; contracting authorities, however, usually do not proceed with the conclusion of the contract until the commission has issued a decision. Proceedings before the Commission are governed by the Act of 30 June 2003 on public procurement. Contracting authorities having breached public procurement law may be asked to withdraw the alleged act. The commission, however, is an advisory body and its decisions ("avis") are neither binding for contracting authorities nor challengeable in judicial review proceedings. Model forms for the submission of requests are available on line (http://www.marches.public.lu/commissionsoumissions/index.html), but they are rarely used in practice. There are no fees for procedures brought before the commission.

15.2 Judicial Review

Judicial review of decisions relating to award procedures shall take place in normal (general) proceedings and in summary proceedings in accordance with the EC Remedies Directives. With respect to the legal nature of the contracting authority, disputes arising from award procedures may be brought before either the administrative or the ordinary (civil) courts. According to the rules implementing the two Remedies Directives, the first option applies to the classical contracting authorities as well as to utilities operators in a public law form (1993 Act). The second option applies to the utilities operators in a private law form (1997 Act). The following developments solely relate to proceedings before administrative courts according to the general rules (1996 Act on administrative justice) and those implementing Directive 89/665/EEC (1993 Act). Before a contract has been concluded and regardless of the estimated value thereof, aggrieved bidders may challenge any decision of the contracting authority which has a definitive character (i.e., not the intermediary steps before a definitive decision has been reached) before the Administrative Tribunal ("tribunal administratif", 1 rue du Fort Thüngen, L-1499 Luxemburg; Phone: + 352 42 105 78 55, Fax: +352 42 105 72 78). In proceedings of the 1993 Act, the order of the President of the Tribunal may not be appealed. In normal proceedings, the decision of the Tribunal may be challenged in the second and last instance before the Administrative Court of Appeal (Cour administrative, 1 rue du Fort Thüngen, L-1499 Luxemburg; Phone: + 352 42 105 78 50, Fax: +352 42 105 78 88 – after the 1996 Reform, the *Conseil d'État* has no longer judicial functions). The Administrative Court of Appeal is a permanent tribunal enjoying the guarantees of independence and impartiality within the meaning of the 1868 Constitution, and renders legally binding decisions. Its judges are qualified lawyers appointed under conditions of the 1996 Act on administrative justice.

15.3 Remedies

Within the context of the 1993 Act, the president of the Administrative Tribunal may order interim measures to have the infringement corrected as soon as possible as well as to prevent further damage to interests involved. The president may, in particular, decide to suspend the award procedure until the contacting authority complies with its tendering obligations, as well as annul discriminatory technical or financial specifications in the tendering documents, the contract specifications or any other relevant document. The president may take into account the probable consequences of measures sought for all interests likely to be harmed, including the public interest, and decide not to grant such measures where their negative consequences would outweigh their benefits. Interim measures are enforceable but do not have a definitive character. The tribunal, in normal proceedings, is solely competent to issue a definitive decision regarding the annulment of a contract award. Where the contracting authority fails to comply with its tendering obligations, the tribunal is entitled to impose **periodic pecuniary sanctions** to ensure compliance of the authority with the judgement. Damages may be sought only before civil courts, unless the parties reach an out-of-court agreement on the provision of damages for infringement of public procurement law. It is sufficient for aggrieved bidders to provide evidence about the actual occurrence of the harm. In principle, the amount of damages is evaluated by experts and may extend to tendering costs as well as to lost profits.

15.4 Procedure

Within the context of the 1993 Act, applications before the president of the Administrative Tribunal may be filed before the conclusion of the contract by any person meeting the requirements of participating in a tendering procedure and considering himself/herself as harmed by an infringement of public procurement law. Applications do not have a suspensive effect on the award procedure, but the applicant may make a special request in this respect. Additionally, contracting authorities shall respect a standstill period of 15 days between the notification to all bidders of the award decision and the formal conclusion of the contract. This rule is considered to

be one of the most important recent evolutions. In normal proceedings, applications shall be brought within three months from the notification of the award decision by any person justifying an individual, direct and actual interest. Proceedings in this case are governed by the 1996 Act on administrative justice (as well as regulations implementing this act). With respect to the award of damages, proceedings are governed by the civil procedure code and shall be initiated within 30 years from the notification of the award decision (the ordinary time limit for non-contractual cases). In all cases, the involvement of an expert, as well as expertise costs, may be decided by the courts. There are no provisions regarding the time limits within which courts shall issue a decision. As far as proceedings under the 1993 Act are concerned, decisions of the president of the Administrative Tribunal are usually rendered within two weeks. There are no court **fees**. Parties have to bear legal representation and bailiff costs, however. In principle, the courts shall decide which party bears the costs of litigation; legal-representation costs may partially be reimbursed upon order of the court. There are no model forms for applications before courts in public procurement cases. Parties in court proceedings are informed of the decisions by the clerk of the court. The decisions of the courts are available on line (Administrative Courts Homepage: http://www.jurad.etat.lu; no reference to names of the parties) and the most important are complied in the "Pasicrisie", the official administrative justice bulletin.

15.5 Remedies Culture

Judges and lawyers may have acquired knowledge in public procurement law as part of their university curricula. They also may attend conferences and continuing education courses organised in the bordering countries. There are no special training sessions in Luxembourg. The members or the Tenders Commission and the administrative courts are considered to possess wide expertise in this field. Bidders may familiarise themselves with public procurement through their respective professional organisations (chambers of commerce). Such organisations usually work together with delegates of ministries (public works, interior). The **attitude** of judges towards conflicting interests is considered to be fair. The competence of procurement officials is sufficient, and is reinforced by compulsory professional training organised by the ministry of civil service and administrative reform. Most bidders seek review proceedings as a matter of last resort. Others intend to obstruct the tendering procedure. There are no specialised publications nor any national procurement association. Conferences and seminars are held by the ministry of public works (especially in the event of amendment of public procurement law), as well as by professional organisations. The impact of ECJ rulings is very important.

16. Malta

Malta has a dual system of review, with the possibility to claim damages in the **civil courts** and all other review proceedings heard by specialised public procurement review bodies. There is a difference between contracts below and above a Lm 20 000 (about €47 000) threshold. All complaints on contracts above this figure are heard by the **Public Contracts Appeals Board**, while the **General Contracts Committee** considers claims regarding contracts below the Lm 20 000 threshold (Parts IX and X of the Public Contracts Regulations 2005 set forth the composition and functions of the General Contracts Committee). The rules apply to contracting authorities and utilities alike. These review bodies were established by the Public Contracts Regulations 2005 (Legal Notice 177/2005). Before April 2002, the General Contracts Committee used to award contracts and also hear appeals. The most important change recently has been the separation of duties from the General Contracts Committee (responsible for awarding contracts) and the Public Contracts Appeals Board. In Malta all contracts below the Lm 20 000 threshold are awarded by the individual contracting authorities, whereas all contracts above this figure are awarded by the Department of Contracts, a central government institution. Hence, the General Contracts Committee acts as the contracting authority for contracts above Lm 20 000 and as a review body for contracts below that figure. The transparency and openness of the process,

giving full access to decisions for non-recommendation etc., are considered strengths of the Maltese review system.

16.1 Contracting Authority

Officers within the contracting authority are responsible for dealing with complaints, and it is compulsory for tenderers to formally complain to the contracting authority directly in order to seek review (LN 177/2005 Clause 83: Procedure for the submission of appeals).

16.2 Non-judicial Review

The intended award of a contract is given due publicity every Wednesday and Friday on the department's notice board and website, and bidders can also obtain this information by fax. An aggrieved bidder can challenge the intended award of a contract to the **Public Contracts Appeals Board** within ten calendar days from the publication of the award by means of a motivated letter outlining the reasons behind the challenge, plus a deposit (Public Contracts Appeals Board, Department of Contracts, Notre Dame Ravelin, Floriana CMR02). The members of the **Public Contracts Appeals Board** are appointed by the prime minister, and their duties are outlined in Part XIV of the Public Contracts Regulations 2005. There are no requirements regarding the chairperson and members of the Public Contracts Appeals Board mentioned in the Public Contracts Regulations 2005 except that they be appointed by the prime minister. (Please see attachment LN 177/2005 Part XIV). In contrast to the General Contracts Committee, which is part of the Department of Contracts, the Public Appeals Board is a separate and independent review body.

16.3 Judicial Review

There is a last-instance **ordinary court of law** reviewing public procurement decisions. This court cannot overturn the result of the Public Appeals Board but can award damages to aggrieved parties. The ordinary courts of law fulfil the requirements of the *Dorsch* and *Salzmann* judgements. Clause 84 (19) of the Public Contracts Regulations 2005 states: "Any bidder submitting a complaint and who shall not be satisfied with the final decision taken by the Appeals Board shall refer the matter to the First Hall of the Civil Court, Malta Law Courts. Such recourse shall not however delay the Director of Contracts or the Head of a contracting authority from implementing the Appeals Board's final decision".

16.4 Arbitration

There is an **Arbitration Panel**, the Malta Arbitration Centre (Address: Palazzo Laparelli, 33, South Street, Valletta; Phone +356 21222557; Fax +356 21230672; website: http://www.mac.com.mt/; Email: malta.arbitration@mac.com.mt) to settle issues during the implementation of the contract, but not during the award process. The Malta Arbitration Centre was set up to promote and encourage the conduct of domestic arbitration and international commercial arbitration. It is administered by a board of governors appointed by the president of Malta but is independent of government. It also provides for the formation of Arbitration Chambers between Maltese and non-residents of Malta for the purpose of international arbitration.

16.5 Remedies

Tenderers may challenge short-listing and qualification decisions in the course of review proceedings at the Public Contracts Appeals Board. Legal Notice No. 177/2005 and Legal Notice No. 178/2005 are the legal basis for the Appeals Board to suspend an award of contract. **The recommendation for award of the contract can be annulled**. After the contract has been awarded, the First Hall of the Civil Courts can award **damages** to aggrieved bidders which can go beyond the tender costs. In the context of civil court decisions, case law is of paramount

importance since there is no legislation and all principles need to be established in case law. The decision of the Appeals Board is final.

16.6 Procedure

There are two distinct procedures: one for above, and another for below, the contract value threshold of Lm20 000.

For public contracts over Lm5 000 and **up to Lm 20 000,** the procedure is as follows. The aggrieved bidder has to pay Lm100 in order to request a review. If the appeal is upheld, the aggrieved bidder is reimbursed the deposited amount. The aggrieved bidder has to object within three days of the notification for award. After the expiry of the period allowed for the submission of a complaint, the contracting authority shall deliver the letter of complaint, the deposit receipt and all documents relating to the public contract in question to the Director of Contracts. The Director of Contracts shall refer the case to the General Contracts Committee, which shall examine the matter in a fair and equitable manner and rule on the complaint by upholding or rejecting it. The written decision of the General Contracts Committee shall be affixed on the notice board of the contracting authority, and copies thereof shall be forwarded to all parties involved. In its deliberation the committee shall have the authority to obtain, in any manner it deems appropriate, any other information not already provided by the contracting authority. The General Contracts Committee's decision shall be final and binding on the contracting authority and the interested economic operator, who shall not be afforded any further recourse (LN 177/2005 Clause 20).

For public contracts above the threshold of Lm20 000, the procedure is as follows (LN 177/05 Part XIII). Any tenderer who feels aggrieved by a proposed award of a contract and any person having or having had an **interest** in obtaining a particular public supply, public service or public works contract and who has been or risks being harmed by an alleged infringement may, **within ten calendar days of the publication of the decision**, file a **notice of objection** at the Department of Contracts or the contracting authority involved, as the case may be. Such a notice of objection shall be valid only if accompanied by a **deposit** equivalent to 1% of the estimated tender value, provided that in no case shall the deposit be less than Lm 200 or more than Lm 25 000. The head of a contracting authority shall immediately notify the director that an objection had been filed with his authority, thereby immediately **suspending** the award procedure. The Department of Contracts or the contracting authority involved, as the case may be, shall be **precluded from concluding the contract** during the period of **ten calendar days** allowed for the submission of appeals. The award process shall be **suspended** if an appeal is eventually submitted. Hence there is an automatic suspension of procedure takes place through the Public Appeals Board (no suspension of contracts in case of civil courts). Within three working days of the expiry of the ten-day period allowed for the filing of a notice of objection, **any other tenderer and any person having or having had an interest** involved in the call for tenders may register an interest in the proceedings. The registration of interest shall be valid only if accompanied by a **deposit** amounting to the deposit paid under subregulation (1). The tenderer who had been indicated in the adjudication decision of the director or the contracting authority as the one to whom the contract was to be awarded shall be deemed to have registered an interest but does not need to pay a deposit. The names of the tenderers or other persons having or having had an interest in obtaining a particular public contract who register an interest shall be **made public** on the first working day after the lapse of the time limit specified above. Within three working days after the publication of the list of persons who register an interest, the tenderer filing the notice of objection shall send a reasoned letter of objection explaining the objection. The letter of objection shall be made public and shall be circulated to all persons with a registered interest. Within five working days from the publication of the letter of objection, any tenderer who had registered an interest may send a reasoned reply to the letter of objection. The reply shall be made public and

shall be circulated to all tenderers with a registered interest and to all tenderers who have filed an objection. Within ten working days of the publication of the replies, the director or the head of the contracting authority shall prepare a report (the Analysis Report) analysing the letter of objection and the replies thereto. This report shall be circulated to the persons who file an objection and who have a registered interest. After the preparatory process is duly completed, the head of the contracting authority shall forward to the Director of Contracts all documentation pertaining to the call for tenders in question, including files, tenders submitted, copies of deposit receipts, any motivated letter, analysis report, etc. The director shall forward all the documentation related to any appeal case to the chairperson of the **Appeals Board,** who shall then proceed as stipulated in Part XIII. The director or the head of the contracting authority shall publish a copy of the decision of the Appeals Board at his or her department or at the premises of the relevant contracting authority, as the case may be. Copies of the decision shall be forwarded to the complaining tenderer, any persons who had registered or had an implied interest and, by the birector only, to the contracting authority concerned when this is one listed in Schedule 2 of LN 177/2005.

The Appeals Board may use **experts** to help in deliberation. The Department of Contracts bears the costs for their involvement. Experts from recommended awardees, aggrieved bidders and relative beneficiary departments/entities are paid by their respective party. Any decision by the General Contracts Committee (or a Special Contracts Committee) and by a contracting authority shall be **made public** at the Department of Contracts or at the office of the contracting authority prior to the award of the contract. The notice of objection duly filed in accordance with subregulation (1) shall be made public no later than the next working day following its filing. There are no mandatory **model forms** or documents used for public procurement review and remedies. The parties are notified by fax. The decisions are **published** on the Department of Contracts' website (http://www.contracts.gov.mt). The final decision taken by the Public Appeals Board is disseminated to all parties concerned via fax or e-mail.

16.7 Review Culture

Judges and panellists on public procurement review bodies, and public procurement lawyers representing tenderers or contracting entities in review proceedings, acquire their knowledge of public procurement law in particular and Community law in general, and their knowledge of how public procurement works in practice — as well as the technical and financial considerations involved — by "on the job"/ "learning by doing" and through legislation. Judges and panellists act in a fair and balanced manner. Tenderers seeking the review of public procurement decisions gain their knowledge of the legal, financial and administrative background of how public procurement works in practice through lawyers and consultants and through their professional organisations, such as the chamber of commerce. Some tenderers are deterred from seeking judicial review by the high costs (including legal representation, administrative costs, etc.). In general, contracting officers are well versed in the procedures and legislation. However, in most cases the help of the Attorney General is obtained. The attitude of contracting officers dealing with complaints towards tenderers filing complaints or seeking judicial review is described as quite normal and professional, giving assistance as best they can to aggrieved bidders. The Director of Contracts issues a **yearly publication** on the cases heard by the Public Contracts Appeals Board and the General Contracts Committee. **Conferences and seminars** organised by the Chamber of Commerce and Malta Enterprise have discussed public procurement. There is no national **association** on public procurement law and policy. Most tenderers use the Chamber of Commerce and other national associations to lobby for discussions on public procurement. In-service training for procurement section officials on the Public Procurement Regulations has taken place recently. However, no specific training on law or policy has taken place to date. The impact of the judgements of the European Court of Justice on public procurement review proceedings is crucial. Nevertheless, reference has been made to judgements only sparingly.

17. The Netherlands

The public procurement review and remedies system of the Netherlands is based on **judicial review** over three instances in the civil courts. The system applies to contracts inside and outside the field of application of the EC Directives and to public contracting authorities and utilities alike. Moreover, arbitration and other alternative dispute settlement mechanisms are available.

17.1 Complaints to Contracting Authorities and Entities

The Dutch system is based on judicial review. If, however, a tenderer wishes to complain only about the behaviour of the contracting authority, he or she can file a formal complaint with the contracting authority or entity itself. If the contracting authority does not deal satisfactorily with the formal complaint, then the tenderer can turn to the National Ombudsman ("Nationale Ombudsman").

17.2 Judicial Review

A tenderer seeking financial compensation (damages), or the execution of the contract or the tender procedure to be suspended, or the annulment of the contract, must file suit in a **civil court**. Suspension of the contract or the tender procedure (interim measures) can be sought in special **preliminary relief proceedings** (or interim injunction proceedings) dealing with the case on a provisional and short term basis ("kortgeding" procedure or "voorlopige voorzieningen" procedure). In the first instance, the case will be reviewed by a **court of first instance** ("rechtbank"). The decision of the rechtbank can be appealed in the **Court of Appeal** ("Hof"). The decision of the Hof can be appealed in the **Supreme Court** ("Hoge Raad"). The Dutch court system in general is regulated in an Act of Parliament, the "Wet op de Rechterlijke Organisatie". With the Hoge Raad there is a last-instance general court of law reviewing public procurement decisions, which like the rechtbank and the Hof fulfils the requirements of a court of law set forth in the *Dorsch* and *Salzman* judgements. Arrangements guaranteeing the independence of the judges of all three above-mentioned courts of law include appointment for life, the judges' qualifications (six years of training must be successfully completed, or a certain amount of working experience in the legal profession), funding regulated by law (governmental funding only), and tasks and competence which are regulated by law.

17.3 Arbitration

It is currently still possible for parties to bring their conflict before an arbitration panel or other alternative-dispute settlers. However, new legislation is being discussed in parliament to prohibit arbitration in conflicts about the use or application of the rules on procurement of public contracts, to protect the rights of tenderers in procurement procedures. If this legislation is passed, then all conflicts about the use or application of the rules on procurement of public contracts must be dealt with by the civil courts, as described above.

17.4 Remedies

There are many available remedies, e.g., damages, suspension of the tender procedure, termination of the tender procedure, recommencement of a tender procedure, qualification of the tenderer for the contract, suspension or termination of the execution of the contract, etc. It is up to the tenderer to define the requested remedy when he or she files the lawsuit with the court and make the arguments needed for the court to decide. **All decisions and actions of the contracting authority (or procurement authority) can be challenged**, even when the contract has already been concluded. The legal basis is Article 162 "Boek 6, Burgerlijk Wetboek" (Civil Code) and "Wetboek van Burgerlijke Rechtsvordering" (Civil Procedure Code) and (a lot of) case law. Codified law, in combination with case law, is the legal basis for authorising a court of law to set aside or suspend a contract award. For suspending or temporarily setting aside the contract award (**preliminary ruling**) the requirements are: a well-founded interest (point d'intérêt),

urgency and a breach of law. The court will **set aside** the contract award (temporarily or otherwise) only if it concludes that a breach of law has occurred and if it considers this breach should be remedied by setting aside the award decision. The conclusion of the contract can be **annulled** by the court only if the breach of law is considered to be of a public order ("ordre public"). In other circumstances the court will order the procurement entity to terminate a contract, to not conclude a contract (with a certain party or in general), not to execute the contract, to start (another) procurement procedure, to admit an enterprise to the procedure, to accept the offer of an enterprise as suitable, etc. Codified law, in combination with case law, is the legal basis for **damages**. Damages can be claimed even if the decision is not set aside. Requirements are: the claimant has suffered a loss (pecuniary or otherwise), there has been a breach of law, causality is present (cause and effect – meaning the loss must be caused by the breach of law), there is accountability ("guilt"). Dutch case law shows that these damages can go far beyond tender costs. Codified law and case law are the basis for interim measures. The court of law or arbitration panel takes the probable consequences of **interim measures** for all interests likely to be harmed into account, including the public interest, and decides not to award such measures where their negative consequences would outweigh their benefits. Case law shows that the court is likely to reach such a decision only if the contract is fully or almost fully executed when the proceedings before the court are initiated. **Penalty payments** are a possibility in the Netherlands in order to ensure that the court ruling is executed by the procurement authority or entity. The large variety of possible remedies is seen as an important strength of the Dutch system of remedies.

17.5 Procedure

The **Civil Procedure Code** regulates the procedural law of the civil courts. Anyone who can claim a **point d'intérêt** may initiate proceedings. Thus it is not necessary for an individual or company to have submitted a bid, etc. Proceedings can be initiated without entry into the procurement proceedings. A general **court fee** varying from €26 to €4563 must be paid. The exact amount varies depending on the instance and the financial interest connected to the case. There are no fees in complaint procedures to the contracting entity itself. Fees are regulated by law. Costs in addition to the court fees include costs for lawyers, bailiffs and experts, and they may vary considerably. The outcome of the proceedings affects the costs for the parties. If the applicant wins on all arguments, the contracting entity has to pay all the costs of the proceedings, including court and lawyers' fees. If the judgement is in favour of each of the parties, both have to pay a more or less equal share of the costs. The court decides on requests regarding **expert advice** made by the parties and decides which party should pay the relevant costs. Court proceedings for damages can be started at any time within five years after the breach of law has occurred or is noticed. Proceedings "behind closed doors" are a possibility if necessary to protect confidential business. Also, the court can prohibit the parties from making information about the proceedings public during and after behind closed doors proceedings. (Arts. 27 and 29 Wetboek van Burgerlijke Rechtsvordering). The **judgements** are pronounced in public. Judgements are also distributed to the parties, made available on a website (insofar as they do not contain confidential information) and published in various law journals (if an interesting point of law comes up in the judgement). The suspension of a procurement procedure needs to be specifically requested as an interim measure before the court. Interim injunction proceedings are decided within a matter of days. In normal proceedings it will take several weeks to start the proceedings, and the proceedings themselves can take several months (depending on the arguments, the complexity of the case, the amount or complexity of expert advice that is requested and the extra time the parties ask of the court to deliver a certain argument or piece of proof). After the proceedings themselves are finished, the court will take a few weeks before it announces the decision. The speed of the court proceedings is seen as an important strength of the Dutch review and remedies system. Case law is of limited but considerable importance due

to a system consisting of both codification and case law. The court uses a special **form** to start the proceedings. That model is the same for all proceedings (public procurement or other subjects). There is also a model form for the announcement to the procurement entity by the party who has started proceedings. This is a general model for all proceedings (procurement being the subject or not). In principle, all court decisions are public and available to everybody. The judgements are pronounced in public. Judgements are also distributed to the parties, made available on a website and published in various juridical journals. The court can make exceptions on grounds of privacy and confidentiality. Electronic versions of many decisions are available on, e.g., www.rechtspraak.nl and www.jol.nl.

17.6 Review Culture

Judges and public procurement lawyers representing tenderers or contracting entities in review proceedings acquire their **knowledge** of public procurement law in particular, Community law in general and knowledge of how public procurement works in practice as part of their university studies; their vocational training; continuous education; in courses provided by the government, for example the ministry of justice; in courses provided by the EU or international organisations; and "on the job"/"learning by doing". The **attitude of judges** towards the public interest on the one hand and the private interests of the bidders on the other is described as fair and balanced. Tenderers seeking the review of public procurement decisions gain their knowledge of the legal, financial and administrative background of how public procurement works in practice mainly through lawyers and consultants. During the last few years the number of proceedings in procurement cases has risen. There are several possible reasons for tenderers not to opt for proceedings. It normally means that their case is not strong enough (the breach of rules is uncertain or only minor). Some tenderers intend to obstruct procurement, and most of them seek financial gain through review proceedings. Some are deterred from seeking judicial review by the costs (including legal representation, etc.) or by the duration of these proceedings. **Publications** and academic journals dealing specifically with public procurement issues, including public procurement review and remedies, include the "Tijdschrift voor Aanbestedingsrecht", "Tijdschrift voor Bouwrecht", "Tijdschrift voor Europees recht", various Internet sites (e.g., www.Ovia.nl), "Nieuwsbrieven IOEA" and "Nieuwsbrieven Kenniscentrum Europa Decentraal". Several **seminars and conferences** on public procurement are organised by the private sector. Also, various universities have courses dealing with public procurement. These courses are open to everyone (not just full-time students). There is a national association on public procurement law and policy, the Nederlandse Vereniging voor Aanbestedingsrecht. National interest groups such as associations of economic entities (VNO/NCW, MKB Nederland, Bouwend Nederland, etc.) lobby and inform on public procurement. Formal and informal advisory organisations such as Nederlandse Vereniging voor Aanbestedingsrecht, InnovatiePlatform, Regieraad Bouw, etc., also exist in the field. Judgements of the ECJ have an impact on the review proceedings because they are part of the rules on public procurement. Thus, review bodies make reference to them.

18. Poland

Public procurement in Poland was regulated by the Act of 29 January 2004 as amended (English translation: http://www.uzp.gov.pl/english/PPL_29_January_04.doc), but the new EC Procurement Directives have been implemented in national law through an Act of 7 April 7 2006 (entry into force: 25 May 2006). The Polish reviews and remedies system is based on a mixed system of administrative, quasi-judicial and judicial review. In the utilities sector, review of procurement decisions is solely available above the EC thresholds. The main actor is the **Public Procurement Office** (henceforth: the **PPO**; Urząd Zamówień Publicznych, Al. Szucha 2/4, 00-582 Warsaw; Phone +48 22 458 77 77; Fax: +48 22 458 77 00, E-mail: uzp@uzp.gov.pl, website: http://www.uzp.gov.pl), an independent government authority established in 1995 with jurisdiction over policymaking and coordination in the field of public procurement. The office is

also responsible for publishing the national Public Procurement Bulletin, i.e., the advertising tool for contracts below the EC thresholds, and monitoring decisions of contracting authorities in both the classical and the utilities sectors (in the latter case solely above the EC thresholds). The chairperson of the PPO is appointed for a five-year mandate by the prime minister after an invitation to submit applications has taken place. The PPO comprises a secretariat of the chairperson; a legal department; a control department; a training and publications department; an international cooperation, studies and analysis department; a bureau of appeals and an organisational and financial bureau. Extrajudicial control is available in the utilities sector (conciliation mechanism of EC Directive 92/13). There is no arbitration body entrusted with an alternative dispute settlement mission in the field of public procurement.

18.1 Review of Procurement Decisions

With respect to the estimated contract value and before the contract has been concluded, there may be three stages for the review of decisions in relation to a tendering procedure. At the **first stage**, any person having an interest in obtaining the contract (bidder, candidate, contest participant) who has been or is likely to be harmed by an act or omission of the contracting authority he or she considers to be contrary to the Public Procurement Act, is entitled to file a **complaint** (protest) in writing to the contracting authority within seven days from the time he or she became aware of the alleged infringement. There are some exceptions to this rule: 1) Complaints against contract notices or/and contract specifications in open procedures shall be lodged within seven days, in the case of contracts below the EC thresholds, or 14 days, in the case of contacts above the EC thresholds, as from the date the contract notice has been published in the national Public Procurement Bulletin (for contracts below the EC thresholds) or the Official Journal of the European Union (for contracts above the EC thresholds) or/and the contract specifications have been put out to consultation through the website of the contracting authority; 2) Complaints against contract specifications in procedures other than the open procedure shall be lodged within seven days from the date the bidder received the said specifications but, in any case, no later than a) three days before the time limit for the submission of tenders has expired in the case of contracts below the EC thresholds and b) six days before the time limit for the submission of tenders has expired in case of contracts above the EC thresholds. The complaint must be lodged before the contract has been concluded. Complaints may also be lodged by several organisations (such as chambers of commerce, crafts organisations, independent institutions of several professions [entrepreneurs, architects, civil engineers, town planners], employers' organisations)] no later than the final date for the submission of tenders. The list of said organisations may be amended by the chairperson of the PPO and shall be published in the national Public Procurement Bulletin. Complaints are dealt with by the head of the contracting authority or a duly authorised official of the authority. The contracting authority shall issue a reasoned decision on the complaint within 10 days from the receipt thereof. Failure to issue a decision within this time limit is deemed to be a rejection of the complaint. The first stage is the sole applicable review procedure for contracts the estimated value of which does not exceed €60 000. Regarding contracts of a value greater than €60 000, there is a **second stage**. Persons having lodged a complaint to the contracting authority may **appeal** the decision before the PPO within five days from the delivery of the said decision or the expiry of the time limit within which the contracting authority should have reached a decision. Persons not having lodged a prior complaint are not admissible to proceedings before the PPO. Examination of an appeal is subject to the prior payment of a registration fee. The appeal is dealt with at the seat of the office, by a panel of three arbitrators appointed by the PPO chairperson. Arbitrators are selected among a list established for a six-year period by means of a public electronic procedure. Arbitrators are not necessarily lawyers or legal experts; some are experts in a particular field such as construction or IT systems. A separate arbitration panel is appointed for each review procedure. This can be seen as a weakness of the Polish review system, for

decisions issued by arbitration panels usually diverge from one another. Even though the panel shall apply the provisions of the Polish Civil Procedure Code in relation to arbitration and arbitrators are not answerable to the PPO chairperson, proceedings before the panel are not a method of alternative dispute settlement but part of the formal review system. The panel shall not decide ultra petita and is bound to issue a decision within 15 days from the date the appeal has been lodged to the PPO. In 2005, 4094 appeals were lodged to the PPO, from which 308 have been withdrawn, 1714 upheld, 1226 dismissed, 440 rejected and 406 not examined due to omission to pay the registration fee. On average, arbitration panels issue a decision within 13 days (2005 data). At the **third stage**, the final decision of the arbitration panel may be challenged before a regional court whether by the complainant of the first stage or the contracting authority itself. Regional courts are the review bodies of last instance in public procurement cases. The court's territorial jurisdiction depends on the seat of the contracting authority. The **petition** must be lodged through the chairperson of the PPO within seven days from the delivery of the final decision of the arbitration panel to the parties. The chairperson then has to provide the opposing party with a copy of the petition and forward the file of proceedings, as well as the petition, to the competent court within seven days from the lodging of the petition. After having received the petition, the court shall issue a decision in due time but no later than one month (under the former Public Procurement Act: three months) from the receipt of the petition. A violation of the time limit does not invalidate the decision. On average, regional courts issue a decision within 2.73 months (2005 data under the former Public Procurement Act). There are 45 regional courts located in several cities. Regional courts are permanent bodies, issuing legally binding decisions and composed of members of the judiciary whose independence is guaranteed by the Constitution (Arts. 173 and 178). In particular, any Polish citizen at least 29 years old with ascertained experience in the field of law and enjoying full civil rights may be appointed as a judge. In 2005, 506 petitions were lodged in the regional courts. Only 12.5% of the judgements issued resulted in the annulment of decisions made by arbitration panels.

18.2 Remedies

The initiation of a review procedure has an **automatic suspensive effect** on the ongoing tendering procedure from the first stage. The contracting authority shall not conclude the contract before all available means of legal protection have been used, i.e., before a regional court has issued a decision on a petition against an appeal of an arbitration panel. A contract concluded in violation of the aforementioned obligation is deemed to be void. The contracting authority may, however, conclude the contract should the chairperson of the PPO so decide upon request of the authority and after having taken into account the probable consequences of the suspension for all interests likely to be harmed, including the public interest. The contracting authority is also entitled to conclude the contract if the complainant does not bring proceedings under the second or the third stage. Through its final decision, the **arbitration panel** may 1) reject the appeal against the decision of the contracting authority on the prior complaint; 2) uphold the appeal and order the contracting authority to issue an act or cancel the alleged act; and 3) set aside (annul) an act of the contracting authority. Circumstances likely to result in the annulment of the decision of contract award shall be examined by the panel ex officio. The **regional court** may 1) dismiss the case should the petition be unjustified; 2) discontinue proceedings – i.e., stop the review proceedings on formal grounds); and 3) uphold the petition and reverse the decision of the arbitration panel. In the third scenario, the court shall examine the case from the very beginning and issue a decision on the merits. Before rendering its final decision and under conditions referred to in the Public Procurement Act, the court may upon request of the contracting authority allow the latter to conclude the contract. The aforementioned remedies shall be awarded by both review bodies before the contract has been concluded. The annulment of a concluded contract falls within the jurisdiction of regional courts. **Financial penalties** may be imposed by an administrative decision of the PPO chairperson in cases referred to in Article 200 of the Public

Procurement Act (irregular award; failure to publish a contract notice; irregular abandonment of the tendering procedure; issuance of certain acts without the prior consent of the chairperson of the PPO; irregular amendment of a concluded contract). **Damages** may be awarded in accordance with the general rules of the Civil Code.

18.3 Procedure

Proceedings before arbitration panels are governed by provisions of the Civil Procedure Code in relation to arbitration. Proceedings before regional courts are governed by provisions of this code in relation to appeals. Lodging a prior complaint to the contracting authority is not subject to the payment of an administrative fee. In contrast, initiation of proceedings before an arbitration panel is subject to the payment of a registration fee, the amount of which depends on the estimated contract value (on average: 3138 PLN in 2005). Before the 2006 Act, the registration fee did not depend on the contract value, i.e., its amount was the same for large and small contracts. Under the 2006 Act, the registration fee in case of contracts above the EC thresholds is 20 000 PLN for supply and service contracts, and 40 000 PLN for works contracts. The registration fee in case of contracts below the EC thresholds is 10 000 PLN for supply and service contracts, and 20 000 PLN for work contracts. According to the Act of 28 July 2005 on court costs in civil cases, initiation of proceedings before the regional courts is subject to the payment of a court fee amounting to 3000 PLN. The relatively low value of applicable fees is considered to be a major advantage of the Polish review system. Indeed, the appeal registration fees were low before the 2006 Act, and one could argue whether they are still too low – in fact, they were increased significantly in order to limit the abuse of recourse to review measures. There are no other compulsory costs, but parties may wish to have recourse to legal representation. On average, the cost of legal representation before arbitration panels in 2005 was about 694 PLN for contracting authorities and about 1776 PLN for bidders. As a matter of principle, costs in relation to proceedings before both review bodies shall be reimbursed by the losing party. There are no model forms for the submission of appeals/petitions, but a list of compulsory elements (such as indication of the decision challenged, description of facts, requested measures) must figure therein. With respect to proceedings before regional courts, the relevant provisions of the Civil Procedure Code remain applicable. Regarding expertise, where specialised knowledge is necessary to evaluate or determine the facts of the case, arbitration panels may appoint an expert among a list maintained in the regional court of Warsaw. Regional courts may appoint an expert upon request of a party to proceedings. In this case, expert costs are paid by the losing party. There are no specific provisions in relation to in camera proceedings. The decisions of arbitration panels and regional courts shall be reasoned and are announced in a public session. Regional-court decisions are notified to the parties upon request within seven days from the announcement of the decision. Arbitration-panel decisions are immediately notified to the parties. The most important decisions are published on the PPO website.

18.4 Remedies Culture

Long-term training and education programs are organised by the PPO. In addition, the office, alone or together with other (public or private) organisations, holds periodic training conferences for judges and arbitrators as well as contracting authorities and other interested entities. The office holds a major international conference annually (although not all of them focus on the subject of remedies). The PPO has also been responsible for the implementation of EC-funded projects in relation to government purchasing, such as PHARE 2002/2003. The PPO website is the primary and the best source of information in the field of national and EU procurement policy. Bidders or contracting officers may consult PPO experts through the PPO helpdesk on a daily basis. Private companies and consultants provide a wide range of training seminars, and numerous post-graduate programs include public procurement law courses. Work experience plays an important role in the attitude of judges and lawyers towards review proceedings. In

general judges are considered to have a balanced view of the interests involved in a procurement case. Case law, however, is of limited importance due to a system mainly consisting of the interpretation of existing statutory law. The attitude of bidders towards review proceedings usually depends on the estimated contract value. Bidders for small value contracts are less familiar with procurement law than those bidding for large-scale projects and already having expertise in government purchasing. In some cases, the latter initiate proceedings with the purpose of obstructing the ongoing tendering process. In general, familiarisation with procurement law is mainly ensured by the private sector. The Polish Agency for Enterprise Development (PAED) has also prepared Internet courses which bidders may follow free of charge. The competence of a contracting officer in the field of procurement law depends on the extent to which the contracting authority purchases goods and services. To enhance accountability and promote professionalisation, officers attend courses provided by several institutions, but there is no official public procurement training program. Contracting officers must respect of the Public Procurement Act but do not seem to encourage review proceedings. There is a wide range of official publications in relation to procurement law: official commentary on the Public Procurement Act, guidelines and best practice recommendations issued by the PPO, etc. Most of them are available on line (PPO website). There are also specialised professional law journals, such as “Zamówienia Publiczne Doradca”, “Monitor zamówień publicznych” and “Prawo Zamówień Publicznych”. There is no official national public procurement association but numerous commercial organisations, such as “Ogólnopolskie Stowarzyszenie Konsultantów Zamówień Publicznych” (the Polish National Association of Consultants on Public Procurement), or “Polski Związek Rzeczoznawców Zamówień Publicznych” (the Polish Union of Expert Staff on Public Procurement), often play an advisory role in this respect. The civil society takes a more active role in the evolution of public procurement rules, especially through opinions issued by several professional bodies such as “Polska Izba Informatyki i Telekomunikacji” (The Polish Chamber of Information Technology and Telecommunications), “Stowarzyszenie Architektów Polskich” (Union of Polish Architects) and “Stowarzyszenie Kosztorysantów Budowlanych” (Association of Construction Estimators). The impact of ECJ rulings is considerable, in particular since the accession of Poland to the EU. Poland twice submitted written observations in proceedings before the ECJ (cases C-220/05, Jean Auroux and C-410/04, ANAV), but there have been no referrals by domestic courts according to Article 234 EC. Five Polish cases attracted the attention of the European Commission (failure to implement the EC Procurement Directives, discriminatory behaviour in computer purchasing, failure to implement the applicable tendering procedure). These cases are being discussed at a formal stage; no proceedings have been brought to the ECJ pursuant to Article 226 EC. The Polish government is considering a number of amendment proposals aiming at rationalising the review system currently in force. In particular, the most significant changes include: 1) the establishment of a unique professional arbitration body replacing the existing arbitration panels; and 2) the establishment of a specialised court of review undertaking the task currently entrusted to the 45 regional courts. The purpose of the suggested amendments is to enhance homogeneous dispute resolution, for under the system currently in force decisions of the review bodies usually diverge from one another.

19. Portugal

The public procurement review and remedies system of Portugal is based on a **two-instance judicial review in the administrative courts**. This applies to contracts below and above the EC thresholds. There is a wide range of remedies available. However, most issues seem to be settled at a pre-judicial stage. Portugal has a traditional written legal system which is considered an adequate environment for the access of tenderers to remedies, complemented by a modern open administrative system. Citizens have access to documents and procedures that directly affect them, and the system provides the opportunity to challenge any administrative decision.

19.1 Complaints to the Contracting Authority

Tenderers may complain directly to the respective **contracting authority** or to their superiors (recurso hierárquico facultativo) at any stage of the procedure until the award. This two-level (executive) administrative review is the main forum for review in practice. However, it is not a compulsory precondition for the judicial review described below. Tenderers may make a direct complaint and bring proceedings at the same time.

19.2 Judicial Review

Tenderers can bring proceedings for judicial review regarding public procurement contracts below or above the EC thresholds in the **administrative courts** or tribunals of first instance. There is an administrative court in each district of Portugal. Judgements of the administrative courts can be appealed to the **Supreme Administrative Court** in Lisbon in the second and last instance. These administrative courts are independent from the executive, administration or any other part of government, and their decisions are of a jurisdictional nature. All courts were established on the basis of the Constitution and acts of parliament, and fulfil the requirement for a court of law set forth in the *Dorsch* and *Salzmann* judgements, except that their procedure is not *inter partes*. The judges must be experienced and recognised jurists. They are appointed according to a general procedure. The Constitution and other laws guarantee the independence or the judges; they may be dismissed only in very special cases. Justices of the Supreme Administrative Court, as well as its president, who is chosen among them, have to be highly qualified lawyers. There are few cases of judicial review of public procurement decisions in practice. An **arbitration procedure** conducted by one-off and case-by-case panels can be used, provided that this option was established in the tender documents. Two judges are chosen by the parties, and a third is chosen by the other judges. The panel's decision is binding only on the parties and is subject to a complaint procedure. Moreover, the arbitration decision does not exclude a tenderer from bringing proceedings in the administrative court. There is a **conciliation procedure** for utilities established in DL No. 223/2001, on 9 August, but this procedure does not preclude the right to initiate proceedings before the administrative courts.

19.3 Remedies

Remedies include the annulment of individual procurement decisions, the annulment of the entire public procurement procedure, an order to recommence the procedure, and damages. Since 2003 it has been possible to annul concluded contracts. Individual procurement decisions can be challenged up to five days after they were taken. The award decision can be challenged up to ten days after it was taken; then the contract will be concluded. Proceedings against the award decision in the administrative court prevent the conclusion of the contract. All remedies are established in administrative law. In order for a procedure or contract to be a annulled, it has to be illegal due to very serious violations of the law, for instance a violation of the principle of legality (when an entity decides *contra legem*). The administrative court can determine the suspension of the decision or the procedure (Law 15/2002, de 18/02/2003l – Código de Processo nos Tribunais Administrativos) on the basis of the Decreto Lei 197/99, de 8/06, Code for the Administrative Procedure, and the Code for the Procedure in the Administrative Court. The requirements are that the tenderer's request be reasonably likely to be recognised as valid and that he or she can argue his or her interests will be seriously compromised if the procedure is not suspended. In cases where the **public interest prevails**, the administrative court will not suspend the procedure. The principle of the responsibility of the state for legal decisions established in administrative law and in civil law is the basis for the award of damages. The tenderer must prove serious infringements. Normally the tender costs can be reimbursed, but it is difficult to produce the evidence for lost-profits compensation.

19.4 Procedure

The relevant **procedural law** is stipulated in the Administrative Court Procedure Code (Código de Processo nos Tribunais Administrativos). The court may accept the request for the participation of technical experts, to be paid for by the party who made the request. Alternatively, the court may decide to involve experts and cover their costs. Any interested party in the procedure may initiate proceedings but will have to prove his or her capacity: Normally, it is necessary to have been a candidate for the contract in question. Proceedings have to brought within one month after the tenderer became aware of the decision in question. The losing party covers the costs of the court and of the winning party. Portugal has a codified legal system and case law is used only for interpretation, without a rule of precedence. No model forms are used. The parties are properly notified of the judgements, which are also published, by mail.

19.5 Review Culture

Judges acquire their knowledge of public procurement law as part of their university studies in constitutional law and administrative law courses. Judges follow the "*magistratura judicia"*, a separate path of legal training specifically designed for judges and separate from the curriculum for advocates. Judges, lawyers and tenderers receive their knowledge of how public procurement works in practice as part of their university studies, vocational training, continuous education and courses provided by the government, the EU or international organisations, and on the job/learning by doing. The **attitude** of judges towards the interests involved depends on the situation, the case and the individual judge. There are very competent and fair experts but also people who are not sensitive to the public interest involved. Some **tenderers** do not wish to initiate review proceedings because they do not wish to compromise their chances for the next contract; some see review proceedings as a matter of last resort; others intend to obstruct procurement through review proceedings; others seek financial gain through review proceedings; some are deterred from seeking judicial review by the high court fees; some are deterred from seeking judicial review by the high costs (including legal representation, etc.); some are deterred by the long duration of these proceedings; finally, some tenderers are ignorant about the possibilities of judicial and other review. Some **contracting officers** acquired their knowledge of the legal and other aspects of public procurement at university; some attend internal and external seminars; also, the daily experience transmitted by their senior colleagues is a valuable tool. There is a general sense of respect and awareness of the legal rights regarding complaints and fairness of procedures towards the tenderers. There is no specific academic journal, but public procurement law is discussed at academic and professional conferences and seminars. There is no national public procurement association. The courts are aware of the importance of the ECJ judgements and use this knowledge in their decisions adequately.

20. Romania

Public procurement in Romania is regulated by Emergency Ordinance No. 34/2006, which came into force on 30 June 2006 (there are also additional provisions in relation to e-procurement: http://www.e-licitatie.ro). The review and remedies system is based on both quasi-judicial and judicial control. This system can be divided into **remedies before and remedies after** a contract has been concluded. The award of **damages** is independent and may be sought before or after the contract has been concluded. In all cases, judicial protection does not depend on the estimated contract value. It is not compulsory for bidders to formally protest to the contracting authority directly as a precondition to seek review. There are some 700 applications per year against acts of contracting authorities. Even though applications often have a favourable outcome for aggrieved bidders, only 1% of procurement acts annually are reviewed.

20.1 Judicial Review

Before a contract has been concluded, bidders may have recourse either to the **National Council for Solving Legal Disputes** (henceforth the council) or the **administrative courts of law**. Bidders may challenge any act, including failure or refusal to issue an act, in relation to the award procedure. The council was established by Emergency Government Ordinance No. 34/2006 (Chapter IX). It has both administrative and jurisdictional capacity. In particular, the council is competent to solve legal disputes before a contract has been concluded, to issue opinions on the legality and compliance of award procedures launched by contracting authorities (a procedure similar to the attestation mechanism) and finally to issue opinions on disputes that aggrieved bidders have brought before the administrative courts. The council members are public servants with a special status (independence, procedure of selection and appointment, incompatibilities and interdictions, salaries) and experience in the field of procurement law. The council's decisions are binding on the parties and may be appealed to the Court of Appeal located in the area of the contracting authority. The Court of Appeal is a permanent body founded by law and is independent from the executive, administration or any other part of government. Its decisions are rendered on the basis of legal rules and are binding *inter partes*. A specialised panel within the Court of Appeal is in charge of ruling on appeals against council decisions. The panel reviews the legality and substance of appealed decisions. Judgements issued by the panel cannot be appealed. After a contract has been concluded, aggrieved bidders may lodge an application only before a court of law in accordance with Law 544/2004 on administrative litigation. Applications for damages may be brought before a court of law only in accordance with Law 544/2004 on administrative litigation, regardless of whether the dispute arose before or after the contract has been concluded.

20.2 Remedies

Applications before the council have a suspensive effect. Moreover, the council has the power 1) to totally or partially annul the alleged act of the contracting authority; 2) to order the contracting authority to comply with an obligation or to issue an act; 3) to take any further measure deemed necessary for remedying an infringement of public procurement law committed by the contracting authority; 4) to annul or to restart the award procedure in the light of the facts of a given case; 5) to impose a fine against senior officials of the contracting authority so as to enforce granted measures or the decision issued and 6) should the application be rejected for lack of grounds, to resume the award procedure. The council's decisions are binding on the parties and may be enforced by means of a **fine** (see no. 5 above). If the contracting authority disregards the decision and signs the contract, the contract is deemed to be null and void. Applications to the administrative courts of law before the contract has been concluded do not have suspensive effect. The applicant may, however, request the suspension of the award procedure. The council or the courts may take into account the probable consequences of measures sought for all interests likely to be harmed, including the public interest, and decide not to grant such measures where their negative consequences would outweigh their benefits. Before or after the conclusion of the contract, **damages** may be awarded by an administrative court of law under following conditions: 1) a legal provision in relation to the tendering procedure has been breached; 2) the alleged act is an administrative act; and 3) the applicant has suffered a material or moral prejudice.

20.3 Procedure

Generally, any person considering his or her rights to have been harmed or having a legitimate interest by an act of the contracting authority he or she believes to be irregular is entitled to seek review, whether before the council or the courts. In case of applications for damages, the applicant must prove that 1) the relevant legal provisions have been breached; 2) he or she had a real chance of winning the contract; and 3) the alleged infringement has deprived him or her

from the chance of winning the contract. Proceedings before the council and the courts are regulated, respectively, by Emergency Ordinance No. 34/2006 and Law 544/2004 on administrative litigation. A procedure before the council begins with an application sent by the interested bidder. The application must be filed within ten days as of the time the bidder learned of the act he or she considers to be irregular. The application must mention the name and address of the applicant, the object of the dispute, the subject matter of the tendering procedure, and the factual and legal grounds and proof (if any). It has to be signed and supplemented by further documents, if any. A copy of the application and the attached documents must be sent to the contracting authority. As of the notification, the award procedure is automatically suspended. The contracting authority has to issue a written opinion regarding the dispute. The opinion is sent to the council, and the applicant is notified. The council then orders the contracting authority to send the procurement file. Proceedings take place in writing. Parties may be heard if the council so decides. Moreover, the council may administrate evidence, and ask the parties to provide explanations on issues as well as further information in order to establish the facts. It may also ask an independent expert to give an opinion on the case (particularly on technical and financial aspects). The duration of the expertise shall not exceed the time limit within which the council must reach its decision. Expert costs are paid by the party having requested the expertise. Proceedings shall not exceed ten days as of the transmission of the procurement file to the council. In duly justified cases, this time limit may be extended for another 20 days. Decisions must be reasoned. They are notified to the parties and are available on line. There are no fees. Should it be requested, the council may order the losing party to pay the winning party's procedural expenses.

20.4 Remedies Culture

Judges and lawyers may have acquired knowledge in public procurement law through professional experience or seminars organised by government institutions. The **attitude** of judges towards conflicting interests is considered to be fair. Bidders may also have made themselves familiar with public procurement through work experience. Additionally, they may be assisted by lawyers and consultants or by relevant professional organisation. Bidders seem unwilling, however, to initiate review proceedings because they do not wish to compromise their chances for other contracts. Others bring actions merely in order to block the award procedure. In general, review proceedings before courts of law are lengthy and are considered a last resort. This is the reason that the National Council for Solving Legal Disputes has been established. Proceedings before this body free of charge and are expected to be rapid. In view of its recent creation, however, it has not been established whether the entity will effectively respect the time limits within which it is deemed to reach a decision. Case law is not developed. There are a lot of seminars held by both the public and the private sectors, and occasionally some conferences. There is no specialised publication nor a national association on public procurement. Training of procurement officials is ensured by the National Institute for Administration. The impact of ECJ rulings cannot be assessed for the time being.

21. Slovak Republic

The public procurement review and remedies system of the Slovak Republic can be divided into **three stages**: first, a review through the contracting authority or entity in question; second, non-judicial review through the review division of the Office for Public Procurement (OPP); and finally, judicial review through ordinary courts. The system is set up in Title Four of the Slovak Public Procurement Act (PPA), Act of Parliament/Law: 25/2006 Coll. www.uvo.gov.sk. There are no specific arrangements for utilities. There are generally only minor differences between contracts to which the EC Directives apply and contracts to which they do not apply. According to Article 140 PPA, contracts below the thresholds are called "below the limit". According to Article 4, PPA contracts which are below the threshold and small-value contracts are not subject to

protest proceedings under the PPA; however, they are subject to an internal audit without prejudice to the OPP's supervision powers.

21.1 Contracting Authority

According to Article 136 (1) PPA, review procedures may by initiated by a communication between tenderers or another person who believes that his or her rights have been or might have been affected and the contracting authority or contracting entity, in the form of a "request for remedy" concerning facts or decisions of the latter. It is **compulsory** for tenderers to formally complain to the contracting authority or contracting entity directly as a precondition to seek further review: Article 138 (1) PPA.

21.2 Non-judicial Review

If the request for remedy to the contracting authority or entity has not been accepted by the latter within the stipulated time limit, the tenderer or other person who believes that his or her rights have been or might have been affected may lodge a protest with the **OPP**, requesting the removal of the irregularity within the scope exhaustively listed in Article 138 (2) PPA. The OPP is part of the executive branch of government. Its members do not have a status comparable to that of judges. It was established by the PPA in 2000. In 2005 there were 1089 protests, including 83 from abroad and 108 concerning contracts above the EC thresholds (up 50% in comparison with 2004). The office issued 500 *in merito* decisions on protests before the conclusion of contracts and nine decisions after conclusion (pursuant to the 2006 PPA, protests after contract conclusion are no longer admissible). Forty-four percent of the decisions were in favour of the applicants and 56% were rejected as unsubstantiated. For 578 filed protests, the proceedings were discontinued. Eighteen OPP decisions on protests were challenged in the courts (see below). The supervision focused mainly on the unlawful use of the negotiated procedure without prior notification. In a total of 856 contract award procedures, there were stated 489 various violations of the law. The total amount of fines imposed in 2005 represented SKK 25 318 492 (21 contracting authorities and one contracting entity).

21.3 Judicial Review

There is a last-instance ordinary court of law reviewing public procurement decisions as a third and last stage of review. OPP decisions can be appealed to the **Krajský súd** in Bratislava (**Regional Court** in the City of Bratislava) and the **Najvyšší súd** (**Highest Court** of the Slovak Republic). An independent judiciary is guaranteed by the Constitution of the Slovak Republic. The requirements regarding the chairperson or president and the other members of these courts on their appointment are stipulated in relevant legislation and Orders of Procedure. Both courts fulfil the requirements of the *Dorsch* and *Salzmann* judgements. Decisions of the OPP by which the contract award procedure has been suspended due to a violation of the law which could have a significant impact on the outcome of the contract award procedure (e.g., non-fulfilment of at least one condition, on basis of which the employment of non-competitive contract award procedure can be justified) may be reviewed by these courts. In 2005 there were hearings in most court cases commenced in 2004. Thirty judgements of the first-instance court were delivered to the OPP. In 25 cases the action (accusation) was rejected or the court proceedings were terminated. In three cases (of a total five cases) not decided in favour of the OPP, the latter appealed to the court of second instance. In the cases decided by the court of first instance in favour of the office, 11 appeals to the court of second instance were initiated. In ten cases, decisions were delivered to the office by the court of second instance.

21.4 Remedies

Before the conclusion of a contract, the OPP may take decisions stipulated in Article 139 (2) PPA. They may **order to cancel** an award procedure or design contest on the basis of

discriminatory conditions in all tender documents, contract notices, etc., the decision to exclude a tenderer and order to include him or her, the selection of candidates and order to reselect, and order to cancel tender evaluation and order re-evaluation. After the conclusion of the contract the OPP may only state the violation of the PPA and, in cases listed in Article 149 PPA, initiate administrative proceedings resulting in a decision to impose a fine. OPP decisions may be scrutinised by the court (including fines imposed to contracting authority/entity). According to Article 148 PPA, the concluded contract may be annulled by the court under the main condition that it has been concluded in a manner contradictory to the PPA. **Interim measures** are issued by the office in the event of review proceedings before the conclusion of the contract pursuant to Article 146 PPA, in combination with Article 138 PPA. For the duration of such a measure, the contracting authority or entity is obliged to abstain from acting in any relevant contract award procedure and time limits are interrupted. The OPP is not obliged to issue interim measures, although such a decision in proceedings before the conclusion of the contract is rather usual. The legal basis for **damages** is the general rules for damages in Article 420 of the Civil Code (which will be revised during the next few years). For unlawful decisions taken by the state administration in the exercise of public executive powers, damages can be awarded on the basis of Act. No. 514/2003 Coll. One of the review proceedings is the **supervision of the contract award procedure**. The supervision may be initiated prior to conclusion of the contract (motivated by the OPP only) or afterward (in this case motivated by the office or by another person who could not/was not eligible to lodge a protest; such a legal set-up is justified by the fact that this kind of review proceeding should not appertain to the candidate/tenderer who has had [or could have] utilized his or her legal opportunities before).

21.5 Procedure

The relevant procedural law is regulated in the PPA. **Standing:** Tenderers or any other person who believes that his or her rights or interests protected by the law have been or might have been affected may initiate proceedings. A motion for a review procedure (supervision) shall be set up only by a person who did not take part in the relevant contract award procedure, i.e., could not lodge a protest. Not admissible for supervision is a motion by a person who presented a request for contract documents but who did not eventually submit a tender. The OPP can also initiate a review procedure at its discretion. **Experts:** The OPP may invite experts from the relevant field of activity in the event of decisions on a protest or in the event of protests aiming against fines imposed by the office; the OPP covers the costs based on the decision of the chairperson. **Fees:** In the event of a protest, the applicant is obliged to deposit bail (Article 138 (16) PPA). The motion for supervision is not dependent on a fee; the office exercises such activity *ex officio*. Any action in the courts of law is subject to a fee (under a separate regulation). **Rule of success:** The deposit for proceedings in the OPP is refunded in case of success: Article 138 (17) PPA. For proceedings in the courts of law, fees and costs (for lawyers) shall be reimbursed. **Time limits:** A request for a remedy has to be filed within seven days (Art. 136 (3) to (8) PPA) or any time before the conclusion of the contract (Art. 136 (3) g) PPA). The time limit for lodging a protest is also seven days (Art. 138 (5) PPA). **Confidentiality:** Supervision is a procedure which is not open to the public; civil servants are obliged to keep private anything they learn during the procedure. However, the final decision is accessible to the public, though identification data are deleted. Similar principles apply to protest proceedings as well. The right of citizens to free access to information is laid down in Act. No. 211/2000 Coll., as amended. **Suspensive effect**: Lodging an action with a court as such has no automatic suspensive effect. The performance of the contract may be suspended only by the courts in prescribed cases. The **time limit** for the OPP to decide on protests is 30 days: Article 139 (5) PPA. As for courts of law, the period from undertaking the action until passing the judgement varies; in the first-instance court (Regional Court) it can take approximately one and a half to two years and in the second-instance court (Highest Court) approximately two to three years. Case law is of limited

importance due to interpretations of legislation provided in court judgements. No **model forms** are available, but the requirements as to the form and content of a protest are laid down in Articles 136 (2) and 138 (6) PPA, respectively. OPP decisions are delivered by registered mail to the applicant, to the contracting authority or entity and, if appropriate to any person to whom the decision is also relevant; they are also published on the OPP website (certain parts of the offer or other information and data which might be confidential are deleted). Court judgements courts are delivered by registered mail.

21.6 Review Culture

Public procurement law is a part of the economic and business law modules at universities and some private agencies. The OPP takes care of the **training** of trainers and the training (and re-training) of the others in public procurement, including the issuance of a certificate of eligibility for public procurement. Judges, OPP panellists, public procurement lawyers representing tenderers or contracting authorities/entities in review proceedings, and tenderers receive their knowledge of how public procurement works in practice, as well as the technical and financial considerations involved, as part of their university studies and in courses organised under auspices of the OPP. Some tenderers do not wish to initiate review proceedings because they do not wish to compromise their chances for the next contract (see reference above to review proceedings as a matter of last resort). Some intend to obstruct procurement through review proceedings or seek financial gain through review proceedings. Some may be deterred from seeking judicial review by the high court fees or by other costs (e.g., for legal representation); others may be deterred from seeking judicial review by the long duration of these proceedings or may be ignorant of the possibilities for judicial or other review. On the other hand, some do not hesitate to undertake any available legal steps to succeed in contract award procedures, even at the price of possible consequent deterioration of business relations with the contracting authority involved. The **knowledge of contracting officers** of the legal and other background of public procurement is described as fairly good. Contracting authorities and entities are obliged to settle complaints and to respect the OPP decisions. The Slovak Association for Public Procurement, Transparency International Slovakia, and the Chamber of Contracting Entities, take an interest in review proceedings and public procurement as a whole. Judgements of the ECJ are fully respected as far as they are known and available in official translation. Until now there has been no ECJ involvement in the national reviews and remedies system (Article 234 EC Treaty) and no infringement proceedings brought by the European Commission, including those settled at the pre-judicial stage (Article 226 EC Treaty). The **most important changes** in the Slovak public procurement review and remedies system over the last 15 years were Act No. 263/1993 Coll. (first integrated legal act on public procurement based on UNCITRAL), Act No. 263/1999 Coll. (first legal text based on EC directives), the OPP established in 2000 on basis of the mentioned Act, Act No. 523/2003 Coll.(full transposition of “old” EC directives into national legislation), and Act No. 25/2006 Coll. (transposition of “new” EU directives as from 1 February 2006). A rather formalistic attitude arising from the historical tradition in the area of control and audit is seen as the main weakness of the system, whereas a well-functioning system of training in public procurement that should manifest itself in a future decrease of errors and the number of objections is seen as its main strength. One of the main problems in public procurement was, formerly, too-frequent objections and complaints, which were often employed only with the goal to postpone, complicate and obstruct the contract award procedure. As from 1 February 2006, a new obligation to deposit bail was introduced in Article 138 (16) PPA. The OPP shall monitor and assess carefully the developments to prevent the contract award regime from intentional and malevolent obstructions on the part of certain unsuccessful tenderers or candidates.

22. Slovenia

In Slovenia the review of public procurement award procedures is conducted in **two stages**. In the first stage, the tenderer has to file a complaint with the respective contracting authority. In the second stage, failing a satisfactory decision of the contracting authority following such a complaint, the tenderer may initiate proceedings before the **National Review Commission for the Review of Public Procurement Award Procedures (NRC)**. There is no difference between contracts falling within or outside the field of application of the EC Directives. The Slovene review and remedies system is considered rapid and effective.

22.1 Complaints to the Contracting Entity

The contracting entity has the jurisdiction to decide on complaints of tenderers as a first instance. Tenderers have the **obligation** to complain to the respective contracting authority before seeking review in the NRC. The contracting entities are enumerated in the decree of the categories and lists of contracting entities according to the Public Procurement Act, issued by the Government of the Republic of Slovenia, under the terms of Paragraph 4 of Article 2.a of the Public Procurement Act (Ur.l. RS, 36/04 – official consolidated text).

22.2 Judicial Review

The **NRC** (Slovenska 50, 1000 Ljubljana) is a specialised, independent, and autonomous national body reviewing public procurement award procedures as prescribed in the Act on the Review of Public Procurement Procedures. The NRC fulfils the requirements set for a **court of law** set forth in the *Dorsch* and *Salzman* judgements. The p**resident and members** of the NRC are appointed by the National Assembly on a proposal from the Commission for Mandates and Elections, for a term of five years with the possibility of re-election. The president and two members must have a university degree in law and a bar vocational degree. The other two members must have a university degree in economics or engineering. The president and members must also fulfil the following general conditions: be a citizen of the Republic of Slovenia and have a good command of the Slovene language, have the general capacity to enter into contracts, be in good health, be at least 30 years of age, not be convicted of a criminal offence punishable by imprisonment and have at least two years' experience in the field of public procurement. The decisions of the NRC are sent to the parties by mail. The public has access to the decisions through the commission's website (http://www.gov.si/dkom/).

22.3 Conciliation

The **conciliation procedure** is intended only for procedures for the award of public contract in the water, energy, transport and telecommunication sectors. It is an alternative way of resolving disputes in award procedure and is performed only with the agreement of the contracting entity and the unsuccessful tenderer. The European Commission nominates a person to lead the procedure (a conciliator) if the contracting entity states that it is willing to take part. Both parties to the conciliation procedure have to declare in writing that they accept the person designated by the European Commission, and each of the parties must propose an additional conciliator from a list, who conducts the procedure together with the conciliator nominated by the European Commission. The person requesting the conciliation procedure and the contracting entity have the right to terminate the procedure at any time. If the unsuccessful tenderer, other than the person requesting the conciliation procedure, has proposed a review of the procedure with regard to the award of the public contract or is pursuing judicial review proceedings and, after being invited to participate in conciliation procedure, fails to indicate within the given time limit whether he or she agrees to participate in that procedure, then the conciliators terminate the process and the review of the public procurement procedure is executed.

22.4 Remedies

There are two types of decisions the national review body can arrive at. It may reject a claim as unsubstantiated, or sustain it and either partially or entirely invalidate the procedure. There are various reasons to suspend a contract award, such as discrimination of tenderers, restriction of competition, discriminatory award criteria and factors that are not connected to the substance of the contract, etc. The conclusion of the contract cannot be annulled by the contracting authority or entity itself: only the NRC can annul decisions of contracting entities. The president of the NRC can remove **interim measures** with an *ex parte* interim order. A favourable review decision is a prerequisite for the contracting entity's successful litigation for **damages** in civil courts.

22.5 Procedure

A specific public procurement review procedural code covering both the public and utilities sectors regulates proceedings before the NRC. Proceedings can be initiated only after an unsuccessful first-stage review before the contracting authority and when the aggrieved party does not consent (partially or entirely) to the decision of the contracting authority on the review claim or if it does not decide in due time (15 days). In most cases, tenderers who have submitted a bid bring proceedings. However, 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 has standing. An aggrieved party has de facto standing when it has proved its genuine interest in the award of a contract and provides evidence of a real probability that it may have suffered a loss. Parties filing a complaint have to pay a fee of about €420 (supply and services contracts) or €840 (works contracts). For high-value contracts published in the Official Journal of the European Communities, these charges are doubled. The tenderer has to pay the fee only upon lodging his or her protest. Any other costs may be considered by civil courts. There is a principle set out in the remedies law that the party which causes the costs bears the burden of their payment. Thus, a successful complainant gets his or her fee but no other costs reimbursed. The NRC may, before arriving at its decision, attain expert opinion on technical, economic and legal aspects relevant to the case. The NRC has to decide on the claim and issue a decision within 15 days from the receipt of the claim. The time may be extended in certain cases to a maximum of 20 days. There are procedural possibilities to take into account the need to protect confidential business information;, for example, through *in camera* proceedings. However, the transparency principle is paramount, and the procedural possibilities are linked to the legislation on public access to information. The submission of a complaint has an *ex lege* automatic suspension effect before the NRC. There are no mandatory model forms or documents used for public procurement review proceedings. The NRC's decisions are published on its website portal and sent to the contracting entity, the complainant and the ministry of finance.

22.6 Review Culture

Case law is of limited but considerable importance due to a system consisting of both codification and case law. Judges and panellists on the NRC, public procurement lawyers representing tenderers, and contracting entities in review proceedings acquire their knowledge of Community law in general and public procurement law in particular, as well as their knowledge of how public procurement works in practice — including the technical and financial considerations involved as part of their vocational training — as part of continuous education, and "on the job"/ "learning by doing". The **attitude** of judges and panellists on the NRC towards the public interest on the one hand and the private interests of the bidders on the other is described as fair and balanced. Tenderers seeking the review of public procurement decisions gain their knowledge of the legal, financial and administrative background of how public procurement works in practice mainly on the job/learning by doing and very much through the consultancy and expert advice provided by the ministry of finance. Tenderers are actively inclined to lodge a complaint which they deem practicable. Contracting officers' knowledge of the legal and other background of public

procurement is described as “commendable and praiseworthy”. The attitude of contracting officers and their superiors dealing with complaints towards tenderers who have filed a complaint or are seeking judicial review of public procurement decisions are aware of the ever-present possibility of the parties’ judicial protection. Generally, they do not bear a grudge against a complainant but are nevertheless review-averse. There are no regular publications except articles published in some professional periodicals; books and handbooks are also circulated. There are seminars on public procurement law and practice organised by private stakeholders in which public servants also take part. There is no national association on public procurement law and policy. Civil society (national interest groups such as chambers of commerce, association of national construction industries, etc.) is involved in public procurement policy as whole and in its constituent parts. Society closely follows and monitors the procurement proceedings, especially where high stakes are involved. The role of the media is very pronounced. There is a considerable interrelation of the judgements of the ECJ in national public procurement review proceedings.

23. Sweden

The public procurement **remedies and review system** of Sweden is based on independent judicial review. The system can be divided into remedies before and after a contract has been concluded: there are two separate three-instance paths of judicial review for contracts above and below the EC thresholds.

23.1 Complaint to the Contracting Authority

It is not compulsory to complain to the **contracting authority or entity**. There are no specific rules in the field of public procurement, which regulate complaints to the contracting authority. However, it is possible to try to settle objections in this way.

23.2 Judicial Review

Before the conclusion of the contract, an **administrative court** can suspend the procurement procedure and order the procuring authority or entity to recommence or correct the procedure in the first instance. In the second instance, an appeal can be filed against the decisions of the first-instance courts in one of four administrative courts of appeal: the “Kammarrätten” in Stockholm, Göteborg, Sundsvall, or Jönköping. Finally, there is a last-instance administrative court of law, the “Regeringsrätten” in Stockholm, also reviewing public procurement decisions. All of these courts are independent from the executive, administration or any other part of government, and their decisions are of a jurisdictional nature. Review through the administrative courts is precluded after the conclusion of the contract. However, since 2002 the implementation of the *Alcatel* judgement ensures a period of ten days between the notification of the contract award to the tenderers and the conclusion of the contract. The administrative courts are the main forum of public procurement review in Sweden. In 2005, 1280 cases were initiated – the vast majority in the administrative courts. Very few cases were brought by tenderers from other Member States, but most international companies have a Swedish subsidiary. Less than 1% of all public procurement contracts resulted in complaints. About 30% of the judgements ordered the contracting authority or entity to correct (13%) or recommence (17%) the procedure. Many cases do not resulting in a judgement because the authority or entity terminated or corrected the procedure or already concluded the contract. Most review cases concern the evaluation process. Normally, it takes three to four weeks between the filing of a complaint or a lawsuit for judicial review and the final decision. The costs of the reviews and remedies system for the taxpayer are not officially measured. The strength of the review system is that it is rapid and cheap for the tenderer and that the decision is taken by a local court close to the contracting authority or entity in question. After the conclusion of the contract, the supplier or service provider may ask for damages only in a **(ordinary or civil) district court** in the first instance. In the second instance,

an appeal can be filed against the decisions of the first-instance courts to a Court of Appeal. There is a **last-instance general/ordinary court of law**, the "Högsta domstolen" in Stockholm, also reviewing public procurement decisions awarding damages. These courts are independent from the executive, administration or any other part of government, and their decisions are of a jurisdictional nature. There are very few cases on damages. A weakness of this dual system of administrative and civil courts is its unpredictability because too many courts and judges are involved. Moreover, there are insufficient remedies against unlawful direct awards without publication. It is nearly impossible to get damages in such a case. Hence the risk of review is much lower when the authority is not at all following the legislation compared to published contracts with procedural shortcomings. As outlined above, there are two last-instance courts of law in Stockholm dealing with public procurement cases. The last **instance general/ordinary court of law** the Högsta domstolen reviews concluded procurement contracts and awards damages. The **last-instance administrative court of law,** the Regeringsrätten, reviews public procurement decisions. Both courts were established on the basis of the Constitution and acts of parliament, and fulfil the requirements for a court of law set forth in the *Dorsch* and *Salzmann* judgements. The judges, who must be experienced and recognised lawyers, are appointed according to a general procedure. The Constitution requires that judges be independent, and they may be dismissed only in very special cases. **The chairpersons or presidents** of all courts are appointed by the government, and they are distinguished lawyers. There has been no involvement of the **ECJ** in the national review and remedies system through the preliminary references procedure. There are a couple of public procurement cases subject to infringement proceedings brought by the European Commission, including those settled at the pre-judicial stage. There is no court of arbitration. Tenderers may ask the National Board for Public Procurement ("NOU", Vasagatan 44, 111 20 Stockholm, www.nou.se) for an opinion, and there is a procedure for conciliation and attestation at the **Swedish Board for Accreditation and Conformity Assessment C** (**SWEDA;** Box 2231, 103 15 Stockholm; Phone +46 8 406 83 00; Fax +46 08 791 89 29; Website: www.swedac.se)**.** However, this procedure has never been used.

23.4 Remedies

Remedies include the annulment of individual award decisions, an order to recommence award proceedings, interim measures, damages and, for utilities, periodic penalty payments. The first-instance administrative court may order that the award procedure be recommenced or that it not be concluded until an infringement has been remedied. Legal protection is admissible against decisions before the conclusion of the contract, e.g. for, the selection of a particular award procedure, short-listing decisions or qualification decisions. The jurisprudence is unclear if a decision after the conclusion of the contract is subject to procurement legislation. The court can also order interim measures pending a final decision, taking into account the probable consequences of the measures for all interests likely to be harmed, including the public interest, and decide against awarding such measures where their negative consequences would outweigh their benefits. If the contracting entity has infringed the provisions of Article 4 of Chapter 1 or any other provision in the PPA and this has caused harm or the risk harm to the tenderer, the court shall order that the award procedure be recommenced or that it be concluded only when violation has been rectified. The contract itself cannot be annulled, except in the case of fraud or illegal circumstances. When an award procedure has been concluded, a supplier who considers himself or herself to have been harmed can claim damages against the contracting entity in an (ordinary) district court. It is not necessary that the contested decision be set aside before damages may be claimed. The damages may go beyond the tender costs and are usually calculated to a net of loss of profit. In cases concerning procurement in utilities sectors, the court may impose **periodic penalty payments** prohibiting the contracting entity to continue with the award procedure until it has rectified the infringement. According to Chapter 7 Art. 2 and 6 - 7 PPA, a contracting entity

which has failed to observe the PPA provisions shall pay compensation for injury this may have caused to a tenderer. A tenderer or candidate who has participated in an award procedure as set forth in Chapter 4 (utilities sectors) is entitled to remuneration for the costs of preparing the tender or for otherwise participating in the procedure, if failure to observe the provisions of the PPA has had a detrimental effect on his or her chance of being awarded the contract.

23.5 Procedure

The relevant **procedural law** is regulated in the Civil Court Procedure Code, the "Rättegångsbalken", for ordinary courts and the Administrative Court Procedure Code, the "Förvaltningsprocesslagen", for the administrative courts. The court of law may decide to hear a technical expert or to obtain a written statement. The court has no obligation to do so if the expert's opinion is not needed for the judgement. Any supplier or provider that has an interest in being awarded the contract, even if he or she did not submit a tender, may bring a case. The NOU has no standing, although this has often been suggested. There are no fees in administrative courts and no requirement for legal representation. The losing party in a claim for damages has to pay the legal costs of the winning party. A protest to the administrative court has to be launched within ten days after the decision about the award of the contract was sent to the tenderers. A claim for damages must be brought within one year from the conclusion of the contract. There is a possibility for the courts to see the documents without disclosing their content to the parties. There is no automatic effect of suspension of the award procedure once a protest has been filed in the administrative court, but the court may decide to suspend the procedure so that a contract may not be concluded before the judgement of the court. There are no mandatory forms for review proceedings. There are no mandatory time limits for the courts to reach a decision. However, the courts of first instance normally decide within three to four weeks. Judgements are sent to the parties, and some cases of general interest are published. There is a **publication of the decisions:** the yearly Reports of the Court, the "Regeringsrättens årsbok (RÅ)" for the last-instance administrative court "Regeringsrätten" and the "Nytt juridiskt arkiv (NJA)" for the last-instance ordinary court "Högsta domstolen". A newsletter "NOU-info" publishes information about all last-instance judgements on public procurement and some interesting cases from other courts. The Swedish Association of Local Authorities and Regions also provides information to its members. Case law is of limited but considerable importance due to a system consisting of both codification and case law: There are important interpretations of the law provided by the courts. The only differences of the review and remedies system with regards to **utilities** is the possibility to issue periodic penalty payments outlined above and a number of special burden-of-proof rules in damages cases akin to the regulation in Directive 92/13/EEC.

23.6 Remedies Culture

Younger judges and lawyers may have studied procurement and EC law as part of their university curricula. Others have to ask for training, courses and seminars organised by private law firms or government authorities, such as the NOU or international organisations. In recent years there has been some voluntary specialisation on procurement cases. The NOU distributes information by means of telephone, newsletters, publications, seminars and conferences to support the government offices and to follow developments in the area of procurement in the EU and the WTO (further information on www.nou.se). More than 100 judges deal with procurement cases. Their attitude is normally fair and balanced, but there may be exceptions with a bias towards the public interest. The administration should help and give advice to all parties. The NOU provides information to tenderers, as does the Association of Local Administrations and Regions and the Chamber of Commerce. Otherwise, tenderers must seek the help of law firms and consultants. In 2005, 1,280 complaints on public procurement were initiated. Some tenderers may be ignorant or abstain from seeking review. The level of knowledge of contracting officers regarding public procurement law and practice is improving. The younger generation is more

knowledgeable about the legal and economical requirements. The attitude of contracting officers and their superiors dealing with complaints towards tenderers is normally fair. The NOU newsletter and "Anbudsjournalen", a newspaper about public procurement with interviews, opinions and information on procurement judgements and discussion about problems and successes in public procurement, disseminate information on public procurement and act as a forum of discussion. Public procurement law is discussed at academic and professional conferences and seminars, organised both by the public and the private sector. There is no national association on public procurement as such, but there are related private and branch organisations. The chambers of commerce are active and have a role in supervising the opening of the tenders and e-procurement. The Association of National Industries, as well as the associations of the construction, medical supplies, health and other sectors are interested and have organised seminars and meetings. NGOs, such as the national section of Transparency International, on fair trade and environmental concerns are active. The press and television occasionally cover public procurement review proceedings. There is university education for public procurement officers. The impact of the judgements of the ECJ is fairly considerable in the higher courts. The parties make references to the judgements, which are known from the publications of NOU and other organisations.

24. United Kingdom

Public procurement in the United Kingdom is regulated by the **Public Contracts Regulations 2006** (Statutory Instrument 5/2006 implementing EC Directives 2004/18 and 89/665 http://www.opsi.gov.uk/si/si2006/uksi_20060005_en.pdf) and the **Utilities Contracts Regulations 2006** (Statutory Instrument 6/2006 implementing EC Directives 2004/17 and 92/13 http://www.opsi.gov.uk/si/si2006/uksi_20060006_en.pdf). The aforementioned regulations are solely applicable in England and Wales and Northern Ireland. In Scotland, the Scottish Executive has issued two similar regulations (Statutory Instruments 1/2006 and 2/2006 http://www.opsi.gov.uk/legislation/scotland/ssi2006/ssi_20060001_en.pdf). The reviews and remedies system is based on independent judicial control. There are various UK organisations providing **alternative dispute settlement** services (especially at the performance stage). Public bodies and their contractors may use these services on occasion, but they are not obliged by law or policy to do so. The conciliation mechanism established by EC Directive 92/13 has been implemented in domestic law by the Utilities Contracts Regulations.

24.1 Judicial Control

A bidder who considers that he or she has suffered or is likely to suffer loss as a consequence of a breach of the Public Contracts Regulations or the Utilities Contracts Regulations has the right to seek redress via the national court system. **Any breach** of the aforementioned regulations by a contracting authority/utility would be open to challenge via the national courts system. This would include selection of the award procedure, the manner in which the specification is expressed, exclusion at the pre-qualification and award stages etc. Regarding contracts not falling within the scope of the regulations (i.e., contracts below the EC thresholds), proceedings may be initiated on the basis of general common law. An application under the regulations must be brought promptly and in any case within three months from the date when grounds (practically the alleged infringement) for bringing the action first arose. In duly justified cases, the three-month period may be extended by decision of the court. There is, in addition, a strict requirement that the applicant inform the contracting authority of the breach, or apprehended breach, of duty and of his or her intention to bring proceedings under the relevant regulations in respect of it, before he or she is able to commence proceedings. However, respect of this obligation is not a precondition to seek judicial review. The protest shall be lodged to the procurement division of the contracting authority. Legal actions are brought in the **High Court in England, Wales and Northern Ireland**, in the **Court of Session or Sheriff Court in Scotland**

(Scotland has a separate court and legal system from that of England, Wales and Northern Ireland). The court will serve a claim on the contracting authority, and the case will then be processed in accordance with the guidelines for the civil courts set out in the Civil Procedure Act 1997. The High Court is the review body of first instance in public procurement cases under the regulations. The central location is the Royal Courts of Justice in London (London WC2A 2LL; Phone: +44 (0)207 947 6000), but there are regional courts in more than 20 provincial cities. A High Court judge presides over proceedings, hearing the cases brought by both parties in support of their interpretation of events and deciding a verdict on the basis of the evidence presented. In the event an action brought by a claimant is unsuccessful and the claimant believes the decision to be legally flawed, he or she may bring an appeal in the **Civil Division of the Court of Appeal** (London WC2A 2LL; Phone: +44 (0)20 7947 7882), where their arguments will be heard by three judges. The review body of last instance is the House of Lords, specifically the **Lords of Appeal in the Ordinary** (Lords of Appeal in the Ordinary, The House of Lords, Palace of Westminster, London SW1; Website: http://www.parliament.uk/judicial_work/judicial_work.cfm). Permission must be granted by the Court of Appeal or the House of Lords itself for an appeal against a decision by the Court of Appeal to be taken to Law Lords. The Law Lords are appointed from the most eminent members of the United Kingdom Judiciary by Her Majesty on the advice of the prime minister, on the basis of their experience and expertise. They form a permanent body founded by law and render legally binding decisions. The body is independent form the executive or any other part of government. After the coming into force of the relevant provisions of the Constitutional Reform Act 2005, procurement cases will be heard in the last instance by the **Supreme Court of the United Kingdom**.

24.3 Remedies

The legal basis for remedies awarded in procurement cases is to be found in Part 9 of the regulations. Should the High Court find in favour of the applicant, it may grant an order to **amend a relevant decision** by the contracting authority, or to **amend a document** (such as a specification). If the applicant has suffered losses arising from the contracting authority's transgression, then **damages** may also be awarded. Damages for losses (including loss of a chance to win the contract) may be awarded should the court be satisfied that there has been a breach of the duty to comply with the regulations and the supplier has suffered loss or damage in consequence of that breach. It is not necessary for the contested decision to be set aside. The successful applicant's costs will also probably be paid by the contracting authority. Save in the case of fraud or bad faith, damages are the sole available remedy once the contract has been signed. The lodging of an application has no automatic suspensive effect on the ongoing tendering procedure. However, at any stage of the proceedings, the court may grant interim relief upon an urgent request by the applicant and issue an **injunction** which has a suspensive effect on the relevant actions of the contracting authority. When determining whether interim relief is appropriate, the court will have regard to a need, on the one hand, to provide an effective system to uphold EC public procurement rules and protect the applicant and, on the other hand, the interests of the public in the progress of public projects. Therefore, to obtain an injunction suspending the tendering procedure or implementation of a decision taken in respect of the tendering procedure, the applicant would have to show that there is a serious case to be tried and that damages would not be an adequate remedy. The court does not have the power to overturn a contract award once the contract has been signed. However, and with regard to contracts covered by the Public Contracts Regulations, the UK has introduced a **ten-day standstill period** between the notification of the results of the tendering procedure to the bidders and the formal conclusion of a contract. This rule is regarded as the most significant recent evolution in the field of domestic procurement law. Aggrieved bidders thus have the opportunity to mount a challenge to an award decision they believe to be legally flawed. A contracting

authority shall not award a contract if it knows that a legal action has been initiated during the standstill period, until the outcome of the action is clear. Nevertheless, it is currently unclear whether a failure by the authority to respect the mandatory ten-day standstill period would mean that the court can set aside the award of the contract. Finally, there are no provisions in relation to periodic penalty payments.

24.4 Procedure

Proceedings before the High Court are governed by the Public Contracts Regulations 2006, the Utilities Contracts Regulations 2006 and the Civil Procedure Act 1997. The Civil Procedure Act also applies to proceedings before the Civil Division of the Court of Appeal. **Any person** who sought or seeks, or would have wished to be the person to whom a contract is awarded, and is a national of, and established in, a relevant State can bring an action if he or she suffers or risks suffering loss or damage due to the contracting authority's breach of duty. This might extend beyond those that actually participated in the tendering procedure if they believe that they were prevented from participating as a result of a breach of the Regulations. Relevant States include the 25 EU Member States, EEA countries, Bulgaria, Romania and signatories to the Government Procurement Agreement. There are no model **forms** in relation to procurement cases, but the general forms (available on line: http://www.hmcourts-service.gov.uk/HMCSCourtFinder/FormFinder.do) apply. **Experts** are called by the parties to proceedings to support their case and will be cross-examined by the lawyers representing both sides. Typically costs will be borne by the party that is unsuccessful in the action. An applicant may seek to obtain **access** to the procurement file under the normal disclosure procedure applicable to court actions in England and Wales. However, a request may be made to the court for confidential information not to be disclosed outside of the court proceedings. The decision would be made by the judge. Alternatively, the applicant may apply for information under the Freedom of Information Act 2000. The contracting authority may, however, refuse access under the act where information in the procurement file was received under an express duty to preserve the confidential nature of that information, such that disclosure of the relevant information would constitute a breach of confidence actionable by the relevant bidder, or the disclosure of the procurement file would be prejudicial to another person's commercial interest. **Court fees** are payable by the party bringing an action in court. The fees are regulated by Fees Orders made by the Lord Chancellor and are on a sliding scale depending on the value of the claim. They are varied by Fee Order from time to time. There are no fees merely for making a complaint about a procurement decision. A party bringing an action in the High Court will have to fund the action from its own resources in the first instance. This includes court costs and professional fees for lawyers and experts. However, the unsuccessful party will normally have to bear the costs of both sides once the case is concluded. There are no mandatory time limits for the courts to issue a **decision**. How long it takes for the court to reach a decision depends on the complexity of the issues under consideration and will vary widely. Decisions of the House of Lords are publicly announced to the parties to a case at the conclusion thereof and are then published for broader promulgation. The decisions are normally handed down to the parties' representatives in court. Most High Court decisions are published on the Court Service website (http://www.hmcourts-service.gov.uk), and many cases are also published in the legal press.

24.5 Remedies Culture

Judges may have studied procurement law as part of their university curricula and their vocational training, or through seminars provided by the government or other public or private institutions. Practical knowledge on the functioning of procurement policy is mainly ensured by information generated by the public sector and through experience. The attitude of judges towards the interests involved in procurement cases is considered to be completely independent

and unbiased. Case law of the higher courts is very important, as there is a system of legal precedent making court decisions binding on the lower courts. Bidders may familiarise themselves with public purchasing practices whether through work experience or through their professional organisations. There are no empirical data regarding the attitude of bidders towards review proceedings but, generally, the UK has not traditionally had a culture of challenging bids Moreover, the "Woods Review" (www.ogc.gov.uk//documents/woodreview.pdf) found that UK. tenderers in brief are reluctant to challenge mainly due to the negative consequences for their business relationships and the difficulties to prove a wrong-doing and therefore to mount a challenge. Regarding contracting officers, they have a duty to act in accordance with the public procurement rules and to act fairly and reasonably on ordinary public law principles. Any complaint will be treated in accordance with these rules and principles. Generally, in terms of formal review procedures, an effective system of remedies is dependant upon an appropriate degree of transparency for the decisions taken by public contracting authorities, a clear route for an aggrieved bidder to follow in the event it wishes to pursue a formal review of the matter. This system of review must be visible to interested parties and must be founded on a clear legal framework in respect of the impact of the relevant laws/regulations, etc., and the consequences of a transgression of the rules in terms of remedies. At a more informal level, officials involved in procurement must be educated/trained to appreciate the need for an effective, appropriately frank dialogue with the supply side of the purchasing equation if the public procurement is to function as effectively as both sides would wish. A key element of this dialogue must be openness to discussion with bidders as to the justification for decisions taken, and with regard to potential complaints. At the academic level, there has been an increasing interest in public procurement law following the adoption of the EC Remedies Directives. The most important legal journal is the "Public Procurement Law Review (PPLR)" published by Sweet & Maxwell. Numerous academic and professional conferences also take regularly place. There is no national public procurement association, but a wide range of industry and trade associations represent to the UK government the interests of their members in respect of public procurement. These actors may provide support to their members with advice in respect of specific circumstances. Among the more influential are the Confederation of British Industry and the Federation of Small Businesses. Official training aimed at contracting offices is included in the syllabus of the Certificate of Competence in Purchasing and Supply developed by the National School of Government and the Chartered Institute of Purchasing and Supply. The impact of ECJ rulings on domestic proceedings is considerable since the former are the fundamental source of legal interpretation carried out by UK courts. In terms of Article 226 EC Treaty, divergences between the UK and the European Commission with regard to the implementation of EC procurement rules have been settled at the pre-judicial stage (around 15 cases within the past four years).