

Remedies in Public Procurement

A. Introduction

The aim of the present paper/thesis is to find out about the reactions of different Member States on the requirements set by the EC directives on public procurement remedies.

In the following, an overview will be given on the EC public procurement remedies directives and the landmark decisions by the European Court of Justice (ECJ). As a second step, the provisions on remedies in public procurement enacted by several Member States will be analysed. Since it is obvious that the procurement remedies systems enacted by all Member States cannot be analysed within a thesis, it was decided to deal with some Member States each representing a group of states. First Member State to be dealt with is Germany being a relatively old Member State belonging to the group of *civil law* countries and having a long public procurement law tradition. However, prior to enacting the procurement (remedies) directives, the character and nature of German national procurement law was very much different from the character it has today. The second state to be dealt with is Austria which also belongs to the group of *civil law* countries and being a relatively young Member State. Although Austrian public procurement law has a lot in common with the German system, it seems to be relevant since the development of Austrian rules on public procurement remedies seems to be different. For example, Austria seems to be the first and only Member State which has introduced a remedies system as to contracts below the thresholds which is very similar to the remedies applying to contracts above the thresholds. In addition, it will be dealt with the procurement remedies applicable in England and Wales representing the group of *common law* countries. Finally, it is intended to add an analysis on the French procurement remedies system and on the Hungarian rules as well. Particularly, Hungary seems to be a good example for a very young Eastern European Member State.

B. Case law by the ECJ relating to the “Remedies Directive” and to the “Utilities Remedies Directive”

Since the two directives on remedies in public procurement¹ entered into force, the ECJ had to decide on a great number of cases. In the following, the most important decisions will be described and analysed:

I. Review procedures must enable review bodies to correct any decision that is made by contracting authorities

One landmark decision was made in case C-433/93.² The judgement related to early German public procurement law, according to which aggrieved bidders had an opportunity to apply for review of awards procedures. While the awards procedures in question were reviewed by the competent review bodies, the contracting authority was still entitled to award the public contract in question. The ECJ found that procurement remedies must enable individuals to rely on procurement law in national courts. Thus, remedies systems must allow for correcting mistakes occurred within the award procedure prior to final conclusion of a contract. This was confirmed in case C-81/98³ according to which review bodies must be empowered to set aside the contracting authority’s decisions – regardless of its nature or contents. The latter also applies to the contracting authority’s withdrawal of an invitation to tender.⁴

¹ Council Directive 89/665/EEC of 21 December 1989 on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (1989) O.J. L 395/33 (“Remedies Directive”); Council Directive 92/13/EEC of 25 February 1992 co-ordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (1992) O.J. L 76/14 (“Utilities Remedies Directive”). The two directives and the remedies system they provide are described by *Arrowsmith/Fernández-Martin*, „Developments in Public Procurement“, (1993) ELR 323 and by *Gormley*, „The New System of Remedies in Procurement by Utilities“ (1992) P.P.L.R. 259.

² *Commission v. Germany* [1995] I-2303. The ECJ’s decision and its effects on German public procurement law are described by *Prieß*, “Handbuch des europäischen Vergaberechts, 2nd edition (2001), pp.190-192; see also *Prieß*, “Revision of the Implementation of the Remedies Directives in Germany”, (1997) P.P.L.R. CS 47.

³ *Alcatel Austria AG v. Bundesministerium für Wissenschaft und Verkehr* [1999] I-7671; see also *Davis*, “The European Court of Justice Decision in *Alcatel* – the Implications in the United Kingdom for Procurement Remedies and PFI”, (2002) 5 P.P.L.R. pp. 282-286.

⁴ Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungsgesellschaft mbH v. Stadt Wien* [2002] I-5553; see also the comments by *Dischendorfer/Fruhmann*, „The Reviewability under EC Law of the Decision to withdraw an Invitation to Tender: A Note on the Judgment of the Court of Justice in Case C-92/00“, (2002) 6 P.P.L.R. NA 126-132.

II. The nature and character of review bodies in Member States

In three decisions, the ECJ dealt with the nature and character review bodies on national law level must have. Member States may choose between two options in establishing bodies responsible for review of the award of public contracts. On the one hand, Member States are entitled to install (procurement) review bodies of judicial character. On the other hand, at a first stage, the award of public contracts may be reviewed by bodies which are not of such character. If the Member States decide to avail of the second option, the decisions made by bodies not having a judicial character must be subject to judicial review or review by another body which must satisfy the particular requirements of the second subparagraph of Article 2(8) of Directive 89/665/EEC.⁵

III. Raising objections with the contracting authority or applying for review within reasonable time-limits

In the *Simmering* case⁶, the ECJ confirmed that, in principle, Member States may establish time-limits within national procurement review mechanisms provided they do not compromise the *effectiveness* of procurement remedies. The latter has to be verified in each specific case.

Reasonable time-limits conform to EC law because they support legal certainty. Thus, a national time-limit according to which review proceedings must be initiated within

⁵ It can be taken from the ECJ's decisions in this matter that a body is of judicial character under the procurement remedies directives it meets the requirements of a court under Article 234 (ex Article 177) of the Treaty. Case C-103/97, *Josef Köllensperger v. Gemeindeverband Bezirkskrankenhaus Schwaz* [1999] ECR I-551, in particular para. 29; Case C-258/97, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v. Landeskrankenanstalten-Betriebsgesellschaft* [1999] ECR I-1405, para. 17; see also Case C-54/96 *Dorsch Consult GmbH v. Bundesbaugesellschaft Berlin* [1997] ECR I-4961.

⁶ Case C-470/99, *Universale-Bau AG v. Entsorgungsbetriebe Simmering GesmbH*, judgment of 12 December 2002.

two weeks after the relevant bidder becomes aware of the infringement in question is not in breach of EC law.⁷

This was confirmed and further developed in the *Santex* case.⁸ In the *Santex* case, the ECJ had to deal with an Italian time limit of 60 days which ran from the date of notification of the act or the date on which it was apparent that the party concerned became aware of the breach of law. The Court held that a time-limit of 60 days for initiating review proceedings and running from the date on which the party concerned becomes aware of the breach of law does not render *virtually impossible* or *excessively difficult* the exercise of any rights granted to the bidder or candidate.

IV. Bidders must have an interest in the contract and must be harmed or must risk being harmed by the alleged infringement of law

There are two decisions, in which the ECJ made a bit more clear in which circumstances bidders have some sort of an “individual right” to apply for review of a contracting authority’s decision.

In *Hackermüller*,⁹ the contracting authority invited tenders to select architectural designs. *Hackermüller’s* project was not recommended for implementation. *Hackermüller’s* application for review was dismissed since his project should have been eliminated on the first stage of the award procedure for formal reasons. It was for the ECJ to decide whether a candidate or bidder does not *risk being harmed* if his bid had to be excluded on the first stage of the procedure regardless of the rest of the procedure. The ECJ held that it would be contrary to *effectiveness* of procurement remedies if access to review procedures would be denied for formal reasons which are

⁷ Case C-470/99, *Universale-Bau AG v. Entsorgungsbetriebe Simmering GesmbH*, judgement of 12 December 2002, paras. 73-79; see also the comments by *Dischendorfer*, „The EBS Case: Definition of a *Body governed by Public Law*, Limitation periods, and Publicity Requirements for scoring methods“ (2003) 2 P.P.L.R. NA 34, NA 38-39.

⁸ Case C-327/00, *Santex SpA v. Unità Socio Sanitaria Locale n. 42 de Pavia*, judgement of 27 February 2003; see also the comments by *Brown*, “Whether a National Limitation Period for Procurement Actions may be overridden: A Note on Case C-327/00, *Santex v Unita Socio Sanitaria Locale n. 42 di Pavia*” (2003) 4 P.P.L.R. NA 78-81.

⁹ Case C-249/01, *Werner Hackermüller v. Bundesimmobiliengesellschaft mbH and Wiener Entwicklungsgesellschaft mbH für den Donauraum*, judgement of 19 June 2003, not yet reported; see also the comments by *Dischendorfer*, „Consecutive Infringements of the Public Procurement Rules and their Treatment under the Remedies Directive: The *Hackermüller* case“, (2004) 2 P.P.L.R. NA 36-NA 38.

equal to grounds for exclusion but of which the contracting authority was not aware of.

In *Grossmann*,¹⁰ it was verified whether an enterprise is entitled to apply for review if the enterprise did not participate in an award procedure, because the contract documents were of a discriminatory nature, so that the enterprise would not have had a chance to win the contract. The ECJ held that an undertaking which did not submit a tender because of allegedly discriminatory specifications is entitled to apply for review of the specifications of discriminatory nature. However, an undertaking which did neither participate in the award procedure nor seek review prior to the submission deadline loses its right for access to review.

V. Damages¹¹

The cases dealing with damages in the public procurement area seem to refer basically to *Francovich* and *Brasserie* decision.

In the damages case *Embassy Limousines*,¹² the facts were that the European Parliament did not award a contract, although the whole award procedure was nearly completed. According to the CFI, the Parliament had a broad discretion as to the award decision. The Court's review is therefore limited to verifying whether there has been a serious or manifest error.¹³

VI. Interim Measures

In Case C-236/95,¹⁴ the ECJ dealt with Greek rules enacted to implement the procurement Remedies Directive. Greek law only provided for suspension of operation of measures. The ECJ made clear that the Remedies Directive requires any interim measures including measures *to suspend orto ensure the suspension of the*

¹⁰ Case C-230/02, *Grossmann Air Service v. Republik Österreich*, judgement of 12 February 2004, not yet reported.

¹¹ As to damages in the field of public procurement law see the article by *Leffler, op. cit.*

¹² Case T-203/96 *Embassy Limousines and Services v European Parliament* [1998] ECR II-4239.

¹³ *Ibid.*, para. 56.

¹⁴ *Commission v. Greece* [1996] I-4459; see also the comments by *Fernández Martín*, „Greek Non-Implementation of the Remedies Directive: a Note on Case C-236/95 (1997) P.P.L.R. CS 1.

procedure for the award of the public contract. In addition, according to Greek legislation, interim measures required the existence of a main action seeking to have the contested administrative measure annulled. This was found to be contrary to EC law as well.

This was further developed in Case C-424/01¹⁵ where the ECJ had to deal with the question whether a national procurement review body is obliged to or may take account of the prospects of success of the substantive action, if it has to determine an action for interim relief. The ECJ held that the two procurement remedies directives do not mention the prospects of success of the substantive action among the factors to be considered. However, there is no provision to be found which preclude these prospects from being considered. Because there are no specific EC rules it is for the Member States to decide whether prospects of success of the substantive action may be considered when deciding on interim measures.

C. Analysis of Member States' public procurement remedies mechanisms

I. Germany

1. Historical background

At the beginning of the 20th century, it was found that provisions on the award of public contracts do not belong to the area of public (administrative) law, but rather to private law. They were deemed to be equal to internal orders of budgetary (law) character¹⁶ not creating individual rights for undertakings that could be enforced by initiating legal proceedings. The latter applied both on federal¹⁷ and on state level.¹⁸

¹⁵ *CS Communications & Systems Austria v. Allgemeine Unfallversicherungsanstalt*, order of 9 April 2003, not yet reported; see also the comments by *Brown*, „Whether the Prospects of Success of the Substantive Action may be taken into account when considering an application for interim measures: A note on Case C-424/01 *CS Communications & Systems Austria v AUV*“ (2003) 6 P.P.L.R. NA 144-147.

¹⁶ See German Supreme Court (BGH) 1992 *Neue Juristische Wochenschrift* (NJW) 827;

¹⁷ *Bundshaushaltsordnung – BHO* (Federal Budgetary Law).

¹⁸ *Landshaushaltsordnung – LHO* (State Budgetary Law).

For these historical reasons, the German legislator first tried to transpose the EC procurement remedies directives into national law by adapting budgetary law provisions (so-called *budgetary law solution*). Therefore, in early 1994, a couple of new provisions came into force.¹⁹ In addition, three provisions were added to the *Statute on the Principles on the Spending of Public Funds* (§ 57a, § 57b and § 57c) on the award of public contracts.

According to § 57c (1), the German Federation²⁰ and the states had to establish each a supervisory board, performing its functions independently and on its own responsibility. These supervisory boards were administrative bodies, i.e. decisions were made by administration officials who were not independent judges. The supervisory boards were – however - not expected to protect individual rights of tenderers, they rather had to verify whether the award procedure in question was carried out in accordance with procurement provisions in force. In addition, the boards were not empowered to suspend award procedures. Thus, regardless of review procedures, contracting authorities were entitled to award the contract in question.²¹ By judgement of 11 August 1995,²² the ECJ confirmed that the German *budgetary law solution* did not conform to EC law requirements, since primary aim of the budgetary law solution was not to create individual rights of tenderers.

Thus, in 1998, a new Fourth Part on the Award of Public Contracts was added to the *Act Against Restraints of Competition*. (Gesetz gegen Wettbewerbsbeschränkungen, §

¹⁹The *Zweite Gesetz zur Änderung des Haushaltsgrundsatzgesetzes* (Statute on the Principles on the Spending of Public Funds) of 26 November 1993, (1993) I Bundesgesetzblatt (Federal Gazette) 1928; the *Verordnung über die Vergabebestimmungen für öffentliche Aufträge* (Ordinance on the Award of Public Contracts) of 22 February 1994, (1994) I Bundesgesetzblatt (Federal Gazette) 321; the *Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge* (Ordinance on the Review Procedures for the Award of Public Contracts) of 22 February 1994, (1994) I Bundesgesetzblatt (Federal Gazette) 324.

²⁰ Federal Supervisory Board (*Vergabeüberwachungsausschuss des Bundes*)

²¹ See reasons on the draft law of the Federal Government (Draft on Second Law to modify the *Statute on the Principles on the Spending of Public Funds* (Federal Parliament printed matter no. 12/4636 of 25 March 1993, p. 12).

²² Case C-433/93 *Commission v. Germany* [1995] I-2303.

97 - 129)²³ In addition, a new *Ordinance on the Award of Public Contracts* (Vergabeverordnung) was enacted.²⁴

2. Review mechanisms currently in force

2.1. Review bodies in “first instance”

Aggrieved bidders or applicants may demand initiating a review procedure. In “first instance”, under § 104 (1) of the *Act against Restraints of Competition*, the enterprise has to apply for review to the *awards chamber* (Vergabekammer) responsible. *Awards chambers* are installed both on federal level and on state level.²⁵

Awards chambers are not equal to courts within the meaning of German law, because they are rather administrative authorities. The awards chambers are bodies taking decisions independently and, furthermore, the members of the awards chambers are independent as well, i.e. they are not subject to administrative orders or orders in general.

2.2. Review of an award procedure prior to contract award only

A Review of award procedures is admissible prior to the valid contract award only.

According to § 114 (2) of the *Act against Restraints of Competition*, an award made validly cannot be cancelled. Therefore, according to § 13 of the *Ordinance on the Award of Public Contracts*, contracting entities must inform bidders whose tenders will not be considered of

- the name of the tenderer to whom the contract is to be awarded and of
- the reasons for the intended non-consideration of their tenders.

²³ (1998) I Federal Gazette (Bundesgesetzblatt) 2546.

²⁴ (2001) I Federal Gazette (Bundesgesetzblatt) 110.

²⁵ § 104 (1) of the *Act against Restraints of Competition*.

Under § 13 of the *Ordinance on the Award of Public Contracts*, the contracting authority shall provide this information in writing by no later than fourteen days prior to concluding the contract. A contract concluded within the 14 days period is null and void.

This seems to be in line with the *effectiveness* principle established by the *Alcatel* decision.

2.3. Admissibility of applications for review

2.3.1. Undertakings incurring or being in jeopardy of incurring a loss

According to § 107 (2) of the *Act against Restraints of Competition*, admissibility of an application requires that the enterprise has an interest in the contract and is able to assert that its individual rights were infringed by non-compliance with the provisions governing the award of a public contract. In addition, the enterprise must show that it has incurred or is in jeopardy of incurring a loss due to the alleged infringement of the award provisions.

In the past, Awards chambers often concluded that enterprises are unable to show that they have incurred or are in jeopardy of incurring a loss, if the tender in question must be ruled out, i.e. that there is no chance to get the contract.

Awards chambers often tried to find reasons that justified an inadmissibility of an application in order to get rid of the case. If the *awards chamber* found an application inadmissible, according to literature and according to most procurement decisions in Germany, there was no need to review other issues of the case.²⁶ However, the German Supreme Court – upon request of a preliminary ruling by the Higher Regional Court of Thuringia – made clear that decisions made by contracting authorities have to be reviewed even if the bidder applying for review has to be ruled out. The latter particularly applies if there is not even one bid that may be considered.

²⁶ E.g. Higher Regional Court of Thuringia (Oberlandesgericht Thüringen) ref. 6 Verg 3/01, decision of 5 December 2001.

The reason is that, in such cases, the whole award procedure must be cancelled, so that the bidder applying for review has at least a chance to win the contract in the following procedure.²⁷

Another view previously taken in early German case law also seemed to be in conflict with EC law. For example, the Awards Chamber of Northern Bavaria (*Vergabekammer Nordbayern*) (ref. 320.VK-3194-33/02) took the view that bidders are not entitled to challenge the decision by the contracting authority to cancel an award procedure. Although the bidder expressly referred to case C-92/00, the awards chamber did not give a hearing and rejected the application because of alleged inadmissibility. The awards chamber held that the decision of the ECJ in case C-92/00 had to be transposed into national law first.²⁸ Without such transposition, a cancellation could – according to the chamber - not be subject to review.

2.3.2. Raising an objection with the contracting authority

According to § 107 (3) 1st sentence of the *Act against Restraints of Competition*, the application is admissible only if the enterprise has raised an objection with the contracting authority concerning an asserted infringement the applicant already became aware of during the award procedure. The objection under § 107 (3) 1st sentence of the German *Act against Restraints of Competition* must be raised *without undue delay*. Furthermore, an application is inadmissible under § 107 (3) 2nd sentence of the *Act against Restraints of Competition* insofar as objections to infringements of award provisions which were apparent by virtue of the tender notice were not lodged with the contracting entity by the expiry of the deadline indicated in the tender notice for tenders or for requests to participate.

²⁷ Higher Regional Court of Thuringia (Oberlandesgericht Thüringen), ref. 9 Verg 3/05, decision of 20 June 2005.

²⁸ A view contrary to the one taken by the Bavarian awards chamber can be found in the decision made by the Awards Chamber of Brandenburg (case VK 38/02, decision of 20 July 2002) or the decisions made by the First Awards Chamber of the Free State of Saxony (case 1/SVK/077-02, decision of 21 August 2002) or by the Awards Chamber at the Treasury Office of the Hanseatic Town of Hamburg (case VgK FB 1/2, decision of 18 July 2002).

In principle, this seems to be in line with EC law requirements. However, it has to be considered in which way judges interpret § 107 (3) of the German *Act against Restraints of Competition*.

Awareness of an infringement requires – according to most review decisions - that the enterprise knows about the facts which form the asserted infringement and, in addition, the enterprise must be aware that the facts known are in conflict with procurement provisions.²⁹

Courts do not seem to apply § 107 (3) 2nd sentence of the *Act against Restraints of Competition* too strictly. They seem to verify each case individually and ask whether the infringement in question was apparent from the bidder's point of view. For example, the Higher Regional Court of Naumburg held that a medium-sized enterprise which does not have its own legal department is unable to take from the tender notice whether requirements set by the contracting authority or by the State Procurement Act (Landesvergabegesetz Sachsen-Anhalt) are in line with EC law.

Furthermore, there are a lot of decisions dealing with § 107 (3) 1st sentence of the *Act against Restraints of Competition* and verifying whether the objection raised with the contracting entity by an enterprise was raised without undue delay. In general, awards chambers think that an objection that was raised within 7 days after the bidder got to know about an infringement of procurement rules was raised *without undue delay*. If the enterprise needed more time, the aggrieved bidder would have to explain to the chamber for which reasons the objection was raised that late. In very complex cases, tenderers may raise objections within two weeks after they got to know about the infringement of rights in question.³⁰

Although some award chambers and courts are very strict when applying § 107 (3) of the *Act Against Restraints of Competition*, the approach now taken in literature and in practice seems to be in line with EC law requirements.

²⁹ Case 1 Verg 9/02.

³⁰ See case VK 2-16/99 decided by the Federal Competition Authority, printed in *Fischer/Noch Entscheidungssammlung Europäisches Vergaberecht*, ref. V 8; case 2-6/00 decided by the Federal Competition Authority.

2.4. Interim measures to be taken during a review procedure in first instance

Since award procedures are suspended automatically after an application for review was submitted by an aggrieved bidder, cases may occur where the contracting authority is unable to wait with the award of the contract until the awards chamber has made its decision (within five weeks).³¹ For example, it may be necessary to realize a hospital because, otherwise, sick people cannot be treated effectively. Therefore, according to § 115 (2) of the *Act against Restraints of Competition*, the awards chamber may permit the contracting authority, upon its application, to award the contract after the expiry of two weeks after the announcement of this decision, if, after taking all of the interests that might be impaired and the interests of the public at large in speedy conclusion of the award procedure into account, the negative consequences of delaying the award until the end of the review outweigh the advantages pertaining hereto.

Experience shows that awards chambers in principle do not permit to award the contract until the review is finished. There must be very extraordinary circumstances that could justify awarding a contract before the awards chamber has come to its decision.

If the awards chamber does not reject the application, the applicant may apply to the Higher Regional Court. Under § 115 (2) 2nd sentence of the *Act against Restraints of Competition*, the appellate court may, upon application, reinstate the prohibition of the award pursuant to (1) of this provision.

2.5. Review of award procedures by awards senates (Higher Regional Courts)

If bidders or contracting authorities do not agree with the decision of the awards chamber, they may appeal against such decision. They have to file an *immediate complaint* to the appellate court responsible. Appellate courts in procurement review

³¹ § 113 of the *Act Against Restraints of Competition*.

procedures are the *Vergabesenate* (awards senates) which are installed at various Higher Regional Courts (Oberlandesgerichte).

According to § 118 (1) of the *Act against Restraints of Competition*, the immediate complaint shall have a suspensive effect on the decision taken by the awards chamber. This suspensive effect shall lapse two weeks after the expiry of the deadline for filing a complaint provided the aggrieved bidder does not apply for an extension. As a result, the contracting authority is not entitled the contract in question for at least another two weeks. In general, however, German courts do only dismiss an application for extension of the suspensive effect if the application for review is clearly not successful.

3. Review procedures below the thresholds

According to German law, below the thresholds, bidders do not have individual rights. If they feel that contracting authorities are going to award a public contract while infringing provisions on the award of public contracts, they may suggest to the supervisory authority responsible to verify the award procedure. The supervisory authority has discretion how to deal with such suggestions. Experience shows that authorities often advise the contracting authority to suspend the award procedure and to make available the records to the supervisory authority. In addition, upon application, administrative courts or civil law courts may grant interim relief.

4. Damages

Under § 126 of the German *Act against Restraints of Competition*, enterprises may demand compensation for the costs of preparing the tender or of participating in an award procedure. The aggrieved bidder has to prove that he would have had a *genuine chance* of being granted the award without the asserted infringement. Compensation for lost profits may be claimed under German law of damages. Such claims are rarely

successful since the aggrieved bidder has to prove that - without the infringement - he would have won the contract.³²

II. Austria

1. History of Austrian Public Procurement Law

Austrian law on public procurement remedies was reworked for several times. One landmark enactment was done prior to 31 August 2002 since the Austrian *Verfassungsgerichtshof* found review mechanisms applying to public awards above the thresholds only to be in breach with Austrian constitutional requirements.³³

In 2005, the new procurement directives had to be implemented³⁴ and various ECJ and national decisions had to be considered.³⁵ Provisions on review mechanisms are now included in the 5th Part (sections 284-348) of the Federal Procurement Act 2006 which came into force on 1 February 2006.³⁶

2. Procurement review mechanisms actually in force

The following description of Austrian review mechanisms tries to refer to both the provisions of the FPA 2002 and the FPA 2006 on the one hand and to provisions included in state acts on the other hand.

³² See *Hans-Joachim Priess* Handbuch des europäischen Vergaberechts, 2001, p. 217.

³³ *Verfassungsgerichtshof* (Federal Constitutional Court) VfSlg. (Collection of judgments made by the Federal Constitutional Court) 16.027/2000

³⁴ Directive 2004/17/EC and Directive 2004/18/EC.

³⁵ *Inter alia* case C-92/00 *Hospital Ingenieure Krankenhaustechnik v Stadt Wien*; as to national Austrian discussion dealing with the question of challenge of cancellation of an award procedure, *inter alia*, Madl/Hauck in Heid/Preslmayr (ed.) *Handbuch Vergaberecht* (2005) 577 ff.

³⁶ As FPA 2006 see the overview by Schwartz (2005) *Recht und Praxis der öffentlichen Auftragsvergabe* (hereafter referred to as "RPA") 214.

2.1. Proceedings in the *Bundesvergabeamt* (Federal Procurement Authority)³⁷ or the *Unabhängige Verwaltungssenat* (Independent Administrative State Senate)³⁸

The BVA is responsible for reviewing public award procedures attributable to federal organs or federal contracting authorities.³⁹ In addition, the Austrian states each established an UVS being responsible for reviewing public award procedures attributable to the specific state.⁴⁰

Three different types of proceedings in the BVA or UVS have to be distinguished:

- review procedure, admissible unless the contract is awarded which aims at declaring decisions by contracting authorities null and void,⁴¹
- review procedure, admissible after contract award which aims at stating defaults within the award procedure challenged,⁴²
- interim relief measures.⁴³

According to Austrian national law, a contract once concluded by the contracting authority cannot be cancelled any more. Contracting authorities, however, have to inform aggrieved bidders of the bidder to whom the contract is intended to be

³⁷ Hereafter referred to as “BVA”.

³⁸ Hereafter referred to as “UVS”.

³⁹ Section 162 FPA 2002; section 312 FPA 2006.

⁴⁰ Section 2 State Law of Tyrol; section 4 State Law of Niederösterreich; section 2 State Law of Oberösterreich; section 2 State Law of Kärnten; section 4 State Law of Vorarlberg; section 3 State Law of Steiermark; section 2 State Law of Burgenland; section 2 State Law of Salzburg.

⁴¹ Section 163 FPA 2002; section 312 (2) no. 2 FPA 2006; section 14(1) no. 1 State Law of Salzburg; section 2(2) no. 1 State Law of Oberösterreich; section 4(1) and (2) State Law of Vorarlberg; section 4(2) no. 2 and section 15 State Law of Niederösterreich; section 3(2) no. 2 State Law of Tyrol; section 6(2) no. 2 State Law of Kärnten; section 3(1) no. 2 State Law of Steiermark; section 3(1) State Law of Burgenland.

⁴² Section 164 FPA 2002; section 312(3) FPA 2006; section 14(2) State Law of Salzburg; section 2(3) State Law of Oberösterreich; section 4(3) b) State Law of Vorarlberg; section 4(3) State Law of Niederösterreich; section 5(1) no. 2 State Law of Steiermark; section 9(1) no. 2 state Law of Kärnten; section 3(3) State Law of Tyrol; section 4(1) no. 1 State Law of Burgenland.

⁴³ Section 162(2) no. 2 FPA 2002; section 312(2) no. 1 FPA 2006; section 14(1) no. 2 State Law of Salzburg; section 2(2) no. 1 State Law of Oberösterreich; section 15 State Law of Vorarlberg; section 13(2) State Law of Niederösterreich; section 12 State Law of Steiermark; section 3(2) no. 1 State Law of Tyrol; section 16 State Law of Kärnten; section 13 State Law of Burgenland. Both the FPA 2002 and the FPA 2006 as well as the state laws expressly provide that direct awards made by contracting authorities without several competitors having participated in a bidding process may be reviewed after the contract has been awarded (Section 162(4) FPA 2002; section 312(3) no. 3 FPA 2006).

awarded.⁴⁴ Contracting authorities are not entitled to award the contract validly to the preferred bidder within a period of 14 days beginning with the notification of the award decision.⁴⁵

2.1.1. Decisions subject to review

According to Austrian law, only some decisions by contracting authorities are subject to review. The Austrian legislator distinguishes between *decisions that may be challenged separately* on the one hand and *decisions that may not be challenged separately* on the other hand.

Bidders are entitled to challenge such decisions that may be challenged separately.⁴⁶ Section 20 no. 13(a) FPA 2002 (section 2 no. 16 FPA 2006) includes an exhaustive list of decisions that can be challenged separately.⁴⁷ Decisions which may not be challenged separately are, according to section 20 no. 13 (b) FPA 2002 (section 2 no. 16 (b) FPA 2006), all decisions that are made prior to decisions that may be challenged separately. Such decisions can only be challenged together with the following decision made by the contracting authority which may be challenged separately.⁴⁸ It is doubtful whether such distinction between two categories of decisions is in line with EC law.

2.1.2 Standing

According to section 163(1) FPA 2002 (section 320(1) FPA 2006),⁴⁹ enterprises have standing provided they

⁴⁴ Section 100(1) FPA 2002; section 131 FPA 2006 and section 272 FPA, the latter of which applies to award procedures carried out in the utilities sectors.

⁴⁵ Section 100(2) FPA 2002, section 273(1) FPA 2006 (applying to contract awards by utilities), section 132(1) FPA 2006. Under the FPA 2002, in case of award procedures within which the time allowed for submitting bids etc. was reduced, there was a stand still period of 7 days only.

⁴⁶ Section 20 no. 13 of the FPA 2002 section 2 no. 16 FPA 2006.

⁴⁷ Section 163(1) FPA 2002.

⁴⁸ See, *inter alia*, Schwartz, *Kurzkommentar zum Bundesvergabegesetz* (2003) § 20 at para. 14.

⁴⁹ Section 5(1) State Law of Tyrol; section 3(1) State Law of Burgenland; section 16(1) State Law of Salzburg; section 5(1) State Law of Niederösterreich; section 4(2) State Law of Vorarlberg; section 3(1) State Law of Oberösterreich; section 4(1) State Law of Steiermark.

- assert an interest in a contract award the Federal Procurement Act is applicable to, and if they
- assert to have incurred or are in jeopardy of incurring a loss due to the alleged infringement of the award provisions.

An enterprise not having submitted a bid might have standing if it asserts that it is prevented from submitting an offer due to requirements set by the contracting authority which have discriminatory effects.⁵⁰ Another problem is whether bidders or participants in an award procedure have standing if their bid or application has to be excluded (for formal reasons). Later decisions by the BVA now consider the judgment by the ECJ in case C-249/01. In Austria, it is taken from the judgment that applications for review by bidders who have necessarily to be excluded can be rejected.⁵¹

2.1.3. Time limits

Aggrieved bidders may apply for review of decisions by contracting authorities within clear time limits. According to section 321(1) no. 7 FPA 2006, the time limit for bringing an application for review is, in general 14 days, in exceptional cases 7 days.⁵² The time begins to run when the enterprise in question becomes aware of the infringement or could reasonably have become aware of it.⁵³

2.2. Interim relief measures

Under Austrian national law, an application for review of award procedures does not suspend the award procedure automatically.⁵⁴ In order to prevent contracting

⁵⁰ Thus, the Austrian legislator or review bodies implement the decision by the ECJ in case C-230/02 *Grossmann Air Service v Austria*.

⁵¹ *Inter alia*, BVA, decision of 2 October 2003, ref. 17N-80/03-37; decision of 7 June 2004, ref. N-15/99-42.

⁵² A time limit of 7 days applies to awards below the thresholds (section 321(1) no. 5 FPA 2006), to contract awards without prior (and formal) award procedure (section 321(1) no. 6 FPA 2006), to award procedures within which time limits for submitting bids etc. were reduced to a minimum amount of days (section 321(1) no. 1-4 FPA 2006).

⁵³ ErlBem (Explanatory comments) to section 335 FPA 2006.

⁵⁴ Section 163(4) FPA 2002; section 320(3) FPA 2006; section 8(4) State Law of Kärnten; section 5(4) State Law of Tyrol; section 3(4) State Law of Burgenland; section 5(4) State Law of Niederösterreich;

authorities from awarding the contract prior to completion of the review of the award procedure, the BVA or UVS may, upon application by the (aggrieved) bidder, suspend the whole award procedure or – at least – suspend specific decisions made by the contracting authority until the BVA has made its decision on the asserted nullity of the decision.⁵⁵ According to section 328(1) FPA 2006, applications for interim relief measures are also admissible prior to applications for review.

The applicant has to assert that he is at least in (realistic) jeopardy of incurring a loss. Such jeopardy of incurring losses must not be fully proved; it is rather sufficient for the applicant to make such jeopardy believable to the review body. It is not relevant whether the infringements asserted have in fact been realized.

If the BVA or UVS does not grant interim relief, the contracting authority is entitled to continue with the procurement procedure and to award validly the contract. As such an award cannot be cancelled any more, the review body has to weigh carefully all interests involved when making its decision.⁵⁶ In circumstances in which the interests of the public or the interests of the contracting authority outweigh the interests of the applicant, the application for interim relief can be rejected only.⁵⁷ Lawfulness of the contract award has, in principle, priority over speediness of the procedure.⁵⁸

3. Review of award procedures in second instance

In principle, the BVA or UVS has to decide on applications in first and in last instance. Austrian law does not provide for general remedies against decisions made by the BVA or UVS. According to Austrian law, however, any decision might be

section 3(4) State Law of Oberösterreich; section 4(4) State Law of Steiermark; section 16(4) State Law of Salzburg.

⁵⁵ Section 171(1) and (4) FPA 2002; section 328(5) and 329(2) FPA 2006; section 24(5) State Law of Salzburg; section 12(4) State Law of Steiermark; section 11(4) State Law of Oberösterreich; section 15(4) State Law of Vorarlberg; section 13(4) State Law of Niederösterreich; section 13(4) State Law of Burgenland; section 13(4) State Law of Tyrol; section 16(4) State Law of Kärnten.

⁵⁶ Section 171(3) FPA 2002, section 329(1) FPA 2006; section 16(3) State Law of Kärnten; section 13(3) State Law of Tyrol; section 13(3) State Law of Burgenland; section 13(3) State Law of Niederösterreich; section 15(3) State Law of Vorarlberg; section 11(3) State Law of Oberösterreich; section 12(3) State Law of Steiermark; section 24(4) State Law of Salzburg.

⁵⁷ BVA, decision of 9 January 2004, ref. 10N-3/04-4; decision of 2 January 2001, ref. 05N-150/03-5; decision of 9 April 2001, ref. N-62/00-42, N-7/01-39, N-9/01-39, N-10/01-39, N-24/01-34.

⁵⁸ BVA, decision of 23 December 2002, ref. 01N-73/02-21; decision of 20 January 2004, ref. 03N-1/04-12.

appealed against to the Federal Constitutional Court or the Federal Administrative Courts by way of extraordinary remedies.

According to Article 131(3) Federal Constitutional Law, the Federal Administrative Court is entitled to reject complaints against decisions by the BVA provided the decision does not depend on a legal issue of principle character.⁵⁹

4. Damages

According to section 181(1) FPA 2002 (section 338(1) FPA 2006), aggrieved applicants or bidders may demand compensation if the FPA was infringed and the contracting authority was to blame for the infringement in question. In principle, the aggrieved enterprises may only demand compensation for the costs of preparing the tender or of participating in an award procedure. However, further claims – under different provisions – shall remain unaffected by section 181(1) FPA 2002 (section 338(1) FPA 2006). Thus, in principle, the aggrieved enterprises can also demand compensation for lost profits provided the bidder would have been awarded the contract if the infringement had not been occurred.⁶⁰

III. England and Wales

1. Historical background

Prior to enactment of rules implementing the EC Procurement Remedies Directives, review of decisions made by contracting authorities in preparation of contract awards was almost impossible. The reason was that there were more or less no rules regulating public procurement, so that bidders could not rely on rights in court.

⁵⁹ VwGH, decision of 25 June 2003, ref. 2003/04/0087-3; decision of 19 November 2003, ref. 2003/04/0128-2, both of them printed in Sachs/Hahnl, *supra no.*, at no. 31.15 and no. 31.20.

⁶⁰ Oberster Gerichtshof (OGH) (Highest Court), decision of 27 June 2001, ref. 7 Ob 200/00p, decision of 27 June 2001, ref. 7 Ob 148/01 t; ref. 7 Ob 92/99a; ref. 7 Ob 568/94; ref. 4 Ob 573/94, ref. 4 Ob 188/98.

In the end, the EC procurement directives were transposed by legislation through regulations adopted by the Treasury. The *Public Works Contracts Regulation* 1991 (SI 1991 No 2680)⁶¹, the *Public Supply Contracts Regulation* 1991 (SI 1991 No 2679)⁶², the *Public Services Contracts Regulations* 1993 (SI 1993/3228)⁶³ and the *Utilities Contracts Regulations* 1996 (Utilities Regulations)⁶⁴ were enacted. All the Regulations transpose the Remedies Directive or the Utilities Remedies Directive as well⁶⁵ and have been amended for several times.

2. Remedies under the Procurement Regulations

The national Regulations apply to award procedures falling under the EC directives only. The regulations expressly provide for two remedies, a *set aside* and an *order to amend documents*.⁶⁶ If the court is satisfied that a decision or action taken by a contracting authority was in breach of procurement law, the court may order the *setting aside* of that decision or action or order the contracting authority to *amend any document*.⁶⁷

If the court orders the *setting aside*⁶⁸ of a decision or action made within an award procedure, the decision will be devoid of legal effect. The second remedy provided for by the Regulations entitles bidders to apply for ordering the contracting authority to amend any document where a decision or action has been taken in breach of a relevant duty.⁶⁹ For example, the remedy could be used to amend requirements or specifications which do not comply with the Treaty or the substantive procurement directives.⁷⁰ It is still not clear whether applicants may avail of any other *judicial review remedy* in addition to these remedies. The wording of the Regulations appears

⁶¹ In the following: “the Works Regulations”.

⁶² In the following: “the Supply Regulations”.

⁶³ In the following the “Services Regulations”.

⁶⁴ In the following the “Utilities Regulations”.

⁶⁵ In particular, see Regulation 31 of the Works Regulations, Regulation 29 of the Supply Regulations and Regulation 32 of the Services Regulations. Proceedings under the Regulations must be brought in the High Court, see Works Regulation 31(4), Supply Regulation 29(3), Services Regulation 32(3), Utilities Regulation 32(3). In Scotland, such remedies must be brought in the Court of Session.

⁶⁶ Works Regulation 31(6)(b)(i), Supply Regulation 29(5)(b)(i), Services Regulation 32(5)(b)(i), Utilities Regulation 32(5)(b)(i).

⁶⁷ Works Regulation 31(6)(b); Supply Regulation 29(5)(b); Services Regulation 32(5)(b).

⁶⁸ Works Reg.31(6)(b)(i), Supply Reg.29(5)(b)(i), Services Reg.32(5)(b)(i) and Utilities Reg.32(5)(b)(i).

⁶⁹ Works Regulation 31(6)(b)(i), Supply Regulation 29(5)(b)(i), Services Regulation 32(5)(b)(i) and Utilities Regulation 32(5)(b)(i).

⁷⁰ Arrowsmith, *supra*, at para. 21.34.

to imply that both judicial review remedies and remedies under the regulations are available to bidders.⁷¹ It appears that a declaration and injunction are thus available in procurement review proceedings under the general powers of the High Court to award such remedies. In addition, in *Severn Trent v Dwr Cymru*, an injunction was awarded.⁷²

3. Specific problems relating to procurement remedies in England and Wales

3.1. Forum

As to the question of forum, all remedies are brought before the High Court in England, Northern Ireland and Wales.⁷³ Decisions made by the High Court can be appealed before the Court of Appeal. In addition, the House of Lords can, with leave, hear such cases.

3.2. Standing

According to the Regulations,⁷⁴ the obligations of a contracting authority to comply with the provisions of the Regulations and with any enforceable Community rule is a duty that is owed to bidders. There are some exceptions to this rule which are listed exhaustively in the Regulations.⁷⁵ Such exceptions are obligations not directly relevant to the relationship between the contracting authority and the contractor.⁷⁶ Apart from these exceptions, according to the Regulations, any breach of duties is actionable by any bidder who *suffers or risks suffering loss or damage* as a result.⁷⁷

⁷¹ Works Regulation 31(6), Supply Regulation 29(5), Services Regulation 32(5), Utilities Regulation 32(5)(b)(i).

⁷² Works Regulation 31(8), Supply Regulation 29(7), Services Regulation 32(7) and Utilities Regulation 32(9).

⁷³ Works Regulation 31 (4), Supply Regulation 29(3), Services Regulation 32(3).

⁷⁴ Works Regulation 31(3), Supplies Regulation 29(1), Services Regulation 32(1), Utilities Regulation 32(1).

⁷⁵ Works Regulation 31(1), Supply Regulation 29(1), Services Regulation 32(1).

⁷⁶ Arrowsmith, *The Law of ...*, *op. cit.*, pp. 900-901.

⁷⁷ Works Regulation 31(3), Supplies Regulation 29(2), Services Regulation 32(2), Utilities Regulation 32(2).

3.3. Time limits

According to the Regulations⁷⁸, the cases must be brought before the court *promptly* and in any case *no later than three months after the grounds first arose*.

Even if an action is brought within the time limit of three months, it is not sure that the action will be considered to be prompt.⁷⁹ The requirement of promptness may demand bringing an action before the end of three months.⁸⁰ In particular, bidders might be required to bring the action earlier within the three-month limit if the applicant seeks to quash an award decision.

Furthermore, it is not clear when the time begins to run. As it was found by Langley J in *Keymed*⁸¹, time begins to run when the grounds for bringing the proceedings first arise. However, in case the Regulations are not considered at all, Langley J concluded in *Keymed* that the breach arises and time begins to run when the purchaser begins to seek offers and does, however, not notify the award planned to the Official Journal.

3.3. Discretion to refuse relief

In principle, courts have discretion in deciding whether they refuse relief or not. This has to be taken from the wording of the Regulations, according to which the court *may* award the remedies of setting aside or of amending documents. In addition, the courts decide whether they set aside decisions or whether they grant damages only.

Courts may exercise their discretion to refuse relief in order to avoid public inconvenience and/or hardship to other contractors.⁸² *Inter alia*, timeliness the action was brought with is relevant for the court decision as well as whether damages might be an adequate remedy.⁸³

⁷⁸ Works Regulations 31(5)(b), Supply Regulation 29(4)(b), Services Regulation 32(4)(b), Utilities Regulation 32(4)(b).

⁷⁹ See *Severn Trent v Dwr Cymru Cyfybgedig (Welsh Water Ltd)* [2001] Eu. L.R. 136 (HC); *Holleran v Severn Trent Water* [2004] EWHC 2508 at [42]

⁸⁰ *R v Tower Hamlets LBC ex parte Luck* judgement of 30 October 1998.

⁸¹ *Keymed (Medical and Industrial Equipment) Ltd v Forest Health Care NHS Trust*, High Court, judgment on preliminary issues of 12 October 1997 [1998] E.L.R. 71.

⁸² *Severn Trent* [2001] Eu.L.R. 136.

⁸³ As to this discussion see Arrowsmith, *supra*, para. 21.55.

In principle, the discretion granted to UK courts does not appear to be in conflict with EC law requirements. The wording of the Remedies Directives does not prohibit Member States to grant such discretion to procurement review bodies. However, it seems that the EC legislator did not think of such discretion when enacting the remedies directives. The Remedies Directives were based on continental law models where setting aside a decision is compulsory once the breach is established. Therefore, if the Remedies Directives allow such exceptions or discretion, this is done explicitly.⁸⁴

4. Interim relief

If aggrieved bidders decide to challenge an award procedure and courts do not grant interim relief, it might be possible that the contract in question is concluded prior to completion of review.

According to the Regulations⁸⁵, a Court may “by interim order suspend the procedure leading to the award of the contract in relation to which the breach of duty owed ... is alleged, or suspend the implementation of any decision or action taken by the contracting authority in the course of following such procedure ...”.

The national provisions on interim relief in public procurement cases must be applied in accordance with the EC law principle of *effectiveness*. Therefore, a strict approach to interim relief measures seems to be in conflict with EC law as interim relief may be essential to ensure an effective remedies system. Since neither EC law nor the Regulations include specific criteria to be applied when deciding whether interim relief should be granted, courts appear to decide on the basis of previous practice. Thus, it is generally considered whether the applicant has brought an *arguable case*, whether *damages might be an adequate remedy while balancing all interests involved*.⁸⁶

⁸⁴ See case C-225/97 *Commission v French Republic* (1999) E.C.R. I-3011.

⁸⁵ Works Regulation 31(5)(a), Supply Regulation 29(5)(a), Services Regulation 32(5)(a), Utilities Regulation 32(5)(a).

⁸⁶ *American Cyanamid v Ethicon* (1975) AC 396 which was a private law decision; *Belize Alliance of Conservation of Non-Governmental Organisations v Dept of the Environment (BACONGO case)*

5. Damages

Under the Regulations, the court may award damages to a contractor if there is a breach of duties owed under them and if the contractor has suffered loss or damage as a consequence of the breach.⁸⁷

The Regulations are silent on the calculation of damages in case of breaches of procurement rules and on the proof required as well. However, it can be taken from the Remedies Directives that – if applicable – bidders must also be compensated for lost profits.⁸⁸

According to *Harmon*, full lost profits⁸⁹ may be compensated in principle. Such compensation requires very high probability, which is almost equal to certainty, that the bidder would have won the contract if the fault had not occurred. If the aggrieved bidder is unable to prove “sufficient certainty” but rather a substantial chance of having won the contract, the “loss of chance” rule applies. If the bidder proves a substantial chance, the court will verify chance of success and award damages reflecting this chance.

6. Remedies and award procedures to which the Remedies Directives are not applicable to

Relating to award procedures the Remedies Directives are not applicable to, general remedies and procedures must ensure that EC law is enforced. Therefore, such bidders may choose a declaration, an injunction or prerogative orders.

[2003] 1 W.L.R. 2839, PC. See also *R v secretary of State for Transport, ex parte Factortame Ltd. (No.2)* [1991] 1 a.c. 603, HL. These cases deal with injunctions only, but where interim relief is sought other than by way of an interim injunction it seems likely that the court would apply the same principles; with regard to the latter see Arrowsmith, *supra*, at para. 21.10. As to damages as an adequate remedy see *Burroughs Machines Ltd v Oxford Area Health Authority*, July 21, 1983 133 New Law Journal 764.

⁸⁷ Works Regulation 31(6)(b)(ii), Supply Regulation 29(5)(b)(ii), Services Regulation 32(5)(b)(ii).

⁸⁸ See Craig/de Burca, *op. cit.* chapter 13.

⁸⁹ Profits that would have been made by the firm if it had won the contract.

The problem of sufficiently effective remedies with regard to award procedures below the thresholds or which the EC procurement directives are not applicable to seems to be of major importance. According to the ECJ, obligations of transparency in such procurement procedures are imposed on contracting authorities. Currently, however, it is not clear which obligations contracting authorities have to fulfil with regard to such procedures under general EC law.⁹⁰

⁹⁰ Case C-324/98, *Teleaustria*; Opinion of the Advocate General of 01 March 2005 in Case C-458/03 according to whom the approach in such cases may not be too strict and is in no way comparable to the duties imposed by the substantive procurement directives.