



SIGMA Papers No. 30

Public Procurement Review Procedures

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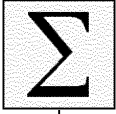
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The SIGMA Programme

SIGMA — Support for Improvement in Governance and Management in Central and Eastern European Countries — is a joint initiative of the OECD and the European Union. The initiative supports public administration reform efforts in thirteen countries in transition, and is principally financed by the European Union's Phare Programme.

The Organisation for Economic Co-operation and Development is an intergovernmental organisation of 30 democracies with advanced market economies. Its Centre for Co-operation with Non-Members channels the Organisation's advice and assistance over a wide range of economic issues to reforming countries in Central and Eastern Europe and the former Soviet Union. Phare provides grant financing to support its partner countries in Central and Eastern Europe to the stage where they are ready to assume the obligations of membership of the European Union.

Phare and SIGMA serve the same countries: Albania, Bosnia-Herzegovina, Bulgaria, the Czech Republic, Estonia, the former Yugoslav Republic of Macedonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

Established in 1992, SIGMA works within the OECD's Public Management Directorate, which provides information and expert analysis on public management to policy-makers and facilitates contact and exchange of experience amongst public sector managers. SIGMA offers beneficiary countries access to a network of experienced public administrators, comparative information, and technical knowledge connected with the Public Management Directorate.

SIGMA aims to:

- assist beneficiary countries in their search for good governance to improve administrative efficiency and promote adherence of public sector staff to democratic values, ethics and respect of the rule of law;
- help build up indigenous capacities at the central governmental level to face the challenges of internationalisation and of European Union integration plans; and
- support initiatives of the European Union and other donors to assist beneficiary countries in public administration reform and contribute to co-ordination of donor activities.

Throughout its work, the initiative places a high priority on facilitating co-operation among governments. This practice includes providing logistical support to the formation of networks of public administration practitioners in Central and Eastern Europe, and between these practitioners and their counterparts in other democracies.

SIGMA works in five technical areas: Public Administration Development Strategies; Policy-Making, Co-ordination and Regulation; Budgeting and Resource Allocation; Public Service Management; and Audit and Financial Control. In addition, an Information Services Unit disseminates published and on-line materials on public management topics.

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Foreword

Public procurement review procedures are intended to guarantee effective remedies for complaints in public procurement. This paper guides central and eastern European countries that are seeking to join the European Union on how to identify the public procurement review procedures best suited to each country's specificities. These countries are adapting their existing public procurement legislation to the European Council "Remedies Directives". The annex contains summaries of complaint review systems in eleven western and eastern European countries. The purpose is to provide possible institutional reform models for central and eastern European countries.

Many authors have contributed to this paper, including the drafting of the country summaries of public procurement complaint and review procedures. The contributors are listed here in alphabetical order: Joël Arnould (France) (j.arnould@simeonassociates.com), Peter Bennett (UK) (peter.bennett@hm-treasury.gov.uk), Peder Blomberg (Sweden) (peder.blomberg@hifab.se), Ingo Brinker (Germany) (bk2@stu.gleiss-law.com), Steen Bruun-Nielsen (Denmark) (sbn@indigo.ie), Glenn Fletcher (glennf@achilles.co.uk), Gabriella Fribicz (Hungary) (ertesito@mail.kerszov.hu), Piotr-Nils Gorecki (Poland) (sigma.contact@oecd.org), Elina Laurinen (European Commission, Brussels) (elina.laurinen@cec.eu.int), Jean-Philippe Nadal (France) (106026.1745@compuserve.com), Unto Kariniemi (unto.kariniemi@hansel.fi), Daniel Spinelli (Italy) (dspinel@tin.it), Franz Vos (Netherlands) (frans.vos@nic-int.nl), and Gösta Westring (Sweden) (gosta.westring@cederq.se). Cynthia Walker (cynthiawalker@attglobal.net) managed the SIGMA project.

For reader queries on substantive questions about this paper, please contact Piotr-Nils Gorecki, SIGMA administrator for public procurement, at the address below.

All SIGMA Papers are available on the SIGMA website or from the address below.

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SIGMA-OECD, 2 rue André-Pascal, 75775 Paris, Cedex 16, France
Tel.: (33.1) 45.24.82.00; Fax: (33.1) 45.24.13.00
e-mail: sigma.contact@oecd.org; <http://www.oecd.org/puma/sigmaweb>

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Executive Summary

For those central and eastern European countries preparing for EU membership, domestic legislation on public procurement must be brought into line with the European Council Directives on Public Procurement.¹ These substantive procurement rules include two Directives specifically dealing with

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1. The EC Procurement Directives applicable to the European Member States are: Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts; Council Directive 93/36/EEC of 14 June 1993 co-ordinating procedures for the award of public supply contracts; Council Directive 93/37/EEC of 14 June 1993 concerning the co-ordination of procedures for the award of public works contracts; Council Directive 93/38/EEC of 14 June 1993 co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; and the two “Remedies Directives” as listed in footnote No. 1. For further information, please refer to full texts of the Directives on the European Union’s Eur-Lex website at <http://europa.eu.int/eurllex/index.html>. Specifically, use the “Legislation in Force” search function at http://europa.eu.int/eurllex/en/search_lif_simple.html and enter the year and number of each Directive. N.B. on 10 May 2000, the European Commission adopted a legislative package to simply and modernise the Procurement Directives. The draft legislative proposals are now going through the various stages within the European Parliament and the European Council. This is a lengthy process and may result in amendments being made to the

remedies. The “Remedies Directives”² are designed to help ensure that the procurement that is not carried out fairly and transparently will be remedied through review procedures. The Remedies Directives’ overall objective is that effective and rapid remedies must be available.

National review procedures that meet the objectives of the EC Remedies Directives must be designed to ensure that public procurement is carried out correctly, and must conform to national procurement procedures, themselves based on EC law.

In designing and implementing review procedures, countries should consider the following:

1. *Complaints review mechanism.* Powers should be given to an independent body or bodies (administrative or courts) to review cases and demand corrective action (possibly using the threat of penalties for non-compliance). The authority to award damages should remain with the courts.
2. *Type of review body.* Establishing an independent body recognises the need for specific professional knowledge in dealing with complaints and the need for speedy action.
3. *Eligibility to take legal action.* “Standing to sue” should be given to all suppliers, but some central and eastern European countries might wish to permit *ex officio* action by the national supervisory authority.
4. *Remedies available for all contracts or only those above the EC thresholds?* The large majority of contracts are below these thresholds, and it would thus be advisable to permit review regardless of the contract size.
5. *Time limit to access the review procedure.* Corrective action should be available at least up to the date when a contract has been concluded.
6. *Relationship with procedures based on the UNCITRAL Model.* Countries that already have review provisions based on the UNCITRAL Model Law³ should refine these procedures rather than build an entirely new system.

The six points above support the Remedies Directives’ objective of enforcing EC procurement law; remedies are of a legal nature and are intended to serve each country's interest in obtaining value for money in public procurement.

National public procurement legislation and supporting review procedures should not be considered sufficient in themselves; countries are strongly recommended to ensure that the procedures are supported by efficient, well-managed organisational structures, and that effective preventive systems of management control and internal audit are in place. In addition, countries should take action to upgrade the skills and

Commission’s text. In the interim, candidate countries for European Union membership are advised by the Commission to continue transposing the existing Directives into their national law. For more information, see EC press release number IP/00/461, available on the Internet at: <http://simap.eu.int>.

2. See footnote No. 1 for the specific references of the EC Remedies Directives.
3. In the early 1990s, most central and eastern European countries chose to model their public procurement legislation on this model law. UNCITRAL stands for United Nations Commission on International Trade Law. For further information on the UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment (1994), refer to the UNCITRAL website at <http://www.uncitral.org>.

experience of their procurement officials through carefully targeted recruitment procedures and training programmes.

Introduction

The EC Public Procurement Directives⁴ are intended to ensure that public procurement is open to European-wide competition and that suppliers and service providers in any Member State are given an equal opportunity to bid for and win public contracts. These rules constitute an important element of the Internal Market programme. The substantive procurement regulations are backed up by the Remedies Directives⁵ whose objective is to ensure effective compliance with the EC procurement regulations.

In the European Community, the system of remedies in public procurement can be characterised as:

1. The obligation of Member States to make adequate remedies available at national level (based on Council Directives); and
2. The power of the European Commission to supervise Member States in the application of Community law (based on Article 169 of the EC Treaty).

The EC public procurement regulations presently cover the conventional government sectors (at national and subnational level) and what used to be termed the “excluded sectors” (because they were not initially covered), namely water, energy, transport and telecommunications utilities. Given the current status of legislation in central and eastern European countries, and the scope for comparisons between the excluded and conventional sectors, this paper focuses mainly on the conventional sectors.

1. Choosing a Public Procurement Review System

In choosing a public procurement review system, countries should concentrate on the following three steps:

1. Identifying objectives to assign to the review system.
2. Identifying local constraints.
3. Designing and implementing a system.

4. See footnote No. 1 for precise references of the substantive EC Procurement Directives.

5. See footnote No. 1 for precise references of the EC Remedies Directives.

1.1. Identifying Objectives

The first step is to identify the objectives to assign to the review system and then to draw up its detailed specifications.

By and large, the ultimate aim of any review system is the effective implementation and enforcement of the domestic public procurement legislation.

The EC Remedies Directives are based on certain broad objectives defined in Section 2.2 below. However, they leave a substantial margin of discretion to Member States in that they relate only to major procurement contracts and do not cover factors that are not directly linked to the bidding stage. As the diverse practices of the EU Member States demonstrates, there are many different ways of implementing a review system that meets the requirements of the EC Directives.

One point that is sometimes made about the success or lack thereof of various review systems concerns the number of complaints lodged each year through the system, with the implication that such statistics provide a clear indication of the effectiveness or lack of effectiveness of the system. Generally speaking, however, the number of formal complaints is not an accurate measure of how effective a remedies system is. Few complaints can mean good compliance or good informal dispute resolution. It can also mean that bidders are afraid to bring complaints, as they fear repercussions in future bidding operations, or believe that the system is not fair or effective. Many complaints, on the other hand, can mean that complaints are brought merely to cause delays and impede the good functioning of the system, or that the system is effective.

1.2. Identifying Local Constraints

The three factors below should be considered when identifying an appropriate model:

1. *Organisation of government.* The type of government administration (central or federal) and the degree to which power is decentralised (to local authorities) or deconcentrated (presence of central government services at local level) will affect the nature of a review system and the way it operates.
2. *Professionalism in the field of public procurement.* How well a review system works in practice depends greatly on how much training in public procurement, of the required quality, is given to relevant officials and contractors as well as to others involved — arbitrators, supervisors, and judges. It is also important to encourage the development of a professional “cadre” of procurement officials within government by achieving recognition for the procurement profession within government (e.g. by creating a system of certification for suitably qualified officials), establishing well-defined career paths, and increasing salaries (within the limits imposed by civil service law) to reduce the temptation for officials, once trained, to leave the public service for the private sector.
3. *The number of procuring entities.* It is inconceivable for a review system to operate in the same way in countries with 30 million or 2 million inhabitants. By the same token, a review system confined exclusively to transactions above the EC thresholds will not be suitable in countries where most procurement transactions are relatively small.

1.3. Designing and Implementing a System

Having defined the objectives and constraints, the government must decide on the kind of system to be instituted. This goes beyond drawing up and enacting the necessary legal instruments. The systems are

directly contingent on introducing measures relating to: (1) the judicial or administrative institutions in charge of the review process (nature, status, operating resources and staffing); (2) training staff in the procuring entities, companies and review bodies; and 3) establishing a management information system covering cases brought for review. A budget will need to be established in order to fund these activities.

2. Meeting the EC Objectives

For countries applying to join the European Union, accession will require incorporating EC law into domestic legislation.

2.1. The Scope of the Remedies Directives

Member States have to adopt national rules on remedies, compatible with the EC Directives, but they are free to determine the means by which these remedies can be ensured, taking into account their national legal system.

The Remedies Directives basically create two obligations on the Member States:

1. To implement/create national legislation on remedies in the field of public procurement that meet the objectives of the EC Directives; and
2. To set up review bodies.

An important point is that the division between public/administrative law and private/civil law has a fundamental impact on the system of remedies applicable to infringements in the field of public procurement. As a result, the typical national system of procurement remedies involves two parallel lines of action:

1. Action in an administrative court or tribunal in order to suspend or set aside an allegedly unlawful act taken during a contract award procedure; and
2. Action in the ordinary civil courts for compensation by way of damages for losses suffered by the aggrieved tenderer as a result of the unlawful act or decision

2.2. Broad Objectives of the EC Directives

It is important to understand the objectives pursued in the Remedies Directives as they have a marked effect in shaping review systems complying with the Directives. In short, they are threefold:

1. To implement public procurement legislation effectively. Once the Directives on the public procurement of goods, works and services had been adopted, it was found that they could well remain ineffective without an efficient control system in every Member State. The EC is not concerned with disputes that may arise about the performance of contractors in delivering

goods and services for which a contract has been signed; the focus is on compliance with procurement procedures.

2. To leave the initiative for supervision at least to the two major players that have a direct interest in ensuring that the principles of European law on public procurement are respected, namely:
 - Companies, which enjoy access to public procurement contracts subject to the EC Directives. (A company wrongly excluded from bidding may initiate the review process as it has a direct interest in seeing the law enforced. This is an example of economic democracy in action, since economic agents are empowered to press their claims to participate in procurement proceedings.)
 - The European Commission, whose role is to supervise proper application of the law.
3. To assign powers of decision to bodies that are independent of the executive, in particular by giving scope for review by a court.

2.3. Specific Features

A bidding procedure usually results in the signing of a public procurement contract. The contracting parties then have rights and obligations that lie to some extent outside the scope of remedies procedures.

In most EU Member States, the signed contract becomes binding on the parties and can no longer be challenged, even if specific acts prior to signature are found to be unlawful. Because of this, it was deemed necessary, in order to institute effective remedies regarding procurement procedures, to be able to intervene before contracts were concluded and to give Member States the possibility of instituting a review system in which:

- Interim measures can be taken to suspend the procurement procedure;
- A rapid decision can be taken to minimise disruption to procurement; and
- Acts can be corrected to rectify irregularities and allow procedures to resume in compliance with the EC Directives.

EC legislation therefore focuses on having the procedure rectified by independent bodies and, ultimately, a court or tribunal within the meaning of Article 234 of the EEC Treaty and independent of both the contracting authority and the review body.

2.4. Inadequacies of Review Systems in Central and Eastern Europe

In the early 1990s, when most central and eastern European countries were drawing up their first public procurement legislation, the only international model was the UNCITRAL Model Law drafted over a period of years by the United Nations Commission on International Trade Law in Vienna.⁶ As many of the EC Directives were adopted after the model law had been drafted, most central and eastern European countries chose to base their first procurement legislation on the UNCITRAL Model Law.

6. For further information, refer to the UNCITRAL website at <http://www.uncitral.org>.

This can create some difficulties since the rules of the UNCITRAL Model Law are not identical with those of the EC Directives.

In addition, the extent to which the UNCITRAL-type review systems are compatible with those based on EC law is limited. So far, the European Commission has given no formal opinion on this issue, although it has brought numerous proceedings against Member States for failure to transpose the Directives.

Some central and eastern European countries are questioning their review systems, either because they themselves find them unsatisfactory or because they have received questions from the Commission regarding implementation of the *acquis communautaire*.

Again, not in line with the requirements of the EC Directives, some countries of the region have given review responsibility to special bodies with a formal procedural framework that in some cases is so detailed that effective and timely decision making is impeded. These special review bodies cannot be said to be genuinely independent: those hearing the complaints are not professional judges but prominent figures in the field of procurement, appointed directly or indirectly by the public procurement authority.

Such institutions appear to be out of line with the EC approach where those hearing a review procedure are expected to be appointed independently and to be sufficiently competent to pass judgement. Arbitration, particularly in international trade, tends to be used more between the parties to a signed contract, to seek a compromise when interests diverge. This is often because the contract has not provided for every contingency or contains ambiguities, and it is worth resorting to arbitration to bring a dispute to an end by looking at the original spirit of the contract.

2.5. Diversity of Models in EU Member States

The EC has produced many relevant publications⁷ on solutions as applied in Member States, as have journals such as the *Public Procurement Law Review*.

In summary, there are three essential ways in which the Member States have chosen to implement the Remedies Directives:

- By means of a brief statute or regulation. This is the case in Denmark, France, Germany, Ireland, Italy and Luxembourg.
- By incorporating the remedies provisions within a legal act of broader scope that includes “remedies chapter”. This is the case in Austria, Finland, the Netherlands (only works contracts), Sweden and the UK.

7. For example, see the European Commission Green Paper *Public Procurement: Exploring the Way Forward*, COM (96)583 final of 27 November 1996. This document included comments on the application of the Remedies Directives in the Member States and suggestions for strengthening procedures in this area. After contributions from Member States, the Commission proposed several measures in its communication *Public Procurement in the European Union*, COM(98)143 final of 11 March 1998, that are to be introduced into the EC public procurement regime over the next five years. See also Advisory Committee for Public Procurement/Advisory Committee on the Opening-Up of Public Procurement (1997), *Study on the Remedies Applied in the Member States in the Field of Public Procurement* (final report), CCO/97/13, CC97/12-EN, European Commission Directorate General XV Internal Market and Financial Services, Brussels.

- By relying on existing legal provisions in order to implement the Remedies Directives. This is the case in Belgium, Greece, the Netherlands (except Works), Portugal and Spain.

For more details, refer to this paper's annex containing country summaries of public procurement review systems.

3. Type of Review Authority

Remedies procedures are the subject of lively discussions between Member States and the European Commission. Thus, care should be taken by the candidate countries any proposed change in the system is compatible with the Directives. As the Directives are clear about the type of measures that should be applied, the main differences in approach between countries concern:

1. The type of authority hearing complaints initially and on appeal;
2. The administrative stages, if any, prior to actual review, given that the Directives allow for the complaint to go first before an administrative authority.

3.1. Prior Review by the Procuring Entity

The Directives allow for a compulsory procedure whereby the case is first submitted to the procuring entity. The procedures may vary, ranging from prior notification to the contracting authority to the establishment of an administrative proceeding.

3.2. Compulsory Prior Review so as to Reach Mutual Agreement

Compulsory prior review so as to reach mutual agreement is found in several countries. It allows the approving authority to react before the case is referred to the courts. The main concern is to avoid litigation by giving the government an opportunity to make adjustments. No authority other than the procuring entity is allowed to intervene so as to avoid litigation.

3.3. Initial Review by an Independent Body

In compliance with the Directives, some EU Member States refer cases for initial review to a special independent body that specialises in public procurement cases. This body's decisions can be challenged in court if allowed by domestic law.

3.4. Judicial Review Only

Some EU Member States provide for referral to domestic courts of complaints against procuring entities' decisions. This is the easiest aspect of implementing EC legislation since the Directives make such review compulsory, at least in the last instance.

Whether or not the competent court specialises in public law cases will depend on the legal system in the country concerned. The United Kingdom, for example, refers such cases to the ordinary courts. Indeed, its judicial system differs completely from the French system in that the very notion of a distinction between public and private law has much less significance. A legal system that has a network of local courts may be considered to help complainants, while a system where judges specialise in administrative law may provide some assurance of professional competence. However, a centralised system makes review easier to manage and facilitates the training of the judges trying such cases.

3.5. Judicial Review in the Final Instance

In the absence of a system based solely on judicial review, the Directives require remedies to include judicial review, at least in the final instance. All EU Member States that have properly transposed the Directives provide for such review.

However, there are some major disparities. The main one stems from each country's concept of public procurement, and whether it is seen as a public or private act. Some legal systems recognise the notion of public law and have special courts for public law cases, in some cases forming a separate hierarchy. These countries fall into three categories:

- Countries that take a public law approach to public procurement. Both the decisions taken by the authorities and the contract itself must be submitted to the administrative court that applies the principles of public law.
- Countries that make a distinction between (1) decisions that can be separated from the contract (including procedural acts subject to review prior to signature), which are covered by public law on annulment and fall within the competence of the administrative courts, and (2) damages resulting from such decisions together with the contract itself, that are covered by private law and fall solely within the scope of the judicial courts. (These countries oblige complainants to make two successive applications, one before an administrative court to annul or rectify an unlawful decision, the second before a judicial court to obtain redress.)
- Countries that recognise the notion of public law but do not view the presence of government as a contracting party to be sufficient grounds for the case to be treated differently from commercial cases. The countries in this category had no comprehensive public procurement regulations before enacting the EC Directives and did not distinguish between public procurement contracts and contracts between private persons.

4. Going Beyond the European Objectives

The EC Procurement Directives only apply to procurement contracts that have a monetary value in excess of certain thresholds defined in the Directives. In many countries, however, smaller contracts are also subject to regulation by the national authorities. This raises the question of whether such contracts should be subject to a remedies regime and, if so, whether the same rules and procedures should be applied as in the case of “above the threshold” transactions. One country, for example, initially transposed the Remedies Directives so as to restrict “European” reviews to contracts subject to the European Directives (i.e. with a value above the threshold levels), but later extended the grounds for review to any infringement of public procurement regulations, whether above or below the EC thresholds.

The Remedies Directives focus on situations where an infringement has allegedly occurred and the aggrieved tenderer wishes to seek review before an independent body. Member States can also make it compulsory for the company to notify the procuring entity or submit the complaint to it in advance.

This shows that Member States are concerned, albeit to varying degrees, with a broader objective that concerns the administrative prevention of infringements. This is an internal (i.e. administrative) approach to the treatment of infringements, whereby an institution that is not independent of government may intervene where necessary to rectify procedural acts deemed improper. Such arrangements are not recognised by the European Union since the institution is not an independent one. Nevertheless, these arrangements may have a substantial impact on government practice. Some are more ambitious than others in terms of their objectives:

- In some cases, procuring entities have the systematic right to make amends and rectify unlawful acts before being called to account before another authority;
- In other cases, a specific auditing department or body is set up to enforce the system and rectify unlawful decisions before they become final and give rise to “European” reviews. The objective here is an active one, with the executive opting to intervene to supervise action by procuring entities.

The effectiveness of such procedures varies from country to country, depending on how the regulations are applied in practice:

- The initiative in seeking review may be left to tenderers (in legal terms this is a form of hierarchical review or settlement by mutual agreement) or extended to some government authorities, in which case the efficiency of the system depends on the mechanisms by which cases are referred to the authorities, and on the quality of the underlying information systems and control procedures;
- The power conferred on administrative authorities over procuring entities may be direct (to annul or suspend decisions, take the place of the procuring entity in decision-making, etc.) or indirect (via moral persuasion or recognised expertise, authority to refer cases to independent bodies in charge of formal review procedures, etc.).

As a significant number of EU Member States have introduced procedures for the administrative prevention of infringements, it is worth asking why they have done so. A parallel may be drawn here with the way the European Commission enforces the law. The government (executive) of a Member State

wants to make its public procurement authority responsible for ensuring that the regulations are duly applied. The reasons for this appear to vary from one Member State to another:

- Supervision based on review sought by aggrieved tenderers may be deemed inadequate, and the aim is to achieve more systematic supervision. If law enforcement is considered to be a guarantee of good governance, it may not be sufficient to rely on private sector companies, i.e. tenderers, to follow that law. This is all the more relevant in that companies may refrain from seeking review for fear of retaliation by the procuring entity, which is in a position of strength.
- Review sought by tenderers may not be thought effective. Because the legal system is inadequate or the judicial review machinery ineffective, government intervention is seen as more direct and better at rectifying unlawful decisions by procuring entities.
- Conversely, the repercussions of review sought by tenderers may be deemed highly prejudicial: governments may seek to do all they can to avoid procuring entities being found to have acted improperly. Instituting an EU-type review system is a European requirement, but the ultimate aim is to take proactive steps to ensure that decision-making is lawful.

With specific regard to the implementation of EC law under the supervision of the European Commission, the aim may be to avoid being subsequently challenged by the Commission. This policy of avoiding litigation may be part of a general aim to build the capacity of procuring entities to apply the law, convincing them or coercing them to rectify any errors.

5. Conclusion and Recommendations

In preparation for membership of the European Union, central and eastern European countries need to introduce review procedures that meet the objectives of the EC Remedies Directives. Primarily, such procedures should be of a proactive nature, designed to ensure that public procurement is carried out in a correct manner, conforming to national procurement procedures based on EC law. Secondly, review procedures should permit dissatisfied suppliers to obtain damages to cover any losses resulting from an infringement of such procedures.

In designing and implementing review procedures, countries should consider the following:

1. *Complaints review mechanism.* Powers should be given to an independent body or bodies (administrative or courts) to review cases and demand corrective action (possibly using the threat of penalties for non-compliance). The authority to award damages should remain with the courts.
2. *Type of review body.* Establishing an independent body recognises the need for specific professional knowledge in dealing with complaints and the need for speedy action.

3. *Eligibility to take legal action.* “Standing to sue” should be given to all suppliers, but some central and eastern European countries might wish to permit *ex officio* action by the national supervisory authority.
4. *Remedies available for all contracts or only those above the EC thresholds?* The large majority of contracts are below these thresholds, and it would thus be advisable to permit review regardless of the contract size.
5. *Time limit to access the review procedure.* Corrective action should be available at least up to the date when a contract has been concluded.
6. *Relationship with procedures based on the UNCITRAL Model.* Countries that already have review provisions based on the UNCITRAL Model Law should refine these procedures rather than build an entirely new system.

The six points above support the Remedies Directives’ objective of enforcing EC procurement law; remedies are of a legal nature and are intended to serve each country's interest in obtaining value for money in public procurement.

National public procurement legislation and supporting review procedures should not be considered sufficient in themselves; countries are strongly recommended to ensure that the procedures are supported by efficient, well managed organisational structures, and that effective preventive systems of management control and internal audit are in place. In addition, countries should take action to upgrade the skills and experience of their procurement officials through carefully targeted recruitment procedures and training programmes.

ANNEX: Country Summaries of Public Procurement Review Systems

1. Belgium

The Legal Framework

Belgian remedy law in the field of public procurement is characterised by a split of competencies between the administrative courts and the civil courts.

Actions for annulment of decisions of the administrative authorities may be lodged before the *Conseil d'Etat* (the Belgian administrative court)⁸. Decisions taken by the awarding authority before the conclusion of the contract, and in particular the decision awarding the contract, are considered to be decisions of an administrative authority. However, the question whether an entity normally governed by private law is to be considered as an administrative authority because of its obligation to comply with the public procurement act⁹ has not been settled. As in French law, the annulment of the decision does not affect the contract that may be cancelled by the competent court (in Belgium the civil court) only on request of the parties to the contract.

An action for annulment does not suspend the application of the challenged act. An action may be lodged before the *Conseil d'Etat* in order to have suspended the application of the act¹⁰. Such an action may be lodged at the latest with the action for annulment. In spite of this power of the *Conseil d'Etat*, civil courts may also grant interim measures, at least in certain circumstances.

Actions for damages must be lodged before civil courts that are the only ones competent to deal with matters concerning "subjective rights". In cases where the award criterion is the lowest price, a bidder that should have been awarded the contract if the law had not been infringed is automatically entitled to compensation equal to 10 per cent of the amount of its bid¹¹. In other cases, the candidate or bidder may claim a compensation for the loss of the chance to win the contract.

How Does It Work in Practice?

Actions for annulment before the *Conseil d'Etat* take a long time (often more than two years), and the judgement is usually not rendered before the contract has been signed and at least partially implemented. In the "Walloon buses" case, for example, where the European Commission referred the matter to the ECJ

8. Article 14 of the Co-ordinated laws on the Conseil d'Etat.

9. Act of 24 December 1993, which is notably applicable to certain entities governed by private law, which operate in the so-called "excluded sectors".

10. Act of 19 July 1991, codified in Article 17 of the co-ordinated laws on the Conseil d'Etat.

11. Article 15 of the Act of 24 December 1993.

under Article 169 of the EC Treaty, an action had also been lodged before the *Conseil d'Etat*, which rendered its judgement more than five and a half years later.

The authority of the judge is limited because of the discretionary power that is recognised to the awarding authority in most of the cases. However, the rate of success of actions is far from negligible. The most common ground for annulment seems to be the lack of a statement of reasons in the challenged decision.

Actions for a suspension of the decisions of the awarding authorities have been a matter of controversy between the Flemish-speaking and the French-speaking chambers of the *Conseil d'Etat* since the entry into force of the Act of 1991. This dispute turns on the question of whether or not the loss of a contract, and any resulting financial impact on the company concerned, constitutes an irreparable damage, which justifies a suspension of the award procedure.

2. Denmark

The Legal Framework

A specific system for public procurement review did not exist in Denmark before the implementation of the Remedies Directives. In 1995 a Law on the Public Procurement Review Board was adopted¹² to implement the Directives. The Law introduced a system that allows complaints in the first instance to be brought before the normal courts or the Public Procurement Review Board (PPB) which has been established as an independent entity by the Ministry of Industry and Trade. The decisions of PPB can be appealed to the normal courts. The PPB is assisted by the Competition Board, which is part of the Ministry of Industry and Trade and is responsible for administering the Law and acting as the Secretariat to the PPB.

The PPB can decide on any alleged infringement of the public procurement Directives, including those concerning the utilities sector¹³, as well as the relevant Treaty provisions concerning, for example, the free movement of goods. This means that the Board can review tenders below the thresholds defined in the Directives.

The PPB is composed of judges and independent experts and is headed by a judge. The status and procedures of the PPB are similar to those of the courts with the possibility for both parties to submit written observations in support of their claims.

Any person with an interest in a particular contract can lodge a complaint with the PPB. This includes situations where the complaint is that a contract has been made without any tender procedure at all. The Competition Board and certain business organisations can also register complaints. The complainant must pay a fee of 535 euro when the complaint is lodged, at which time the contracting entity must be notified about the complaint and the reasons behind it.

12. The Law with its latest amendments is entitled *Lovbekendtgørelse nr.1166 af 20 December 1995 om Klagenævnet for Udbud*. Detailed rules on the activities of the Board are spelled out in a Decree issued by the Minister of Trade and Industry – *Bekendtgørelse nr. 26 af 23 Januar 1996 om Klagenævnet for Udbud*.

13. An important modification in this respect is that complaints regarding contracts involving the utility entities dealing with exploration of oil and gas fall outside the competence of PPB but can be lodged at a specific Commercial Court (*Soe-og Handelsretten*).

The PPB can take all the types of decisions foreseen in the Directives, including suspension of tender procedures and annulment of unlawful decisions of the contracting entity. Normal courts determine the effects of such decisions on the relation between parties in cases when a contract exists according to general Danish rules on contractual relationships. The PPB cannot take decisions about damages which is the responsibility of the courts alone.

How Does It Work in Practice?

The PPB now deals with more than 20 cases each year¹⁴. The Competition Board has gone to great lengths to inform the public about the PPB's decisions that are recorded and easily available. The case law also provides important guidelines for informal conflict resolution.

Since 1996 the Competition Board has dealt with approximately 100 cases annually. It can act on the basis of any complaint from any person and on its own initiative lodge complaints with the PPB. The Board has no power of decision, but usually the contracting entity will comply with the Board's recommendations.

The large number of cases dealt with by the PPB and the Board is significant in a small country like Denmark. It is important that matters can be handled anonymously through a business organisation or the Board as otherwise experience shows that many undertakings would avoid complaints for fear of jeopardising future business opportunities.

3. France

The Legal Framework

Administrative courts are competent to deal with actions concerning the award of public procurement in most cases, even where the awarded contract itself is governed by private law. Indeed, the action is not directed against the contract, but against the decision adopted by the awarding authority (which is normally a public administration), and which is "severable" from the contract.

Before the contract is concluded, an action may be lodged before the president of the administrative court ("pre-contractual action"). The president must decide within 20 days and may suspend the award procedure, make injunctions to the administration and annul all measures taken by the awarding authority, in particular technical specifications¹⁵. Where the awarding authority is operating in the so-called "excluded sectors" and is an entity governed by private law or in certain cases governed only partially by public law, the president of the competent court (which is the administrative court, the commercial or the civil court, depending on the nature of the awarding authority) may only make an injunction to the awarding entity and impose a periodic penalty payment in order to comply with its obligations¹⁶.

14. Typical cases concern alleged incomplete or unlawful amendment of tender material, communication with undertakings before or during the tender procedure, confusion between selection and award criteria and whether reservations in tender proposals actually constitute alternative proposals.

15. Article L22 of the Code of administrative courts and administrative courts of appeal.

16. Article L23 of the Code of administrative courts and administrative courts of appeal, or Article 11-1 of the Act 91-3 of 3 January 1991, as subsequently amended, and Articles 1441-1 to 1441-3 of the new civil procedure code.

After the contract is concluded, an action for annulment of the decision of the administrative authority to conclude such a contract may be lodged before the administrative court. However, the contract does not disappear when the decision to conclude it is set aside. Only the parties to the contract may lodge an action before the administrative court (or the civil or commercial court in cases where the contract is governed by private law) in order to have the contract declared void. An injunction or a periodic penalty payment may be imposed by the court having set aside the decision to award the contract, in order to force the administrative authority to lodge such an action.

Finally, an interested party which has suffered an economic loss because of the violation of the public procurement rules may lodge an action in order to ask for damages.

How Does It Work in Practice?

Litigation on the award of public procurement is relatively frequent in France, but the existing remedies do not provide what is expected by deceived candidates and bidders: the possibility of being awarded a contract which should have been awarded to them if the rules had been complied with. For instance, of a total of approximately 10 000 decisions in 1998, the *Conseil d'Etat* (the French administrative supreme court) adopted only 131 decisions concerning public procurement law, most of which dealt with issues other than disputed award procedures.

The pre-contractual action was conceived in order to give a more effective remedy. It has been negatively affected by the case law of the *Conseil d'Etat*. The *Conseil d'Etat* held that where the contract has been concluded after the action was lodged, but before the judge rendered its decision, the action is inadmissible. This is considered to constitute an incentive for the awarding authority to try to sign the contract as quickly as possible, especially when it is informed that there is a risk that its choice might be challenged before the administrative court. Moreover, the law provides that before lodging a pre-contractual action, a company must ask the awarding authority to comply with its obligations, and if the authority does not reply, the action may be lodged only ten days after this demand. This delays the action and increases the risk that it may be considered inadmissible. Consequently, in many cases, possible actions are not lodged because their chances of success are considered to be too low. A reform has been proposed by the Government in order to make this procedure more effective.

4. Germany

The Legal Framework

In August 1998, after lengthy discussions about the implementation of the EC Procurement Directives, the German parliament enacted a new law ("the Act")¹⁷. The essence of the Act is the establishment of a new review procedure that guarantees effective remedies for complaints against violations of the procurement rules. The new Act grants bidders the right to complain against infringements of the procurement rules during an award procedure, thus enforcing compliance with the procurement rules.

Since 1 January 1999, "Procurement Chambers" (*Vergabekammer*) have been in charge of deciding about complaints lodged in connection with an award procedure. This (independent) administrative review body is an integral part of the German Federal Cartel Office (*Bundeskartellamt*). Parties to the proceeding at the

17. 4th Chapter of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) as of 26 August 1998, Federal Gazette (*Bundesgesetzblatt*) 1998, I p. 2512.

Procurement Chamber are the tendering entity and the bidder(s). It is also possible that other parties, in particular other bidders, may formally participate in the proceeding. The parties involved have standing to appeal against the Procurement Chamber's decision.

A procedure for judicial review of the Chambers' decisions was introduced by the Act. New bodies, the "Procurement Senates" (*Vergabesenate*) were established at the level of the Higher Court of Appeals (*Oberlandesgericht*). These senates form part of the ordinary courts in Germany.

Since Germany is a federal state, review bodies have to be established both at the Federal level (i.e. at the Federal Cartel Office) and the State level. The 16 German States have chosen very different solutions for the establishment of Procurement Chambers. The respective Higher Court of Appeals in the State is in charge of appeals.

How Does It Work in Practice?

The remedies against an infringement of the procurement rules have proven to be very efficient since the award procedure is suspended during the proceeding at the Procurement Chamber and, if the complainant is successful, also during the proceeding in the Higher Court of Appeals. Both the Procurement Chambers and the Higher Court of Appeals are bound by very strict time limits in order to guarantee a speedy resolution of procurement disputes. The Procurement Chambers have to decide within five weeks after a complaint has been lodged. On the basis of the information available, it appears that such time limits have not been observed in only a very few cases. The Higher Court of Appeals has also to make a decision within a reasonable period but this period is not precisely defined in law.

In general, the new system appears to be working well at both federal and state level, though more time is required in order to evaluate its effectiveness.

5. Hungary

The Legal Framework

The Act on Public Procurements¹⁸ contains the Hungarian procurement remedies rules and establishes the Public Procurement Arbitration Committee as the independent administrative review body responsible for providing legal remedies for disputes and/or violations of law. The Act details the Arbitration Committee's responsibilities, deadlines for requesting or initiating procedures, transitory measures, legal consequences, and time limits for procedures.

The Committee is composed of 13 commissioners who are full time employees appointed by the Council for Public Procurement, the central body responsible for national procurement policy. Each commissioner must have passed a special examination in public administration and/or law, have a university degree and at least three years relevant professional experience. Committee decisions are taken in committees comprising three members, of whom one member is always a lawyer and another, an expert in the disputed subject matter (e.g. information technology, engineering, architecture).

Two means exist to request setting up an Arbitration Committee. The first is an application submitted by the contacting authority, the bidder or another interested party whose right or lawful interest is violated and

18. Act XL of 1995 on Public Procurements (as amended, last by Act LX of 1999)

who pays an administrative service fee of 30 000 HUF. The second is a special request from organisations or persons specified in the Act. The Committee may take interim measures suspending the procurement procedure, prohibiting the conclusion of a contract not already signed, or requesting the contracting entity to include the supplier's bid.

If a contract has not yet been signed, the Committee may annul the contracting authority's decision. If a contract has already been signed, the Committee may establish that the Act has been violated and impose a penalty. The Committee has to make its decisions within 15 days or, if it holds a hearing in the case, within 30 days. In exceptional circumstances, this deadline may be extended by a further 10 days.

Judicial review of a decision may be requested by a person(s) whose rights or lawful interests are violated. The person submits his claim to the Committee that will forward it to the court. The submission does not automatically delay or suspend a decision. Court proceedings related to public procurement take priority over other cases. An appeal against the decision of the court of first instance may be lodged with an appeals court (for procurement cases, the Supreme Court). The average duration for a court of first instance proceeding is one to one-and-a-half years; and for a case that is heard both a court of first instance and a court of second instance, two to two-and-a-half years.

The Arbitration Committee follows the general rules of State Administrative Procedure¹⁹. Judicial review of Committee decisions is under the Code of Civil Procedure with minor variations found in "Actions for Judicial Revision of an Administrative Decision" of the Code of Civil Procedure²⁰.

How Does It Work in Practice?

In 1998, the Arbitration Committee had 318 procedures with over 300 cases. The Committee took 297 decisions of which 170 were dismissed and 126 found justified. Seventy-eight of the Committee's decisions were appealed in court (about 30 per cent of the decisions), 24 terminated at the court of first instance and one terminated at the court of appeal (Supreme Court). The Committee imposed 84 million HUF penalties on the organisations violating the rules of the Act.

6. Italy

The Legal Framework

In the public procurement field, a distinction must be made between two phases, i.e. the procedure for selecting the contractor and the execution of the contract once it has been awarded. Under Italian law, private citizens do not have unrestricted rights to bring cases against the government, but can only claim an interest in the government acting appropriately and in compliance with the law (what are known as "legitimate interests").

From a judicial standpoint, this has always been a key distinction, and there are two different courts with jurisdiction in such cases, depending on whether citizens' individual rights or legitimate interests are concerned.

19. Act IV of 1957 on the General Rules of State Administrative Procedure

20. Act III of 1952 on the Code of Civil Procedure

In particular, Italy has an Administrative Tribunal, organised on a regional basis, which handles appeals against illegal acts of government and thereby safeguards the legitimate interests of citizens. These administrative courts may not award compensation for damages (which traditionally is granted by ordinary courts and only for the infringement of plaintiffs' individual rights), but may only annul illegal acts. Consequently, any matters that arise during the tendering phase are the jurisdiction of administrative courts since enterprises may only challenge government action on the basis of the defence of their legitimate interest. However, during the execution of the contract phase, the government is deemed to act as a normal private party, and is therefore liable, like any contracting party, if it fails to meet its contractual obligations. As a result, in such cases claims are brought before the ordinary courts.

As regards public works contracts, an accelerated procedure has been introduced in Italy that has reduced the appeals process from 60 days to 30 days, from the time at which the appeal against the illegal act is lodged. The administrative court can then make an immediate ruling to suspend the act being appealed. Furthermore, under the influence of Community law (Community Directives on Appeals No. 89/665/EC for ordinary sectors and 92/13 for special sectors), an important innovation has recently been introduced by Legislative Decree 80/1998, which has given the administrative courts exclusive jurisdiction over all procedures for awarding contracts for public works, supplies and services related to the management of public services. Administrative courts can also award compensation for damages in these fields.

How Does It Work in Practice?

In practice, appeals most often contest procedures for awarding contracts or calls for tenders and specifications that the parties concerned consider to be directly harmful to their legal positions.

However, this field is continually changing, as is shown by a recent ruling of the Supreme Court of Appeal that allows damages to be awarded when parties' legitimate interests are harmed by an illegal act of government, thus overturning one of the most longstanding tenets of Italian law.

There is also a growing use of extra-judicial methods in the public procurement sector. These methods of resolving conflicts that arise during the execution of the contract generally consist of arbitration and in special cases of "amicable agreements". They undoubtedly make it possible to resolve conflicts more rapidly than through the ordinary courts, even though their cost is often considerable.

7. Netherlands

The Legal Framework

When the Remedies Directives were issued by the European Council to guarantee adequate legal protection to all participating parties in public tendering, the Dutch Government took the view that the Dutch legal system already fulfilled the Directives requirements and issued simply a Resolution²¹. (*Algemene Maatregel van Bestuur*) stating that the European Directives on procurement were also applicable domestically.

21. Resolution on public procurement (*Besluit overheidsaanschaffingen*) dated 4 June 1993 on public procurement of Goods, Works and Services and Resolution on procurement for the utility sector (*Besluit aanbestedingen Nutssector*) dated 6 April 1993

In this way, implementation of two levels of “rules of law” came into effect. The legal protection is also on two levels: European and Dutch.

The European Directives are based on the decentralisation principle since it is assumed that the concerned parties will in the first instance follow the remedies guidelines of their domestic legal systems. The Dutch Government appointed two fora to raise complaints: the Dutch Court of Justice and the Council of Arbitration (the latter for remedies concerning works).

How Does It Work in Practice?

In practice, it is often more important at which stage of the procurement process the legal steps for an appeal are initiated, i.e. before or during a tender procedure, or after the contract has been awarded. Particularly in the initial phases (before/during tender proceedings) when any violation of the Directives’ requirements can be remedied without much harm, it is important for the concerned parties to have access to rapid and effective procedures for protection of their rights.

The preamble of the Public Remedies Directive indicates the importance of provisional measures (e.g. suspension of tender procedure) which in the Netherlands are handled by means of an urgent procedure or injunctive relief (*spoedprocedure, kortgeding*). When arbitration is required (e.g. arbitration of works tender proceedings), the Netherlands offers a form of accelerated arbitration (*spoed arbitrage*) so that a rapid and effective final decision can be obtained.

Before contract award, a concerned party can put in a claim:

- To be admitted to the procedure.
- To modify the tender instructions (when not in line with the Directives).
- To stop the award of contract to the selected enterprise or to request the award of contract to the concerned party.

After contract award, a concerned party can put in a claim:

- To cancel the contract and award it to the enterprise that thinks itself entitled to the contract had the requirements of the Directives been followed (only applicable in exceptional cases).
- To indemnify the concerned party because the award of contract to another party is unjustified.

In practice, indemnification awards vary between 6 and 17 per cent of the contract amount; the claiming party has to prove that it suffered genuine damage and to provide plausible evidence that it had a good chance to win the contract had the tender been organised in accordance with the Directives’ requirements.

8. Poland

The Legal Framework

The Public Procurement Act of 1994 (amended) grants contractors the right of review of their complaints when their legal interests have been infringed upon through a violation by the procuring entity of the

principles described in the Act. (The provisions on complaints and appeals do not apply if the value of the procurement contract is below 30 000 euro.)

The procedure starts when the supplier/contractor submits a written protest to the procuring entity. A complaint must contain reasons for the complaint being submitted and must be filed within seven days from the day the contractor/supplier learned or could have learned of the circumstances giving grounds for the complaint. The procuring entity may not sign the procurement contract until the complaint is resolved.

The supplier/contractor may file an appeal with the Chairman of the Office of Public Procurement (PPO) (1) against the timely decision of the procuring entity or (2) if the complaint is not resolved in due time (seven days from filing). Speed is one of the guiding principles behind the appeal proceedings: an appeal must be reviewed within 14 days of filing by a panel of three arbiters selected from the arbiters' list. The Chairman of the Office of Public Procurement maintains a register of arbiters (over 650 professionals) and manages the arbitration process within the Office of Public Procurement.

The supplier/contractor selects one arbiter, the procuring entity selects another, and the Chairman of the PPO selects the third. (If one party fails to select an arbiter, the Chairman is authorised to do so.) The Chairman also appoints the chairman of the arbiters panel. Arbiters are supposed to be neutral and not to represent the interests of the party that nominated them.

The arbiters' panel upholds or rejects the appeal and assesses the costs of the proceeding. The losing party covers the costs of the appeal proceedings.

When upholding an appeal, the panel of arbiters may (1) order the procuring entity to do or redo an action, (2) declare an action invalid (except signing the procurement contract), or (3) cancel the procurement proceeding. The panel may not allow an appeal to be withdrawn or allow the parties to conclude an agreement between themselves. Within one month after a decision, either party may file a complaint in court requesting annulment of the panel's decision.

How Does it Work in Practice?

Between 1995 and 1998, the number of appeals received by the Chairman of the Office of Public Procurement increased from 348 to 1 195 cases (approximately 1 400 cases in 1999).

Of the 1 195 appeals lodged with the Chairman of the Office of Public Procurement in 1998, 125 were withdrawn before the date of trial. Of the 993 cases examined, 635 appeals were dismissed, while 356 were found to be justified. The remaining 79 appeals, due to the failure to pay the registration fee, remained without judgement. The average period spent awaiting an appeal hearing by the panel did not exceed 13 days, compared with the statutory deadline of 14 days.

The provisions of the Ordinance of the Council of Ministers of 10 March 1998 introduced a requirement that a supplier or contractor must submit a registration fee when lodging an appeal.

The most frequent category of complaint of appeals registered with the panel of arbiters is that the procuring entity had not evaluated the tender proposals in accordance with the criteria defined in the terms of reference. Another frequent complaint is that procuring entities have violated the PPL by rejecting tender proposals without adequate grounds for doing so.

9. Spain

The Legal Framework

The preamble of the Spanish Act of 1995 on public contracts²² states that the remedies rules have not been modified by the Act because they were considered to be satisfactory, in particular as concerns the Remedies Directive 89/665. Subsequently, the Act on the procedure before administrative courts has been replaced, but no specific provision concerning litigation in the field of public procurement has been adopted²³.

Actions before the courts may be lodged only after an administrative complaint to a superior authority, if there is one. The competent courts are the administrative courts. They may set aside the decisions taken by the awarding authority, and in particular decisions awarding contracts. Contrary to French and Belgian laws, the contract normally becomes void by the fact that the decision to conclude it has been set aside. However, the administrative authority may decide, on the grounds of public interest, to continue with implementation of the contract.

Administrative complaints and actions for annulment do not have the effect of suspending the execution of the administrative decision at stake. However, interim measures may be granted both at the stage of the administrative review procedure and by the administrative court. In particular, the decisions of the awarding authority may be suspended.

In cases where no other remedy is available that can correct the effects of the violation of public procurement rules, the court may also grant compensation for damages.

Specific remedies rules have been provided for by the act on utilities procurement²⁴. An administrative complaint must first be lodged before the administrative authority that is in charge of controlling the awarding entity (which may be an entity established under private law).

How Does It Work in Practice?

The case law and decisions of administrative authorities on administrative actions and complaints concerning public procurement are not compiled in a centralised and systematic way in Spain. According to the Consultative Commission for Public Procurement, it is for this reason very difficult to get general information on the case law in this field. However, certain trends appear from the case law published in the Supreme Court report and in law journals. Litigation is not rare in this field, but cases concerning award procedures are much less frequent than cases concerning disputes on the performance of public contracts.

Traditionally, the courts have been quite reluctant to grant interim measures. This is a serious problem, since the Spanish administrative court procedures can result in long delays. Actions often take between two years and five years to reach a conclusion. Nevertheless, the application of the new Act on administrative courts, which is intended to make the adoption of interim measures easier, could lead Spanish courts to grant such measures more frequently in the future.

22. Act 13/1995 on Public Contracts of 18 May 1995.

23. Act 29/1998 on the rules applicable to administrative courts of 13 July 1998.

24. Act 48/1998 on Utilities Procurement of December 1998.

The annulment of the decisions of the awarding authority is not in itself satisfactory for the complainant, especially when it takes place several years later. Actions for damages have been infrequently successful so far. In cases where damages are granted, they are usually equal to 6 per cent of the amount of the bid. Such awards are not regarded as a sufficient incentive for bidders who are victims of a violation of the public procurement rules to go to court.

10. Sweden

The Legal Framework

The Swedish Public Procurement Law (PPL), which became effective on 1 January 1994, regulates all public procurement transactions in the country, including those that fall below the EC thresholds. The PPL is structured in seven chapters with the final chapter covering the two Remedies Directives. The PPL offers a supplier the same opportunities for filing a complaint for transactions above and below the EC thresholds. Thus, the complaint challenge and review procedures apply equally to all public procurements, irrespective of value and type.

Before a procurement contract is signed, a supplier harmed or at risk of being harmed by an alleged infringement is entitled to file a complaint with a County Administrative Court (CAC) which is a judicial body dealing with issues of public law. The CAC may decide to suspend a tender proceeding until the complaint has been reviewed by the court and a final decision taken. The court will abstain from suspending the proceedings if the negative consequences of such a decision are judged to be greater than the advantages, i.e. the damage to the procuring entity is greater than the advantage to the complainant.

The CAC may decide to cancel the tender proceedings and order re-tendering. The CAC may also order the correction by the contracting entity of deficiencies found in the tender proceedings. In the case of a complaint procedure brought against a public utility, the decision may also include a fine.

A decision of the CAC may be challenged in higher administrative courts and in such cases the tender proceeding will be suspended until the court takes its final decision.

Before contract signing, there are no time limits for filing a complaint, nor is there any maximum period of time for the CAC or higher courts to finalise the complaint review.

Once the contract is signed, the only remedy remaining available to a supplier is to request damages in an ordinary court. Such a request must be filed within one year of signing the contract. To be successful in court, the supplier must prove not only that the contracting entity acted unlawfully but also that the supplier in question would have been awarded the contract if the tender proceedings had been carried out lawfully. If the supplier succeeds in proving his case, he is entitled to compensation for "loss incurred". The exact meaning of that expression has been left to the courts to decide. A recent Supreme Court decision (case No. T 1441-97) has confirmed that compensation for loss incurred means a right for the supplier concerned to be placed in the same position as if the proceedings had been carried out in a lawful manner, thus including compensation for loss of profit.

How Does It Work in Practice?

The courts have reviewed over 400 complaints since the PPL became effective on 1 January 1994. There is a downward trend on the number of registered complaints in recent years.

Only 49 per cent of all complaints filed with the CACs since the entry into force of the law have been reviewed by it. The majority of the complaints (51 per cent) were rejected by the courts on the grounds that a valid contract between the contracting entity and another supplier was already in force. Only in 4 per cent of all complaints reviewed (9 cases) did the court decide that the contracting entity must make a correction to the procedure before the tender process may proceed. In 13 per cent of all complaints (13 cases), the courts annulled the tender proceedings and requested the contracting entity to re-tender.

The number of cases (21) where damages were requested in ordinary courts after a contract was signed is significantly lower than the complaints brought before the administrative courts. In six of these cases, the courts agreed to the requests filed and decided that the contracting entities must pay damages to the suppliers.

11. United Kingdom

The Legal Framework

In the UK, the EC procurement regime is given effect in a total of four separate regulations. The Courts have all the necessary powers to grant interim or final injunctions, including suspending procedures, setting aside decisions and awarding damages. A breach of the regulations gives grounds for an action by suppliers who have suffered, or risk suffering, loss or damage. Suppliers must first inform the purchaser that they intend to bring an action and explain the grounds. Claims must be brought promptly and in any event within three months, unless the Court decides that there are good reasons to allow a longer period. Damages are the only remedy once a contract has been awarded. The basis for damages is left to the Court to decide and may, for example, relate to tendering costs, lost opportunity or lost profit.

How Does It Work in Practice?

In practice, the Courts review no more than one or two cases each year. Most problems are sorted out before a hearing is necessary. Where the interpretation of EC law is at issue, however, there may be a need for a reference to the European Court of Justice for a preliminary view.

In general, in the UK, there appears to be a relatively high level of compliance with the procurement law. This is partly the result of the growing professionalism of procurement staff, and over half of procurement personnel in government departments now have a professional qualification. There is currently a trend towards Alternative Dispute Resolution as an alternative to, or precursor to litigation, particularly in cases involving construction contracts.

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(available in English and French, unless noted otherwise)

Training of Trainers in Public Procurement (Eight Modules), Joint ILO/Turin-SIGMA Project (English only)
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Control and Management System Baselines for European Union Membership (English only)
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