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Flagging up the big issues

EU procurement reform guide 2016



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Introduction

The European Union countries are in the process of one of the most important reforms of the public procurement system in the recent years. The reform takes the form of transposition of the package of three EU directives on public procurement and concessions.

These directives were supposed to be implemented by 18 April 2016. However most of the EU member states failed to implement them on time. In the end of May the European Commission sent to 21 Member States a letter with a formal warning for not transposing these three directives.

One of the reasons for this delay is the complexity of national public procurement systems. In many countries public procurement law takes a form of many different acts of law that are issued by various bodies. Moreover, given the value of public tenders and their significance for the national economies, the Member States carefully introduce such significant changes into the law and the practice.

The current change in the legislation occurring in the European Union and the subsequent changes in the local legislation means that some of the past know-how about winning public tenders would become obsolete. This is a chance for all companies that want to compete for public contracts in the European Union as the learning curve would be the same for the current players on this market and for the new entrants.

This publication has been prepared to present the current situation on the most important EU public procurement markets and to give some insights into knowledge required to win public procurement tenders in such European Union countries.



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> Austria

National implementation of EU public procurement directives >

Only a small part of the directives has been implemented in Austria and a respective "small" reform has entered into force in spring 2016.

This reform has mainly changed application of other criteria instead of cost criteria only for granting the award. With respect to various types of procurement, the granting of the award to the "best bidder" (considering quality criteria) instead of to the "lowest bidder" (price criteria only) has become mandatory, including procurement of construction services and food products. In connection with the change considerably strengthening the principle of the "best bid" over the "lowest bid", there have also been changes to the employment of subcontractors and information on subcontractors to be provided to the contracting authority. Otherwise, the directives have not been implemented so far, and no draft law for the implementation has been published.

Due to the requirement of a far-reaching reform of Austria's procurement laws (both federal law and provincial laws regarding procurement complaints), correct implementation of the directives is obviously difficult and an issue of disputes. The non-implementation of the better part of the directives within the given deadline does, however, result in additional, considerable issues for bidders, because parts of the directives have become directly applicable to procurement procedures and complaints and nobody is currently able to describe with required certainty which parts of the directives have already become directly applicable (and no published case law was available in this respect until now). The already-made changes to Austrian laws strengthening the principle of the "best bid" over the "lowest bid" have been widely discussed in Austria, in particular in the context of fighting "social dumping" in the construction industry in connection with employing non-Austrian construction firms.

Procurement in Austria is mainly governed by the Austrian "Bundesvergabegesetz 2006" (federal procurement act of 2006), being also the main law that will have to be amended for implementing the directives. In addition, each of Austria's nine provinces has local provisions for procurement claims concerning certain local contracting authorities, which will also have to be amended in connection with implementation of the directives.



National public procurement remedies >

In Austria, procurement claims have to be filed with either the Austrian federal Bundesverwaltungsgericht (federal administrative court) or with the nine Austrian federal Landesverwaltungsgerichte (provincial administrative courts). It is an occasionally difficult task to decide whether the Bundesverwaltungsgericht or one of the nine Landesverwaltungsgerichte is competent for a complaint, which depends on whether competence for the execution of laws concerning procurement by the relevant contracting authority is with the federal state or with Austria's nine provinces. This has the result that complaints against certain awards of provincial contracting authorities are to be filed with the Bundesverwaltungsgericht, because the competence for the execution of laws concerning procurement by the relevant provincial contracting authority is with the federal state.

It is principally possible to file appeals against decisions of the Bundesverwaltungsgericht or one of the nine Landesverwaltungsgerichte with the Austrian Verwaltungsgerichtshof (supreme administrative court). However, the Verwaltungsgerichtshof is only required to accept appeals concerning legal matters of importance beyond the particular case (for example because there is no available case law regarding the question to be decided or because the court in the first instance decided contrary to settled case law).

No statistical data is published on the number of procurement claims. According to the database of the federal government for court decisions of the Bundesverwaltungsgericht and the nine Landesverwaltungsgerichte, these have together rendered 3,614 decisions on procurement matters governed by the Bundesvergabegesetz 2006 in the year 2015. This figure does, however, not describe the number of awards challenged by complaints, because complaints are usually filed together with an application for a preliminary injunction, so that usually at least two decisions are rendered in each procurement case. Moreover, one and the same award can be challenged by several bidders, which does, of course, further increase the number of court cases.

Complaints in procurement matters and, in particular, against awards have to be filed within very short time limits, which is principally ten days as of the decision of the contracting authority if provided to bidders electronically or by facsimile, or if provided by mail, within 15 days. For sub-threshold awards, the period is only seven days. The period for filing an appeal against a decision of the Bundesverwaltungsgericht or a Landesverwaltungsgericht is four weeks.

Usually, complaints against awards are combined with an application for a preliminary injunction, which avoids a contract being concluded with the successful bidder. Pursuant to applicable laws, courts in the first instance have to decide on applications for preliminary injunctions within seven business days; on the complaints within six weeks. Courts in the first instance try to observe these periods. There is no prescribed period within which the Verwaltungsgerichtshof has to decide on an appeal.

The court fee for filing a complaint with the courts in the first instance is between EUR 308 and EUR 6,156. Costs of legal representation usually range between EUR 5,000 and EUR 20,000, again depending on the type of contract. The fee for an appeal with the Verwaltungsgerichtshof is EUR 240. Cost of legal representation in the appeal procedure usually ranges between EUR 5,000 and EUR 10,000, depending on how complex the case is.

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> Belgium

National implementation of EU public procurement directives >

The Belgian Federal Parliament has recently transposed the 2014 EU directives into Belgian law, by approving, on 6 July 2016, a new Public Procurement Act and a new Public Procurement Act for Concessions (published in the State Gazette on 14 July 2016). These two new Acts are not directly applicable, and will only enter into force when the subsequent executive orders will be approved by the Belgian Federal Government. Until that moment, the 'old' procurement legislation remains effective. The timing of approval of such executive orders is unclear; this can take up to one or two years more, or even longer. When the previous Procurement Act was approved by the Belgian Federal Parliament in 2006, the Belgian Federal Government only succeeded to approve the subsequent executive orders more than 5 years later...

Belgium has decided to adopt new legislation replacing the current legislation rather than amending the recent acts. There is now also a separate act regulating procurement for concessions. An often-heard criticism was that the rules were too complicated and inaccessible for small and medium enterprises (SMEs). Another issue is that Belgium was very late with the transposition of the previous EU directives into national legislation, which created legal uncertainty. The goal of the new legislation is to provide simpler, more straightforward rules.

When replacing the legislation, Belgian authorities aim to increase the efficiency of public procurement and to provide wider access for SMEs. Some basic notions and concepts were also clarified with a view to greater legal certainty and taking into account several aspects of the relevant case law of the Court of Justice of the European Union (such as assignment of a contract, which is currently almost impossible, or at least very difficult, in Belgium).

There will be a certain amount of novelties in the new legislation, but there will also be a lot of provisions which are retained from the old legislation, to have a certain continuity between the old and new legislation. The definitions and main principles of public procurement rules are included in the new Public Procurement Act and Public Procurement Act for Concessions, whereas the detailed "translation" of these principles will be included in the subsequent executive orders of such Acts.

The process of transposition of the EU directives will most certainly involve the implementation of local procurement rules (executive orders – local directives). Since the general executive orders to implement the approved acts are not yet drawn up, it is too early to say what such local rules will be, but these will probably relate to the composition of tender applications and verification methods of the applications by the authorities, provisions against social dumping, energy efficiency requirements and provisions considering social and environmental clauses and focus on innovation.



National public procurement remedies >

In Belgium, complaints regarding awarding the tender have to be filed with the Council of State, which is the highest administrative court in Belgium, with multiple French, Dutch, a bilingual and a German speaking chamber(s). If the case relates to the execution of procurement contracts, the civil judge will be the competent judge.

Every year there are several hundred appeals submitted before the Council of State regarding disputes on awarding a tender. There are no statistics about the number of cases that relate to the execution of tenders. Since Belgian legislation is now quite complicated and not fully adjusted to the ECJ jurisprudence, and the new legislation aims to solve this, it is expected that this number will decrease.

The deadline for filing an appeal with the Council of State is 15 days from the date of issuing the tender decision of awarding a tender (placement decision) and all related administrative decisions which can be appealed. The deadline is strictly observed; an appeal filed later will be rejected.

For legal disputes concerning the execution of a contract before the civil judge, there is no strict legal deadline, but it is advised to do it on a rather short notice.

A case (awarding of a tender) at the Council of State is very formal, consists of several (formal) steps such as the advice of a public attorney before the Council of State (Auditor or 'Auditeur') and is, in principle, a strictly written procedure and thus takes a lot of time. Because of this issue, there is a special urgency procedure for public procurement cases, which has to be initiated within 15 days following the notification of the placement decision of the authorities (usually this is 60 days for other administrative decisions). Also, the 'Auditor' will advise verbally at the hearing instead of in writing, to save time. Attorneys can verbally address the Council for longer than in usual hearings. A judgement can be expected approximately four to six weeks after filing the complaint.

Civil procedures (execution of procurement contracts) can take a long time (two years or more is not unusual).

The fee for filing an appeal before the Council of State is very low (EUR 200 per requesting party + EUR 700 to EUR 2,800 procedural indemnification fee for the losing party). The fee (role fee + indemnification fee for the losing party) for filing an appeal before the civil judge varies in accordance with the value of the dispute: this can range from EUR 180 to EUR 36,000.

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Czech Republic

National implementation of EU public procurement directives >

The Czech Republic transposed the new 2014 EU directives into Czech law through the new act that will come into force on 1 October 2016.

The Czech Republic adopted a completely new act replacing the current PPL. It was discussed at the beginning of the implementation process how to implement the directives correctly. One proposal was to adopt one act for each directive. In the end, only one act covering all the directives was adopted.

Despite some parts of the law being a copy-paste of the directives, the new law sets forth some more strict rules. For instance, Directive 2014/24/EU prescribes examples of information contracting authorities may require with regards to economic and financial standing. Czech law stipulates that it shall be only the turnover of the economic operator.

Furthermore, in the case of modifications without a new procurement procedure any increase in price shall not exceed 50% of the value of the original contract. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing the directive. On the contrary, Czech law provides that should there be more modifications, cumulative value of the successive modifications is decisive.

The implementation will involve issuance of new decrees specifying some sections of the new law (e.g. decree issued by the Ministry of Regional Development regarding technical requirements for public procurement for building or regarding the publishing of forms in the area of concession contracts).

Other public bodies may also issue internally binding guidelines regarding the public procurement that may help the private sector better understand the new law. However, we are not aware that such guidelines have been issued so far.



National public procurement remedies >

In the Czech Republic, complaints relating to PPL can be filed with the Office for the Protection of Competition seated in Brno. Parties to the complaint procedure may subsequently file a lawsuit with the administrative court.

The number of complaints submitted to the Office for the Protection of Competition varies from 600 to 1,000 every year.

Generally, objections against the resolution of the contracting authority have to be submitted within 15 days. The contracting authority has to issue its decisions within 15 days from the delivery of objections. After that the complainant may submit proposal for the review proceeding with the Office for the Protection of Competition in ten days from the date of delivery of the decisions of the contracting authority. Further, the complainant may submit appeal against the decision of the Office for the Protection of Competition to its chairman within 15 days from the delivery of the decision of the Office for the Protection of Competition.

The complainant may also file a lawsuit with the administrative court within two months from the date of delivery of the decision of the chairman of the Office for the Protection of Competition. And finally the deadline for the cassational complaint against the court decision to the Supreme Administrative Court is two weeks.

The proceeding before the Office for the Protection of Competition may take several months. Court proceeding lasts for years.

The fee for filing a complaint to the Office for the Protection of Competition is 1% of the bidding price of the complainant (minimum fee is approximately EUR 1,850 and the maximum fee is approximately EUR 371,000). The fee for a judicial lawsuit is approximately EUR 111, and for the cassational complaint is approximately EUR 185.

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> Estonia

National implementation of EU public procurement directives >

The Estonian parliament is currently in the process of adopting new public procurement law to transpose directives into Estonian Law. It is expected that the new law will be passed at some time during autumn of 2016.

All compulsory provisions of directives will be adopted into new PPL. These provisions mainly regulate public procurements that projected cost exceeds international limit.

Additionally new PPL also regulates the rest of public procurements that projected cost does not exceed international limit. Therefore new PPL shall be universal law in Estonia, which includes both provisions of directives but also regulates other matters in the field of public procurement.

The main changes to be introduced by the new PPL compared to current PPL, which does not derive from directives, are related to procedures for simplified procurement and limit of cost for internal procurements. New PPL regulates that the government may adopt additional rules that specify procedures in construction-related procurements.



National public procurement remedies >

In Estonia an appeal concerning public procurement procedures is filed with the Public Procurement Review Committee, which is a special quasi-arbitration body in Tallinn dedicated to resolving public procurement disputes. The parties to the appeal procedure may subsequently file a complaint with the court against the committee's ruling.

In 2014 and 2015 the number of submitted appeals was 331 and 275 respectively. As appealing proceedings or costs do not change, it is not expected that these numbers would change due to adoption of new PPL.

The deadline for filing an appeal with the Public Procurement Review Committee is ten days from the date of dispatch of information on the contracting authority's action or failure to act. The deadline is strictly observed meaning that failure to comply with the deadline will result in rejection of an appeal.

The complaint with the court against the committee's ruling shall be filed within ten days of service of the ruling with written justification.

The appeal shall be considered by the Public Procurement Review Committee within seven days after filing, at an oral hearing, and ruling will be published within ten days after conclusion of the hearing.

The contract with the selected bidder cannot be concluded before the ruling is issued by the Public Procurement Review Committee.

The fee for filing an appeal is EUR 640 (in case projected cost of the contract is below international limit) or EUR 1280 (in case projected cost of the contract exceeds international limit), depending on the type of contract. Fees for a judicial complaint are the same amount, EUR 640 and EUR 1280 respectively.

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> Finland

National implementation of EU public procurement directives >

On 22 June 2016 the Finnish Ministry of Economic Affairs and Employment gave the Government Bill to Parliament for the new public procurement legislation to be adopted during 2016. With means of adopting new legislation during 2016, Finnish public procurement legislation is currently undergoing an extensive reform. The new legislation is expected to enter into force during October-November 2016.

The proposal includes that a new act on public procurement and concession contracts (Act on Public Contracts) will be adopted to replace the 2007 Act on Public Contracts, the Decree on Procurement, and the 2011 Act on Electronic Auctions and Dynamic Procurement System. Further and corresponding to the current legislative structure, another act is proposed to cover the corresponding competition procedures of the procurement and concession contracts of units operating in the water and energy supply sectors and transport and postal services sectors, to replace the 2007 Act on Public Contracts in Special Sectors.

The proposal aims, inter alia, to simplify procurement procedures, to improve possibilities of small- and medium-sized enterprises to take part in competing for contracts and to improve the possibility to observe environmental and social viewpoints. The Government Bill also includes rules on competing for contract in arrangements that concern public concession contracts.

The main changes will concern new competition procedures, incentives and support for dividing procurements into parts (not, however, obligatory), taking into account the qualitative viewpoints of procurements and electric means of communication related to procedures.

With regard the tender processes that exceed the EU thresholds the coming legislation will widely correspond to the directives (copy/paste).

The above mentioned governmental proposal will make the current procedures of national procurement significantly simpler. Further, the national threshold values will be raised so that for example the national threshold value of procurement of services and supplies will be doubled compared to the current level (from EUR 30,000.00 to EUR 60,000.00).



National public procurement remedies >

In Finland, complaints regarding the procurement are processed by the Finnish Market Court. However, the Government Bill includes that the appeal of Market Court decisions to Finnish Supreme Administrative Court would only be possible based on and after the Supreme Administrative Court's decision.

The Government Bill includes a new procedure related to the supervision of public contracts and the authorization for the Finnish Consumer and Competition Authority to supervise the compliance of the rules related to public contracts.

The annual number of decisions given by the Finnish Market Court is more than 500 (561 decisions in 2015).

The time limit for complaint to Market Court is 14 days calculated from the receipt of the Public tender decision. The average time for the Finnish Market Court to give its decision to a complaint regarding public procurement matters is approximately six months (five to seven months in 2015). However, in many cases the Market Court proceedings will take approximately 12 months or longer.

From 1 January 2016 onwards the fee for the Market Court complaint is EUR 2,000.00. However, in case the value of the Public Contract exceeds EUR 1 million the fee is EUR 4,000.00 and in case the value exceeds EUR 10 million the fee is EUR 6,000.00.

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> France

National implementation of EU public procurement directives >

On 23 July 2015 the French government adopted an ordinance to implement the directives (namely 2014/24 and 2014/25) on public procurement. A decree was adopted on 25 March 2016 to specify some of the provisions included in the ordinance. Both entered into force on 1 April 2016.

On 29 January 2016 the French government adopted an ordinance to implement the directive (2014/23) on the award of concession contracts. A decree was adopted on 1 February 2016 to specify some of the dispositions included in the ordinance. Both acts entered in force on 1 April 2016.

Until 2016, the French rules on public procurement law and concessions were scattered in different texts such as, for example, the Code général des collectivités territoriales and the public procurement code ("Code des marchés publics") or the Loi "Sapin" of 29 January 1993. The adoption of the directives and their implementation into the French legal system might result by 2018 in the adoption of a single Code ("Code de la commande publique") reuniting all the prescriptions applicable to public procurement and concessions contracts which are now dispatched in the four texts mentioned above.

The French government traditionally does not use the copy/paste approach but rather implements the directives in a detailed way. The current implementation does not derive from this tradition. However, there is a new tendency to follow as closely as possible the (more) detailed directives.

The main change concerns the flexibility allowed by the new directive 2014/24 on public contracts dealing with the award procedures, both for the competitive dialogue and the negotiated procedures. The government indeed decided to implement this flexibility whereas negotiated procedures are usually deemed to lack transparency.

There have been no real problems regarding the correct implementation during the process of implementation but some issues of bad implementation are now raised by commentators. For instance, it is not yet sure if the implementation of the exclusion ground related to the "participation in a criminal organization" is correct, as the French implementation includes criminal offences that may go beyond the concept. Other exclusion grounds may raise concerns on the contrary by lacking implementation. For example, two exclusion grounds are not expressly implemented in the Ordinance of 23 July 2015: "where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable" and "where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59". They might be included in other exclusion grounds but this is questionable.



To conclude, the implementation seems to be compatible with the directives, generally speaking, but it remains to be checked if this is the case each time an article of the directive has to be implemented.

The directives implementation does involve additional local procurement rules. It was already and is still the case regarding contract notices below the European thresholds but above 90 000 euros: the model of contract notice and the location of publications are set in a detailed manner. Also, for regional and local authorities, the contract award is decided by a commission (of five or six members) that mirrors the composition of the regional or local council. Finally, for PPP contracts, i.e. privately financed public procurement contracts, the Ordinance is very restrictive: those PPP contracts are allowed above specific thresholds (10 million euros or sometimes 5 or 2) and only if it is proved that they are more efficient than usual (i.e. publicly funded) public procurement contracts.

Another example concerns the over-implementation (also called "gold plating") of Article 73(b) of the directive 2014/24 on termination of contracts: in the directive, the termination of a public contract by the contracting authority is at least allowed when "the contractor has, at the time of contract award, been in one of the situations referred to in Article 57(1) and should therefore have been excluded from the procurement procedure". The ordinance of 23 July 2015 extended this possibility of termination to any exclusion grounds and not only 57(1), including if the exclusion ground appears during the contract implementation.



> France

National public procurement remedies >

In France, procurement complaints can be filed in front of an administrative court of first instance ("Tribunal administratif") of the location of the contracting authority. There are 42 administrative courts of first instance in France. The judgement can be challenged before the administrative courts of appeal and then before the Conseil d'Etat, the supreme court dealing with administrative matters, except in case of emergency procedures where the Conseil d'Etat has to be seized directly after the judgement of the administrative court of first instance.

It must be noted that by way of exceptions some litigations may end up before civil courts if the public procurement contracts are considered as of civil law nature, which is generally the case when the contracting authority or the contracting entity is a private company.

There has been no recent data on this but a 2006 OECD survey set a figure at 4,000 cases a year dealing with public procurement award. There are no actual reasons why this (important) figure may have been substantially reduced since then. However, one case law may have had a certain impact on the number of complaints: since 2008, the administrative courts permit legal arguments to be raised by the plaintiff only if it has - or is likely to have - suffered from the breach of public procurement rules.

An action can be conducted in front of an administrative court before the signature of the contract if the procurement rules have not been respected through a precontractual remedy called "référé précontractuel". It has to be lodged before the contract is signed so in general during the "standstill period": 16 days after the decision regarding the applicant has been sent by mail or 11 days if the decision is notified by electronic means.



An action to nullify a contract that is concluded contrary to the procurement rules or which contains illegal clauses can be initiated by third parties as long as the contract is not terminated unless there has been a sufficient publicity of the contract signature, in which case the time limit is two months. An exception exists regarding the new contractual remedy ("référé contractuel") introduced to implement the 2007/66/CE directive on review procedures concerning the award of public contracts: the time limit is 31 days after the publication of the contract award decision at the EUOJ or in the absence of the latter, six months starting the day following the signature of the contract.

An action for damages due to the breach of the public procurement procedure can be lodged within a period of four years starting on 1 January following the year the breach occurred.

The action that can be filed before the contract is signed is an emergency procedure - consequently the law requires that the court rules on the case within 20 days, which is generally the case in practice. On appeal before the Conseil d'Etat, it can take two to four months. Regarding the new contractual remedy ("référé contractuel"), the law requires the court to rule within 30 days after the complaint is lodged, which is also respected in practice. Regarding the other remedies, which are not emergency procedures, it usually takes around two years to be ruled before the administrative courts of first instance.

There are no costs of using the remedies system per se. However, the legal fees of lawyers vary from the cases but with regard to a precontractual remedy it is usually between 5,000 and 15,000 euros. It may be above the latter amount for other remedies. It is possible to ask the judge to order the opponent to reimburse the lawyer's costs of the winner of the case.

Who should I contact?



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> Germany

National implementation of EU public procurement directives >

The new 2014 EU directives have been implemented into German law in 2016 and the new regulations entered into force on 18 April 2016.

Germany decided to create a mostly new structured PPL and issued the biggest amendment of PPL in Germany since the implementation of legal protection in procurement matters in 1998.

As always, Germany has chosen not to implement the directives by copy-paste provisions that directly link the EU rules with the German legal system but has modified the directives' provisions to fit the national structure and wording of PPL. Additionally, due to the strong lobby of the construction industry, the PPL rules for the procurement of construction work have been implemented in the Procedures for the Award of Contracts for Construction Services ("VOB/A"), even though most of the regulations are also implemented (with slightly different wording) in the preceded valid German Restriction of Competition Act ("GWB") and the Regulation on the Award of Public Contracts ("VgV").

One of the most significant changes to be introduced by the PPL amendment is the rule that the contracting body is free to choose between open and restricted procedure, from now on giving the contracting body an easy solution to limit the number of participants in a public procurement procedure.

The process of implementation of the EU directives involves the implementation of local procurement rules. The implementation of the directives required the amendment of the German Restriction of Competition Act ("GWB"), Regulation on the Award of Public Contracts ("VgV") and the Procedures for the Award of Contracts for Construction Services ("VOB/A"). For example the ESDP will be applicable next to the national pre-qualification procedures.



National public procurement remedies >

In Germany, an appeal regarding procurement matters is filed with the local Procurement Chamber ("Vergabekammer"), which is a special quasi-arbitration body dedicated to resolving public procurement disputes. The parties to the appeal procedure may subsequently file a complaint with the Higher Regional Court ("Oberlandsgericht") against the chamber's ruling.

Every year there are approximately 900 appeals submitted to the Procurement Chambers. About 200 decisions by the chambers are submitted to the Higher Regional Courts by one of the parties.

In case of any violation a rebuke has to be filed within 10 days after knowledge of the violation to the contracting body. An appeal has to be filed within 15 days after a rebuke to the contracting body has been dismissed.

The final deadline for filing an appeal with the Procurement Chamber (in tenders above the EU thresholds) is ten days from the date of receipt of the public tender decision, if the decision was received by fax or by electronic means, or within 15 days – if it was received in any other manner.

The complaint at the Higher Regional Court against the chamber's ruling shall be filed within 14 days of service of the ruling with written justification.

The appeal is usually considered by the Procurement Chamber within three to six months, depending on the difficulty of the case, at an oral hearing. The contract with the selected bidder cannot be concluded before 14 days after the service of the ruling with written justification. If a complaint will be filed at the Higher Regional Court, in general the court will rule that the contract with the selected bidder cannot be concluded before the ruling is issued by the Higher Regional Court. The complaint is usually also considered by the Higher Regional Court within three to six months.

The fee for filing an appeal is EUR 250.00 to EUR 100,000.00, depending on effort and economic impact of the appeal and will be determined by the Procurement Chamber. The fee for a judicial complaint depends on the value of the tendered contract and will be determined by the same regulations as the court costs in civil cases.

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> Hungary

National implementation of EU public procurement directives >

The Hungarian parliament adopted Act CXLIII of 2015 on Public Procurement (PPA) and by this and their implementing decrees Hungary implemented and transposed into Hungarian law all EU directives, including the 2014 EU directive. The PPA entered into force on 1 November 2015.

Hungary decided to create a completely new PPA instead of amending the previous one. The new act introduced significant restrictions (especially in the case of procurement EU funds), excluded the possibility of a procedure without prior publication also under the HUF 18 million threshold, made compulsory preliminary inspection of the procurement documents, reduced the value limit of a procedure without prior publication of HUF 25 million to HUF 18 million, reduced court fees of the Public Procurement Arbitration Board (in case of public work and public services the overall proportion of performance by subcontractors may not exceed the proportion of performance by the winning tenderer) and tightened the grounds for exclusion of the tenderers.

The new act introduced new legal institutions: European Single Procurement Document, Innovation Partnership, the best price-quality ratio as award criteria, the preference of the electronic procedure etc.

The new PPA implementing the EU directives also introduced new local public procurement rules. For example, a new rule to the procedures below EU thresholds is the summary information concerning the procedure:

- the open, restricted and negotiated procedure shall not be launched with the publication of a notice. The contracting authority shall send a summary information concerning the procedure to be initiated to the Public Procurement Authority, at least five business days before the starting date of the procedure but within a maximum of 12 months, at the electronic location and in the manner foreseen by the Public Procurement Authority and that summary information shall be published by the Public Procurement Authority on its homepage, within one business day following the sending thereof
- the summary information shall specifically contain the name and address of the contracting authority, the contact point where interest in the procedure may be expressed, the subject matter of the contract, the duration of the contract or the deadline of performance/delivery, place of performance/delivery, the reservation as well as the invitation addressed to the economic operators to express their interest in the procedure to the contracting authority by the time limit set in the summary information, noting that the time limit may not be shorter than five business days following the sending of that summary information



National public procurement remedies >

In Hungary, the complaint review system of the public procurement has three stages:

- Preliminary Dispute Settlement is with the contracting authority within three business days after having knowledge of the unlawful event (it is not mandatory)
- procedure at the Public Procurement Arbitration Board: the application may be submitted within 15 days from the date when the applicant learned of the infringement and in cases of infringing decisions closing a procurement procedure within 10 days from the date when the applicant learned of the infringement
- court procedure

Approximately 1,000 appeals are submitted to Public Procurement Arbitration Board per year.

In the case of the Preliminary Dispute Settlement to the contracting authority the time limit is three business days after having knowledge of the unlawful event. Remedy to the Public Procurement Arbitration Board: the application can be submitted within 15 days from the date when the applicant learned of the infringement and in cases of infringing decisions closing a procurement procedure within 10 days from the date when the applicant learned of the infringement.

In the Preliminary Dispute Settlement procedure the decision is to be brought within three business days. The Public Procurement Arbitration Board shall launch the review procedure on the business day following the day of receipt and shall be closed within 30 days.

At the Public Procurement Arbitration Board the filing fee is 0.5% of the estimated value of procurement but min. HUF 200,000 and max. HUF 25 million.

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> Ireland

National implementation of EU public procurement directives >

The Public Sector Directive and the Utilities Directive were both transposed into Irish law on 5 May 2016 by way of domestic Regulations. The new Regulations are deemed to have come into operation on 18 April 2016. The Concession Contracts Directive has not yet been transposed into Irish law. As at today's date, there is no information forthcoming from the government as to the expected transposition date for the Concessions Directive.

Ireland did not implement the Directives by the transposition deadline of 18 April 2016 and, as noted above, the Concessions Directive is still to be implemented. The new Regulations are deemed to operate retrospectively from the transposition deadline.

No consultation draft of the Regulations was issued prior to transposition to allow input on the form of the Regulations from stakeholders or other interested parties. No other form of consultation took place.

The method of implementation in Ireland has largely been a copy-out of the directives.

In contrast to the UK, there has been little by way of guidance from the Irish government on the new Regulations or the changes brought about by their implementation and no national guidance for completion of the ESPD has been produced.

No relevant additional domestic procurement rules have been enacted as a result of implementation although it is worth pointing out that the Department of Public Expenditure and Reform in Ireland did publish a circular in April 2014 (Circular 10/2014) on initiatives to assist SMEs competing for public contracts. This included several of the measures set out in the directives for promoting SME involvement in public sector procurement, including giving consideration to breaking contracts into lots, carrying out market analysis prior to commencing a tender process, and the promotion of electronic tendering.



National public procurement remedies >

In Ireland there is no national body specifically responsible for dealing with procurement complaints. Consequently, court action is required if an aggrieved bidder wishes to challenge a procurement decision. Judicial Review proceedings are taken in the High Court by way of Originating Notice of Motion with grounding affidavit.

A pilot scheme for a new Tender Advisory Service ("TAS") was launched by the Office of Government Procurement in February 2015, with the intention of providing potential suppliers with an informal outlet for raising concerns in relation to live tender processes. Similar in ways to the Mystery Shopper scheme in the UK, the objective of the TAS is to improve communication between suppliers and contracting bodies and to increase professionalism and consistency in the procurement process.

The pilot was due to be reviewed at the end of February 2016. No information on the review has been made available to date.

Formal procurement challenges, by way of court proceedings, are relatively uncommon in Ireland. The costs of mounting a challenge by way of Judicial Review in the High Court are prohibitive for many potential litigants.

Applications to the court must be made within 30 calendar days after the applicant was notified of the decision, or knew or ought to have known of the infringement alleged in the application. This time limit may be extended where the High Court considers that there is good reason to do so.

The length of Judicial Review proceedings varies significantly. Typically, a Judicial Review will take between eight and 12 months from the issue of proceedings until final judgement is given.

The costs of a Judicial Review will vary greatly, depending on the complexity of the case and the subject matter involved. Broadly, applicants can expect to pay professional fees in the region of €50,000, excluding counsel's fees and court stamping fees.

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> Italy

National implementation of EU public procurement directives >

EU public procurement directives have been implemented in the Italian jurisdiction by Legislative Decree 18 April 2016, no. 50. However, this Legislative Decree is not a full transposition of the directives and the implementing regulations are not ready yet.

In the implementation phase the gold-plating prohibition has been introduced ('gold plating' refers to obligations that go beyond EU requirements: an excess of norms, guidelines and procedures accumulated at national, regional and local levels interfering with the expected policy goal): this rule prohibited the delegated implementing body (the government) to introduce further administrative/ bureaucratic tasks on tenderers, compared to the ones already provided by the directives.

However, this prohibition was also complemented by a waiver in order to introduce more 'protective rules' with regard to the separation between planning and performance of the tenders.

Implementing regulations are in the process of being prepared. The Decree assigns ANAC (National Anti-Corruption Authority) the task of drawing up the guidelines, a typical soft law instrument. So far ANAC has opened the consultations on several draft guidelines.



National public procurement remedies >

The Decree assigns a prominent role to the ANAC as the body responsible for dealing with procurement complaints.

Generally, the Italian judicial system is characterized by a high level of litigiousness compared to other European countries. According to ANAC, from 2000 to 2009, around 4.3% of public tenders were closed through a lawsuit. In particular, in the period 2000-2007 the level of litigiousness was at 3.8% and in the following two years grew by 0.5%, corresponding to 805 new lawsuits.

Moreover, the litigiousness rate grows together with the value of the tender, reaching 50% for the biggest tenders.

The new Decree introduces a "special" and tailored procedure set forth in Article 204 of Decree for disputes concerning the admission and exclusion of tenderers. Article 120 of Legislative Decree 104/2010 provides for a 30-day time limit to appeal the exclusion or the admission to a tender.

Pursuant to Article 211 of the Decree 50/2016, ANAC shall issue an opinion within 30 days of a complaint being registered.

In order to file a lawsuit to challenge the admission and/or exclusion of tenderers – that would involve the 'special' procedure (see no. 6) – the standard court fees (excluding lawyers' professional fees) are:

- €2.000,00: when the value of the lawsuit is equal or less than €200.000,00
- €4.000,00: when the value of the lawsuit is between €200.000,00 and €1.000.000,00
- €6.000,00: when the value of the lawsuit is more than €1.000.000,00

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> Latvia

National implementation of EU public procurement directives >

On 12 May 2016 the Latvian parliament adopted legislative acts (implementation laws) amending the public procurement law of Latvia and the law on the procurement for public service providers (Public Utilities' Law or PUL) to transpose the bare minimum of the 2014 EU directives on public procurement. Both legislative acts entered into force on 20 May 2016.

However, deliberations on the new draft public procurement laws continue before the Latvian parliament, and it is expected that by 2017 a new public procurement law and a new law on procurement for public utilities will be enacted.

The EU directives were implemented by amending the PPL and PUL. The PPL have already been amended in previous years to comply with most of the measures required by the directives. Accordingly, only some amendments in the PPL were required.

The main changes introduced by the amendments to the PPL and PUL concerned introduction of the ESPD, changes in the classification of social and other specific services (with regard to the CPV codes), and elaboration of the statutory regulation on exclusion grounds.

The PPL and PUL were amended to comply with the minimum of requirements as set in the EU directives because the Latvian public procurement legislation is currently undergoing an extensive reform and a new PPL is expected to enter into force by 2017. The draft PPL currently being submitted before parliament includes provisions that will raise the national threshold value of goods and services procurements from EUR 4,000.00 to EUR 10,000.00.

Guidelines for ESPD were published by the Procurement Monitoring Bureau on 6 June 2016.



National public procurement remedies >

In Latvia, complaints are processed in various ways, depending of the estimated contract price:

- if the estimated contract price of public supply contracts or service contracts ranges between EUR 4,000 and EUR 42,000 and the estimated contract price of public works contracts is between EUR 14,000 and EUR 170,000, the complaints are processed solely by the Latvian Administrative District Courts. A judgement of the Administrative District Court may be appealed before the Court of Cassation, which is the Department of Administrative Cases of the Supreme Court of Latvia
- if the estimated contract price of public supply contracts or service contracts exceeds EUR 42,000 and the estimated contract price of public works contracts exceeds EUR 170,000, then the complaints are processed in a two-tier system:
  - firstly, complaints must be filed with the Procurement Monitoring Bureau (which is a non-judicial public body within the institutional structure under the Ministry of Finance), which will then form a commission to examine the complaint and the commission will make a decision binding both to the contracting authority and the respective tenderer
  - secondly, the decisions of the Procurement Monitoring Bureau may be appealed before the Administrative District Court. A judgement of the Administrative District Court may be appealed before the Court of Cassation, which is the Department of Administrative Cases of the Supreme Court of Latvia

The annual number of decisions given by the Procurement Monitoring Bureau is more than 500 (559 decisions in 2015), of which under 10% are appealed before the Administrative District Courts (28 appeals in 2015).

All tender documents contain a deadline for seeking remedies. The time limit for a complaint to the Procurement Monitoring Bureau is four to 10 days before the date of submission of the tender (in case the complaint concerns tender regulations or terms and conditions of the draft contract) or 10 or 15 days after the grounded decision is passed by the contracting authority and delivered to the tenderer (depending on means of shipment). The time limit for appeal to the Administrative District Court is usually one month from the date of the decision of the Public Procurement Bureau or, in the event of so-called 'below-threshold tenders' – from the date the tender decision is passed.

Under normal circumstances the Procurement Monitoring Bureau is legally bound to give its decision within a month from the date of submission of the respective application (complaint). In complex cases this term can be extended but it may not exceed four months (in practice, usually the term is extended for no more than two to four weeks). However, the proceedings before the Administrative District Court and the Department of Administrative Cases of the Supreme Court will take at least 12 months or longer.

It is free of charge to submit a complaint to the Procurement Monitoring Bureau. The fee for an appeal to the Administrative District Court and the Department of Administrative Cases of the Supreme Court does not exceed EUR 100.00 per case.

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> Lithuania

National implementation of EU public procurement directives >

On 9 June 2015 the Lithuanian Parliament adopted legislative act (implementation law) amending the Public Procurement Law of Lithuania to transpose 2014/24/EU Directive into Lithuanian law. This legislative act entered into force on 1 January 2016.

The Lithuanian Parliament is currently in the process of adopting the new Law on the Procurement for Public Service Providers to transpose 2014/25/EU Directive into Lithuanian law. It is expected that the new law will be passed at some time during autumn of 2016.

The 2014/24/EU Directive was implemented by amending the Public Procurement Law of Lithuania.

Lithuania has decided to create a new separate Law on the Procurement for Public Service Providers in order to transpose 2014/25/EU Directive into Lithuanian law.

The main changes introduced by the amendments to the Public Procurement Law concerned introduction of the ESPD, compulsory reasons to eliminate the supplier from the tender, selection of the most economically advantageous offer in accordance with ratio of price/cost and quality.

The process of implementation of the EU directives involves the implementation of local procurement rules. The Public Procurement Office is planning to issue the guidelines for ESPD.

The Lithuanian Parliament is currently in the process of adopting the new Law on the Procurement for Public Service Providers to transpose 2014/25/EU Directive into Lithuanian law.

An appeal is filed with the regional courts as a courts of first instance. A supplier wishing to dispute the decisions or actions of the contracting authority prior to awarding of a public contract must first file a claim against the contracting authority.



National public procurement remedies >

Annual number of decisions given by the regional courts is about 200 (205 decisions in 2015).

A supplier shall have the right to file a claim with the contracting authority, file a request or bring a lawsuit before court:

- within 15 days from dispatch to suppliers of a written notice of the contracting authority of the decision adopted by it;
- within 10 days (in the case of simplified procurement procedures – within 5 working days) from publication of a decision adopted by the contracting authority.

Where the contracting authority fails, within the specified time limit, to examine a claim filed with it, the supplier shall have the right to file a request or bring a lawsuit before court within 15 days from the day on which the contracting authority ought to have given a written notice of the taken decision to the supplier which has filed the claim, interested candidates and interested tenderers. A supplier shall have the right to bring a lawsuit for nullification of a public contract within six months from awarding of the public contract.

The proceedings of regional courts shall take at least 12 months or longer.

The fee for an appeal to the regional court is EUR 289 per case.

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> Netherlands

National implementation of EU public procurement directives >

On 21 June 2016 the Dutch parliament adopted the implementation law amending Dutch public procurement law to transpose the 2014 EU directives. The implementation law entered into force on 1 July 2016.

The EU directives will be implemented by amending the PPL. Many of the proposed measures in the directives have already been taken care of in the PPL. The explicit insertion of the principle of proportionality was for example already laid down in the PPL. This implies that the PPL does not need to be amended on these points. In the event the EU directives give member states the discretion to implement additional measures, the Dutch legislator has chosen to change as little as possible to the PPL.

The most significant changes to be introduced by the amendment of the PPL include the introduction of the new procedure for social and other specific services, more room for innovation and sustainability in the tender procedures and the introduction of innovation partnerships.

The implementation of the EU directives also involves the implementation of additional local procurement rules. The amendment of the old PPL requires the amendment of the Dutch Works Procurement Regulations 2012 and the amendment of the Proportionality Guide. Furthermore, the Dutch Single Procurement Document will be replaced by the European Single Procurement Document.



National public procurement remedies >

In the Netherlands, procurement complaints can be filed with a general Dutch court. Also, a complaint can be submitted to the Dutch Procurement Experts Committee. The latter committee is less formal and its decisions are not binding.

Every year there are approximately 130 public procurement law cases before a court in the Netherlands. In addition, between 1 March 2015 and 1 March 2016, 117 complaints have been submitted to the Dutch Procurement Experts Committee. The Dutch Procurement Experts Committee has handled 87 complaints of these 117 complaints.

Most tender documents contain a deadline for seeking remedies, limiting the period for remedies to the obligatory standstill period (20 days).

An action to nullify a contract which is concluded contrary to the (European) procurement rules must, in principle, be initiated within 30 calendar days after the day following the date on which the contracting authority has published a notification of the contract. If no notification was published, an action must be launched within six months after the date on which the contract was concluded.

Remedies are usually sought by preliminary relief proceedings at the civil court. Preliminary relief proceedings may take between six to eight weeks. In the case of an appeal, four to eight months are added to the procedure, depending on whether or not the appeal will be considered as urgent. Other judicial proceedings may take longer: one or two years at the civil court, and another one or two years at the Court of Appeal.

There is no legal time limit for the Dutch Procurement Experts Committee to render a decision. Article 10 (7) of the Regulation of the National Public Procurement Experts Commission stipulates that the Commission should strive for a good balance between speed and due diligence when handling complaints. In practice, handling a complaint takes around 75 days on average.

The fee for a judicial complaint can be up to EUR 3.903, depending on the type of procedure and the value of the matter. It is free to submit a complaint to the Dutch Procurement Experts Committee.

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> Poland

National implementation of EU public procurement directives >

The Polish parliament finally adopted the amendment of the Polish Public Procurement Law on 22 June 2016. The amended PPL came into force on 28 July 2016. This amendment is dedicated to transposition of the new 2014 EU directives into Polish law.

Poland, initially, decided to create a completely new act replacing the current PPL, but in January 2016, following major criticism of the draft of the new law, the government decided to limit the changes to those necessary to implement the EU directives. Nevertheless, the work on the new legislation proved that the implementation requires significant changes affecting practically every aspect of the PPL. As a result, the current amendment, initially called the "small amendment" (to distinguish it from the previously planned "big amendment") amends about three-quarters of the current wording of the Polish Public Procurement Law.

Poland has chosen a mixed method of implementation. The new amendment of PPL consists of many copy-paste provisions that link the EU rules directly with the Polish legal system, however many provisions from the EU directives have been partially modified. Additionally, certain rules of the existing PPL have been modified or added to enable the new provisions to work with the previous public procurement system.

One of the most significant changes to be introduced by the PPL amendment is the rule that the weighting given to the price as one of the award criteria cannot be higher than 60% (with regard to most of the contracting authorities). In consequence, contracting authorities will have to use other criteria such as cost, quality or terms of delivery, giving them a total weighting of at least 40%. This is a result of a current, unsatisfactory implementation of the best value for money principle. Before the amendment the PPL included only an obligation to use some of the criteria other than the price (except for procurement of goods or services that are standard and widely available), without any specific weighting assigned to non-price criteria. This has led to the practice of using award criteria of 99% price and 1% other criteria, usually formulated in a way leading to identical values (for example, a non-price criterion that the guarantee must have a duration of at least 36 months, resulting in all tenderers offering a 36-month guarantee).

The process of implementation of the EU directives involves the implementation of local procurement rules. For example, the Prime Minister issued a new regulation regarding documents and statements that can be required by the contracting authorities to verify the statements included in the ESPD. Additionally, the Public Procurement Office issued a communication on the application of ESPD and a manual regarding filing of ESPD.



National public procurement remedies >

In Poland an appeal concerning public procurement procedures is filed with the National Appeals Chamber, which is a special quasi-arbitration body in Warsaw, dedicated to resolving public procurement disputes. The parties to the appeal procedure may subsequently file a complaint with the court against the chamber's ruling.

Every year there are approximately 3,000 appeals submitted. In consequence of adding new grounds for appeals in tenders below the EU thresholds in the current amendment of the PPL, it is expected that this number will increase.

The deadline for filing an appeal with the National Appeals Chamber (in tenders above the EU thresholds) is 10 days from the date of the dispatch of information on the contracting authority's action or failure to act, if the information was dispatched by fax or by electronic means, or within 15 days – if it was dispatched in any other manner. The deadline is strictly observed, e.g. the appeal against a specific requirement of the contracting authority included in the contract notice may be filed only during 10/15 days from publishing the notice; an appeal filed later will be rejected. The complaint shall be filed with the court against the chamber's ruling within seven days of the service of the ruling with a written justification.

The appeal is usually considered by the National Appeals Chamber within 15 days after filing, at an oral hearing. The contract with the selected bidder cannot be concluded before the ruling is issued by the National Appeal Chamber.

The fee for filing an appeal is EUR 3,500 or EUR 4,700, depending on the type of contract. The fee for a judicial complaint is EUR 17,800 or EUR 23,800 respectively.

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> Romania

National implementation of EU public procurement directives >

The directives were transposed in Romanian law through a legislative package which includes four new laws, having the following domains of applicability: public procurement (the classic procedure), sector procurement, works concessions and services concessions, and remedies and appeals concerning the award of public procurement contracts and concession agreements. The legislative package entered into force on 26 May 2016 and is applicable to procedures initiated after this date and to public procurement contracts concluded after 26 May 2016.

Although the directives were transposed in Romanian law approximately a month over the 18 April 2016 deadline, the surpassing of the deadline was mostly related to the authorities' effort to offer a comprehensive reform in the public procurement sector. As was the case of other jurisdictions, the Romanian regulator largely followed a copy-paste approach when transposing the Directives, in order to ensure a proper correspondence of the issues mentioned at EU level.

The main concern upon the entry into force of the new legislative package was the fact that regulating each specific area of public procurement through a distinct law will further encumber the existing system, rather than simplify it, as intended. Also, criticism arose regarding the effective applicability of the laws, as the latter provide that it is necessary to enact secondary legislation (methodological norms) in order to be properly implemented.

So far, only the methodological norms for the implementation of the law on public procurement and the law on sector procurement entered into force on 6 June 2016, while the government is committed to passing the remaining secondary legislation in the near future. The lack of such norms impedes the effective implementation of the new laws, as their main purpose is to clarify certain procedural issues.



In a nutshell, the main changes brought to the public procurement system relate to the following:

- the change of the thresholds applied to the awarding of public procurement contracts. The new thresholds are:
  - RON 23,227,215 (approx. EUR 5,161,603) for public procurement agreements concerning works
  - RON 600,129 (approx. EUR 133,362) for public procurement agreements concerning products and services
  - RON 3,334,050 (approx. EUR 740,900) for public procurement agreements concerning social services or other specific services
- the introduction of a simplified procedure for contracts which are below the thresholds above and also a new procedure – the partnership for innovation, to be used when the contracting authority identifies the need for the development and acquisition of an innovative product, provided that such need is not met by the existing solutions on the market
- the contract will be awarded to the bidder who submitted the most advantageous offer in economic terms, and the criteria to determine such is: the lowest price, the lowest cost, the best price-quality ratio, the best cost-quality ratio
- the introduction of the European Single Procurement Document, allowing participants in a public procurement procedure to initially submit this document, following which only the winning bidder will be required to submit all the documentation in order to be awarded the contract
- the introduction of the possibility to amend the public procurement contract after awarding, under specific conditions
- as a general rule, participants that are under insolvency or bankruptcy proceedings will be excluded from public procurement procedures



> Romania

The implementation of the Directives in Romanian law requires the enactment of secondary legislation, whose scope is to further detail the procedures set out in the four laws entered into force in May 2016. Part of this secondary legislation was already passed by the government, in early June 2016.

Additionally, the competent authority (the National Agency for Public Tenders) has published a set of guidelines for economic operators to use the ESPD.

The bodies responsible for dealing with procurement complaints under Romanian law remain the National Council for Solving Complaints, and the competent tribunals or courts of appeal. The new legislation regulates a mandatory prior notice procedure, by way of which the economic operator must request to the contracting authority to remove any irregularities prior to filing a complaint to the Council or the relevant courts.

National public procurement remedies >

The Council's annual report provides that 2,559 complaints were registered with the Council in 2015, which is significantly lower than the annual average of 6,000 complaints registered between 2011 - 2013. Approximately 20% of the decisions issued by the Council were further challenged in court.

Under the new legislation, the economic operator must submit to the contracting authority a prior notice within five or ten days, depending on the estimated value of the contract. The contracting authority has three days to respond whether or not it intends to implement remedial measures and seven days to effectively implement such measures.

As of the date the contracting authority provides feedback to the operator's notice (or should have provided its feedback), the latter has five or ten days to submit a challenge (again, depending on the estimated value of the contract) in front of the Council. The Council has in turn twenty days to solve the complaint and, in justified cases, the term may be extended with ten days. Within ten days from communication the parties may file a complaint against the Council's decision with the competent court of appeal.



The complaint is settled definitively by the competent court of appeals within a maximum term of 45 days from filing of the complaint.

Following the procedures set forth by the new legislation, the procedure to solve a complaint should not take longer than four months, taking into account the full complaint procedure, starting from the prior notice submitted to the contracting authority and up to the final decision of the court of appeal. In contrast, under the previous legislation, the courts were not bound by a mandatory timeframe to solve a complaint against the Council's decisions, which theoretically could lead to longer timeframes – in practice however matters regarding public procurement were dealt with more swiftly than others.

Contrary to the previous legislation, the new legislation does not require the economic operators to constitute a security for good conduct prior to filing a challenge with the Council.

Without taking into account legal fees and other experts' fees, complaints against the Council's decision are subject to stamp duty calculated on the basis of the estimated value of the contract. For example, if the value of the contract is estimated to be up to RON 450,000 (EUR 100,000), the stamp duty will be of 2% of the estimated value. Any procedure which may not be estimated monetarily is subject to a stamp duty of RON 450 (EUR 100).

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> Slovakia

National implementation of EU public procurement directives >

The Slovak parliament has already implemented the directives in the form of a new Public Procurement Act (PPA). The new act entered into force on 18 April 2016.

Slovakia adopted a completely new act replacing the previous legislation in order to implement the directives. At first, a discussion took place about whether to amend the previous act or adopt a new legislation. The legislator chose to adopt a completely new act to maintain all the changes included in the directives.

The new PPA implemented most parts of the directives using a copy-paste method. However, some provisions governing the procedure of public procurement and the revision procedures are stipulated in the PPA more strictly or in more detail than in the directives. The main areas that are regulated in the PPA differently from the directives are exclusion grounds, the sanctions and conditions for excluding the contractor from further participation in public procurement procedures, procedure regarding under-limit contracts and low-value contracts, dynamic purchasing systems, selection criteria and the revision procedures (procurement complaints).

The main changes resulting from the implementation of the directives involve the contract award procedure, preliminary market consultations, prior involvement of candidates or tenderers, ESPD, obligation to enforce smaller companies by subdividing the contracts as well as changes in the legal protection area and numerous clarifications.

After the process of implementation of the directives, several local procurement rules were issued reflecting the obligations arising from the new act. More specifically, the Office for Public Procurement (OPP) issued six regulations regarding:

- information to be included in notices
- application of ESPD
- system certification for the electronic auction
- financial limits for the above-limit contracts
- the method of calculating the final assessment mark for the purpose of drawing up references
- types of competition in architecture, urban planning and civil engineering, content of the competition terms and the activities of the jury

Besides the regulations, the OPP regularly issues various guidelines and recommendations on the provisions of the new act. These documents along with the regulations are published on the OPP website in Slovak language: http://www.uvo.gov.sk/.



National public procurement remedies >

In Slovakia the main body that is responsible for dealing with procurement complaints (revision procedures) is the OPP. Parties to the revision procedure may subsequently file a lawsuit with the respective Slovak court.

The number of objections submitted to the OPP amounts to 500 every year. The number of court proceedings is unknown.

The deadline for filing an objection with the OPP is 10 days from the date of dispatch of information on the contracting authority's action or failure to act against specific violation of the public procurement procedure, or against refusal of a complaint or not dealing with the complaint by the contracting authority.

The OPP shall rule on the objection within 30 days after receipt of all necessary documentation and payment of the required deposit.

The appeal against the ruling of the OPP is considered by the OPP board within 45 days after filing. The appeal procedure is linked to an additional deposit. If the OPP board rejects the appeal, an action with the court against the final OPP decision shall be filed within 30 days after delivery of the ruling.

The proceeding before the OPP may take several months. Court proceedings last up to several years.

Filing of objections is also linked to the payment of a deposit, which has to be credited to the OPP's account at the latest on the next working day following expiration of the period determined for delivery of the objections. The amount of the deposit depends on the contract and the contract value, and ranges from EUR 600.00 to 150,000.00. Should the OPP reject the objections, the deposit becomes the state budget income. The amount of the deposit for filing an appeal with the OPP board ranges from EUR 300.00 to 6,000.00.

The court fee for an action against the final OPP ruling is EUR 70.00.

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> Spain

National implementation of EU public procurement directives >

The directives have not been implemented yet in Spain. They will be implemented by a new Spanish Public Procurement Act and the Spanish government has elaborated a draft bill but the parliamentary procedure in order to become law is still pending.

Considering that the new Spanish parliament has not been formed after the last general elections held on 26 June 2016, the implementation is not expected shortly.

Spain has decided to create a completely new Public Procurement Act replacing the current one. That method takes longer and could involve legal issues, such as the direct effect of non-transposed directives recognised by courts.

Among the changes to be introduced by the new regulation, what is especially remarkable is the efficiency improvement of public procurement, by accelerating the processing of the procedures (promoting electronic procurement and sworn statements). It is also remarkable the inclusion of certain subjects under the scope of the new regulation, such as political parties, trade unions and business organizations (when their funding is mainly public), as well as the introduction of incentives for those contracts divided into lots (favouring SMEs' access to public contracts). Also, the new regulation restricts the application of the negotiated procedure without publicity and creates new procedures (partnership programme for innovation or simplified open procedure).

The process of implementation of the EU directives involves the implementation of local procurement rules. As an example, a new regulation is foreseen regarding documents and statements that can be required by the contracting authorities to verify the statements, in accordance with a model included in the bidding documents and similar to the ESPD.



National public procurement remedies >

In Spain, procurement complaints can be filed before an administrative tribunal of contractual complaints, which is a special administrative body created specifically to solve some public procurement disputes, and whose decisions may be subsequently appealed before judicial courts. Also, procurement complaints can be submitted directly to the judicial courts.

Approximately 2,000 appeals on public procurement matters are submitted every year (in this regard, it should be noted that the central tribunal of contractual complaints has issued more than 1,000 resolutions in 2015). Considering that the special appeal on contracting in the new Act will be compulsory and not optional, this number is expected to increase.

The deadline for appealing before the administrative tribunals of contractual complaints is 15 working days, and before judicial courts is two months. These periods of time start counting from the day following the date of publication or notification of the challenged administrative action or resolution. Both deadlines are strictly observed, thus appeals filed later will be rejected.

The appeal is usually considered by the administrative tribunals of contractual complaints within one or two months on average after filing. Judicial proceedings may take two years initially, and another one or two years if the ruling is subsequently appealed before the High Court.

There are no costs for filing an appeal before administrative tribunals of contractual complaints. The fee for a judicial complaint depends on the value of the matter (with a maximum limit of EU 10,000).

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> Sweden

National implementation of EU public procurement directives >

The Swedish government is in the process of amending The Public Procurement Act to transpose the new 2014 EU directives into Swedish law. This process is expected to be finalized by 1 January 2017.

The Swedish government presented its governmental legislative proposals on 28 June 2016 and these proposals are likely to pass parliament.

The directives were supposed to be implemented by 18 April 2016. However, Sweden did not manage to implement them on time and the process is expected to be finalized by 1 January 2017. The delay of the implementation entails that certain conditions in the directives can have direct effect.

Sweden has chosen to replace the existing procurement laws by creating two new acts. These new acts consist of many copy-paste provisions that directly link the EU rules with the Swedish legal system for procurement. This has been seen to be the most effective so that the directives should be considered sufficiently incorporated.

There are several significant changes in procurement law because of the implementation. The main change is the completely new act regarding concessions that will be introduced into Swedish procurement law. Before "byggkoncessioner" were regulated but the "tjänstekoncessioner" were excluded, but this new act will regulate both "byggkoncessioner" and "tjänstekoncessioner".

Smaller but significant changes because of the implementation are that the split between A and B services will disappear and a more detailed regulation will be introduced regarding which internal contracts are exempted and which changes are possible to make within contracts without conducting a new procurement.

In addition, it will in practice basically become mandatory to conduct the procurements electronically.

The process of implementation of the EU directives involves the implementation of local procurement rules. As an example, a new rule will be issued that gives the party giving an offer the opportunity to submit a self-declaration about their suitability. The declaration must be submitted in a standard form that the European Commission has established. A self-declaration submitted in this standard form has to be accepted by the contracting authorities as preliminary assurance that none of the exclusion criteria are met and that all demanded requirements are met by the party. A self-declaration submitted in this standard form is reusable.

In addition, various other legislative acts will as a consequence need to be amended.



National public procurement remedies >

In Sweden an application for a review of procurement is made to the Administrative Court. The application shall be made to the Administrative Court in the jurisdiction where the contracting authority is domiciled.

A party may request a review if the party considers that the contracting authority has violated the law and if this can cause damage to the party. In addition, the court can also review the validity of a concluded contract.

The parties to the review procedure may subsequently file a complaint with the Administrative Court of Appeal against the Administrative Court's ruling.

In addition, certain claims for damages are handled by the ordinary civil courts.

Every year there are approximately 1,300 appeals submitted, which roughly corresponds to about 7% of all procurements.

The deadline for filing a review with the Administrative Court is 10 days from the dispatch of information on the contracting authority's action or failure to act if the information was dispatched electronically. If it was dispatched in any other way the deadline is 15 days. An application that is received too late will not be subject for adjudication.

A complaint to the Administrative Court of Appeal against the Administrative Court's ruling shall be made within three weeks. An application for a review of the validity of a contract shall in general be filed with the Administrative Court within six months from the time the contract was concluded.

The average processing time for a review case within the Administrative Court is 1.9 months. It is important that the case proceeds quickly since the contracting party may not finalize the agreement until the case is closed.

There are no official fees for using the remedies system, however, it is normally crucial to instruct legal advisors and thus there will typically be costs for legal services. These costs vary depending on the complexity of the case and the outcome of any litigation.

Who should I contact?



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> Switzerland

National implementation of EU public procurement directives >

As Switzerland is not an EU member state, EU directives on public procurement do not apply. However, Switzerland has ratified the WTO Government Procurement Agreement (GPA) and the European Community and the Swiss Confederation concluded in 1999 an agreement on certain aspects of government procurement, which expands the scope of the GPA between the EU member states and Switzerland. Swiss courts do consult ECJ prejudices as a source of inspiration for a specific legal question.

Swiss procurement legislation is highly fragmented. In accordance with the Swiss political structure, domestically, there are three different levels of rule-making: federal, state (called "Cantons") and municipal. Apart from federal legislation, all 26 Cantons have individual procurement regimes which are harmonized to a certain degree through the Inter-Cantonal Agreement of 25 November 1994/15 March 2001 on Public Procurement (ICAPP).

Currently, Swiss procurement law is under revision due to the necessary implementation of the revised GPA 2012 into federal and cantonal legislation. With regard to the objectives of the revised EU directives on the one hand and the revision of the Swiss public procurement system on the other, the introduction of certain new regulations in both systems is similar.



National public procurement remedies >

In Switzerland, on the federal level, the Federal Administrative Court of Switzerland is competent to deal with procurement complaints.

Regarding cantonal procurement decisions, the respective cantonal procedural laws apply. In most cantons, there is only one cantonal level of jurisdiction. The canton of Berne has a two-stage procedure, however.

Judgements of both the Administrative Court as well as the highest cantonal courts can be brought to the Federal Court of Switzerland as an extraordinary appeal authority.

There were between 400 - 450 decisions in 2014 and 2015.

For the federal procedure, the appeal must be filed within 20 days of notification of the ruling. Regarding cantonal procedures, the appeal must be filed within 10 days of notification of the ruling. In both cases, the appeal does not normally have a suspensive effect. It may be granted upon request, however, if it is based on substantial reasons.

The average time for Swiss courts to give a decision on a complaint regarding the public procurement matters is approximately 12 to 24 months depending on the complexity of the case.

Court fees mainly depend on the value of a claim and are set out in a tariff. Fees range from CHF 200–50'000 for a corresponding value of claim between CHF 0 and 5'000'000 (e.g. for a value of claim of up to CHF 100'000, a fee of CHF 1'500 applies). The courts have some flexibility if the case is more complex than expressed only in terms of its monetary value.

Additionally, the courts grant the prevailing party a compensation for the incurred expenses. This mainly concerns the salary of the lawyer but also other expenses such as translations, travel or accommodation.

The procedural costs normally have to be paid by the appellate authority. In certain cases, the costs may be imposed on a successful party, e.g. if the costs were incurred through a violation of procedural duties.

Who should I contact?



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> United Kingdom

National implementation of EU public procurement directives >

The UK was the first EU member state to implement Classic Directive. The implementing legislation, The Public Contracts Regulations 2015 ("PCR"), came into force on 26 February 2015. Early implementation was designed to enable UK public bodies to take advantage of the greater flexibilities offered by the new public procurement rules. On the contrary, Utility Directive and Concessions Directive overall provide for greater regulation and on that basis the UK decided to implement these directives on the latest possible implementation date, namely, 18 April 2016. The implementing regulations are: The Concession Contracts Regulations 2016 and The Utilities Contracts Regulations 2016.

The implementing legislation referred to above apply to the whole of the UK other than Scotland which has enacted its own separate implementing legislation.

The UK implementation was based principally on a copy-paste approach. Where the 2014 directives provide for options, the UK has opted for the least onerous one. At the same time, the UK chose to implement additional "national" procurement rules, which go beyond the requirements of Classic Directive. These additional provisions seek primarily to facilitate SME access to the public procurement market.

Separately, there have been some problems with implementation, including as regards the implementation of the substantive modification provisions and the transitional provisions in the legislation. These issues have now been rectified by means of amending legislation.

As noted above, the UK has implemented additional "national" provisions (the so-called "Lord Young reforms") which seek to facilitate SME access to the public procurement market. For example, such national obligations include a requirement for contracting authorities to insert provisions in all public contracts to ensure prompt (within 30 days) payment through the supply chain of undisputed invoices. The rules also introduce a requirement for contracting authorities to publish on a new national portal ("contracts finder") their contract award requirements and to dispense with a qualification stage for certain below-the-thresholds contract awards.



National public procurement remedies >

In the UK, courts are responsible for dealing with claims for breaches of procurement legislation. There is no specialist tribunal system for procurement complaints, but the UK government has implemented the so-called "mystery shopper scheme" which allows suppliers to complain to the government about aspects of procurement procedures carried out by public bodies. The government may then investigate such complaints further and has the power, under newly introduced legislation, to direct those public bodies to take action to rectify potential breaches of procurement legislation.

The number of claims that actually reach the courts has remained consistently relatively low over the years with a figure of between 10-20 reported cases each year.

Proceedings must be brought in the court within 30 days from the date when the economic operator knew or ought to have known that grounds for starting proceedings had arisen. That period may be extended by the court with good reason up to a maximum period of three months. In line with EU law requirements, the limitation period for an ineffectiveness order is six months from the day after the conclusion of a relevant contract. This period is reduced to 30 days in specific circumstances, including where a voluntary contract award notice is published (and the ineffectiveness remedy is not available in circumstances where a valid voluntary ex-ante transparency notice is published).

Litigation in the High Court tends to be long and can take nine to 12 months for cases to be dealt with. Increasingly. however, courts seek to hear procurement claims on the basis of expedited proceedings which means that a case may be disposed of within a lesser period of time, sometimes within months.

Costs of bringing a procurement claim in the courts can easily run into the hundreds of thousands of pounds. Also, in circumstances where the court agrees to maintain an automatic suspension, it would normally require the claimant to provide a cross-undertaking in damages. This essentially means that, if the claimant is unsuccessful, the claimant would be liable for any damages suffered by the defending contracting authority as a result of the delay in the performance of the contract brought about by the unsuccessful procurement challenge.

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