Interim Relief and Suspensive Effect
Including Standstill Period

Monday 11 April 2011
London

Regulatory Objective

1. Suspensive Effect

2. Interim Measures

3. Standstill Period
   a. Period
   b. Derogations
Regulatory Objective of Directive 2007/66/EC

Amendments to Council Directives 89/665/EEC and 92/13/EEC in order to improve the effectiveness of review procedures concerning the award of public contracts

In recital (28) the objective is mentioned:

“Strengthening the effectiveness of national review procedures should encourage those concerned to make greater use of the possibilities for review by way of interlocutory procedure before the conclusion of a contract...”

1. First Element: Suspensive Effect

Art. 2 Directive 2007/66/EC:

(para. 3) "When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review."

(para. 4) "Except where provided for in paragraph 3 ... review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate..."
### Jurisdiction at first instance for interim measures

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<tr>
<th>Special review bodies</th>
<th>Courts of law</th>
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<tbody>
<tr>
<td><strong>Romania:</strong> The National Council for Solving Legal Disputes (The Council)</td>
<td><strong>France:</strong> Administrative Court in general: tribunaux administratifs</td>
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<td><strong>Germany:</strong> The Procurement tribunals (also called review chambers)</td>
<td><strong>UK:</strong> Administrative Court which forms part of the Queen’s Bench Division of the High Court</td>
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<td><strong>Denmark:</strong> The Complaint Board for Public Procurement</td>
<td><strong>Italy:</strong> Administrative Court TAR</td>
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### Automatic suspensive effect vs. No automatic suspensive effect

| **France:** Suspension is automatic within the référe précontractuel, but limited just to the signature of the contract, not the rest of the awarding procedure. | **Romania** used to have an automatic suspensive effect, but abolished it due to detrimental experiences. Suspensive effect must now be granted by the review body. |
| **Germany:** Automatic suspensive effect (§ 115 para. 1 GWB) by the official request for review against each decision during the awarding procedure | |
| **Italy:** Complaint against the award of the contract (Art. 10ter of p.p.code) | |
| **UK:** “Contract making suspended by challenge to award decision” (provision title in Reg. 47G PCR 2009) | |
| **Denmark:** Complaint to the Complaints Board has automatic suspensive effect if it is filed in the standstill period. | |
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2. Second Element: Interim Measures

Earliest possible access to interim relief with a wide frame for member states to regulate the criteria which have to be met

Art. 2 Directive 2007/66/EC:

(para. 1) “Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned,…”

(para. 5) “Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.”

Interim measures by aggrieved bidders

Romania: Review body (the Council) is enabled to grant interim relief within three days after a corresponding request.

Denmark: Interim measures can be granted, but the applicant’s case has to meet a very rigid three-condition-test, consisting of the elements prima-facie-case, urgency and predominant interest.

France: If no référend précontractuel which has an automatic suspensive effect has been initiated, the bidder may apply for référend suspension which has to be combined with other remedies at the main proceedings. Besides, référend provision is one of the rare remedies which enables the claimant to seek for interim payment.
Interim measures by aggrieved bidders

**Germany**: Due to the automatic suspensive effect (§ 115 para. 1 GWB) evoked by the official request for review at the Procurement tribunal at first instance as well as at second instance (§ 118 para. 1 S. 1 GWB), aggrieved bidder’s have no further interest for interim measures.

**UK**: The same seems to apply to the UK, see Regulation 47G Public Contracts Regulations 2009:

“(1) (a) Where proceedings are started in respect of a contracting authority’s decision to award the contract;
(b) The contract has not been entered into,

the starting of the proceedings requires the contracting authority to refrain from entering into the contract.”

Interim measures by the favoured bidder

If the law of the member state provides for automatic suspensive effect, can it be removed?

**Germany and the UK**

• Both legal systems provide for remedies which entitle the private entity who is in favour of the awarding decision to seek the permission for concluding the contract (Germany: § 115 para. 2 GWB/ § 121 para. 1 GWB) (UK: Reg. 47H and Reg. 45H Public Contracts Regulations 2009).

• But it is important to bear in mind that these procedures have no relevance in Germany as the time limit of five weeks for a decision of the reviewing body on the main proceedings has proved to be sufficient for protecting the favoured bidder’s interest.
3. Third Element: Standstill Period

Art. 2a Directive 2007/66/EC:

(para. 2) "A contract may not be concluded following the decision to award a contract...before the expiry of a period of at least 10 calendar days...if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days...."

<table>
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<tr>
<th>Larger period</th>
<th>Minimum period</th>
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<tr>
<td>Italy: 35 days</td>
<td>All other countries</td>
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Communication of the award decision

Art. 2a Directive 2007/66/EC:

(para. 2 at the end) “The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

- a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive, and,

- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.”
No specifics | Special rule: Confining the reveal of relevant reasons
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All other countries | France: Information may not be disclosed if either the disclosure would be
a) contrary to law,
b) contrary to public interest,
c) could prejudice fair competition between companies.

**Article 2b Directive 2007/66/EC: Derogations from the standstill period**

“Member States may provide that the (standstill) periods .... do not apply in the following cases:

(a) if Directive 2004/18/EC does not require prior publication of a contract notice in the Official Journal of the European Union;

(b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;

(c) in the case of a contract based on a framework agreement as provided for in Article 32 of Directive 2004/18/EC and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 33 of that Directive.”
**Adopting all derogations** | **Partial use of the derogations**  
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Denmark/France | Romania/Germany: Partial use of Art. 2b (a)  
Italy: Art. 2b (c) has been implemented

Discussants from all countries,  
Now, it’s your turn!