

PUBLIC PROCUREMENT REVIEW AND REMEDIES SYSTEMS International Conference, Dubrovnik, 24-25 May 2007

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

Substantial common ground exists in the review and remedies systems of the 27 Member States, but also considerable differences. These similarities and differences relate to institutional frameworks, available remedies, legal frameworks regulating scope and procedure, and review culture.

In response to the demand of beneficiary countries, Sigma organised in Dubrovnik on 24-25 May, in co-ordination with the State Commission for the Control of Public Procurement Procedures in Croatia, an international conference for senior officials from the CARDS region on the topic of public procurement review and remedies systems. The synopses of three chosen presentations and links to all presentations given by procurement experts to the conference are included in this issue of *Update*.

Also included in this issue are synopses of two comparative studies recently published as Sigma Papers: the first focuses on central public procurement structures and capacity in EU Member States and the second on review and remedies systems in the EU.

[OUR WEBSITE](#)

Articles in this Issue:

► ***Central Public Procurement Structures and Capacity in EU Member States (Sigma Paper No. 40, 2007)***

Sigma's in-depth study of central public procurement structures in EU Member States analyses their functions, structure, status within the government, and capacity. Separate overviews of procurement systems in the 22 participating Member States were prepared on the basis of national responses to a detailed questionnaire. A comparative review analyses the various models in place.

[Synopsis of Sigma Paper No. 40](#)

► ***Public Procurement Review and Remedies Systems in the European Union (Sigma Paper No. 41, 2007)***

This Sigma study examines how public procurement review and remedies systems are organised in EU Member States. Particular emphasis is placed on the availability of remedies as part of the implementation of the relevant EC Directives, from both legal and institutional perspectives. 24 Member States participated in the study.

[Synopsis of Sigma Paper No. 41](#)

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Dubrovnik Conference Presentations:

► ***Factors contributing to the Effectiveness of a Remedy System***

(Peter Braun, Hölters & Elsing, Frankfurt, Germany)

A number of factors contributing to the effectiveness of a remedy system can be deduced from the experience of the UK and Germany.

A review of public procurement procedures has to be readily accessible and provide measures that will allow bidders to hinder the award of a contract. Disgruntled participants in award procedures should be acquainted with the available remedy procedures, and they should also be provided with swift review procedures that give them a realistic chance of winning a case. Especially in the UK, high litigation costs have proved to be a substantial impediment to the review of contract award procedures.

Apart from legal and economic factors, which bidders will consider in their decision (cost-benefit analysis) to lodge a complaint, studies have revealed cultural inhibitions with regard to the (in)appropriateness of litigating against valued public sector clients.

[Link to Peter Braun's presentation](#)

► ***Trends and Features in the Review and Remedies System in Germany***

(Gabriele Herlemann, Competition Authority, Germany)

Two major aspects related to the review and remedies procedure in the German public procurement system currently play a dominant, if not "the" dominant role in litigation decisions.

Germany has adapted its national law to the general framework provided by the EC Directives. Basically the German review system is divided into two parts, based on the thresholds introduced by the Directives. Public procurement law, and especially the review procedure, is integrated into competition law only once a certain threshold has been reached. The public procurement tribunals that are in charge in the first instance are not courts; they are judicial in character but are part of the administration. The major requirements for initiating proceedings in these tribunals are, first, an interest in obtaining a particular public contract and the risk of being harmed by an alleged infringement; and second, the previous notification to the public contracting authority of the alleged infringement. According to the jurisdiction of the higher regional courts and the Federal Supreme Court, these two formal requirements have become decisive in many litigations, since review proceedings will only be initiated when these requirements have been met.

[Link to Gabrielle Herlemann's presentation](#)

► ***Remedies Issues in relation to the Implementation of EC Directives 2004/17 and 2004/18***
(Peter Trepte, Counsel, Grayston & Company, Brussels, Belgium)

EC Directives 2004/17 and 2004/18 introduce some novel concepts, such as public sector framework arrangements, public sector competitive dialogue and new forms of e-procurement, in particular dynamic purchasing systems. These new procedural directives fall within the framework of the two remedies directives adopted in 1989 and 1992, which have been interpreted by the European Court of Justice (ECJ). One decision in particular, the *Alcatel* decision, has had far-reaching effects on the implementation of available EU remedies.

The combination of older remedies directives, jurisprudential development, and the introduction of new concepts in the latest procedural directives raise some issues with regard to the implementation of these remedies. These issues arise essentially as a result of the requirement for effective and rapid review, the fact that the remedies directives are limited to addressing contract award procedures, and the newer ECJ-driven requirement to ensure that breaches of the rules can be challenged following the award but before the conclusion of a contract.

Although it would seem that the remedies directives can be applied to the new concepts introduced in the new procedural directives, consideration should be given to the way in which they are applied.

[Link to Peter Trepte's presentation](#)

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Links to other conference presentations:

- ▶ [**The Review of the Remedies Directives – The Commission’s Perspective**](#)
(Bertrand Carsin, Director, Public Procurement Policy Directorate, DG-MARKT, EC)
- ▶ [**The Capacity to Sue in Public Procurement Redress Procedures**](#)
(Marija Cvrlje, Vice President, State Chairman for the Control of Public Procurement Procedures, Croatia)
- ▶ [**Impact of the Quality of Legal Protection on the Public Procurement Market**](#)
(Tina Eržen, IEDC – Bled School of Management, Slovenia)
- ▶ [**Transparency of Public Institutions and Legal Protection in Procurement**](#)
(Josip Kregar, Professor, School of Law, University of Zagreb, Croatia)
- ▶ [**Some Dilemmas Observed in Public Procurement Procedures**](#)
(Goran Matešić, Chairman, State Commission for the Control of Public Procurement Procedures, Croatia)
- ▶ [**Court Protection in Public Procurement Procedures**](#)
(Srdan Šimac, President, High Commercial Court, Croatia)
- ▶ [**Public Procurement Review and Remedies in EU Member States**](#)
(Martin Trybus, University of Birmingham, UK)
- ▶ [**Legal Protection below the EC Thresholds**](#)
(Martin Trybus, University of Birmingham, UK)
- ▶ [**Private Sector Interests in Legal Protection**](#)
(Tomaž Vesel, First Deputy President, Court of Audit, Slovenia)

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