Consultation on Remedies in Public Procurement

Fields marked with * are mandatory.

There are two Directives laying down remedies in relation to public procurement: Directive 89/665/EEC, which covers the public sector, and Directive 92/13/EEC, which covers the utilities sector. Both Directives were thoroughly amended by Directive 2007/66/EC.

The Remedies Directives require, as regards contracts falling within the scope of the Directives laying down substantive rules on public procurement (Directive 2004/17/EC and Directive 2004/18/EC, which are being replaced by Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU), that decisions taken by contracting authorities or contracting entities may be reviewed effectively and, in particular, as rapidly as possible, on the grounds that such decisions have infringed EU public procurement law. Member States must ensure that the review procedures are available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

The Remedies Directives allow actions to be brought both before the contract is signed (pre-contractual remedies) and after (post-contractual remedies). Pre-contractual remedies are intended to correct the infringement of the public procurement rules in the course of the tendering procedure and in any event, before the contract becomes effective. These include the right of interim measures, a compulsory standstill period and the requirement to suspend the award procedure whilst the appeal is being investigated to prevent the award of the contract. On the other hand, post-contractual remedies aim to declare an existing contract ineffective and/or to provide compensation (mainly damages) to the affected parties after the contract in question has been awarded.

Directive 2007/66/EC obliges the Commission to report to the European Parliament and to the Council on the effectiveness of the Remedies Directives, in particular of the alternative penalties and time limits.

Furthermore, the Commission singled out Directive 2007/66/EC to undergo an evaluation under REFIT (Regulatory Fitness and Performance programme) in 2015. The objective of this evaluation is to assess the functioning of the provisions introduced by Directive 2007/66/EC.

This public consultation should be understood in the context of the above-mentioned report to the Parliament and the Council and evaluation under REFIT.

OBJECTIVE OF THE CONSULTATION

Evaluation of the effectiveness of the provisions of Directive 2007/66/EC on remedies in the field of public procurement

Identity of respondents

*Please indicate your Member State:

Germany

*Please identify yourself:

- (a) Citizen
- (b) Economic operator (e.g. a business)
- (c) Non-profit organisation
- (d) Academia
- (e) Lawyer
- (f) Other private entity (please specify)
- (g) Contracting authority
- (h) Contracting entity
- (i) First instance review body
- (j) Body of appeal against first instance remedy decision
- (k) Court conducting review if applicable in further instance
- (l) Other public authority (please specify)

Other private entity (please specify)

Umbrella Federation of German Industries

Have you been involved in public procurement litigation over the last five years?

- Yes
- No

*Please enter your name/organisation and contact details (address, e-mail, website, phone)

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Register ID number (if you/your organisation is registered in the EU Transparency register)

ID No. 1771817758 - 48

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In the interests of transparency, your contribution will be published on the Commission's website. How do you want it to appear?

- (●) Under the name supplied? (I consent to the publication of all the information in my contribution, and I declare that none of it is subject to copyright restrictions that would prevent publication.)
- ( ) Anonymously? (I consent to the publication of all the information in my contribution except my name/the name of my organisation, and I declare that none of it is subject to copyright restrictions that would prevent publication.
- ( ) No publication - your answer will not be published and in principle will not be considered.

Questions

All questions are optional

1. Have the Remedies Directives as modified by Directive 2007/66/EC helped public procurement process to become:

	Yes	Partly	No
More transparent (i.e. more information is available to all companies about the details of public contracts, how they have been awarded, and how parties may challenge decisions)	●	○	○
Fairer (i.e. companies have the same opportunities to bid for public procurement contracts)	●	○	○
More open and accessible (i.e. there are fewer barriers to companies participating in public procurement contracts, cross border procurement is easier)	●	○	○
More compelling for contracting authorities / entities to comply with the requirements of substantive Public Procurement Directives.	●	○	○

2. In your view, what are the most relevant provisions of the Remedies Directives as modified by Directive 2007/66/EC?

Please grade from 1 to 5, 1 being the least relevant:

	1	2	3	4	5
Automatic debrief to bidders at the time of the contract award decision notice	○	○	○	○	◉
'Standstill period' to be at least 10 days	○	○	○	○	◉
Minimum time limits for applying for a review	○	○	○	○	◉
Suspension of the contract award procedure where review proceedings are initiated	○	○	○	○	◉
The ability of an independent review body to render a contract award ineffective	○	○	○	○	◉
Alternative penalties (the imposition of fines on the contracting authority or the shortening of the duration of the contract)	◉	○	○	○	○
Voluntary *ex ante* transparency notice	○	○	○	◉	○
The possibility to award damages to persons harmed by an infringement	○	○	◉	○	○

3. How long does a review procedure usually last for:
3.1 interim measures?

	Less than 1 month	Between 1 and three months	Between 3 and 6 months	Between 6 and 12 months	More than 1 year
In first instance?	○	◉	○	○	○
In second instance?	○	○	◉	○	○
In third instance?	○	○	○	○	○

3.2 the setting aside of decisions taken unlawfully?

	Less than 1 month	Between 1 and three months	Between 3 and 6 months	Between 6 and 12 months	More than 1 year
In first instance?	○	◉	○	○	○
In second instance?	○	○	◉	○	○
In third instance?	○	○	○	○	○

3.3 damages?

	Less than 1 month	Between 1 and three months	Between 3 and 6 months	Between 6 and 12 months	More than 1 year
In first instance?	○	○	◉	○	○
In second instance?	○	○	○	◉	○
In third instance?	○	○	○	○	◉

3.4 ineffectiveness?

	Less than 1 month	Between 1 and three months	Between 3 and 6 months	Between 6 and 12 months	More than 1 year
In first instance?	○	◉	○	○	○
In second instance?	○	○	◉	○	○
In third instance?	○	○	○	○	○

4. What is/should be the standard for review in public procurement cases in your jurisdiction?

- (●) Exclusively legal matter
- ( ) Legal and technical matters

5. Is there any impact on time and/or standard for review depending on whether the case is dealt by a specialised review body or an ordinary court?

- (●) Yes
- ( ) Partly
- ( ) No

Please give examples

An explicit – and advisable – limitation of the duration of a review procedure, as is stipulated for instance in the German transposition of the EU Remedies Directives for the review procedure in first instance, is easier to be constituted for a non-judicial review body as compared to a formal court, given higher restrictions for time limits of procedures in court due to overall principles of constitutional and procedural law.

In Germany for the first, non-judicial instance of the review procedure the duration of the prodecure is limited by law to five weeks. Only exceptionally, in complex cases, an appropriate prolongation is allowed (see § 113 section 1 of the relevant German „Act against Restraints of Competition“ („Gesetz gegen Wettbewerbsbeschränkungen – GWB“). This rule is basically widely accepted in practice. It provides an essential contribution to avoiding a too long duration of remedies procedures and blockage of procurement and investment decisions.

Nevertheless, a complementary and indispensible condition for the effectiveness of a non-judicial first instance of the review prodecure is that this instance, although not being a court, is shaped very similar to a court. Consequently it is important that it is stipulated by law at national level that the members of these review bodies have to be highly skilled persons and the review body acts independently according to the legal framework. In Germany the chairman or at least one member of the first instance review body needs to possess the qualification of a lawyer and at least one member needs to have expertise in public procurement – cf. § 105 of the German Act against Restraints of Competition.

The basically positive German experiences with the before-mentioned quasi-judicial review bodies in first instance with a limited duration of the review procedure are based on meanwhile several thousand review cases.

6. To what extent are the Remedies Directives as modified by Directive 2007/66/EC sufficiently clear and precise?

- (●) Significantly
- ( ) Moderately
- ( ) Not at all

Please give examples of provisions/notions which are not clear or precise.

We are convinced that the rules of the Remedies Directives are clear and basically well shaped. Especially the principle of „effective review“ laid down in Article 1 of the directives is of fundamental importance and absolutely indispensible for public procurement and the Internal Market as a whole. Certain problems reported in the discussion on the remedies directives, especially concerning a partially too long duration of the procedure, are very often subject to insufficiencies of the relevant national transposition.

Among others, also the rules of the directives on ineffectiveness have to be welcomed with a view to the necessary fight against still ongoing unjustified „direct“ respectively „de facto“ awards without prior publication. Nevertheless the optional exception of „overriding reasons relating to a general interest“ (see for instance Article 2 d para 3 of the Remedies Directive for the award of public contracts) seem to be open to a problematic widening of the scope of this exception in practice, especially regarding „a general interest“. A too wide interpretation of that exception is ciritical as one has to keep in mind that the award has always been illegal in these cases. Insofar a clarification of the exception by way of an interpretative communication of the Commission might be helpful.

7. To what extent do the Remedies Directives as modified by Directive 2007/66/EC balance the interest of economic operators in ensuring the effectiveness of public procurement law and the interest of contracting authorities / entities in limiting frivolous litigation?

- ( ) The balance is too much on the interest of economic operators
- (●) The balance is on the middle
- ( ) The balance is too much on the interest of contracting authorities / entities

Please justify your views.

The directives adequately balance the interests of economic operators and contracting authorities.

In German procurement practice this result is basically also mirrored in practice, given a principally well-functioning review practice.

8. To your knowledge, has the remedy system in your Member State caused delays in the award of public contracts?

- ○ Yes, frequently
- ◉ Only occasionally
- ○ No

What was in your view the main reason for the delay (other than the use of the remedy itself):

- ○ national procedural rules not laid down in the Remedies Directives
- ○ conduct of parties
- ○ ineffectiveness of the national judicial system
- ◉ other (please specify)

Other (please specify)

Given the necessity of an effective review procedure on the one hand and the aim of a quick execution of procurement procedures on the other hand, on has to sum up that in Germany there is principally no considerable delay. In a limited number of cases a higher complexity of the case or individual shortcomings of the actions of the parties may cause a delay. But such a delay may occur in any procedural area and cannnot be seen as proof for specific shortcomings of the EU remedies directives.
Crucial for the overall positive results in Germany are the following three conditions:
- limitation of the review procedure to basically just two instances,
- limitation of the duration of the review procedure in the first instance and
- strict conditions regarding qualification and independence of the rewiew bodies in both instances.

By far most of the delay reported in certain EU Member states is obviuosly subject to insufficiencies of the national legal system respectively missing national provisions to expedite the review procedure.

9. Should interim measures be considered an effective remedy?

- ◉ Yes
- ○ Yes, but only exceptionally
- ○ No

10. Should a standstill period be considered an effective remedy?

- ◉ Yes
- ○ Yes, but only exceptionally
- ○ No

11. Should ineffectiveness be considered an effective remedy, in particular helping to tackle direct awards?

- (●) Yes
- ( ) Yes, but only exceptionally
- ( ) No

12. Should alternative penalties be considered an effective remedy?

- ( ) Yes
- ( ) Yes, but only exceptionally
- (●) No

13. Should damages be considered an effective remedy?

- (●) Yes
- ( ) Yes, but only exceptionally
- ( ) No

14. Do remedies exist for contract below the EU thresholds in your jurisdiction?

- ( ) Yes, they are the same as for contracts above the EU thresholds
- (●) Yes, but they are different from those intended for contracts above the EU thresholds (please specify the differences)
- ( ) No

please specify the differences

In Germany remedies below the thresholds exist to a certain but limited degree. There are no specific rules for the area below the thresholds. The consequence is that it is significantly more difficult to be successful in a remedies procedure below the thresholds as compared to the situation above.

Especially with a view to the interests of small and medium sized companies the question has been raised whether at least some minimum rules for remedies below the threshholds should be set up, eventually with a simplified procedure and an exception for very small procurements.

15. Would alternative dispute resolution (ADR) /mediation prove operational in the context of public procurement disputes?

- (●) Yes
- ( ) No

16. Do court fees apply to public procurement cases in your jurisdiction?

- (●) Yes
- ( ) No

17. Do administrative fees apply to public procurement cases in your jurisdiction?

- (●) Yes
- ( ) No

18. If the answer to questions 16 or 17 is affirmative, would you define the level of fees as dissuasive for users of the review and justice system?

- ( ) Yes (if possible, please specify)
- (●) No

19. Are there any other costs (such as the cost of legal advice and representation) that may have an impact in access to justice in your jurisdiction?

- (●) Yes (if possible, please specify)
- ( ) No

if possible, please specify

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As in other area of legal protection, costs for legal advice and
representation have to be added to the fees for review bodies.
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20. Do you think there are still problems in addressing breaches in EU public procurement law?

- (●) Yes (please briefly describe such problems)
- ( ) No

please briefly describe such problems

In Article 1 of the Remedies Directives it is very clearly stated that the review must not only be conducted effectively but also „as rapidly as possible“. In this regard the directives are significantly clear.

Problems obviously still arise in some countries with insufficient and too long review procedures. As stated above, the reason for these problems does not result from the EU remedies directives but from inappropriate national provisions or maybe also from a structural deficit of national procedural law or practice in these Member States.

Apart from long duration of review procedures in certain Member States we have also faced some further problems in certain Member States. In one case in the past for instance, a problem occured, when only after the award of the contract a complaint was brought up, and although this could have been raised in time during the procurement procedure, a considerable risk came up that the whole contract might have been anulled years after the award. It may be that such cases can no longer occur today. Nevertheless it seems necessary to ensure that risks of that kind are excluded. In this regard it seems necessary that on the one hand time for raising complaints must by no means be too short, but on the other hand some reasonable time limits seem necessary.
In a future perspective it might be helpful to reach common provisions insofar. Fragmentations within the Internal Market regarding such questions may eventually have negative impact on business across the EU.

Additional comments (please specify to which question/questions they relate)

Additional comments of the Federation of German Industries (BDI):

I. General Comments on the EU Remedies Directives

1. EU Remedies Directives indispensable for public procurement and the Internal Market

The EU Remedies Directives are indispensable tools in order to safeguard that public purchasing is compliant in practice with the central goals of the EU directives for public procurement – especially transparency and non-discrimination respectively the fight against unlawful distortions of competition and corruption. These goals are not an end in itself. They are necessary to ensure that public procurement is conducted according to the overall principles of „best value for tax payers money“ in view of public spending and "fair competition" for businesses acting as suppliers in public procurement.

2. „Effective review“ further on essential

The Remedies Directives are further on essential as they clearly stipulate the necessity of an „effective review“. According to the directives it is furthermore necessary that this review has to be carried out „as rapidly as possible“ in accordance with the conditions set out in the directives (see for instance Art. 1 of the remedies directive on procedures for the award of public contracts).

3. Long duration of review procedures in some Member States no deficit of the directives

As far as it is reported from some Member States that review procedures take too long, this cannot be attributed to the directives but is a problem of the national transposition or the relevant national procedural law. If problems of that kind occur repeatedly in a Member State, they will have to be assessed under the aspect of a breach of the rules of the EU Remedies Directives and might be subject of infringement procedures.

4. A reduction of the EU legal remedies would be detrimental

In the past sporadically certain representatives of the communal sector have plead for a reduction of legal remedies in public procurement, either by increasing the thresholds of the directives or by way of reductions of the remedies in substance. Given this background, German Industry – comprising large as well as small and medium sized enterprises from all branches of industries – urges to abstain from any such measure for the reasons stated above.

An increase of the thresholds might not only constitute a breach of the binding, well-reflected rules of the Government Procurement Agreement of the WTO (GPA). Moreover, it would put harm to the necessary protection of transparency and non-discrimination in public procurement across the EU. Apart from that it has to be considered that the thresholds according to present GPA and EU law are already considerably high.

Consequently, given the relatively high thresholds, there has been considerable discussion at Member State level whether at least minimum rules for an effective review procedure below the threshholds should be set up. Insofar it has been discussed whether such basic remedies system below the thresholds might be limited to a simplified procedure, whereby an exception for cases of very small procurements might be established according to „de minimis“ principles. Also these reflections about establishing an effective remedies system below the thresholds clearly show that the present remedies above the EU thresholds should not be decreased in any way.

II. Specific remarks in view of certain questions of the consultation

1. regarding questions no. 3.1, 3.2, and 3.4 (on the duration of the procedure in the different instances)

In the German transposition of the EU remedies Directives basically only two instances are foreseen: In first instance effective and competent administrative procurement review bodies with qualified staff, similar to courts (procurement chambers, „Vergabekammern“), and in second instance specialised senates of the Higher Regional Courts („Vergabebesnate“) as formal courts. Only exceptionally, in cases of diverging opinions of Regional High Courts, the second instance may present the case to the Federal High Court of Justice („Bundesgerichtshof“). This concept of basically only two instances has been established with a view to the effectiveness of the procedure and the quality of the decisions as well as the aim to avoid a too long duration of the procedure.
Only procedures referring to damages are subject to the regular recourse to the courts (civil procedure) with three instances.

2. regarding question no. 4 (on the standard for review – legal and/or technical matters)

As we are not entirely sure about the notion of question no. 4 we would like to explain our understanding and answer as follows:
In our view the standard for a review in a procurement remedies procedure will always have to be an exclusively legal matter, since in a legal remedies procedure by nature only the compliance of a procurement with the legal framework should be subject of the review. It would not seem adeqate that a review body could interfere into decisions of a public purchaser referring to – admissible – technical details of a tender, because such decisions basically fall into the sphere and competence of the purchaser.
Nevertheless an exclusively legal review may contain that all relevant practical – including technical – details of a procurement can be subject to the assessment if in the concrete case procurement law has been violated. This may occur for example in cases of unlawful prescription of a speficif standard which causes a discrimination of certain bidders.

3. regarding questions no. 9 and 10 (on interim measures and standstill periods)

We are not exactly sure about what is meant with questions no. 9 and 10. When opting for „Yes“, we understand our answer in the sense that interim measures are very important in order to reach an adequate remedy. But not alone the interim measure or the standstill period, but a final positive outcome of a remedies procedure constitutes an „effective remedy“.

4. regarding question no. 13 (on damages)

A damage may constitute an effective remedy in cases where it is by no

means possible to correct an unlawful decision within a procurement procedure. Nevertheless, in view of effectiveness a correction of an unlawful measure or decision in the course of a procurement procedure is much more important than a later stipulation of damages.

5. regarding question no. 17 (on the notion of administrative fees)

As „administrative fees“ may be understood in different ways, we would like to explain what we mean when answering „Yes“. It means that in Germany administrative fees apply for the first instance of the remedies procedure before the „procurement chamber“ which acts similar to a court but formally is an administrative review body. Therefore these fees are administrative fees, but might also be qualified as judicial fees in a wider sense. They are not fees with regard to any activities of the contracting authority or another public entity except the review body in first instance.

Contact

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