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Functioning of legal protection measures in EU countries. Key conclusions

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INTRODUCTION

This Report (the "**Report**") was prepared by the Public Procurement Law Association (the "**Association**").

The Association was founded in February 2017 on the initiative of lawyers from international and Polish law firms specializing in public procurement law. The aims of the Association include popularization of legal standards adopted in the European Union on public procurement and concessions law, dissemination of knowledge about regulations on public procurement and concessions in and outside Poland, and conducting comparative and other studies, research and analyses regarding public procurement and concessions law.

In view of the above, the Association has undertaken to prepare an analysis of legal protection measures in EU countries. An effective system of legal protection measures in public procurement should complement regulations on contract award procedures. Without this, a true opening of domestic markets to EU competition may not be possible. The Report, which follows from this analysis, was created based on answers to 29 questions asked in a questionnaire that was sent by the Association members to law firms from 27 European Union member states (their full list can be found at the end of this Report). We have attempted to make this Report practical; thus, apart from questions about legal solutions existing in a given legal order, questions were also asked about their practical functioning. We would like to thank our colleagues from the law firms for their contribution. Without it this Report would not be possible.

The notion of legal protection measures in public procurement, harmonized on the EU level based on the Remedies Directive, is crucial for an effective public procurement system. It is to guarantee transparency and equal treatment by eliminating any behavior contrary to those principles. The best observers of the public procurement market are its participants – that is why the evaluation of the effectiveness of the contractor's right to appeal against defective decisions of contracting authorities is the acid test for the effectiveness of a public procurement system. This right is also particularly important at the stage when an irregularity may be corrected, i.e. at the stage of the contract award procedure.

We should emphasize that the issue of legal protection measures has been recently evaluated by the European Commission, which in January 2017 submitted a report to the European Parliament and the Council. The Commission concluded that there was no need to amend the Remedies Directive, but certain functional imperfections had to be removed and greater convergence of the remedies systems in member states should be achieved.

The European Commission states that " There is currently no EU-wide monitoring and evaluation system of remedies in Member States. Data for remedies actions on public contracts above thresholds brought in each Member State are not collected in a structured, coherent and systemic manner that would allow analyzing the results obtained in an automated and easily comparable way. For this reason, the proper measurement or estimation of the effects of the Remedies Directives is difficult and requires additional actions (e.g. one-off data collection and manual analysis […])"[1].

We hope that this Report becomes one of the elements supporting EU analyses and contributes to supporting this process, especially in the context of the Polish remedies system.

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[1] Report from the Commission to the European Parliament and the Council on effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, amended by directive 2007/66/EC, concerning review procedures in the area of public procurement. SWD(2017) 13 final.

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PREFACE

Report: Functioning of legal protection measures in EU countries. Key conclusions was prepared by the Public Procurement Law Association. The authors are: Piotr Bogdanowicz, Wojciech Hartung and Anna Szymańska. Warszawa 2017.

One of the key issues related to the functioning of the public procurement system is to guarantee contractors the right to inspect the actions of the entity conducting the contract award procedure. The authors of this Report have presented the results of an analysis of the functioning of legal protection measures in EU countries. The professional style and level of the analysis give the conclusions both a theoretical and practical edge. We should note that the method employed to obtain information during the research and some of the conclusions confirm the stance expressed in the Polish legal literature. The questions prepared concern the most important issues of the functioning of that part of the public procurement law system, that lays down subsequent stages of procedure as part of resorting to legal protection measures. A positive aspect is that the research covers both public procurement and concessions.

Special attention should be paid to the recommendations for Poland proposed by the Authors. Those recommendations are not only a result of the Authors' intellectual considerations; they primarily result from the analysis carried out. This means that they constitute an additional legal and comparative asset and may form an excellent basis for unifying appeal procedures in EU countries. The basic virtue of this study, however, is that it may contribute to the process of preparing the new act regulating public procurement.

The first group of conclusions concerns issues regarding the system, e.g.: - introduction of an obligatory 3-member adjudicating panel; - introduction of mechanisms enabling broader use of experts' assistance; - appointment of one regional court for all public procurement cases; - granting the parties to the proceedings the right to file a last-resort appeal to the Supreme Court – introduction of solutions eliminating prevalence of a deadline over the "quality of the judgment"; - reduction of registration fees and charges in appeal and complaint procedures.

The second group of conclusions concerns the same procedure and includes: - introduction of the obligation to provide pleadings to the parties within a specified time limit (before the hearing); - extention of the time limit for filing a complaint with the court; - extention of the time limit of the prohibition against execution of the contract; - granting the parties a right to apply for an injunction in the form of prohibition on contract execution; - introducing order to regulations on the time limit for filing a complaint with the court by the President of the PPO; - introduction of the possibility to record a hearing.

The above system recommendations regarding the number of adjudicating panel members are related to the need to distinguish merit-based proceedings from formla proceedings. The issue of experts, both for the purposes of proceedings before the National Chamber of Appeal and before common courts, requires settlemtn and adaptation to the changing (business, economic, etc.) conditions. The proposal to appoint one court to resolve public procurement cases is obvious and has been but forward by jurisprudence for many years. The legal regulations on public procurement should create a general possibility for those procedures to undergo court inspection with the use of all stages of this procedure, including a last-resort appeal. This corresponds to the conclusion regarding the reduction of registration fees and charges, which should not limit "the right to a judgement". During legislative works, consideration should also be given to conclusions regarding the procedure itselt and introduction of additional obliations and rights of the participants of the appeal process and complaint procedure.

The conclusions for Poland presented in the Report and the legal and comparative analyses of particular issues presented in the questions are outstanding material for the Polish legislator prepaing changes to the public procurement regulations.

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STIPULATION

1. The Report covers 28 EU Member States; in the case of the UK, the information only concerns England and Wales.
2. The Report only covers an analysis of the functioning of legal protection measures relating to proceedings above EU thresholds covered by directive 2014/24/EU on public procurement and repealing directive 2004/18/EC[2].
3. The Report only discusses legal protection measures concerning contract award procedures, including, as a rule, remedies.
4. The Report was prepared based on analysis of the Polish law and answers given by law firms from 27 European Union member states to questions asked in the questionnaires. As a rule, we have not analyzed the topics concerning foreign law and practice covered by the questionnaires individually.
5. The Report was prepared as at 31 August 2017.

[2] EU OJ of 28 March 2014, series L 94, p. 65

DEFINITIONS

Remedy Directive – Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC) amended by directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council directives 89/665/EEC and 92/13/EEC with respect to improvement of effectiveness of remedy procedures in public procurement[3]

TFEU – Treaty on the Functioning of the European Union[4]

Chamber - National Appeal Chamber

[3] EU OJ of 30 December 1989, series L 395, p. 33 as amended
[4] EU OJ of 30 March 2010 series C 83, p. 47.

SUMMARY

General comments

The systems of legal protection measures in individual EU countries are organizationally and legally very different.

Despite harmonization at the Remedies Directive level, when it comes to the functioning of the remedies systems, we still have many autonomous and separate systems, which, apart from the harmonization elements, differ significantly.

While procedural differences in different legal orders of member states are natural due to different legal traditions, a question arises if the solutions in the Remedies Directive do not require certain modifications and supplements. Even if they were not to result in obligatory solutions being introduced to national laws, they could be provided for at the EU level as a facultative solution. Similar mechanisms have been introduced in directives concerning public contract award procedures. It is obvious that such mechanisms encourage national legislators to introduce them, without additional and often redundant fears as to their compliance with the EU law.

Appointment of separate specialized first instance authorities

Public procurement cases are becoming more and more complex and require extensive professional knowledge not only in the field of law but also in other fields, especially technology and economics. All this requires the appellate authorities to be more professional than ever.

One of such instruments that facilitates and gives a professionalizes an appeal process could be the appointment in the first instance of separate and specialized bodies, composed of lawyers and experts from other areas (not necessarily with a voting right but with advisory and consulting powers). This goal could also be achieved by creating specialized departments within the existing court structures.

This proposal is related to other suggestions concerning expeditious and effective examination of cases in first instance courts (the standstill period concerns this stage, at least according to the Remedies Directives). Establishment of a specialized body in charge of only public procurement cases (or possibly also competition) would facilitate

adjudication. According to information gathered in the Report, in some countries the number of cases examined in first instance is very high and exceeds 2,500 (Poland), 1,200 (Croatia, Spain) or is slightly lower than 1,000 (Bulgaria, the Czech Republic, Germany). In all these countries first instance judgments are passed by a specialized body.

Composition

This, in turn, goes hand in hand with the number of persons forming the bodies adjudicating in first instance. It is obvious that the establishment of an appellate body alone will not guarantee high level and efficient adjudication; this largely depends on the qualifications of the panel members, but also on their number and experts' support. The Report shows that the situation differs from country to country. It seems that this element requires greater coordination at the EU level so that the effectiveness requirements could indeed be fulfilled through not only expeditious adjudication, but also its quality.

Professionalization of appellate procedures is also significant in Poland. The substance of cases examined by the Chamber is often complicated legally, technically and economically. Some appellate cases require not only comprehensive legal knowledge going far beyond procedural regulations but also material knowledge (e.g. in cases concerning grossly underestimated prices, compliance of a tender with the description of the subject matter of a contract). In this context, we should refer to the number of people adjudicating an appeal in the Chamber and the practice of relying on experts.

EU has a three-member system of adjudicating on first instance cases apart from a one-member solution, which is also popular. In Poland, an appeal is generally examined by the Chamber composed of one member, except when the Chamber President orders a case to be examined by a three-member panel due to particular complexity or precedential nature of the case. A one-member first instance panel is quicker with examining cases and making up delays, which is one of the European Union priorities. On the other hand, panels of more members allow views to be exchanged and opinions to be cut and thrust, which contributes to a versatile, effective and objective examination of the case (these features of the legal protection measures are the pillar of the Remedies Directive), contributing to standardization of case law. Given the specific nature of the Polish market and for the reasons stated above, in certain cases a three-member panel of the Chamber should be considered obligatory (e.g. in cases where the value exceeds EU thresholds) or the prerogative of ordering a case to be examined by such a panel should be resorted to more often (currently every fifth case is considered by such a panel).

Experts

In Poland, experts in appellate proceedings are rarely appointed although cases may require special knowledge. Poland is not alone here; according to the Report this is not a common practice in most EU countries (although sometimes experts are in the body examining the case or act within its structures). Bearing in mind the professionalization of appellate procedures, it has become necessary to have greater availability of experts' support. The main obstacle to facilitating this element of the system is that it prolongs the proceedings, sometimes even by several months. In this context, a helpful solution could be that applied in some of the countries, e.g. permanent experts in various fields, including economy and technology.

Adversary procedure. Hearing

The optimum solution seems to be the system functioning in Poland of adversary oral, obligatory hearing before the Chamber, supported by a written appeal and the possibility of filing pleadings and request evidence during the proceedings (as opposed to only written chambers' procedure in certain jurisdictions). Written appellate procedures are probably quicker, but in cases concerning tenders the active participation of the parties, whose aims and standpoints are contradictory, is justified since it fulfills the requirement of effective legal protection measures. An open hearing in turn implements the right to the initiative of the parties and to full consideration of the case, and it reflects the principle of clarity and transparency of the proceedings. It also implements the Remedies Directive, which requires "proceedings in which both parties are heard".

We should consider introducing legal mechanisms increasing an orderly and efficient course of the proceedings, especially in large, complicated cases, where pleadings are often exchanged during the hearing. It seems reasonable to introduce the obligation to submit pleadings to the parties and participants of the proceedings (especially replies to appeals) within a set time limit (before the hearing) even at the cost of the hearing date being delayed. This would, on the one hand, allow the participants and the Chamber members to prepare better, and on the other, it would undoubtedly accelerate and facilitate the course of the hearing.

Recording hearings

A proposal should also be put forward for the first instance authority to record hearings (audio or video) to reflect precisely the course of the hearing, implement the principle of

clarity and transparency, and serve a disciplinary purpose. Recording hearings is legally admissible in member states.

Speed of procedure

Poland fulfills the requirement set forth in the Remedies Directive of speedy appellate proceedings. Generally, a 15-day time limit for the Chamber to examine a case is the shortest identified indicative time limit in the EU (beside two other countries). In many member states, the regulations do not provide for any time limit in this regard, in others, the time limit is approximately one month. In an attempt to strike a balance between speed and effectiveness of the procedure, one should consider disseminating solutions that would eliminate precedence of time limit over quality of resolution, where required.

Standstill period

As for the standstill period set forth in the Remedies Directive, i.e. the prohibition to execute a public contract, in the case of an appeal this period usually lasts, similarly as in Poland, until the end of the first instance proceedings. In some countries, only the closing of the second instance proceedings allows the contract to be executed. There is also a developed system of various security measures (extending or shortening the prohibition).

Theoretically the Polish solutions are appropriate here. Although after the Chamber's decision, the contract may be executed, the party intending to file an appeal with the regional court may apply for an injunction restraining the execution of the contract while the proceedings are pending. The problem is that in practice such requests are sometimes rejected as ungrounded. A change should be introduced to legal provisions that would clearly allow injunctions to be awarded in public procurement cases.

In special instances, the Chamber may also shorten the standstill period. However, the effectiveness of the existing injunction measures should be analyzed. Quite often the contracting authority executes the contract after the Chamber announces the judgment, which does not preclude an appeal but may bring about irreversible consequences in the form of the contract being performed. Given the lack of an expeditious compensation procedure in Polish law (which may raise doubts as to its compliance with the Remedies Directive), the extension of the contract execution injunction period until the time limit for an appeal passes (or a few days later) could be a solution allowing appropriate security to be obtained, possibly with the Chamber's right to repeal the injunction.

Another solution to consider is to grant the Chamber the right to issue an injunction restraining the opening of tenders while appellate proceedings triggered by an appeal filed are pending with regard to the wording of the tender documentation.

Challenging adjudications of second instance body

In most member states, the law provides for the possibility of challenging the adjudications of second instance body (as extraordinary appellate measures). In such a case, this right is vested in both parties to the procedure, i.e. the contracting authority and the contractors. Meanwhile, in Poland an extraordinary appeal (*kasacja)* may only be filed by the President of the Public Procurement Office. This should change.

Entries and fees for legal protection measures

In most member states, using legal protection measures is subject to a fee. Only three countries have no fees. In two other countries, there are no fees for first instance proceedings. In the countries that have the fees, their amount differs and depends on many factors. As a rule though, those fees are lower than in Poland, both in first and second instance, which implies that they should be lowered in Poland.

Invalidation of proceedings ex officio

Not many member states allow the possibility of invalidating proceedings ex officio, i.e. irrespective of the pleas raised, based on defects of the proceedings identified by the body alone. As in most of European legislations, in Poland, at present the Chamber and the court do not examine ex officio the grounds for invalidating the proceedings and are bound by the pleas of appeal. In the light of existence of many, even too many, parallel procedures inspecting the correctness of contract award procedures, in our opinion such a solution is sufficient and adequate.

Uniformity of case law

One of the challenges that the appellate systems in European Union member states face is to ensure uniformity and predictability of case law. This is a significant element encouraging entrepreneurs to participate in contract award procedures.

To this end, many countries provide for specific instruments to ensure that those requirements are met. This is the case especially in specialized public procurement matters before first instance authorities. Regular meetings are organized with the

participation of members of the bodies, judges and experts in the given areas, which allow decisions binding on those bodies to be taken on certain legal issues.

Uniformity of case law can also be facilitated by the appointment of one court to examine public procurement matters in second instance, especially in those countries where the number of cases considered by appellate bodies is significant. This would give the institutions a professional edge and would be organizationally justified. The existing practice, e.g. in Poland shows that second instance cases being examined by common courts with jurisdiction over the contracting authority's registered office does not promote the courts' uniform approach to specialist tasks regulated by public procurement laws, especially when the courts only examine several such cases a year.

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CONCLUSIONS FOR POLAND

- ✓ Introduction of an obligatory three-member panel in certain cases, e.g. where the value exceeds the EU thresholds;
- ✓ Introduction of mechanisms to allow broader use of experts' assistance, e.g. by having well compensated permanent experts in various areas, including economics and technology at the Chamber; apart from appointment of permanent experts, creation of auxiliary positions supporting the Chamber members should also be considered;
- ✓ Introduction of the obligation to submit pleadings, especially replies to appeals, to the parties and participants of the proceedings within a specified time limit (before the hearing);
- ✓ Allowing the hearings to be recorded (audio or video) by first instance authorities;
- ✓ The need to disseminate solutions that eliminate priority of time limits over the quality of judgments where required;
- ✓ Extension of the duration of the injunction restraining the execution of a contract until the time limit for an appeal passes (or a few days later), and introduction of regulations clearly granting the parties the right to apply for an injunction restraining the execution of a public contract, alternatively with the Chamber's right to cancel the injunction;
- ✓ Extension of the time limit for filing a complaint to the regional court from 7 to 14 days;
- ✓ Indication that the time limit for the President of the Public Procurement Office to file a complaint with the regional court counts from the date of receiving the judgment with the reasons, and not from the date the judgment is passed;
- ✓ Introduction of the possibility for the parties to the proceedings to file an extraordinary appeal (*kasacja)* with the Supreme Court;
- ✓ Reduction of the registration fees and charges for using legal protection measures;
- ✓ Appointment of one regional court to handle all public procurement cases.

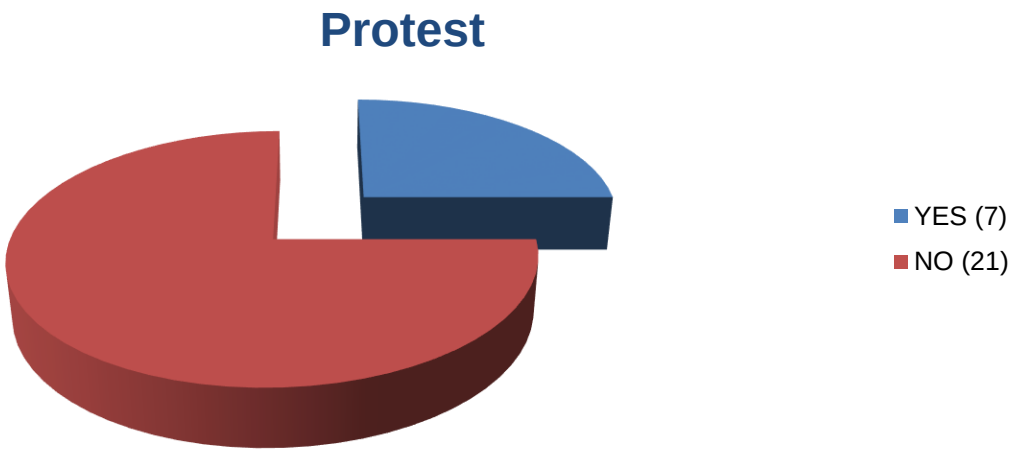
REPORT

1. *Is there an obligation to submit an appellate remedy to an awarding entity before filing an appellate measure to an independent appellate body of first instance?*

One of the elements of an appeal under the public procurement procedure includes objections being submitted by interested contractors against decisions taken during the appeal procedure addressed directly to the contracting authority (protest). In other words, before a case is submitted to the competent appellate body of a given country, internal regulations may oblige contractors to submit the case to the contracting authority for reconsideration.

This type of a solution, however, does not affect the requirement to ensure a two-instance inspection of the contracting authority's decisions, which follows from the Remedies Directive.

In 21 countries, the protest is not an obligatory element of the appeal process, and it is required in only seven countries.



What is interesting, 5 out of those 7 countries became EU members in 2004 or later (the Czech Republic, Lithuania, Romania, Slovakia and Slovenia). The protest is also provided

for in Greek and German law. If the contracting authority rejects the protest, the contractor is entitled to file an appellate measure to an independent body.

In the 21 countries that do not provide for the protest as obligatory, there are solutions that oblige contractors who intend to resort to appellate measures to first inform the contracting authority thereof – e.g. in Finland and Ireland.

2. *What type of independent authority is appointed to adjudicate remedies involving correctness of the public procurement procedure in the first instance?*

The institutional system of legal protection measures in public procurement of EU member states differs. This means that, not in all of the legal systems, the body competent to examine cases related to contract award procedures in first instance is the court within the meaning of internal regulations and administrative structure. This is not required by EU law, either[5]. In such a case, member states are required to introduce regulations providing for the possibility of launching an appeal against decisions taken by such non-judiciary authorities. The appeals should be examined by an authority being a court within the meaning of article 267 of the TFEU, independent of both the contracting authority and the first instance appellate body[6].

The criteria that a "court" within the meaning of article 267 of the TFEU should meet follow from the case law of the CJEU, which is only body competent in this regard. The set of premises established by case law includes, in particular, statutory authorization to establish a body, its permanent nature, obligatory nature of its jurisdiction, adversary nature of the proceedings, application of the law by the authorities and judicial independence[7]. The fact that, under separate regulations, the authority is also authorized to perform other functions, e.g. consulting, is of no significance[8].

The EU member states do not have a uniform appeal system in place with regard to first instance adjudicating authorities. It seems that three basic organization methods may be distinguished:

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[5] Cf. article 2(9) of the Remedies Directive.
[6] *Ibidem*.
[7] Cf. CJEU judgment of 13 December 2012 in case C-465/11 *Forposta S.A.*, clause 18
[8] *Ibidem*.

In the case of a judicial system, in 8 countries we have administrative courts (Austria, Belgium, Finland, France, Luxembourg, Portugal, Sweden, and Italy), and in 4 common courts (England and Wales, the Netherlands, Ireland and Lithuania).

What is interesting, among the countries that joined the EU in 2004 or later, only Lithuania decided to entrust the role of a first instance authority to a court. All other countries have mainly a system of independent specialized entities (Bulgaria, Croatia, Cyprus, Estonia, Latvia, Malta, Poland, Romania, Slovenia, and Hungary). This system also exists in Denmark, Greece, Spain and Germany.

In two instances, i.e. the Czech Republic and Slovakia, the role of the first instance authority is played by public administrative authorities – appeals are considered, accordingly, by an antimonopoly authority and an authority in charge of public procurement matters.

An interesting and a unique solution is the Portuguese example, where, apart from an administrative court considering matters related to the contract award procedure in first instance, arbitration is admitted (CAAD – Administration Aribtration Center). Arbitration may be resorted to on the condition that it has been stipulated in the procedure documentation, which is not a frequent practice.

The contracting authority may, therefore, refer to an *ad hoc* arbitration tribunal or to permanent arbitration tribunals. Irrespective of this, some legal entities reporting to the minister of justice and the minister of culture, education and science, as well as some of

the universities in cases related to performance of public contracts fall under the jurisdiction of CAAD.

In some cases (e.g. Denmark and Romania), although as a rule the appellate authority in first instance is not a court (tribunal), contractors have the right to submit directly to jurisdiction of common courts, which is a rare practice.

3. *Who adjudicates in the appellate body of first instance – professional judges or persons holding other professional qualifications?*

In view of the organization of appeal systems in individual countries, and, first of all, due to the fact that in 12 of those countries, the appellate body of first instance are courts (common or administrative → cf. reply to question 2.), cases in those countries are examined by professional judges.

However, in the case of Austria and the Federal Administrative Court in Vienna, Austrian public procurement law provides for the participation of qualified lay judges. Lay judges should have at least five years' professional experience or expert public procurement knowledge (concerning legal, economic or technical issues).

Also in the case of Denmark, where the body of first instance is an independent and specialized entity which is not a court (tribunal) within the meaning of domestic regulations, cases are also examined by judges supported by experts in various fields.

In four instances, the adjudicating panels in appellate bodies of first instance are composed of public officials, which is the case not only when a public administrative authority is the adjudicating body (the Czech Republic and Slovakia), but also when the adjudicating bodies are specialized separate administrative entities (Latvia and Slovenia).

In five cases with non-judiciary adjudicating bodies of first instance, there is an explicit requirement for the members to have legal educational background. Only in three cases the members must be law graduates (Spain, Germany and Poland), and in two this requirements concerns at least the chairman of the body (Croatia and Hungary). Most often, however, these persons have various university degrees, i.e. legal, economic or technical.

An additional element required in some of the countries is the experience that a candidate for a member of the adjudicating panel (irrespective of whether it is a court within the

meaning at national level, or another appellate body) must have. This experience varies depending on the member state; in some a candidate must have at least 15 years of experience (Spain, Luxembourg) or 10 years (Belgium, Bulgaria, Croatia) of professional experience, at least in the case of the chairman of the adjudicating body. In the remaining cases, there is either no requirement of professional experience at all, or the requirement is much lower.

4. ***How many people are authorized to adjudicate in an independent appellate body of first instance? How many cases does this body hear in a year?***

Apart from the qualifications and experience of the persons in charge of adjudicating public procurement cases, an important element is also the number of adjudicating persons compared to the number of appeals filed with the body.

In the countries that have specialized bodies adjudicating public procurement cases of first instance, the number of members of such bodies and the number of cases they hear greatly differs:

3 persons	• MALTA - ca. 150 cases a year • SLOVENIA - ca. 350 cases a year
4	• ESTONIA - ca. 250 cases a year
5	• CYPRUS - ca. 70 cases a year
7	• BULGARIA - ca. 900 cases a year
9	• CROATIA - ca. 1200 cases a year
23	• FINLAND - ca. 500 cases a year
29	• DENMARK - ca. 120 cases a year
36	• ROMANIA - ca. 300 cases a year • POLAND - ca. 2500 cases a year
37	• SLOVAKIA - ca. 250 cases a year
70	• THE CZECH REPUBLIC - ca. 800 cases a year

Some of the countries which have specialized appellate bodies of first instance have not set the requirement of a specific number of members of the panel (Greece, Latvia and Hungary).

Also, in some of the countries, the system of legal protection measures of first instance is decentralized – there are bodies in charge of considering appeals in proceedings organized at a local and at the central level (e.g. Spain, Germany).

In systems where public procurement disputes are adjudicated in first instance by courts (administrative or common), it is not possible to determine the exact number of adjudicating judges. This is the case in England and Wales, Austria, Belgium, France, the Netherlands, Ireland, Lithuania, Luxembourg, Portugal, Sweden, and Italy.

5. ***What is the composition of the adjudicating panel of an independent appellate body?***

Appellate bodies of first instance adjudicating cases related to tender procedure in member states have different systems. The number of panel members adjudicating a case also differs (from one, which is quite common, to as many as seven in Bulgaria[9] and Greece[10]).

The basic model in member states is a panel composed of 3 members (11 countries). A one-member panel is also a common solution. Some legislations apply several basic models depending on the type of the case. For example, in a case to declare a contract award decision invalid, the Belgium Council of State adjudicates in a panel composed of 3 judges, and in a case to suspend a contract award decision – by one judge. In Greece, a panel of 3 or 7 persons adjudicates, depending on the case. A three-member panel adjudicates in first instance in Finland but certain procedural cases may be resolved by 2 judges or even 1 judge. In Hungary certain cases are also considered by one arbitrator, although as a rule the panel is composed of 3 members.

There are also jurisdictions in which, in exceptional cases, more members are appointed to panels that are usually composed of 3 members. For example, in Croatia such powers are vested, in more complex cases, in the Chairman of the Public Procurement Procedure Supervision Commission.

[9] There is no requirement for each case to be adjudicated by a 7-member panel; irrespective of this all decisions require a majority of 4 members
[10] There is no requirement for each case to be adjudicated by a 7-member panel; some of them are adjudicated are adjudicated by 3-member panels

The second most common model in first instance is a one-member panel (11 countries). Most jurisdictions allow a broader panel (usually up to 3 members) when required by complexity or difficulty of the case or uniformity of law, etc. – this is the case of, e.g. Estonia, the Netherlands, Ireland, Lithuania, Poland, and Slovakia (1 public officer considers the case and the decision is signed by the Head of the Department). In Sweden, an appeal in a first instance court is only considered by one judge.

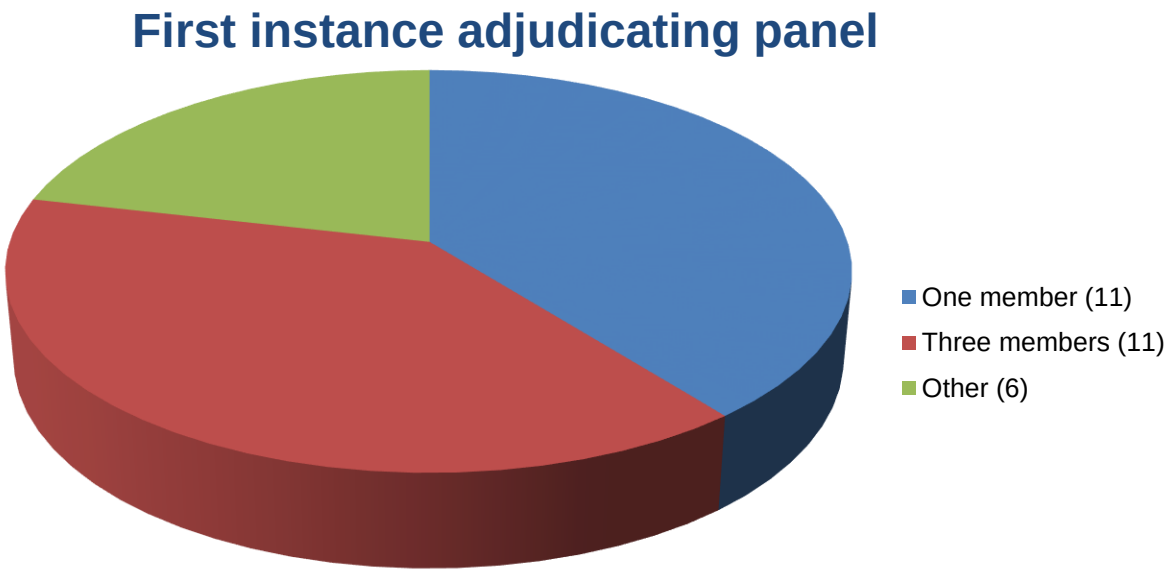
Austria adopted an in-between form, where the Federal Administrative Court usually adjudicates in a three-member panel; one chairman and 2 lay judges. Each land has different principles of establishing the adjudicating panels of regional administrative courts (also first instance courts).

Generally a 2-member panel adjudicates cases in Denmark, but according to the Danish law, the panel usually includes one presiding member (judge) and one expert. In difficult and complicated cases, the chairman of the authority is entitled to increase the number of adjudicating members .

Malta as a rule has a 4-member basic adjudicating panel, and Cyprus's legislation provides for 5 members (cases are considered by the full composition of the Tender Inspection Office; however, the Chairman together with two other Members may form a quorum). As already mentioned, the biggest number of people may be engaged in adjudicating a first instance case in Bulgaria (7-member full composition of the Competition Protection Commission, by a majority of 4 votes) and in Greece (7- or three-member panels of the Uniform Independent Office for Examination of First Appeal).

Generally speaking, regulations on public procurement legal protection measures referring to the composition of the adjudicating panel assume – due to the substance of the examined cases – judicial/case law professional approach, and as a rule they do not provide for the so-called social factor in the judicial process. In many cases, however, the regulations refer to the knowledge and experience of the adjudicating panel, i.e. to material aspects. This concerns primarily cases when the first instance appellate body is not composed exclusively of lawyers, but includes members from various fields, e.g. law, economics, technology (including construction, transport, utilities procurement). For example, Hungary adopted an interesting requirement related to mixed composition of the panel, that namely at least two arbitrators from a panel composed of many members must have a degree in law, at least one – in cases related to contracts financed from the EU funds – experience in contracts financed from the EU funds, and also, one must have

university or equivalent diploma in an area directly related to the subject matter of the case. Mixed compositions are also common in Denmark, Bulgaria (the requirement is legal or economic education), Croatia, Finland, Latvia, Cyprus or in Romania (in the last case, each three-member panel must include at least one member with a master's degree in law).



6. ***Do the persons adjudicating in an independent appellate body of first instance receive technical and material assistance?***

Undoubtedly, an important element facilitating the work of the persons adjudicating in appellate bodies is the material support, which does not include purely technical issues (secretarial services, taking minutes of hearings), but the possibility of drawing from knowledge and experience of experts in various fields.

In the case of court authorities, this is regulated in general provisions on the organization of those institutions, and there are no separate regulations for public procurement (12 countries → cf. reply to question 2).

This issue looks different in those countries which have specialized appeal bodies. Some of them have services dedicated to facilitating the work of the adjudicating persons (Bulgaria, Croatia, Cyprus, Denmark, Slovakia and Slovenia).

In Bulgaria, Croatia, Denmark and Slovenia the adjudicating persons are supported by additional experts on all or certain legal issues.

In Slovakia, whose appellate body is the public administration office, the employees may refer to the institutional knowledge and request consultations of all units of this office.

7. *What is the nature of appellate proceedings pending before an independent body of first instance (written proceedings or adversary trial)? Are the hearings recorded?*

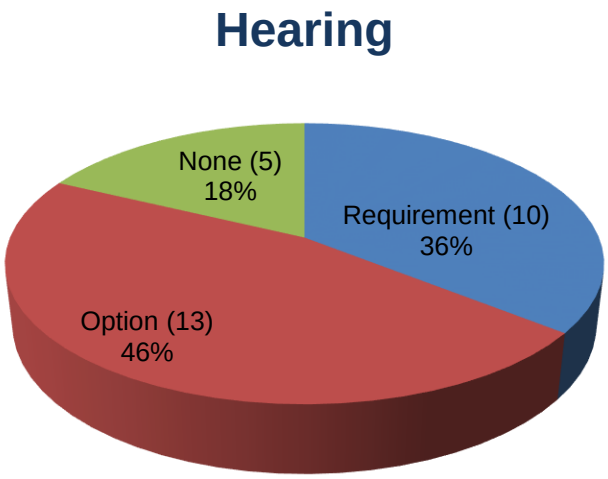
Due to the varying nature of first instance appellate bodies in public procurement, the ways in which cases are heard also differ.

This Report has examined the explanatory procedure (whose main aim is to collect and evaluate evidence) to determine if the rule is for a case to be examined at an oral hearing with the participation of the parties (which is the most important manifestation of the adversary/contradictory form), or if the proceedings are in the form of cabinet proceedings with written proceedings prevailing.

Most EU countries provide for the requirement or possibility of holding a hearing in order to examine a first instance case. In 10 countries, there is a legal requirement to hold an adversary trial. These are primarily countries that have a civil law procedure conducted before a common court (e.g. England and Wales, the Netherlands), but also countries that have a specialized independent body appointed to resolve public procurement disputes (e.g. Bulgaria, Poland, Latvia, Malta, and Germany). Hearings are also a standard procedure in France and Belgium.

In 13 countries, appellate proceedings are mainly in writing although an oral hearing may be held at the request of a party or ex officio (e.g. Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Romania, Slovenia, Italy and Hungary). This concerns

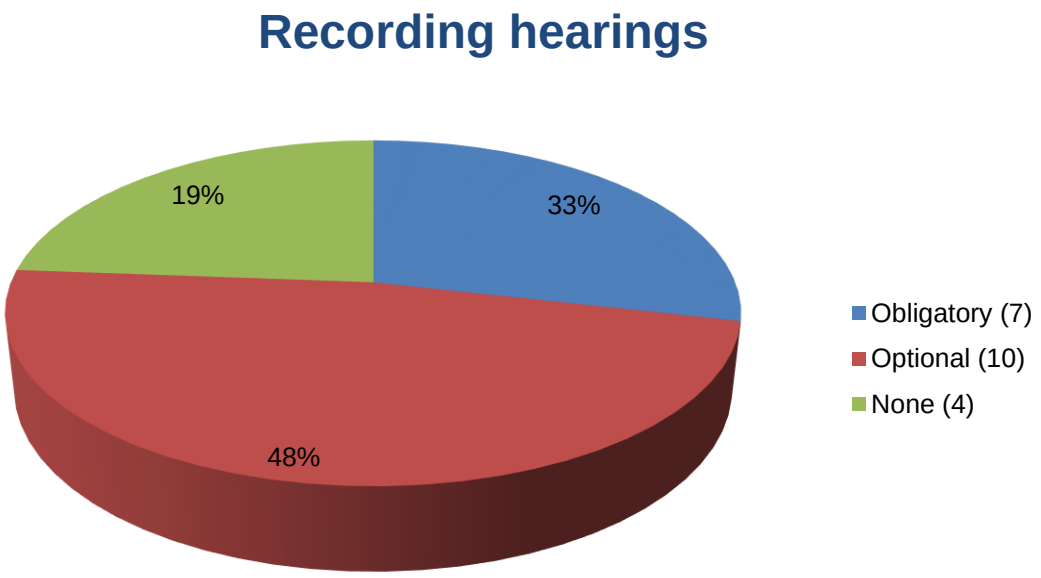
primarily countries relying on an administrative, or a court and administrative appellate procedure. In Finland, hearings are rarely held. In 5 cases, first instance appeal proceedings are purely written (Greece, Spain, Lithuania, Luxembourg and Slovakia).



It is also common that hearings may be lawfully recorded (video or audio) by a first instance body – this allows the course of the hearing to be faithfully recollected, implements the principles of transparency and openness, and has a disciplinary effect. In 4 member states, hearings are not recorded (Belgium, Bulgaria, Croatia, Finland, and Poland).

However, in Poland, hearings are not recorded but there is a possibility (although not applied in practice) for the chairman of the adjudicating panel to express his consent to have the hearing recorded by a person present at the hearing (but not by the authority of first instance itself). In Italy, if the parties allow, the judge may permit a photographic or audio-visual recording (or TV transmission) of a hearing provided that this does not distort the discussion. However, if there is a significant community interest in a given debate, the judge may allow the recording without the parties' consent.

In 7 countries, national legislation provides for every hearing to be recorded (Malta, Germany, Hungary, Cyprus, Estonia, Finland and Sweden in the case of hearing of a witness or expert witness), in 10 countries such possibility exists though practice varies (e.g. England and Wales, the Netherlands, France, Latvia, Italy, Romania, Ireland, Portugal, the Czech Republic and Denmark).



8. ***In accordance with binding legal provisions of law, is an independent appellate body of first instance required to adjudicate a case within a set timeframe? Are statutory deadlines met?***

The requirement of expeditious appellate proceedings provided for in the Remedies Directive may be fulfilled, e.g. by giving the first instance authority a statutory time limit to examine a public procurement case. Usually such time limits are indicative. In Spain, if the 2-month time limit for issuing a judgment is exceeded, the appealing party may refer directly to the competent administrative court (second instance authority). In Slovakia, if the 30-day time limit for issuing a judgment is exceeded, the appeal is deemed rejected by force of law, and the appealing party may refer to the second instance appellate authority.

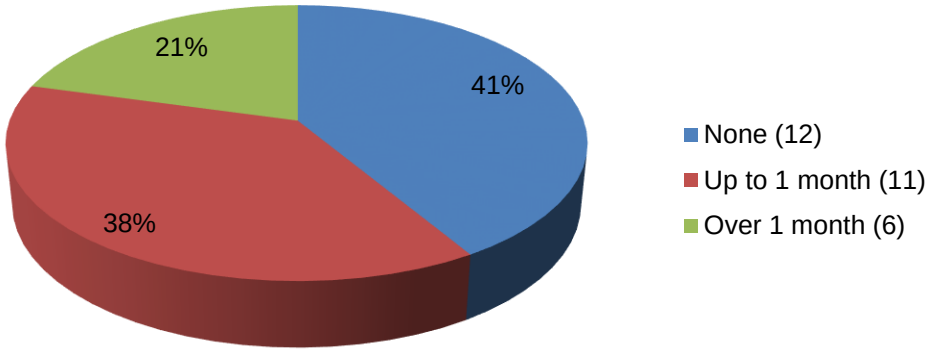
In most member states, legal regulations provide for a specific time limit to examine a case; however, 12 countries do not set firm time limits (including England and Wales, Belgium, Denmark, Finland, Ireland, Luxembourg, Italy, Sweden and Portugal in the case of court appeals). In this group, 2 countries have intermediate solutions setting time limits for issuing judgments, counted not from the moment the proceedings are initiated, but e.g.,

from the end of consideration of the complaint (45 days – Cyprus) and closing of the hearing (6 weeks - Malta). Also in Italy, the law does not lay down the time limits for issuing the final decision, and the time limits are set by law for other situations: with respect to passing judgments (from the time the court takes a decision), the appearance of the parties and setting the dates of the hearings.

In 11 countries, a case should be examined within 1 month. This concerns Bulgaria, Croatia, the Czech Republic, Estonia, France, Latvia, Poland, Romania, Slovakia, Slovenia, and Hungary. The basic time limits in those countries are 15 days (e.g. Poland, or Hungary), 20 days (e.g. France, Romania) and 25 days (e.g. Hungary in the case of an oral hearing), and even up to 30 days to examine a case. In this group, a 30-day time limit is the most common (e.g. Croatia, the Czech Republic, Latvia, and Slovakia). In Estonia, the time limits depend on whether a hearing was conducted (in the case of written procedure, the decision is announced within 10 days of a defect-free application being received). Concurrently, in such instances typically the time limit may be extended in justified cases, e.g. due to the need to hold an oral hearing, request for additional documents, having to hold a site visit, or the complicated nature of the case. Some regulations set a maximum number of days by which the time limit may be extended (e.g. generally by an additional 10 to 30 days). In some cases, the time limit for examining a case starts running from the moment the appellate authority receives a complete set of documents, and not from the moment the appellate measure is filed, which may also affect the actual duration of a case in first instance.

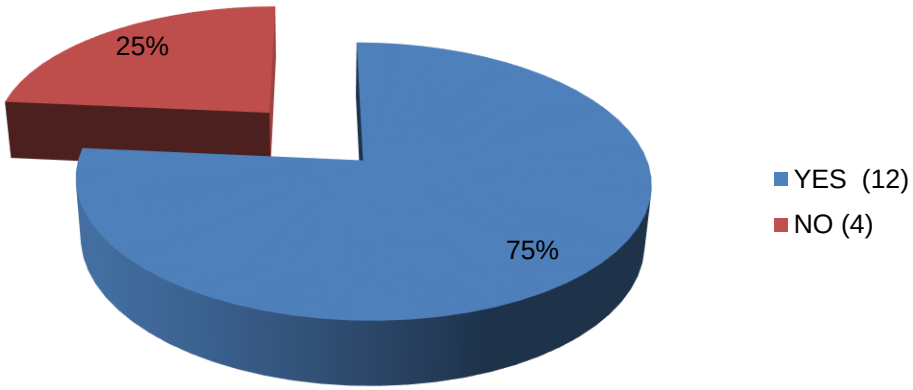
In 6 countries, the regulations set a time limit longer than one month to issue a judgment, ranging from 5 weeks in Germany to 6 months in Portugal (in the case of arbitration proceedings before CAAD, counting from the day the last arbitrator is appointed). Other time limits are 6 weeks (Austria), 60 days (Greece, Lithuania), 2 months (Spain).

Time limit to issue a judgment in first instance



The question if statutory time limits are kept was answered ‘yes’ in 12 countries. Cases are examined on time in Bulgaria, Hungary, Estonia, Spain, Lithuania, Latvia, Malta, Germany, Poland, Romania, Slovakia, and Slovenia. The statutory time limits are more often exceeded in Austria, Croatia, the Czech Republic and the Netherlands (4 countries).

Observance of time limits



9. ***Is it standard practice to appoint witnesses and expert witnesses in proceedings pending before an appellate body of first instance?***

The participation of an independent expert witness in first instance appellate proceedings in public procurement is not a common practice in the European Union. Such evidence may be lawfully admitted in most EU member states, although appellate bodies rarely resort to it (in complex cases with complicated technicalities). This is the practice in as many as 24 member states. Similar statistics displays the practice of admitting evidence in the form of witness testimony – in 24 countries this is not a standard situation, although it is admissible (e.g. in the form of witness testimony at a hearing or written statements of witnesses in the case of written procedure).

Appointment of witnesses or expert witnesses before an appellate authority is most common in 7 countries, i.e. England, Austria, Latvia, Germany, Ireland and Slovakia (in the form of experts' written opinions).

Some national appellate authorities are composed of experts in various fields, including economy and technology or have experts' assistance available in their structures (→ reply to questions 5 and 6.). In those cases, the need to admit evidence in the form of an expert's opinion will be less common.

In many cases, an expert witness, although admissible, is not used in practice (e.g. in Poland, in ca. 2500 appeals examined annually at the National Appeal Chamber, whose members have legal educational background, expert witnesses were appointed only in 13 cases[11]).

10. ***Does a non-final ruling handed down by an appellate body of first instance entitle the awarding entity to enter into a public procurement contract? Does a suspension period apply during the appellate proceedings, understood as the period in which the contracting authority cannot execute a contract with the selected contractor?***

According to the Remedies Directives if a first instance body, which is independent from the contracting authority, examines an appeal against a decision to award a public

[11] Cf. *Information on the activity of the National Appeal Chamber in 2016*, Warsaw 2017.

contract, member states ensure that the contracting authority cannot execute the contract before the appellate body rules on the request for an injunction or on the appeal.

In performance of the above obligation, member states variously regulate the effect of the appellate proceedings on the injunction restraining the execution of a public contract.

Most models provide for the automatic suspension of the possibility of executing a contract if an appeal if filed with first instance authority until the first instance proceedings are completed. Such a solution has been adopted by 17 countries, including England and Wales, Ireland, Croatia, Denmark, Estonia, Finland, France, the Netherlands, Spain, Latvia, Germany, Poland, Portugal, Romania, Slovenia, Hungary, and Sweden.

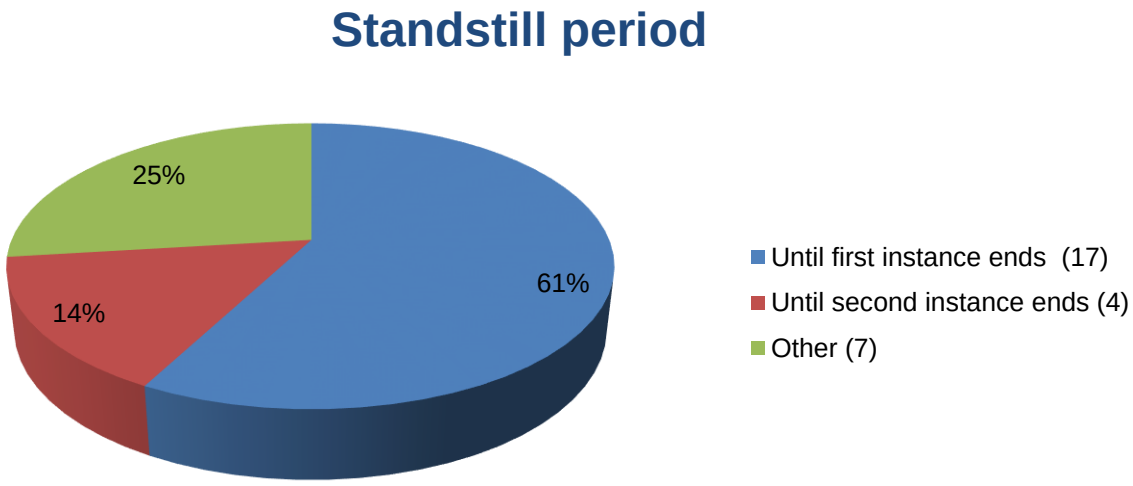
In this model, various interim measures are often applied, including the injunction restraining the execution of a contract, introduced by first or second instance authority – on request – also at the stage of the case being examined in second instance. In special cases, the body examining the case may shorten injunction restraining the execution of a contract. Moreover, e.g. in Estonia injunction restraining the execution of a contract lasts for a certain time (7/14 days depending on the case) after first instance judgment is passed, when the appealing party has the right to challenge the judgment and demand an interim injunction (the consideration of which is discretionary). In Germany, the injunction restraining the execution of a contract operates for up to two weeks after the time limit for filing an appeal passes. The injunction may be extended by the court at the request of the appealing party.

The second model includes cases when the injunction restraining the execution of a contract lasts until the case is adjudicated in second instance – 4 countries, (Bulgaria, Greece, Malta and Slovakia, where the suspension is automatic by force of law). There are exceptions here, as well – e.g. the possibility of repealing the injunction to execute a contract, at the request of a party.

The third model includes particular regulations and concerns 7 countries. In Lithuania the standstill principle applies automatically only until the court adjudicates on interim measures, if requested. The first instance court has the right, but not an obligation, to prohibit the contracting authority in such a case from executing the contract during the proceedings. The situation is similar in Italy, Cyprus and Luxembourg. In the Czech Republic there is a so-called protective period of 60 days, after which the contract may be executed (even if it is during the appellate procedure). In Austria filing an appeal does not

result in an injunction restraining the execution of a public contract, which may be executed if the national or federal administrative court (first instance) recognizes a request for an injunction and issues and injunctive order to suspend contract execution. In Belgium the suspending effect lasts throughout the appeal procedure, and during this period the appellate authority should decide on its extension.

In some of the member states, there is a prohibition to open tenders (or continue the tender procedure) if an appeal has been filed against the content of the tender documentation (e.g. the terms of reference) or against the evaluation of part of the tender that does not contain the price, which lasts until the dispute is resolved (this is common in Spain).



11. ***Can the rulings of a body of first instance be appealed (be made the subject of a complaint) to a body of second instance? Who is entitled to submit an appellate remedy?***

The Remedies Directives require member states to guarantee court inspection of contract award procedures, available to contractors.

In most EU countries, there are at least two instances in public procurement procedures. First instance judgments are final and non-revisable only in Belgium and Slovenia.

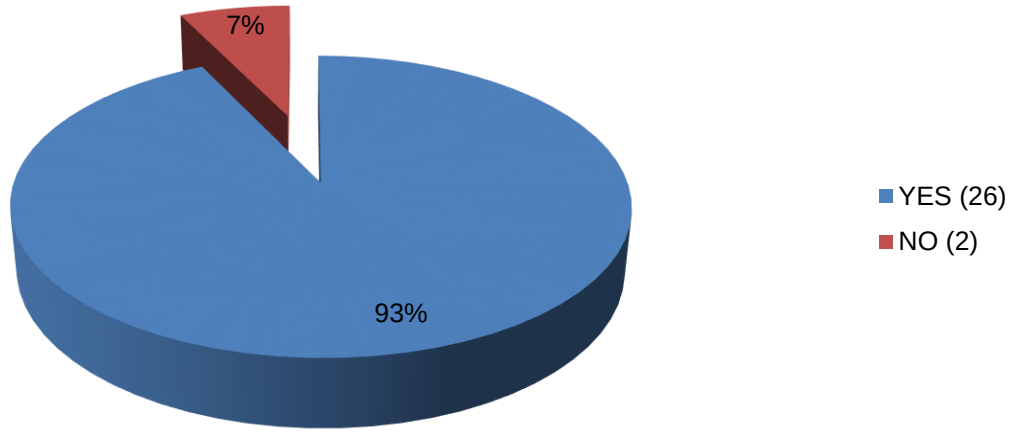
The appellate measure against a first instance judgment is most often filed with a competent administrative or civil court, and in some countries this role is played by the

Supreme Administrative Court or the Supreme Court (e.g. Croatia, Austria, Bulgaria, France in some cases Ireland). There are also models that provide for a further administrative appellate path, and only thereafter a court procedure (e.g. Cyprus, the Czech Republic and Slovakia).

The right to challenge the first instance judgment is usually vested in the parties and participants of the appellate proceedings (e.g. the contracting authority, the appealing party, contractor, whose tender was the subject of appeal). Sometimes the contracting authority's right to challenge an unfavorable judgment is limited (e.g. the contracting authority has no right to appeal against a decision issued by the Latvian Procurement Monitoring Bureau); in Cyprus, the contracting authority cannot challenge a decision issued by the Tender Inspection Office).

Sometimes national regulations give a broader definition of the entities that have the right to challenge a first instance judgment, referring, e.g., to persons who suffered damage or any person whose rights or interests have been breached, or by indicating the public institutions entitled to appeal (Croatia, Estonia, Greece, Spain, and Hungary).

Right to appeal to second instance

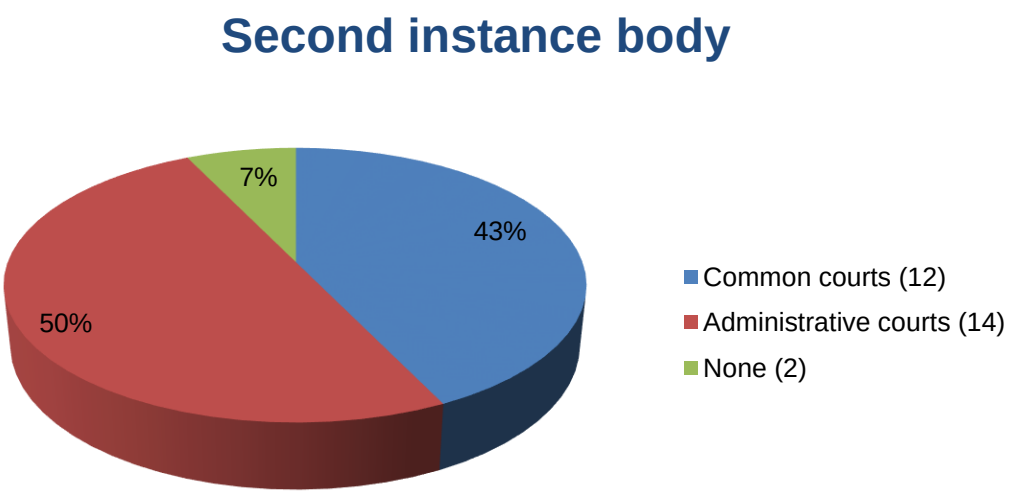


12. What body serves as an appellate body of second instance?

According to the Remedies Directive, if appellate authorities are not judiciary, regulations should be introduced to guarantee proceedings in which any unlawful measures taken by the appellate body or any irregularities in the exercise of its powers can be appealed against in court or in an appeal examined by another body being a court within the meaning of article 267 of the TFEU and independent of both the contracting authority and the appellate body.

Although not in all member states, appellate authorities are judicial (→ reply to question 2.), in most member states (26) there are regulations that guarantee appeal against decisions passed by first instance authorities. As stated above, an exception is Belgium and Slovenia (→ reply to question 11.).

In 14 countries, the appellate authority is an administrative court, and in 12 countries – the common court.



13. *Who adjudicates in the appellate body of second instance – professional judges or persons with other professional background?*

In most instances, the bodies competent to examine public procurement cases in second instance are courts, hence, adjudicating persons are judges – this is the case of 24 countries.

In Slovakia the second instance body is the Public Procurement Board composed by membes appointed by the government and members appointed by force of law (the chairman and deputy chairman of the authority in charge of public procurement matters).

On the other hand in the Czech Republic, second instance decisions are issued by the President of the entity in charge of competition matters, which is a public administrative authority.

What is interesting, Belgium and Slovenia have a one-instance system. Though, while in Belgium, cases are examined by the court (*Conseil d'Etat* – the Supreme Administrative Court), in Slovenia decisions of the National Audit Commission on Control of Public Contract Award Procedures, which does not have the status of a court within the meaning of domestic regulations, are final and not subject to court review.

With the exception of Slovakia, in all countries that have second instance authorities (even if they are non-judiciary), the adjudicating persons should have legal educational background. Moreover, obtaining a status of an adjudicating person is often conditional on having court or public procurement experience. This requirement looks different in different countries:

- 1 year in Hungary,
- 5 years in Estonia, Latvia, Portugal and Slovakia,
- 6 years in the Netherlands,
- 8 years in Croatia, Cyprus, and Lithuania,
- 9 years in Romania,
- 10 years in Austria,
- 12 years in Bulgaria and Malta,
- 15 years in Sweden.

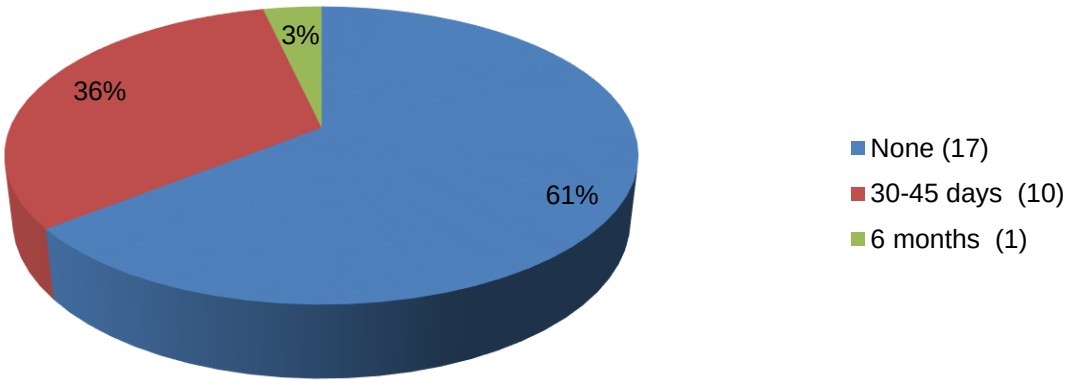
14 ***Is, in accordance with the binding law, an appellate body of second instance required to observe a particular timeframe for resolution of a case? Are statutory deadlines met?***

In most member states (17), the laws do not provide for a time limit for the appellate authority (court) of second instance to resolve a case.

Such a time limit exists in 11 member states (Bulgaria, Croatia, the Czech Republic, Estonia, Lithuania, Malta, Poland, Romania, Slovakia, Hungary, and Italy).

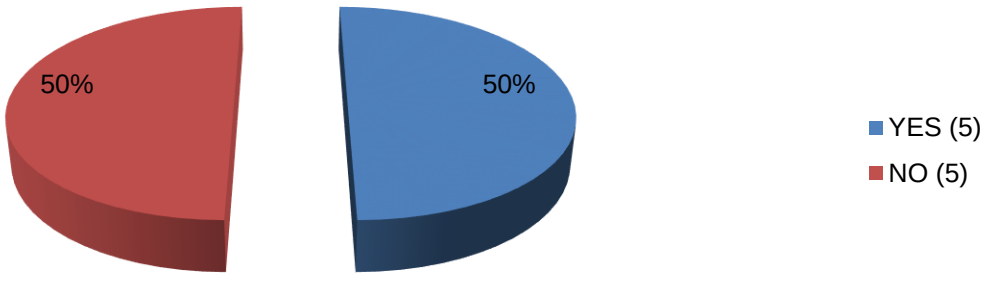
This time limit is usually from 30 to 45 days (10 member states). In Malta it is 6 months.

Timelimit for second instance resolution



In the light of the above, it should not come as a surprise that in Malta the time limit to examine a case by a second instance authority is observed. In other countries, the situation varies – there are problems with keeping the statutory time limit primarily in Croatia, Lithuania, Poland, Hungary, and Italy.

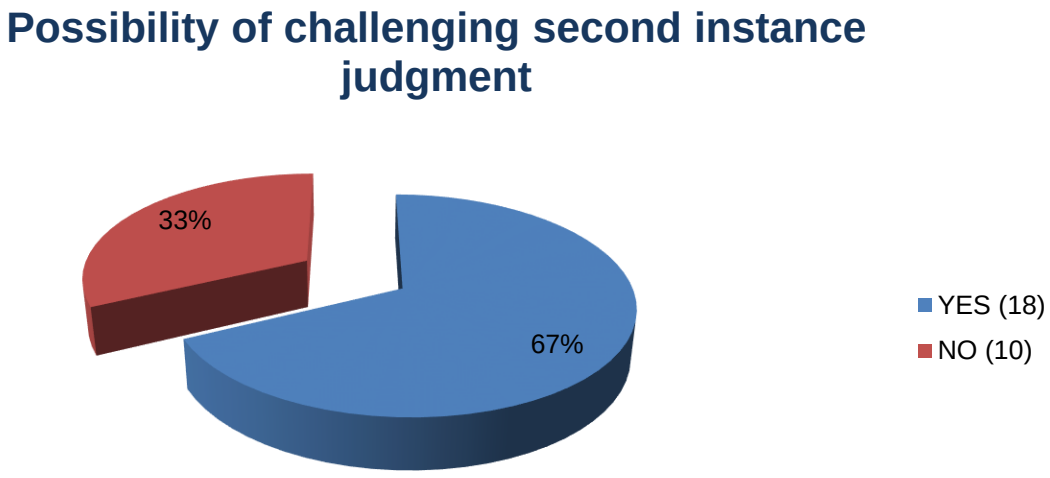
Observing time limits



15. *Is it possible to challenge adjudications made by a body of second instance? Do contractors or awarding entities hold this right?*

In most member states (18) the laws provide for the possibility of challenging the judgment of a second instance authority (as part of extraordinary appellate measures). This right is vested in both parties to the proceedings, i.e. the contracting authorities and the contractors.

There is no such possibility in England and Wales, Austria, Belgium (where there is no second instance authority), Bulgaria, France, Greece, Luxembourg, Germany, Poland[12] and Slovenia (where there is not even the second instance).



16. *What are the fees and charges associated with the use of legal protection measures?*

In most member states, the use of legal protection measures is subject to a fee.
Only four countries, namely France, Spain, Luxembourg and Sweden do not provide for any fees. In Latvia first instance proceedings are free.
In countries that have the fees, the amounts vary and depend on many factors. For example, in Austria and Italy it depends on the subject-matter of the contract, the type of

[12] In Poland, the judgment of a second instance authority may only be challenged by the President of the Public Procurement Office

procedure and the contract value, i.e. if the value is equal to, higher or lower than the EU thresholds. EU thresholds are the fee criterion also in Estonia, Poland and Hungary. In the Netherlands, the fee is different (lower) for individuals and (higher) for legal entities. In Cyprus, the fee is determined based on the value of the winning tender. The fee may also depend on the stage of the procedure at which legal protection measures are used (e.g. Lithuania, Slovakia).

In some countries, i.e. Belgium, Bulgaria, Denmark, Estonia, Finland, the Netherlands, and Lithuania the fee is fixed. Interestingly enough the fees are then usually relatively low. For example, in Belgium it is EUR 200, and in Ireland from EUR 20 to EUR 250.

In all countries where the fee is an estimate, the maximum value is set.

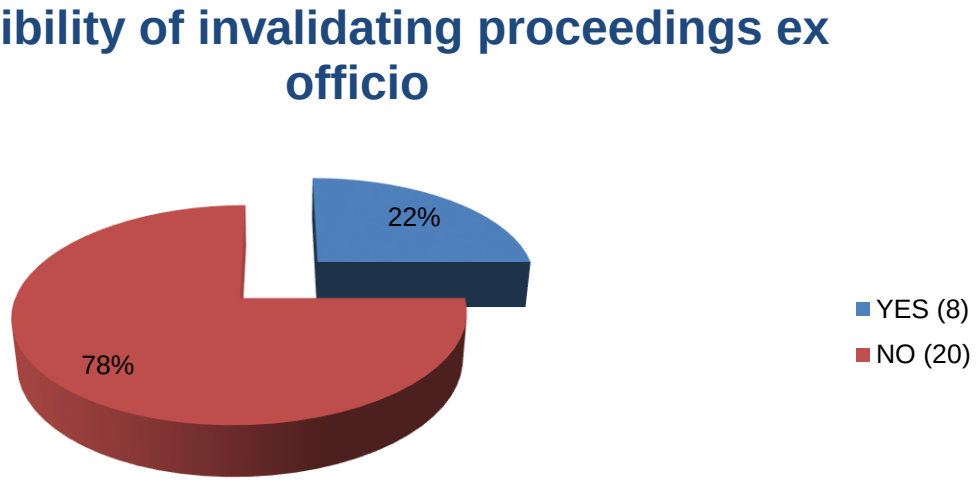
17. Can the appellate body of first or second instance order that the proceedings be cancelled ex officio (i.e. even when the appealing party does not request so)?

One of the key procedural aspects is the scope of powers of the authority examining a public procurement case of first or second instance. The admissibility or even obligation of ex officio actions of the authority is particularly interesting here. The question whether a public procurement procedure may be *ex officio* invalidated by the authority is connected with the relation between what the court/authority does and what a party to the proceedings does. Invalidation of a contract award procedure by the appellate authority is the furthest-reaching interference in the course of the procedure and theoretically may be the outcome of (i) a party's request in connection with alleged breach of law, (ii) the authorities' ex officio actions (in such a case the authority invalidates the tender procedure

due to procedure defects discovered by the authority itself having no relation to the pleas or demands).

In most countries, the adjudicating powers of the first instance authority are limited by decision making powers of a party, which through the wording of the appeal– the allegations and the demand – defines the scope of the appellate procedure. The resolution must thus be in connection with the pleas and motions of the appealing party.

In eight member states, the appellate authority has further-reaching powers including invalidation of a public procurement procedure ex officio, i.e. even if a party has not requested it. This solution exists in legislation of Cyprus, the Czech Republic, France, Lithuania, Luxembourg, Romania, Slovakia and Hungary.



18. Are there any mechanisms for unification of the rulings handed down in public procurement cases?

Unity, stability and predictability of judgments passed in public procurement cases may be a very significant element motivating entrepreneurs to participate in public procurement procedures. This, in turn, makes the entire process more competitive and results in achievement of the basic assumptions of the system, i.e. implementation of the principle *Best Value for Money*.

On the other hand, interpretational discrepancies and incoherent interpretation of regulations are undoubtedly a setback and drive competition down, both within a given country and the entire EU. Thus it is important that the initial postulates be guaranteed by certain institutional solutions.

Although in countries, where appeal procedures are part of the general judiciary system (irrespective of whether administrative or common courts), introduction of a separate mechanism unifying case law only for public procurement would be difficult to implement, in countries where authorities other than courts are involved (at least in first instance), such instruments are established and used in practice.

In Romania, the National Board for Appeal Examination (NBAE) meets on a monthly basis to discuss legal issues which have led to discrepancies in its case law. In order to unify case law, the Board organizes meetings every six months with the participation of its members, judges, experts in given fields and other experts. During those meetings, the NBAE may take a decision to unify the case law practice. These decisions, however, are only binding for the NBAE.

If the NBAE identifies discrepancies in judicial case law, it should address the Appellate Court in Bucharest with a request that the Supreme Cassation and Justice Court resolve the discrepancies. The Supreme Cassation and Justice Court decision is binding for the whole Romanian legal system.

A similar solution has been adopted in Hungary, where the Arbitration Council established the so-called arbitrator panels, whose task is to monitor and analyze decisions issued by the Council. The panels are to support uniform case law in appellate proceedings, monitor changes in court practice and issue opinions in the case of a dispute. Opinions of the panels are not binding.

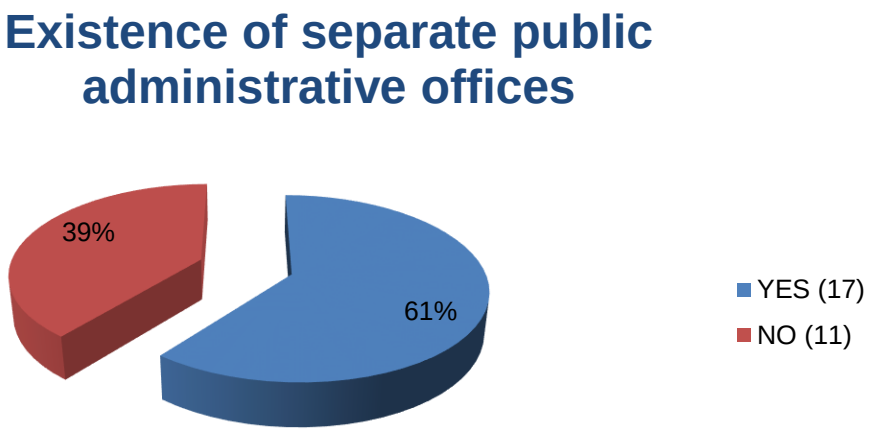
The Council also prepares – after consultations with a minister in charge of public procurement and, where applicable, in cooperation with national chambers of commerce or other professional authorities – guidelines for applying legislation in public procurement.

In Slovakia, where the first instance appellate authority is the Public Procurement Office, its employees meet regularly to discuss cases where there exist no earlier models to set general standards. They also issue guidelines and notices, which despite being general (they concern an abstract specific legal issue), translate into case law practice in specific cases.

19. Is there an administrative body appointed to supervise the public procurement market?

Another instrument, apart from case law, that is equally important and that may guarantee predictability and uniformity of application of public procurement regulations is their official interpretation and dissemination of knowledge about public procurement.

To this end, seventeen countries have decided to appoint independent administrative authorities in charge of the public procurement system. Eleven of them have authorities dedicated exclusively to public procurement (Bulgaria, Croatia, Greece, Lithuania, Luxembourg, Latvia, Poland, Portugal, Romania, Slovakia, and Hungary), and four have combined public procurement with competition law (the Czech Republic, Denmark, Finland, and Sweden), and one country has combined it with corruption combating and prevention (Italy).



What is interesting, it is not necessary to create separate, special authorities for this purpose; separate departments may be established within the existing ministries. This solution has been adopted by seven countries (England and Wales, Cyprus, Estonia, France, Spain, Malta, and Slovenia). In six countries, these are entities operating as part of ministries of finance (finances and the economy), and in the case of Slovenia, it is the ministry of public administration.

Three countries have not provided for separate (even as part of a greater structure) units in charge of public procurement at the central level (Austria, Belgium, and Germany). Although those countries do have units in charge of public procurement, their objectives mainly include drafting legal acts or developing solutions for computerization of public procurement. In other matters concerning, e.g., interpretation of regulations or promoting good practices, these issues are dispersed and are handled by various ministries and entities.

The German so-called Public Procurement Committees are a unique solution. They are composed of representatives of the federal government, Länder, lower level local governments, and business chambers. Their role is to prepare regulations having regard to postulates of the contracting authorities and the private sector; there are two separate committees: construction works and supplies and services.

20. Is the said body empowered to take part as a party to the appellate proceedings held in the first or the second instance? Is this body able to question the resolutions handed down by a body of second instance?

Legal protection measures in public procurement procedures are generally available to contractors who have or may have an interest in being awarded a contract.

This does not mean that other entities, including public administrative authorities which are given supervisory powers by the law of the given country, cannot initiate or participate in an appellate procedure.

These regulations have been provided for in eight countries (Croatia, the Czech Republic, Denmark, Latvia, Malta, Poland, Slovakia, and Hungary) and they basically concern the possibility of submitting an appellate measure in second instance or extraordinary appeal.

In Estonia and Finland, the ministry in charge of finances (Estonia) and the authority in charge of competition (Finland), respectively, may order a procedure to be invalidated or submit an independent motion to the appellate authority for prohibiting, declaring invalid or suspending performance of a contract, which has been executed without a competitive procedure.

In the remaining countries (18), similar powers either have not been introduced or they are limited to powers to inspect the correctness of the tender procedure.

21. Is representation of the parties in public procurement cases reserved for qualified lawyers (obligatory representation by a professional attorney)?

In most countries, where first instance authorities are specialized non-judicial bodies within the meaning of the national legal order, there is no requirement for the parties to be represented by professional attorneys (legal obligation to use a lawyer). Nonetheless in one instance, namely Germany this obligation exists.

In countries where public procurement issues are examined in first and second instance by courts, there is a legal obligation to use a lawyer except when the party decides to have no representative. In Lithuania the requirement to be represented by an attorney applies without any restrictions – only a professional attorney may file a complaint with a court.

Moreover, in the Czech Republic, even in cases examined in second instance by non-judicial authorities within the meaning of the national legal order, there is no legal obligation to use a lawyer.

22. Are the cases concerning concessions adjudicated by the same bodies as the public procurement cases? If no, what bodies are authorized to adjudicate in cases involving the concession for construction works or services?

In the law of all EU countries, concession cases are examined by the same institutions that examine those cases in public procurement.

Slovenia is an exception; the competent authority are common courts (and public procurement cases are examined by the National Audit Commission, which is not a court within the meaning of the national law).

LIST OF LAW FIRMS, WHO RESPONDED TO THE QUESTIONNAIRE

We would like to thank the following Law Firms for their assistance in preparing the report:

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