

Summary results of the survey on the draft transposition of Directive 2007/66/EC into Member States law

Aims of the survey:

- Exchange of information and benchmarking on the transposition approaches in the different Member States
- comparative analysis on difficulties in transposing specific Remedies Directive rules
- support the European Commission (ACPC) in the monitoring activity on the transposition process into national law

Tools of the survey

- summary table of the main features of the draft text for the transposition of Directive 2007/66/EC into Member States law.

Answers from:

BULGARIA, CYPRUS, CZECH REPUBLIC, DENMARK, FRANCE, GERMANY, IRELAND, ITALY, POLAND, ROMANIA, SLOVENIA, SPAIN, THE NETHERLAND, UNITED KINGDOM.

1. General features of review system (art.1)

1.1 Scope of the review system

In all Member States Remedies Directive applies to all contracts covered by Directive 2004/17/EC and 2004/18/EC: works, services and supply contracts and also concessions. In some Member States (**Cyprus, Czech Republic, Denmark, Italy, Poland, Romania, Slovenia**) the Directive applies also to below the threshold contracts.

1.2 Obligation to notify the contracting authority of the intention to seek review

Some Member States provide in their national legislation for the obligation to notify the contracting authority of the intention to seek review (**Germany, Ireland, Italy, Romania, Slovenia, Spain, United Kingdom**).

In some Member States (**Germany and United Kingdom**) in case of infringement of such obligation the review will be dismissed as inadmissible.

1.3 Prior application for review before the contracting authority

It was transposed only in **Czech Republic** and **Spain** legislation.

1.4 Nature of the review bodies

In most of Member States review bodies have **judicial** nature (administrative or civil). In some Member States the national legislation provides for a specific **non judicial** review body on public procurement as first instance: **Cyprus** (Tenders Review Authority establish by the Tender Review Law), **Czech Republic** (Office for the protection of Competition), **Denmark** (National Complaint Board for public procurement - administrative quasi-judicial board), **Poland** (National Appeal Chamber – non judicial review body -appeals), **Spain** (administrative review).

2 Pre-contractual phase

2-1 Standstill period (articles 2, 2 a, 2 b)

2.1.1 Duration and calculation of the standstill period

In almost all Member States the national legislation provides for the minimum period of the Directive: **10** days from the day following the date on which the contract award decision is sent electronically or **15** days if the notice is sent by other means. In Italy a longer period is provided (**40** days starting from the date the last communication of the contract award procedure has been sent to the operators concerned).

2.1.2 Exemptions to the mandatory standstill period

Most of the Member States (**Cyprus, Denmark, France, Ireland, The Netherland, Poland, Romania, United Kingdom**) transposed all derogations allowed by the Directive:

- a) if Directive 2004/18/EC does not require prior publication of a contract notice in the *Official Journal of the European Union*;
- b) if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned;
- c) in the case of a contract based on a framework agreement and in the case of a specific contract based on a dynamic purchasing system .

In **Italy** only option b) was transposed . In **Germany** only option a) was transposed in case of extreme urgency. **Slovenia** did not transposed any derogations.

2-2 Precontractual review (artt. 2 , 2c)

2.2.1 Time-limit for seeking review

In most of the Member States time-limit for seeking review is equivalent to the standstill period (**10** or **15** days depending on the mean used). In **Italy** the transposition draft law provides for **30** days starting from the date of the receipt of the communication of the contract award procedure or from the date of publication of notices (if directly adversely affecting). In some Member States no predetermined time-limit is provided but applications for review are no more admissible after the conclusion of the contract (**France**) or the tenderer must object an infringement immediately after knowledge (**Germany**). In the **United Kingdom** proceedings must be started promptly and in any event within **3 months** from the date when the grounds for starting proceedings first arose, unless the Court considers there are good reasons for extending the period.

2.2.2 Suspension of the conclusion of the contract (art. 2, par. 3)

In more than half of the involved countries the suspension ends when the decision on interim measures has been taken . In the other Member States (**Czech Republic, Poland, Romania, Spain, The Netherland, United Kingdom**) the suspension ends when the decision on review has been taken. In **Germany** the suspension ends with the decision of the Public Procurement Competition Board and another two weeks (deadline for appeal).

2.2.3 Time-limit imposed to the review body for returning a decision

Time-limits are provided from a minimum of **15** days (**Poland**), **20** days (**Spain**) or **21** days (**France**) from the date of submission of the application to a medium term of **30-45** days (**60** days in **Bulgaria**). Nevertheless in some countries no maximum time-limit is provided (**Denmark, Ireland, United Kingdom**). In **Italy** (first instance) ordinary protection is normally granted within **80** days; a decision on an interim measure is normally granted within **45** days and an application for an emergency ruling to obviate the risk of damage to the applicant is normally granted by **5** days.

2.2.4 Competencies devoted to the review body

In almost all Member States the review body can impose the suspension or the cancellation of decisions related to the award procedure. In **France** and the **United Kingdom** the review body can also order to modify decisions or documents related to the award procedure.

3 - Contractual review (articles 2 d , 2 e, 2 f)

3.1 Time-limit for seeking review

All Member States transposed the minimum time-limit provided by the directive:

art. 2 f, par. 1, a): **30 days**

art. 2 f, par. 1, b): **six months**

In **The Netherland** the time-limit is, according to the national system, **5 years**.

3.1 Competencies devoted to the review body

As concerns infringements mentioned in art. 2d, all Member States transposition draft law provides for ineffectiveness, or, in case of overriding reasons of general interest, alternative penalties.

As concerns the meaning of ineffectiveness, the judge may opt between *ex tunc* or *ex nunc* ineffectiveness (**Denmark, Poland, Romania, Spain, Italy**), *ex nunc* (**Czech Republic, United Kingdom**), *ex tunc* (**Bulgaria, France, Germany, The Netherland**).

As concerns infringements mentioned in art. 2e, in most of the Member States the review body can opt between ineffectiveness and alternative penalties. In some Member States the transposition draft law provides only for alternative penalties (**Bulgaria, Denmark, Poland, United Kingdom**).

3.2 Alternative penalties

3.2.1 Nature and scale of alternative penalties

Almost all Member States transposition draft law provides for financial penalties or the shortening of the duration of the contract.(in **Bulgaria** and **Czech Republic** only financial penalties).

Financial penalties (from a minimum of 5-10% up to 15-20% of the total estimated amount of the contract) are usually paid as revenues of the State budget.