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THE RECENT REFORM OF THE GREEK SYSTEM OF INTERLOCUTORY JUDICIAL PROTECTION IN PUBLIC PROCUREMENT PROCEDURES[1]

1. The hitherto transposition of the requirements of interlocutory judicial protection into the Greek legal order: A brief introduction;
2. New regulations and their objectives;
3. Conclusion.

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1. Law No 3886/2010, entitled "Judicial protection during the awarding of public contracts – harmonisation of the Greek legislation with Directives 89/665/EEC[3] and 92/13/EEC[4], as amended by Directive 2007/66/EC[5] of the European Parliament and of the Council of the European Union of 11 December 2007" replaces Laws No 2522/1997[6] and

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[3] Council Directive 89/665/EEC 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.

[4] Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

[5] 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 regard to improving the effectiveness of review procedures concerning the award of public contracts.

[6] Entitled "Judicial protection during the stage prior to the conclusion of public works, supplies and services contracts in compliance with Directive 89/665/EEC".

No 2854/2000[7] introducing in the Greek system of interlocutory judicial protection in public procurement Procedures against decisions of the awarding authorities the provisions of the Directive 2007/66/EC. Within the scope of the new Law fall all disputes arising from the application of the regime that governs, by implementing the EU public procurement Directives 2004/18[8] and 2004/17[9], the procedure before the conclusion of awarded contract[10].

The domestic system of interlocutory judicial protection can be briefly described as follows: Any person who has or has had an interest in obtaining a particular contract and has been or risks being harmed by an infringement of Community or national law can apply for interim relief, the annulment or declaration of the nullity of the unlawful act of the awarding authority or the grant of damages (Articles 2 and 7 § 1 of Law No 3886/2010). Any affected party in the procurement procedure can apply for the suspension of application of the contested decision, until a judgment is reached in the main proceedings in order to correct the alleged infringement or to prevent further damage to his interests (Article 5 §§ 1 and 5 of Law No 3886/2010). Before lodging the application for interim relief, the interested party must, within a time limit of ten days from the day he was informed in any way of the unlawful action or omission, bring a recourse before the awarding authority referring to the act against which interim measures are sought, in which he defines precisely the legal and factual arguments that justify his claim (Article 4 § 1 of Law No 3886/2010)[11]. The awarding authority examines both the lawfulness of the

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[7] Entitled "Judicial protection during the stage prior to the conclusion of contracts of entities operating in the water, energy, transport and telecommunications sectors according to Directive 92/13/EEC".

[8] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

[9] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

[10] The relevant rules are dispersed in numerous legal instruments, mainly governed by Law No 2286/1995 giving the authorization for the issuance of the Presidential Decree No 118/2007, which enacts the Regulation of State Supplies and is by analogy applicable for the awarding of services. The provisions of Presidential Decree No 60/2007 incorporate EC Directive 2004/18. The conclusion of public procurement contracts in the fields of EC Directive 2004/17 is governed by Presidential Decree No 59/2007. As for public works, the applicable framework legislation is Law No 1418/1984, as amended and in force.

[11] The only, as far as I can see, detailed and systematic introduction to the Greek system of interlocutory judicial protection in public procurement procedures is Pachnou, The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece, Thesis/University of Nottingham 2003 pp. 157-234, with case studies in pp. 334-395.

act and the facts on which it is based and assesses whether the authority's decision was correct[12] and has to issue a reasoned decision; if it considers that it has merit, must take all necessary measures. If the time limit passes without any action on the part of the authority, the complaint is presumed to have been rejected. While the time limit for the recourse is running and, if it lodged, until a decision is reached the contract cannot be concluded. The same applies in case of an application for interim relief (Article 5 § 2 of Law No 3886/2010), except for the case that the conclusion of the contract has been explicitly allowed by a provisional order of the court (Article 5 § 4 sentence 2 of Law No 3886/2010). The authority can go ahead with the award only if the continuation of the procedure is in line with the principle of fair administration. The application for interim relief is accepted, if there is a serious probability of infringement of a EU or national rule and the measure is necessary to eliminate the harmful results of the infringement or to prevent harm to the interests of the applicant (Article 5 § 5 sentence 1 of Law No 3886/2010).[13] Applications for suspension are inadmissible, unless an application to annul the decision in the main proceedings has been lodged within a month.[14]

Especially considering that under Greek law there is no separate public or private body charged with the overall supervision of the

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[12] The decision must stay within the limits of the complaint and be based on an assessment of the legal and factual arguments invoked by the complainant, otherwise the authority would exceed its material competence and be judging ultra petita.

[13] It may, in particular, suspend acts, documents or the conclusion of the contract, prohibit the authority from taking legal or material acts and order the authority to take positive action, such as keeping documents related to the award procedure. The court may also order the suspension of the procedure as a whole, if the court finds that there are several serious breaches, which cannot be corrected by less restrictive measures (like the suspension of a specific act or the change of the terms of the notice) and which render the continuation of the award inadmissible (Article 5 § 1 sentences 1 and 2 of Law No 3886/2010).

The application can nevertheless be rejected if, after balancing the harm of the applicant, the interests of third parties and the public interest, it is decided that the negative consequences of the award [of relief] are more serious than the benefit to the applicant (Article 5 § 5 sentence 2 of Law No 3886/2010).

[14] The award procedure constitutes what is called a "composite administrative action", comprised by several stages; at the end of each stage a separate act is provided for, the issuing of which of each is, at the same time, a condition for the issuing of the next. Each successive act depends for its legality on the prior acts and the award decision incorporates all of them. Contrary to the basic Greek model of annulment proceedings before the administrative courts (according to which only the final act can be challenged as it is considered to incorporate all the preceding acts and, therefore, to develop enforceability), each act of the tender procedure, as considered "separable", can be challenged by an application for annulment on its own.

application of public procurement rules, the task of their effective application and enforcement is entrusted to the courts and to the initiative of the individuals concerned[15].

2.

I. Unification of Jurisdiction

A unified jurisdiction to settle disputes within the field of Law No 3886/2010 law has been consolidated – except for certain cases (see below sub III 2). The administrative appeal courts (in three-judge formation) have become competent in that of appeal (Article 3 § 1 of Law No 3886/2010), regardless of the legal structure of the contracting authority as a public law entity or public "undertaking" (the latter being defined as bodies set up by the state but governed by private law, often taking the form of a commercial law company, established to cover public utility needs which are funded or managed in their majority by the State or by any public law entity[16]). Under the regime of previous Law No 2522/1997, the jurisdiction was dependent on *the qualification of the contract as* private or administrative: If the contract was concluded by public law bodies, that means administrative, the supreme administrative court, the Council of State had jurisdiction upon acts leading to its conclusion (as administrative acts), while civil courts reviewed acts taken to conclude a private law contract as contracts awarded by public undertakings (although these are qualified as public contracts in the meaning of the procurement Directives). This is, according to the relevant explanatory memorandum, aiming at the hitherto interpretation and application of the same rules in a unified way in view of several deviations that have been observed between the jurisprudence of the Council of the State and the civil courts (First Instance Courts)[17]. This fact had already led some theoreticians to suggest that it is not wise to split the jurisdiction of the courts for contracts concluded under

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[15] **Michalopoulou**, in *The International Comparative Legal Guide to Public Procurement* 2009: Greece, pp. 102/106, http://www.iclg.co.uk/khadmin/Publications/pdf/2228.pdf.

[16] Whether a specific undertaking constitutes a "public undertaking" for the purposes of the application of the pertinent legislation is an issue on which no independent ruling may be obtained. It is rather depended on political choices of different governments that might or might not consider it opportune to create them.

[17] Moreover, in the preamble of Law No 3886/2010 is submitted that consolidation of jurisdiction was necessary because of controversies repeatedly expressed by agents of the Commission on the adequacy and quality of legal protection afforded by the First Instance Courts, obviously because of the sometimes lesser expertise of the civil judge in administrative law matters (comp. Pachnou (op. cit. note 10 above), p. 165).

the same rules[18]. It had been submitted, that there is a risk of unequal or conflicting judgments between the two branches of courts in identical cases, since jurisdiction of the courts was split for procurement contracts concluded under the same substantive law, depending on the nature of the contracting authority, meaning that different remedies and procedural rules will be applied to disputes based on the same provisions and often the same facts[19].

II. Unification of applicable law

The new provisions introduce in the national legal order a single piece of legislation in order to provide interlocutory legal protection in the field of public procurement. In addition, the legislator has explicitly limited the application of any organizational regulations for certain contracting authorities regarding procurement or any other relevant administrative provisions in procedures within the application field of the Remedies Directive to the extent that these usually entail provisions for interlocutory protection (mainly concerning recourses or other general remedies, see below sub V 3).

III. Judicial Economy

1. *The application for interim relief is heard as a rule by an individual judge*, the Chairman of the competent administrative appeal court or another judge designated by him, instead of the Suspensions Committee, which was a special three-judge formation of the Council of State. The same was the rule in the interim proceedings before civil courts, as applications for interim measures before the civil courts were heard by only one first instance judge[20]. However, a three-judge formation of the court may be used when the case is considered to be of particular importance (Article 3 § 2 of Law No 3886/2010).

2. Under the jurisdiction of the Council of State remain cases of awarding contracts of particular economic importance, in relation to public works concessions or service contracts covered by Directive 2004/17/EC and contracts with a budget of more than EUR 15,000,000 (Article 3 § 3 of Law No 3886/2010). The removal of large volumes of cases from the

[18] Compare Pachnou (op. cit. note 10 above), p. 171.
[19] Pachnou (op. cit. note 10 above), pp. 160-162.
[20] The respective remedies before the civil courts were actions for interim relief, for declaration of nullity (to have contracting decisions declared void) and for damages. These are all brought before the Civil Court of First Instance of the area where the contracting authority is based or where the contract was or would be concluded or the undertaken obligation was or would be delivered.

Council of State is expected to relieve the court of its work and contribute to the acceleration of justice, particularly as now an extensive jurisprudence on almost all issues of procurement has been developed, which facilitates the effective implementation of interlocutory protection.

3. The new rules provide, in the same formulation as the previous regulation (Article 3 § 2 sentence 2 of Law No 2522/1997), that a recourse lodged with a contracting authority is to be notified of the applicant's care in informing each affected party by a total or partial acceptance of the recourse. Since then, it has been specified that in cases that the recourse is explicitly or implicitly rejected, any failure to notify does not involve the admissibility of the application for interim relief (Article 4 § 2 of Law No 3886/2010). The failure to notify the recourse, *a contrario*, although not explicitly stated, should be, in our opinion, classified as a prerequisite of the admissibility of the recourse. This assessment has been supported by the relevant case-law which has been changing in recent years[21]. This is valid both on grounds of public interest, so that the awarding authority is capable of taking into consideration the views of all parties (it is induced to assess the case on points of fact and law) in order to achieve the earliest possible settlement of the issue raised, and, on the other hand, to ensure effective protection of any affected parties[22].

4. Unlike the previous provisions, that the lodging of recourse is facultative and not a procedural requirement of the application for interim relief was contested as an acceptance in whole or as part of an application of another competitor (Article 3 § 2 sentence 3 of Law No 2522/1997), the legislator can now *exclude the recourse* in this case (Article 4 § 3 of Law No 3886/2010). The ratio legis for the previous provision was that the recourse was aimed at enabling the administration to respond to specific allegations of an applicant, so if the decision results from recourse of another competitor, the above mentioned reason ceases[23].

We believe, however, that a recourse can serve (in a global procedural perspective) the economy of the judicial proceedings in this case, as it can be presumed that the administration would be capable of providing reasons that may even result in the acceptance of a decision by the affected party[24]. This is valid, because recourse, as an administrative procedure, is aiming essentially at allowing for an amicable solving of the dispute, as well as at helping clarifies the dispute for the parties and,

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[21] Council of State, Suspensions Committee, Decisions No 1407/2007, 9/2008.

[22] Critical before the above mentioned recent case law Pachnou (op. cit. note 10 above), p. 181: Uncertainty of the conditions of the recourse regarding the consequences of lack of notification.

[23] Comp. **Tomaras,** *The Administrative Contract*, Athens 2008, p. 84 (in Greek).

[24] Details on this issue Wuertenberger, Die Akzeptanz von Verwaltungsentscheidungen, Baden-Baden 1996.

eventually, for the judge who will hear the case if no solution is found and the complaint proceeds before the courts[25].

5. The time limit for issuing a reasoned decision on the application for interim measures is *extended* for the awarding authority from a (calendar) ten-day (from the lodging of the recourse (Article 3 § 2 sentence 1 of Law No 2522/1997) to fifteen days (Article 4 § 1 sentence 1 of Law No 3886/2010), paving the way for better response. We believe that the previous period often proved too short, especially in cases where the collective body which had jurisdiction over the action was different from the body conducting the competition.

IV. Effectiveness of judicial protection

1. In the new Law the minimum "standstill" period[26] of ten calendar days provided for in Directive 2007/66/EC[27] to be applied between the award decision and the subsequent conclusion of the contract is laid down for the contracting authority, with effect from the day following the date on which the tenderers were made *fully aware* of the contract award decision (coordinating application of Articles 4 § 1 sentence 1, 5 § 2 sentence 1 and 8 § 1 of Law No 3886/2010). At the same time, by the new regulation in Article 5 § 2 sentence 1 a gap was fulfilled which was stated under the regime of Law 2522/1997, in which only the time limit for the application for interim relief prevented the conclusion of the contract, while for the recourse the suspensive effect was maintained after it was lodged and until a decision has been reached or the recourse tacitly rejected, this was not the case for the application for interim relief, where the suspensive effect ceased after it has been lodged (Article 3 § 3 sentence).

In order for the challenge of the award decision to be realistically possible, it is true, all bidders should be notified of it and there was no

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[25] Analytical to this issue **Christonakis**, *Sog. Bürgerverurteilungsklage? – eine prozessrechtliche Analyse mit sozialrechtlichem Bezug*, Die Sozialgerichtsbarkeit 2002, pp. 309/313-314; Meier Die Entbehrlichkeit des Widerspruchsverfahrens. Eine rechtswissenschaftliche Untersuchung unter besonderer Berücksichtigung der Rechtsprechung des Bundesverwaltungsgerichts, Muenchen 1992, p. 76.

[26] **Golding/Henry**, *The New Remedies Directive of the EC: Standstill and Ineffectiveness*, 17 Public Procurement Law Review (2008), pp. 146/148-149. A practice which was observed in several EU Member States on the part of a contracting authority to conclude the awarded contract within a very short period of time after the award decision has been taken in order to make the consequences of that decision irreversible, deprived the Remedies Directive 89/665/EEC of an important part of its effect and has led to a situation in which rejected tenderers were not effectively protected; see European Court of Justice, *Alcatel Austria AG and Others, Siemens AG Oesterreich and Sag-Schrack Anlagentechnik AG v Bundesministerium fuer Wissenschaft und Verkehr* (C-81/98).

[27] Article 2a § 2 of Directive 2007/66/EC.

provision for that in Greek law. However, under the previous regime of Law 2522/1997, according to established case law, the principle of *fair administration* required that authorities refrain from taking any action endangering the outcome of a judicial procedure, as they are aware of the possibility of an application for interim measures against the awarding decision for at least fifteen days after the expiry of the time limits set for the recourse and the application for interim relief; this period of time was considered reasonable in view of the provision of Law No 2522/1997 which stated that the hearings in the summary proceedings should not be later than fifteen days from the lodging of the application for interim relief (Article 3 § 3 sentence 4). During this period of time the contracting authority had to be informed by the administration of the court if there is a proceedings pending.

2. The validity of a public contract under the previous legal regime would not be affected, if the court annulled or recognized the invalidity of an act or omission of the contracting authority after the conclusion of the contract (unless prior to the conclusion, the awarding procedure that would be suspended by an interim measure or by a provisional order of the court). The protection of the affected party was limited to claiming damages (Article 4 § 2 of Law No 2522/1997), which had become a matter of criticism by practitioners[28] and was one main reason for the issuing of Directive 2007/66/EC[29]. Under the new rules, the affected competitor may seek an *annulment of the contract* within thirty days from the issuance of a reasoned awarding decision (and, in any case, not later than six months after the conclusion of the contract[30]), in specific cases referring to issues of transparency, equal treatment, management, formality in some types of competition procedures and effectiveness of judicial protection. That is when the contract was assigned either i) without prior notice published in the Official Journal of the European Union or ii) under violation of the "standstill" period or of any suspension on grounds of an interlocutory measure of a court or iii) under violation of certain obligations in case of a framework agreement[31] or a dynamic purchasing system[32] (Article 8 §§ 1 and 6 of Law No 3886/2010). Further, the new Law states that the time

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[28] **Berends**, *Judicial Protection in the Field of Public Procurement: The Transposition into Dutch Law of Directive 2007/66/EC Amending the Remedies Directives*, Merkourios/Utrecht Journal of International and European Law – Volume 27 (2010), p. 17/18.

[29] See **European Court of Justice**, *Stadt Halle and RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* (C-26/03).

[30] Both time limitations are equal to the minimum periods contained in Article 2f § 1 of Directive 2007/66/EC.

[31] Article 32 of Directive 2004/18/EC.

[32] Article 33 of Directive 2004/18/EC.

limit and the application for interim relief in such cases have no suspensive effect as well as that the procedure for issuing a decision on a provisional order applies (Article 8 § 8 sentences 2 and 3).

However, these provisions do not give a direct answer to the question of whether competitors who participated in the bidding process prior to the conclusion of a contact can be seen as authorized by law to seek the annulment of the contract for reasons of competition, mainly because of changes in conditions that might be made in relation to the tender notice[33].

3. Opposite to the general rule, that, when the claim which constitutes the object of an action in damages stems from an unlawful administrative act or omission, the action for compensation is not dependent on an application for annulment or another recourse against the act[34], in the application field of the judicial protection during the stage prior to the conclusion of public contracts the prior annulment or declaration of nullity of the act is required as a precondition for the admissibility of an action for compensation for damages (Article 9 § 2 sentence 1 of Law No 3886/2010). However, the new provisions state that if the annulment is not possible for reasons not attributable to the applicant *compensation can be directly claimed*[35].

4. The time limit for a recourse has been extended for the applicant from five to ten calendar days, after he was made fully aware of the act that may harm his legal interests (Article 4 § 1 of Law No 3886/2010). By extending the time the legislator has corrected his assessment of the reasonableness of the time needed to draft a detailed and fully reasoned

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[33] This is crucial, because a deficit of judicial protection in these cases can arise. Lodging an application for annulment by third parties against an act relating to the implementation of administrative contracts is generally inadmissible in the Greek system of judicial protection before administrative courts, so that consequently the application for suspension would be dismissed (see Article 52 of Presidential Decree No 18/1989 on the organisation and proceedings before the Council of State and Article 200 et seq. of Law No 2717/1999 ("Administrative Court Procedure Code"). Furthermore, the chances of success of an application for suspension of the performance of a contract by a court regulation is considered rather unlikely, because the alleged need for servicing the public interest (Article 210 § 4 alternative (a) of Administrative Court Procedure Code) by the performance of the contract may exclude the above measure, to these issues very critical Giannakopoulos, The Protection of free competition during the implementation of public contracts, Athens 2006 (in Greek), pp. 688 et seq., especially regarding the necessity of a regulation of a balancing procedure to protect both competition and the need for continuation of the performance of a public contract.

[34] Article 78 sentence 1 of Law No 2717/1999 ("Administrative Court Procedure Code").

[35] According the previously applicable provision (Article 5 § 2 sentence 2 of Law No 2522/1997), the action can be lodged and heard together with the main remedy (which was, however, applicable only in the trial before the civil courts where the action for declaration of nullity and the action for damages might be joined, since the competent court was the same). This is stated now in the explanatory memorandum to Law No 3886/2010.

complaint, although competitors are usually expected in practice (depending on each specific market) to be acquainted with the problems that might arise and be ready to react promptly.[36]

5. According to new provisions, the court in adjudicating the application and having assessed the circumstances in each specific case may *impose a financial penalty* on the contracting authority, if it considers that the failure to reason the rejection of the recourse against an act, or a delayed filling of it makes it particularly difficult to provide effective judicial protection (Article 4 § 5).

6. Once an application for interim measures has been filed, the applicant should notify the contracting authority by any appropriate means such as electronic or fax, within ten calendar days after exercising the application (Article 5 § 2 sentence 2 of Law No 3886/2010). It is in the best interests of the party affected to defend his interests by contributing to a more effective operation of the system of interlocutory protection.

7. The court *imposes, in binding competence*, on the contracting authority, a *fine* which accrues to the applicant (up to 10% of the value of the contract), if the court assesses that the effects of a contact that should be declared void, for reasons of overriding public, require the fulfillment of its performance (Article 8 § 5 of Law No 3886/2010).

8. The new provisions refer to an analogy of the provisions of the Council of State Court Procedure on a previous settlement of the dispute in both cases, if the competitor did not lodge an application for interim relief at all or he did so unsuccessfully and the contract has already been concluded and executed before the hearings of the main case and if the contracting authority, in compliance with the contents of the court order which had accepted an application for interim measures, has amended or revoked the act that caused the dispute (Articles 5 § 8 sentence 2 and 7 § 3). The applicant may then request the court in the main proceedings the *continuation of the hearing in order to declare, by judgment, that the administrative act was unlawful* if the plaintiff had a specific justified interest in this finding[37]. In my opinion, such an interest, contrary to established case law of the Council of State[38], must be assessed as legitimate in cases that the applicant declares his intention to prepare a redress[39].

V. Acceleration of Procurement Procedures

[36] Comp. Pachnou (op. cit. note 10 above), p. 180.
[37] Article 32 § 2 of Presidential Decree No 18/1989.
[38] Council of State, Decisions No 1103/2009, 542/2010, 3667/2009, 2610/2002.
[39] See the analysis in **Christonakis**, *Feststellungsinteresse* (§ 113 Abs. 1 S. 4 VwGO) *und Prozessökonomie bei der sog. „vorbereitenden" Fortsetzungsfeststellungsklage*, Bayerische Verwaltungsblätter 2002, pp. 390-396.

1. The expiry of the time limit for the contacting authority of fifteen days from the lodging of a recourse, to the issuing of a decision, will be presumed to be a rejection (Article 4 § 4 sentence 2 of Law No 3886/2010). Then, the time limit for an application for interim measures commences. Though the contracting authority can issue a *decision accepting the recourse*, even in part, after that point in time, *until the first hearings before the court* of the interlocutory proceedings and in this case the trial is settled (Article 4 § 4 sentence 3 of Law No 3886/2010).

2. According to new provisions, the contracting authority can *provide*, if it rejects the recourse, *additional reasons* to the act which have been challenged by the application for interim measures or deficient or insufficient reasons. The time limit for filling is six days before the original or adjourned hearing of the application (Article 4 § 4 sentence 4).

This provision is a remarkable innovation in the Greek system of judicial protection against administrative actions in which the strict control on observance of these so-called substantial requirements of the administrative procedure is of fundamental importance as an essential part of the control of legality. This control seeks to serve the purpose of making a more sound decision possible, particularly in cases of technical operation, exercise of discretion, and acts as a guarantor of the interests of participants in the administrative procedure. However, the formulation of the above mentioned provision raises questions. Then, there should have been exceptions to this rule, as in cases in which reasons may not be supplemented if they lead to change in the nature of the challenged decision of the awarding authority or if such reasons because a disadvantageous procedural position of the applicant[40].

3. The legislator introduced, under the new rules, the *recourse as a special and exclusive remedy* against the acts or omissions of contracting authorities and thus regulated its relation to any domestic administrative remedies (Article 4 § 6). Under the previous regime of Law No 2522/1997 the introduction of a specific recourse was not hereby touched by any special provisions on the exercise of any domestic procurement remedies. The legislator clearly did not intend to resolve the issue on the relation or prevalence between any domestic procurement remedy or any general administrative remedy that are often provided by applicable law or by any organizational regulations for certain contracting authorities and the

[40] See about the comparable problems arising from the implementation of controversial Article 114 sentence 2 of the German Law on Administrative Court Procedure (Verwaltungsgerichtsordnung) regarding supply of considerations which led to discretionary decisions R. P. Schenke, Das Nachschieben von Ermessenserwägungen - BVerwGE 106, BVerwGE 106, 351, Juristische Schulung 2000, pp. 230/231-233.

recourse against decisions on public procurement proceedings[41]. Therefore, an affected party had often the possibility either to raise an administrative remedy provided by another law and, in case of rejection, to lodge the recourse of Law No 2522/1997, which was in his favor to extend the period within which he has to apply for an interim measure before the court, or to refrain from that and lodge a recourse[42].

4. In the new Law it is defined that an act that could be subject to a recourse or, subsequently, to an application for interim protection so as any evidence of its reasoning may be sent to any party concerned by fax or electronic means (Article 4 § 1 sentence 3 Law No 3886/2010)[43].

5. The hearing of a case brought before a court has not to be more than thirty days after lodging an application for interim relief and the notice of the summons cannot be less than fifteen days before the hearing (Article 5 § 3 sentence 2 Law No 3886/2010), instead of twenty and fifteen days, respectively, as in force under the previous law (Article 3 § 3 sentence 4 of Law No 2522/1997). The time limit is certainly indicative, however, that this provision is, in our opinion, setting a more realistic timetable, which is an evident expression of the legislative intention to emphasize the urgency of keeping time up which contributes to the acceleration of the administrative procedures (the usual length of summary proceedings in public procurement cases in Greece until the decision is, as far as I have experienced, three to five months).

VI. Regulations on Court Discretion

1. The measures set by the judge, as content of a decision on a provisional order, can include the *cancelling of the prohibition to award the tender and to conclude the contract* (Article 5 § 4 sentence 2 of Law No 3886/2010). This is a manifestation of a constant case law jurisprudence according to which the contracting authority had been able to conclude the contract, in case that an application for provisional order had been rejected or such an interim measure had been already revoked by a court[44]. This was a common case if applications had been assessed obviously

[41] Compare the views of the Chairman of the Committee that was commissioned to draft Law No 2522/1997 Geraris, The interlocutory judicial protection in public works, supplies and services (Law No 2522/19997), Athens 1999 (in Greek).
[42] Council of State, Suspensions Committee, Decision No 785/2004.
[43] In addition, the case law jurisprudence has suggested that the sending of e-mails by the administration is a lawful way to notify the contents of the relevant decision but did not move a time limit for respective administrative action, Council of State, Suspensions Committee, Decision No 803/2004.
[44] Council of State, Suspensions Committee, Decisions No 339/2003, 915/2005.

inadmissible (eg. time limit or if there had been no recourse lodged with the contracting authority).

2. In applying the provisions of enrichment without just cause (Article 904-913 of Greek Civil Code), the court may order a partial payment in the amount owed, or not award any amount at all after taking into consideration that the contractor knew or should have known of the invalidity of the contract signed (Article 8 § 2 sentences 1 and 3 of Law No 3886/2010).

3. The court may either declare the contract partially void (ex nunc) after assessing any particular circumstances. This includes, without limitation, the time of the implementation stage, the severity of the offense and the conduct of the contracting authority. Or, it may alternatively shorten the contract period (Article 8 § 3 of Law No 3886/2010).

4. The court may, even in a case where it has registered an unlawful award of contract, not to declare it void if it assesses the existence of an overriding public interest requiring the preservation of results and performance is set. However, the presence of financial interests alone does not constitute such an overriding reason in a performance of a contract, unless the annulment would lead to disproportionate consequences. In any case, such reasons cannot explicitly be constituted by increasing burden of the awarding authority at the expense of a delay in implementation of the contract to conduct a new procurement procedure. Neither the changing of the financial institution that is performing the contract or the obligations arising from the annulment of the contract be sited (Article 8 § 4 of Law No 3886/2010).[45]

3. Law No 3886/2010 introduces in the transposition of the Remedies Directive 2007/66/EC in the Greek system of interlocutory judicial protection for public procurement in four major innovations that serve both the economy of the administrative procurement procedure and of the court proceedings while on the other hand they satisfy the requirements of the Directive for effective protection of competitors. The dualism of the previous regime of Law No 2522/1997, according to the legal nature of the contracting authority has now ceased and the Council of State should be relieved since protection measures have to be ordered by the administrative appeal courts. A "standstill" period has been introduced. A possibility to challenge the contract has been given to affected parties under conditions related to a breach of the fundamental principles of transparency and equal treatment and a possibility for the awarding authorities to provide grounds for rejecting a recourse in the

[45] See to this issue further **Goebel**, *Gesamtwirtschaftliche Aspekte im vorlaeufigen Vergaberechtsschutz*, Baden-Baden, 2009.

proceedings before the court which establishes a deviation from the principle of formality of the Greek system of application to annulment has been granted. The new regulations incorporate case law jurisprudence, whereas the issue of interlocutory measures against a contract on grounds of protection of competition so in case of changes in certain conditions, in relation to the tender notice, remains open.

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