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INFORMATIVE NOTE

PUBLIC LAW

CJEU blocks automatic lifting of the suspensive effect

CJEU requires judicial consideration before lifting the automatic suspension introduced by Law 43/2024

The Court of Justice of the European Union (CJEU) was asked to rule on whether Article 25-A, inserted into Law 30/2021 of 21 May by Law 43/2024[1] of 2 December, is compatible with EU law and, in particular, with Directive 89/665/EEC (the 'Remedies Directive'). The judgment, delivered by the Second Chamber, concludes that the exceptional arrangements for lifting the automatic suspensive effect introduced by Law 43/2024 infringe the essence of the right to an effective remedy enshrined in the Charter of Fundamental Rights of the European Union.

A difficult balance: provisional protection versus the public interest

We have witnessed a series of legislative developments in pre-contractual litigation at both the EU and national levels. They have all pursued the same objective: striking a balance between two competing requirements. On the one hand, **tenderers must have effective provisional protection** against potentially unlawful award decisions. On the other hand, there is a **public interest in ensuring that contracts are entered into promptly** and their purpose is achieved.

The Remedies Directive reflects this balance precisely. It provides for an automatic suspension of the procedure, and this prevents the contract from being concluded until the court has delivered its ruling. However, it allows the appeal court to consider all the relevant interests and, where appropriate, lift that suspension.

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1 Although the CJEU judgment consistently refers to 'Article 25-A of the Public Contracts Code', Article 25-A does not form part of that Code. Article 25-A was inserted into Law 30/2021 by Law 43/2024. Law 30/2021 approved special public procurement measures and amended, among other legislation, the Public Contracts Code and the Code of Procedure in the Administrative Courts.

Article 25-A changed this balance in proceedings relating to projects with EU funding. Only pre-contractual legal action taken within 10 working days of notification of the award decision to tenderers automatically suspends the award. The contracting authority may obtain provisional lifting of the suspension without a prior hearing of the claimant and on the basis of summary evidence of the existence of funding. Demonstrating the contract's link to EU funds is sufficient. It is only at a subsequent stage that the claimant is heard, and the judge carries out a genuine balancing of interests.

Only pre-contractual litigation commenced within 10 working days automatically suspends the award procedure. The contracting authority may obtain the provisional lifting of that suspension without prior hearing of the claimant, provided it demonstrates that the contract is linked to EU funding.

The case in question

The matter was referred to the CJEU via two preliminary rulings from the Administrative and Tax Court of Porto. This occurred in the context of proceedings in which I-Sete challenged two decisions by EDIA - *Empresa de Desenvolvimento e Infraestruturas do Alqueva, S.A.* - to award works contracts to competing companies. These contracts were for the construction of floating photovoltaic power stations at pumping stations in the Alentejo region. The funding, which included €45 million granted by the Council of Europe Development Bank, was conditional upon the contracts being finalised by the end of 2025.

The Court of Justice's analysis

Restriction of the right to an effective remedy: does Article 25-A comply with the essential content of Article 47 of the Charter of Fundamental Rights?

The CJEU began by recognising that removing the automatic suspensive effect constitutes a **restriction on the right to an effective remedy**. This is because it deprives the tenderer of the immediate provisional protection afforded to them by the EU system of legal remedies. However, it also recognised that this restriction pursues the **legitimate objective of general interest** of expediting proceedings to prevent the loss of EU funding.

Nevertheless, the Court concluded that Articles 25-A(2) to (4) **infringe the essential content of the right to an effective remedy** by undermining the principle of automatic suspensive effect. The reasons are clear:

- The system enables the contracting authority to **conclude the contract** immediately following the provisional lifting of the suspensive effect before any decision has been made on the merits. This completely contradicts the prohibition set out in the Remedies Directive.

- The requirements for lifting the suspensive effect are **straightforward** for the contracting authority to meet. This effectively amounts to a legal presumption, while the claimant faces a near-impossible burden of proof (*probatio diabolica*).

- The judge is **bound by the terms of the legislation** and has no discretion or scope to weigh up the interests at stake at this initial stage.

- The result is a **reversal of the principle of automatic suspension**. The automatic suspension required by the Directive is replaced by the automatic lifting of that suspension.

Is the restriction proportionate?

The CJEU held that it is not. The risk of losing EU funding **cannot, in itself, be a compelling enough reason** to systematically tip the balance in favour of the contracting authority. Absolute protection of the public interest removes the right to be heard and the right to judicial review. This could result in unlawfully awarded contracts becoming irreversible, thereby undermining the objectives of the EU system of legal remedies.

The **judge hearing the application for provisional measures** must weigh up all the interests at stake on a case-by-case basis. They cannot be bound by legislation that carries out that weighing-up in their place and in abstract terms.

Conclusion: incompatibility with Article 2(3) to (5) of Directive 89/665

The CJEU ruled that:

Article 2(3) to (5) of Directive 89/665/EEC, when considered alongside Article 47 of the Charter of Fundamental Rights of the European Union, precludes national legislation which, in pursuit of the public-interest objective of expediting public procurement procedures in order to avoid the loss of EU funding. In particular, national legislation cannot oblige a court, at the request of the contracting authority, to provisionally lift the automatic suspensive effect of an action challenging the award decision of a public contract. This applies where the court is required to do so without first hearing the unsuccessful tenderer who brought the action, and without being able to weigh all the interests at stake on their merits.

Practical implications: between non-application and legislative sovereignty

The CJEU delivered its judgment in response to a request for a preliminary ruling. It is therefore important to emphasise that the judgment does not formally invalidate Article 25-A of Law 30/2021 (as amended by Law 43/2024). The provision remains in force within the Portuguese legal system. The CJEU has no jurisdiction to invalidate national legislation. It is only empowered to interpret EU law with binding authority.

In the present case (Cases C-266/25 and C-267/25), the judgment is directly binding on the Administrative and Tax Court of Porto. The court may not apply the provisions of Article 25-A in a way that has been declared incompatible.

In other cases, the judgment does not invalidate the legislation. However, it establishes an interpretative framework that all national courts must observe.

Nevertheless, the legislative sovereignty of the Portuguese State remains intact. The national legislature must now decide how, when and whether to amend Article 25-A to align it with the interpretation established by the CJEU. The judgment does not replace the legislative prerogative. However, if legislation that has been declared incompatible continues to exist, the Portuguese State could be exposed to the risk of infringement proceedings brought by the European Commission. ■

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