

Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation

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Abstract

Directive 89/665/EEC first regulated remedies in public procurement cases. Existing arrangements at national level for ensuring their application were not always adequate to ensure compliance with the relevant substantive provisions. Indeed, while in some Member States public procurement cases have always been litigated before the administrative courts, in others losing and/or potential bidders were even denied access to a court. Building on the case law of the Court of Justice, Directive 2007/66/EC strengthened the enforcement system by going well beyond traditional remedies such as annulment and damages, and foreseeing instances in which contracts awarded in breach of EU are devoid of any effect. However, there has been a failure to address a number of issues so far, such as the standard for judicial review, leaving gaps in the system of judicial protection which is not always effective as it should be.

Introduction

In the area of public contracts European lawmakers understood early on that substantive provisions were not enough to safeguard the *effet utile* of what has become EU law. Remedies could not be left solely to the procedural autonomy of the Member States. The first public procurement remedies directive was enacted in 1989. It introduced what in most jurisdictions would be recognised as administrative law remedies, such as interim relief, annulment and damages following unlawful administrative decisions in the award procedure. Remedies precluding the conclusion of the contract or depriving the effects of contracts awarded on the basis of unlawful procedures were added in 2007 to try and remedy a situation which was still unsatisfactory for effective judicial protection. The wisdom of adding new remedies without addressing the limits of the old ones is however doubted.

The making of legislation on remedies in public contracts and the characteristics of those remedies will be analysed first. This will include reference to

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their scope of application and their relationship with the general principle of effective judicial protection and the residual place of procedural autonomy. A critical assessment of the weaknesses of the present system will then follow. Conclusions as to the possible lessons of EU public contract remedies law for other areas of EU law will form the final part of the article.

I The Story so Far

The first (at that time) EEC (substantive) public procurement directives were enacted in 1971. About 20 years later Directive 89/665/EEC 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 (the first remedies directive) was enacted. Its recitals acknowledged both that the substantive directives then in force did not contain any specific provisions ensuring their effective application and that the existing arrangements at both national and Community levels for ensuring their application were not always adequate to ensure compliance with the relevant substantive provisions: and this ‘particularly at a stage when infringements can be corrected’.¹

Indeed, while in some Member States like France and Italy public procurement cases have always been litigated before the administrative courts, in others, like in Germany, disaffected bidders (or potential bidders) were denied standing because the rules on the award of public contract rules were considered to protect public budgetary interests rather than individual rights.² On the other hand the Commission has limited resources and cannot police thousands of procurement procedures on its own in what are now 28 Member States.³

The recitals to Directive 89/665/EEC stressed that ‘the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination’.⁴ Indeed, the absence of effective remedies or the inadequacy of existing remedies may deter undertakings from submitting tenders in other Member States. Consequently, effective

¹ See generally C. Bovis, ‘Remedies’, in: M. Trybus, R. Caranta & G. Edelstam (Eds), *EU Public Contract Law. Public Procurement and Beyond* (Bruxelles 2014) 363, and the contributions collected by S. Treumer & F. Lichère (Eds), *Enforcement of the EU Public Procurement Rules* (Copenhagen 2011), and P. Delvolvé (dir.), ‘Le contentieux des contrats publics en Europe’, *Rev. Fr. Dr. Adm.* 2011, 1.

² See the second recital (not numbered in the directive).

³ K. Wauters, ‘Public Procurement Review Bodies’, in: M. Trybus, R. Caranta & G. Edelstam (Eds), *EU Public Contract Law*, *supra* at 1, 353 ff.

⁴ See the third recital (not numbered in the directive).

and rapid remedies must be available in the case of infringements of what has become EU public contract law.⁵

Specific remedial rules for the utilities sector were soon enacted in Directive 92/13/EEC (the Utilities Remedies Directive). This Directive is quite similar to Directive 89/665/EEC. One big difference was the provision in Article 9 (and subsequent articles) of a conciliation mechanism involving the Commission. This is best practice in the contract implementation phase, but did not make much sense with breaches concerning the award procedure given the polycentric nature of these disputes. Directive 2007/66/EC, amending (but neither replacing nor repealing) Directives 89/665/EEC and 92/13/EEC (usually referred to as the new remedies directive), did away with this peculiar regime, making convergence between the two Directives almost perfect. Therefore, unless otherwise stated, Directive 89/665/EEC and its provisions, as amended by Directive 2007/66/EC, will be referred to here. For reasons explained later on, Directive 2007/66/EC also somewhat shifted the focus of the remedies from the award procedure to the contract itself, concluded between the contracting authority or entity and the chosen economic operator.

The remedies afforded to economic operators are coupled with the power of the Commission to bring infringement procedures under Article 260 TFEU. These are widely used in this area, as will be shown in a number of examples. A specific corrective mechanism involving the Commission is foreseen with reference to public procurement, but it is not really used because limited resources push the Commission to focus on systemic breaches in the Member States rather than on individual case management.⁶

1.1 The Old Remedies

Originally Directive 89/665/EEC and Directive 92/13/EEC very much followed a French model of administrative law as regards standing. Remedies had and still have to be afforded to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement (Art. 1(3)).⁷ This includes individual members of a consortium.⁸ This forced some jurisdictions like Germany to lower their traditionally high requirements to show standing.⁹

⁵ C. Bovis, 'Remedies', *supra* at 1, 363.

⁶ See Art. 3 of Directive 89/665/EEC, as substituted by Directive 2007/66/EEC; this provision updates what used to be Art. 8 of the older directive.

⁷ C. Bovis, 'Remedies', *supra* at 1, 365 and 375 ff.

⁸ Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others v. Ethnico Symvoulío Radiotileorasis and Ypourgos Epikrateias, Aktor Anonymi Techniki Etaireia (Aktor ATE) v. Ethnico Symvoulío Radiotileorasis* [2010] ECR I-4165, paragraphs 78 f.

⁹ M. Burgi, 'EU Procurement Rules – A report about the German Remedies System', in: S. Treumer & F. Lichère (Eds), *Enforcement*, *supra* at 1, 109 f and F. Wollenschläger, 'Deutschland', in: U. Neergaard, C. Jackson & G.S. Ølykke (Eds), *Public Procurement Law: Limitations, Opportunities and Paradoxes. The XXVI FIDE Congress in Copenhagen, 2014 Congress Publications*

The remedies to be provided under the two original remedies directives correspond to the traditional administrative law remedies in those jurisdictions following the French model: interim relief (suspension), setting aside (annulment) and damages (Art. 2(1)).¹⁰

More specifically interim measures aim at ‘correcting the alleged infringement or preventing further damage to the interests concerned’ (Art. 2(1)(a)). They include measures to suspend the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority. The

‘Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits’

(Art. 2(4) – now Art. 2(5)). The provision requires the courts to apply a balance of interest – as is usually the case for the granting of interim measures in most jurisdictions.¹¹

The case law has made clear that, in their discretion to lay down the detailed procedural conditions of interim procedures the Member States may well – and in fact have to – take into account speed requirements.¹²

In a couple of cases of infringement procedures the Court of Justice interpreted Directive 89/665/EEC in the sense that Member States are under a duty more generally to empower their review bodies to take, independently of any prior action, any interim measures, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract in question.¹³ This led some Member States, like France, to adopt fast track procedures allowing courts not just to stay the procedure but to take a decision on the merits of the case.¹⁴

The second remedy provided in the old directive was the annulment of the contested award decision. This includes the removal of ‘discriminatory technical, economic or financial specifications in the invitation to tender, the contract

Vol. 3 (Copenhagen 2014) 390 ff; for a comparative assessment please refer to R. Caranta, ‘General Report’, therein, 81 ff and 161 ff.

¹⁰ C. Bovis, ‘Remedies’, *supra* at 1, 371 ff.

¹¹ C. Bovis, ‘Remedies’, *supra* at 1, 371.

¹² Case C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others v. Provincie Drenthe* [2010] ECR I-12655, paragraph 59.

¹³ Case C-236/95 *Commission v. Greece* [1996] ECR I-4459; Case C-214/00 *Commission v. Spain* [2003] ECR I-4667.

¹⁴ *Supra* at 1, F. Lichère & N. Gabayet, ‘Enforcement of the Public Procurement rules in France’, in: S. Treumer & F. Lichère (Eds), *Enforcement*, 322 ff.

documents or in any other document relating to the contract award procedure' (Art. 2(1)). As will be shown later, the EU is silent as to what makes a decision illegal, namely the identification of the relevant grounds of invalidity. What is also lacking is a hint as to the possible distinction between formal and substantive illegality and as to whether a balance of interests test is to be applied in deciding whether or not to annul an unlawful decision.¹⁵ Under Article 2(7) – outside the mandatory cases of ineffectiveness which will be discussed below – a Member State may provide that after the conclusion of a contract the powers of the review body are limited to awarding damages to any person harmed by an infringement.¹⁶ Many Member States have availed themselves of this option.¹⁷

The last remedy foreseen in the first remedies directives was damages, but these are difficult to obtain in many jurisdictions because of the relatively high demands placed on the claimant in terms of causation as will be explained later.¹⁸

1.2 The Need for New Remedies

The system did not prove fully effective. More specifically it was found that the mechanisms established by the first remedies directives did not always make it possible to ensure compliance with what has become EU law, especially at a time when infringements could still be corrected. Quite often an illegally awarded contract was not just signed but also implemented (at least partially) before the competent court could annul the acts of the procedure leading to the award.¹⁹ Moreover, the big issue (along with other aspects that will be discussed in the following paragraph) was direct awards: that is, contracts awarded without any prior publicity in situations in which a call for tenders was required under EU law. In such a case, as will be discussed in more detail later, damages are hardly available because causation is almost impossible to prove. How could, apart from cases of small oligopolistic markets, an economic operator that had not even placed a bid claim that it stood a chance to win the contract? Another issue was contracting authorities rushing to sign the contract and not leaving losing bidders time to attain or even ask for interim relief.²⁰

¹⁵ C. Bovis, 'Remedies', *supra* at 1, 375.

¹⁶ On the systemic relevance of that provision see Case C-314/09 *Stadt Graz v. Strabag AG and Others* [2010] ECR I-8769.

¹⁷ S. Treumer, 'Towards an obligation to terminate contracts concluded in breach of the E.C. Public procurement rules – the end of the status of concluded public contract as scared cows' [2007] *PPLR* 371.

¹⁸ See the papers collected by D. Fairgrieve & F. Lichère (Eds), *Public Procurement Law. Damages as an Effective Remedy* (Oxford 2011).

¹⁹ See, referring to the 'rush to signature' C. Harlow & R. Rawlings, *Process and Procedure in EU Administration* (Oxford 2014), 59.

²⁰ C. Bovis, 'Remedies', *supra* at 1, 368 ff.

The overarching problem in most jurisdictions was that the sanctity of contract or similar doctrines stood in the way of third party remedies impacting on the effects of a concluded contract.²¹

In a way private law checkmated public law remedies.

The Court of Justice had mitigated some of these shortcomings. The rush to sign the contract was already halted in *Alcatel*.²² The Court of Justice indicated – even if somewhat obliquely – that a period of time must elapse between the decision to award a contract and its conclusion.²³ This message was delivered in unambiguous terms in a subsequent infringement procedure against Austria.²⁴ The Court held that complete legal protection presupposes an obligation to inform tenderers of the award decision.²⁵ However, complete legal protection also requires that it be possible for the unsuccessful tenderer to examine in sufficient time the validity of the award decision. Given the requirement that the Directive have practical effect, a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract, particularly in order to allow an application to be made for interim measures prior to the conclusion of the contract.²⁶

The case law had undermined the sanctity of the contract itself in a fundamental way. The Court of Justice had held that Germany had breached EU law when two of its municipalities directly awarded long term contracts for the collection of waste water and for waste disposal.²⁷ The Commission then brought a second infringement procedure claiming that Germany had failed to comply with the first judgment by leaving the two contracts to stand, being content to write to the responsible authority to comply with the rules on the publication of calls for tenders when awarding future contracts. According to Germany and

²¹ The problem was deeply felt in Germany, but already taken care of by the case law in France: see the comparative work by J. Germain, 'Les recours juridictionnels ouverts au concurrent evince contre un marché public communautaire après sa conclusion en France et en Allemagne', *Rev. Fr. Dr. Adm.* 2009, 49; *supra* at 11, M. Burgi, 'EU Procurement Rules', 137 ff, and F. Lichère & N. Gabayet, 'Enforcement of EU Public Procurement Rules in France', *supra* at 16, 314 f.; on the situation in France see also G. Berton, 'La suspension juridictionnelle du contrat administratif entre "référé suspension" et "référé contractuel"' *Rev. Fr. Dr. Adm.* 2009.

²² Case C-81/98 *Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagen-technik AG v. Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-7671.

²³ *Ibid.*, paragraph 41 ff.

²⁴ Case C-212/02 *Commission v. Austria* [2004] ECR I-386; see also Case C-455/08 *Commission v. Ireland* [2009] ECR I-225.

²⁵ See also Case C-406/08 *Uniplex (UK) Ltd v. NHS Business Services Authority* [2010] ECR I-817, paragraphs 30 ff; Case -456/08 *Commission v. Ireland* [2010] ECR I-859, paragraph 30.

²⁶ Paragraph 23; see also C-327/08 *Commission v. France* [2009] ECR I-00102, paragraphs 57 ff, on the (im)possibility to condition judicial review upon a previous administrative appeal; on this latter case see A. Brown, 'A French Provision Breaches Remedies Directives 89/665 and 92/13 by Jeopardising the Effectiveness of the Standstill Period between Notification of the Award Decision and Conclusion of the Contract: *Commission v. France* (C-327/08) [2009] PPLR NA222.

²⁷ Joined Cases C-20/01 and C-28/01 *Commission v. Germany* [2003] ECR I-3609.

a number of Member States which had intervened in the procedure, the principles of legal certainty, that of the protection of legitimate expectations, the principle *pacta sunt servanda* and the fundamental right to property among other arguments precluded the termination of the contracts at issue. The Court of Justice curtly retorted that those principles could be used against the contracting authority by the other party to the contract in the event of termination: but Member States cannot rely on them to justify the non-implementation of a judgment establishing a failure to fulfil obligations and thereby evade their own liability under (then) Community law.²⁸ This put Member States in a corner, the alternative being either paying tribute to the sanctity of contract and being in persistent breach of EU law or complying and dropping the notion of *pacta sunt servanda*.²⁹

1.3 The New Remedies

The case law paved the way to Directive 2007/66/EC amending Directives 89/665/EEC and 92/13/EEC with the aim of improving the effectiveness of review procedures concerning the award of public contracts.³⁰ The sanctity of contract was no longer a taboo that the Member States could fight for. Detailed rules concerning the effect of the annulment of the award procedure on the concluded contract had to be set down in legislation for reasons of legal certainty and this was also true concerning the need to stop rushing to sign the contract. Article 2(a) of Directive 89/665/EEC as amended by Directive 2007/66/EC now provides for a standstill period of 15 calendar days during which the contract cannot be signed unless one of the situations listed in Article 2(b) applies.³¹ The standstill period comes with an automatic suspension rule. This suspension is automatic in that there is no need for the economic operator to specifically ask for it (Art. 2(3)).

Directive 2007/66/EC also followed the case law in eroding the sanctity of contract. Recital 13 makes it clear that in order to combat the illegal direct award of contracts 'there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in

²⁸ Case C-503/04 *Commission v. Germany* [2007] ECR I-6153, paragraph 36; see also M.-J. Clifton, 'Ineffectiveness – The New Deterrent: Will the New Remedies Directive Ensure Greater Compliance with the Substantive Procurement in the Classical Sector?' [2009] *PPLR* 167.

²⁹ In the end Germany tried to save both by considering contracts which are ineffective under Directive 2007/66/EC as de facto contracts: see *supra* at 11, F. Wollenschläger, 'Deutschland', 439 ff.

³⁰ Case C-19/13, *Ministero dell'Interno v. Fastweb* [2014] ECLI:EU:C:2014:2194, paragraphs 34 f; see S. Treumer, 'Enforcement of the EU Public Procurement Rules: The State of the Law and Current issues', in: S. Treumer & F. Lichère (Eds), *Enforcement of the EU Public Procurement Rules*, *supra* at 1, 17 ff.

³¹ This is for instance the case in which prior publication of a contract notice is not mandated under EU law; see also C. Bovis, 'Remedies', *supra* at 1, 369.

principle be considered ineffective'. Indeed, '[i]neffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete'.³²

Ineffectiveness means the dissolution of contractual obligations. It is regulated in Article 2(d) and the subsequent articles of the reformed Directive 89/665/EEC.³³ The scope of the provisions reaches beyond an illegal direct award to strike a series of egregious breaches of EU public procurement law. More specifically, a contract should in principle be declared invalid when awarded without prior publication of a contract notice in the Official Journal of the EU without this being permissible under EU law.³⁴ This would occur in a case of breaching the standstill and automatic suspension rules when the infringement has deprived the tenderer (who has applied for the review) of the possibility to pursue pre-contractual remedies;³⁵ and in the case of breaching the rules on calls off in framework agreements and dynamic purchasing systems.³⁶ The Member States are free to decide whether and to what extent to address ineffectiveness in situations going beyond the three cases listed above.

Ineffectiveness is not automatic, but should be pronounced by a court or another independent review body.³⁷ It is for domestic law to articulate the consequences of a contract being considered ineffective. For instance in Poland provisions derogating to the Civil Code were introduced.³⁸ However, as is made clear by Recital 21, the objective to be achieved 'is that the rights and obligations of the parties under the contract should cease to be enforced and performed'. Member States, besides finding the right label to translate 'ineffectiveness' into the domestic legal order, are left to decide on issues such as 'the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible'. This should also include the remedies – if any – afforded to the economic operator who was party to the contract. In other words the main legal consequence of ineffectiveness – the dissolution of the contractual obligation – is already set out in EU law; the Member States are called on to regulate further consequences of the declaration of ineffectiveness.

³² Rec. 14.

³³ S. Treumer, 'Enforcement of the EU Public Procurement Rules', *supra* at 1, 47 f; see also, M. J. Clifton, 'Ineffectiveness', *supra* at 27, 167.

³⁴ See also Rec. 14 ff.

³⁵ Rec. 18 indicates that the sole breach of those safeguards will not lead to ineffectiveness if no substantive public procurement rule was breached as well.

³⁶ See also Art. 2(b)(c).

³⁷ See also Rec. 13.

³⁸ A. Sołtyńska, 'Poland', in: U. Neergaard, C. Jackson & G.S. Ølykke (Eds), *Public Procurement Law*, *supra* at 11, 662.

Member States may also choose between the retroactive cancellation of all contractual obligations or the limitation of the cancellation to those obligations which still have to be performed. In the latter case however alternative penalties are foreseen and are discussed below.³⁹

The Member States may provide that a review body may not consider a contract ineffective even if it has been awarded illegally on the grounds already mentioned, and if it finds that overriding reasons relating to non-purely economic general interests require that the effects of the contract should be maintained. In this case the alternative penalties will also apply.

Recital 23 indicates that the dissolved contract could somehow be revived. If immediately after the cancellation of the contract, ‘for technical or other compelling reasons, the remaining contractual obligations can, at that stage, only be performed by the economic operator which has been awarded the contract’, direct award through a negotiated procedure would be possible. It is however submitted that this is overly complex, and the ‘effects of ineffectiveness’ should rather be postponed in such a case.

In practice ineffectiveness is rarely declared, if ever,⁴⁰ and even this is only prospectively.⁴¹ Its value seems rather to lie in the deterrent effect it plays on both contracting authorities and potential contractors when tempted to forgo the award procedures.⁴²

Under Article 2(d)(4) ineffectiveness is also ruled out in case of a voluntary ex ante transparency notice (that is, a notice stating the intention to conclude a contract and the reasons why, according to the contracting authority, no competitive award procedure had to be followed) has been published in the Official Journal and the standstill period provided therein has been abided by. Voluntary ex ante transparency notices are routinely published in some Member States either as a precaution or as a way to short-circuit ineffectiveness.⁴³

This led the Italian *Consiglio di Stato* – the highest administrative court in the country – to ask the Court of Justice whether Article 2(d)(4) precludes national courts from declaring the contract ineffective even if an infringement of the provisions permitting the award of a contract without a competitive tendering

³⁹ See also Rec. 22.

⁴⁰ See e.g. G-W. Van de Meent & E.R. Manunza (Eds), ‘The Netherlands’, in: U. Neergaard, C. Jackson & G.S. Ølykke (Eds), *Public Procurement Law*, *supra* at 11, 645 f.

⁴¹ As is the case in the UK: see, M. Trybus, ‘An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales’, in: S. Treumer & F. Lichère (Eds), *Enforcement*, *supra* at 1, 222 ff; retrospective ineffectiveness is rather the case in Italy: see M. Comba, ‘Enforcement of EU Procurement Rules. The Italian System of Remedies’, *ibid.*, 249; see also for information on other jurisdictions *supra* at 11, R. Caranta, ‘General Report’, 166, and works referred to therein.

⁴² See, S. Treumer, ‘Enforcement of the EU Public Procurement Rules’, *supra* at 1, 50; on the deterrent effect see also C.H. Bovis, ‘Remedies’, *supra* at 1, 387.

⁴³ S. Troels Poulsen, ‘Denmark’, in: U. Neergaard, C. Jackson & G.S. Ølykke (Eds), *Public Procurement Law*, *supra* at 11, 323.

procedure is established. The Court of Justice held that the Member States do not have any discretion as to the consequences of the publication of a voluntary ex ante transparency notice, which are those laid down in Article 2(d)(4): excluding ineffectiveness as a consequence of the publication of the notice.⁴⁴ This does not however mean that contracting authorities are free to abuse voluntary ex ante transparency notices. The Court makes clear that the conditions laid down in Article 2(d)(4) must have been fulfilled. These conditions are that the contracting authority considered it permissible under EU law to award the contract without prior publication of a contract notice and that the voluntary ex ante transparency notice must state the justification for the contracting authority's decision. More specifically, the 'justification'

'must disclose clearly and unequivocally the reasons that moved the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action before the review body and so that the review body is able to undertake an effective review'.⁴⁵

According to the Court, the review body has to verify whether the contracting authority acted diligently and whether it could legitimately hold that the conditions for direct award were in fact satisfied. To this end, the review body must take into consideration the circumstances and the reasons mentioned in the notice.⁴⁶

In the end, the voluntary ex ante transparency notice is not an absolute bar to ineffectiveness: the domestic court or other review body is under a duty to ascertain whether the decision not to open the contract to competition was justified. It is to be anticipated that courts from different jurisdictions will tend to play their role quite differently and more guidance from the Court of Justice will be needed.

Given that, as already mentioned, in some circumstances a declaration of ineffectiveness may not be appropriate, Directive 2007/66/EC foresaw alternative penalties as – and as the word spells out – an alternative to ineffectiveness. Under Article 2(e) they must be effective, proportionate and dissuasive. They shall either consist of the imposition of fines on the contracting authority, or in the shortening of the duration of the contract, or in a combination of both. Under the same provision, the Member States may confer on the review body a broad discretion to take into account all the relevant factors, including the

⁴⁴ Case C-19/13 *Ministero dell'Interno v. Fastweb* ECLI:EU:C:2014:2194, paragraphs 42 f; the Court is here relying on Rec. 26.

⁴⁵ *Ibid.*, paragraph 48.

⁴⁶ *Ibid.*, paragraph 52.

seriousness of the infringement and the behaviour of the contracting authority. The provision also makes it clear that the award of damages is not an appropriate penalty for the purposes of the provision. Damages and an alternative penalty are therefore to be cumulated since they fulfil different rationales, namely the making good of losses suffered by an economic operator and the sanctioning of the contracting authority for the infringement of EU law.

In a way Directive 2007/66/EC strengthened the set of traditional public law remedies laid down in the first remedies directives and which focused on the award procedure leading to but preceding the conclusion of the contract, by making sure that they were not short circuited by private law rules on the sanctity of the contract. The distinction between remedies targeting the award procedure and those affecting the contract itself is sometimes described as laying between pre-contractual and post-contractual remedies (with the standstill acting as a boundary post).⁴⁷

1.4 The Residual Procedural Autonomy

Procedural autonomy of the Member States still plays a big if residual role in this area.⁴⁸ As the Court of Justice has made clear many times, Directive 89/665/EEC lays down only ‘the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement’.⁴⁹ Stated another way, Directive 89/665/EEC ‘leaves Member States a discretion in the choice of the procedural guarantees for which it provides, and the formalities relating thereto’.⁵⁰ In the absence of EU rules, it is therefore ‘for the domestic law of each Member State to determine the measures necessary to ensure that the review procedures effectively award damages to persons harmed by an infringement of the law on public contracts’.⁵¹

This is the case with the choice of the court (or of another body with jurisdiction) to hear public contract claims. Article 2(9) contents itself with laying down minimum safeguards in case the body responsible for review procedures

⁴⁷ See e.g., C. Bovis, ‘Remedies’, *supra* at 1, 368.

⁴⁸ C. Bovis, ‘Remedies’, *supra* at 1, 368; more generally D.U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Berlin - Heidelberg 2010).

⁴⁹ Case C-314/09 *Strabag* [2010] ECR I-8769, paragraph 33; Case C-327/00 *Santex SpA v. Unità Socio Sanitaria Locale n. 42 di Pavia*, and *Sca Mölnlycke SpA, Artsana SpA and Fater SpA* [2003] ECR I-877, paragraph 47, and Case C-315/01 *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v. Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)* [2003] ECR I-6351, paragraph 45, are referred to.

⁵⁰ Case C-568/08 *Spijker* [2010] ECR I-12655, paragraph 57.

⁵¹ Case C-314/09 *Strabag* [2010] ECR I-8769, paragraph 33; Case C-315/01 *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v. Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)* [2003] ECR I-6351, paragraph 46, is referred to.

is not judicial in character (written reasons for the decisions must be given, the decision itself may be challenged in front of a court or tribunal within the meaning of Article 267 TFEU, and so forth).⁵²

At times EU legislation somewhat ‘constrains’ the procedural autonomy of the Member States. For instance, under Article 1(4) the Member States may require the aggrieved economic operator to notify the contracting authority of the alleged infringement and of his/her intention to seek review. However, this must not affect the standstill period or any other time limits for applying for review. Under Article 1(5) they may also require the person concerned to first seek review with the contracting authority. This possibility must however be coupled with the ‘immediate suspension of the possibility to conclude the contract’.⁵³

But there are plenty of other issues which are impliedly left to be determined by domestic law, such as for instance the deadlines to bring the action or the rules on evidence. The procedural autonomy of the Member States is however ‘limited by the principles of equivalence and effectiveness’,⁵⁴ as is shown by the abundant case law on time limits.⁵⁵ Two of these cases were decided in early 2010. They focused on English and Irish limitation rules which, while providing for reasonably long default deadlines (three months), also stated that proceedings had to be brought promptly (the English rule) or at the earliest opportunity (the Irish rule). In one case a tenderer, in the other the Commission, brought actions challenging the rules. In both judgments the Court of Justice stressed that the objective of rapidity pursued by Directive 89/665/EEC ‘does not permit Member States to disregard the principle of effectiveness’.⁵⁶ A limitation period, the duration of which is placed at the discretion of the competent court, ‘is not predictable in its effects’, and consequently, a national provision providing for such a period does not ensure effective transposition of the directive.⁵⁷

⁵² Wauters, *supra* at 3, 343 ff.

⁵³ See also Case C-410/01 *Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others v. Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* [2003] I-6413, paragraphs 31 ff; see also C. Bovis, ‘Remedies’, *supra* at 1, 376 f.

⁵⁴ See e.g. Case C-314/09 *Strabag* [2010] ECR I-8769, paragraph 34; Case C-568/08 *Spijker* [2010] ECR I-12655, paragraph 90.

⁵⁵ Case C-470/99 *Universale-Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2) ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v. Entsorgungsbetriebe Simmering GmbH* [2002] ECR I-11617; Case C-327/00 *Santex SpA v. Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke SpA, Artisan SpA and Fater SpA* [2003] ECR I-1877; Case C-241/06 *Lämmerzahl GmbH v. Freie Hansestadt Bremen* [2007] ECR I-8415, and Case C-161/13 *Idrodinamica Spurgo Velox srl and Others v. Acquedotto Pugliese SpA* ECLI:EU:C:2014:307. On the case law on domestic time limits to actions for the protection of EU granted rights see M. Eliantonio, *Europeanisation of Administrative Justice?* (Groningen 2008), 72 ff.

⁵⁶ Case C-406/08 *Uniplex (UK) Ltd v. NHS Business Services Authority (UK)* [2010] ECR I-817, paragraph 61.

⁵⁷ Case C-406/08 *Uniplex (UK)* [2010] ECR I-817, paragraph 42; Case C-456/08 *Commission v. Ireland* [2010] ECR I-859, paragraphs 74 ff.

1.5 Remedies for Awards not Covered under the Substantive Directives

It is to be noted that the remedies provided under the remedies directives only apply to the contract awards covered by the substantive public contracts directives. Today this means Directives 2014/23/EU, on concessions contracts, 2014/24/EU on public procurement contracts, and 2014/25/EU on utilities procurement contracts.⁵⁸ Many contracts do however fall outside the scope of the said directives. Even if service concessions are now covered under Directive 2014/23/EU, so much so that Articles 46(f) of that directive amended the remedies directives, contracting authorities are still not required to apply EU-conforming procedures to the award of contracts falling below the EU thresholds or to the award of a long list of service contracts.⁵⁹

Provided that these contracts present a cross-border interest,⁶⁰ the case law is very straightforward in holding that they must be awarded and comply with the substantive TFEU principles of non-discrimination and transparency.⁶¹ Moreover, the procedural and general principle of effective judicial protection also applies.⁶² Indeed, besides and beyond the specific provisions in the directives, this principle is now enshrined in Article 19(1) and Article 47 of the EU Charter of Fundamental Rights. As such it does apply to all contract awards that fall under the empire of EU law because of their cross-border interest.⁶³

Among the remedies which were held to be part and parcel of an effective system of protection of EU rights, interim relief and damages stand out in a famous line of cases starting with *Factortame* and including *Francovich* and *Brasserie du pêcheur* and *Factortame* (again).⁶⁴

⁵⁸ See the contributions collected by in F. Lichère, R. Caranta, & S. Treumer (Eds.), *Modernising Public Procurement. The New Directive* (Copenhagen 2014); please also refer to R. Caranta, 'The Changes to the Public Contract Directives and the Story They Tell about How EU Law Works', [2015] *CMLRev.* (forthcoming).

⁵⁹ Please refer to R. Caranta, 'Mapping the margins of EU public contracts law: covered, mixed, excluded and special contracts', F. Lichère, R. Caranta & S. Treumer (Eds.), *Modernising*, *supra* at 57, 67 ff; on the 2004 Directives, but with opinions *mutatae mutandis* still relevant today C. Risvig Hansen, *Contracts not covered or not fully covered by the Public Sector Directive* (Copenhagen Publishing 2012) and the works collected in D. Dragos & R. Caranta (Eds.), *Outside the EU Procurement Directives – Inside the Treaty?* (Copenhagen 2013).

⁶⁰ *Ibid.*, C. Risvig Hansen, *Contracts not covered*, 121 ff.

⁶¹ The leading case being Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG*, joined party: *Herold Business Data AG* [2000] ECR I-10745; for analysis please refer to R. Caranta, 'The Borders of EU Public Procurement law', in: D. Dragos & R. Caranta (Eds.), *Outside the EU Procurement Directives*, 25 ff.

⁶² R. Caranta, 'Many Different Paths, but Are They All Leading to Effectiveness?', in: S. Treumer & F. Lichère (Eds.), *Enforcement*, *supra* at 1, 57 ff.

⁶³ See the analysis by A. Tokár, 'Institutional Report', in: U. Neergaard, C. Jackson & G.S. Ølykke (Eds.), *Public Procurement Law*, *supra* at 11, 208 f.

⁶⁴ Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Others v. Italian Republic* [1991] ECR I-5357; joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Federal Republic of Germany*, *The Queen v. Secretary State for Transport ex parte Factortame Ltd and Others* [1996] ECR I-1029. Please refer to R. Caranta, 'Judicial Protection Against Member States: A New Jus Commune

Interim relief and damages are two of the three remedies originally provided for in Directive 89/665/EEC. Providing interim relief in award procedures translates into the suspension of the award decision and implies the possible annulment of the same decision when the merits of the case are decided upon. The requirements laid down in the remedies directive concerning these three remedies are still not very detailed.

It is argued here that Member States could hardly satisfy the principle of effective judicial protection by providing remedies more limited in scope and strength for the award of those contracts and which, while falling outside the scope of application of the substantive directives, still present a cross-border interest.⁶⁵ In a way the directives end up acting as a blueprint of what is required from the Member States under the principle of effective judicial protection in areas which are not covered by the directives. This is reinforced by the principle of non-discrimination, having led a number of national courts, including the Austrian Constitutional Court, to conclude that the same remedies did apply to the award of contracts both above and below the EU thresholds.⁶⁶

The situation is somewhat similar with reference to the 'new remedies' introduced with Directive 2007/66/EC. The standstill period necessarily preceding the conclusion of the contract was required by the case law as a matter of complete judicial protection and effective enforcement of EU public contract law.⁶⁷ Of course the general principles do not go into the level of detail of setting the duration of the standstill period, but it is hard to say how they might be satisfied by a significantly shorter period. Ineffectiveness was first imposed by the Court of Justice as an obligation on Member States rather than a right of competitors. However, reading the recital of Directive 2007/66/EC one cannot escape the conclusion that effective judicial protection requires those contracts awarded following the most egregious breaches of EU law to be deprived of their effects.⁶⁸ It is true that the principle of effective judicial protection alone cannot define which are the most egregious breaches, nor be unequivocally developed into the complex system binding together ineffectiveness, alternative penalties, and voluntary ex ante transparency notice in Directive 2007/66/EC. The directives may however act as a sort of guideline if not template as to what is required under EU law.⁶⁹

takes shape' [1996] *CML Rev.* 703; a more detailed analysis can be found in, M. Eliantonio, *Europeanisation of Administrative Justice?*, *supra* at 54.

⁶⁵ Caranta, *supra* at 61, 59.

⁶⁶ For discussion and further references please refer to R. Caranta, 'General Report', *supra* at 11, 168 f.

⁶⁷ Case C-212/02 *Commission v. Austria* [2004] ECR I-368; see also Case C-455/08 *Commission v. Ireland* [2009] ECR I-225.

⁶⁸ Rec. 13 ff.

⁶⁹ To say the least, the Court of Justice is expected to find inspiration from it: *supra* at 59, 274.

The recent *Wall* case, decided by the Grand Chamber of the Court of Justice might be read as disproving the above considerations.⁷⁰ The case concerned subsequent amendments to a service concession that is a contract excluded from the coverage of the procurement directives. The Court held that the change of a highly qualified subcontractor could be considered to be a substantial alteration to the contract, so much so that 'If need be, a new award procedure should be organised'.⁷¹ However, and somewhat contradictorily, when asked whether the national court was under a duty to terminate the contract, the Court of Justice held that

'the principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 43 EC and 49 EC and the consequent obligation of transparency do not require the national authorities to terminate a contract or the national courts to grant a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions'.⁷²

This judgment in no way contributes to clarifying a potentially contentious issue (so much so that a number of Member States intervened in the proceedings).⁷³ At no point in its reasoning did the Court refer to the infringement procedure against Germany which led to the establishment of the duty to terminate long-term concession contracts directly awarded in breach of EU Treaty principles.⁷⁴

An alternative take on *Wall* could be to suggest that in the end it only decided that ineffectiveness does not follow from every breach.⁷⁵ This is not mind-boggling. Even after the modifications introduced in 2007, the remedies directives stopped short of making ineffectiveness the general rule. If the Court of Justice had held that the general principles of the Treaty require ineffectiveness to follow from every breach of the procurement rules, the limits found in the remedies directives would no longer make sense.⁷⁶

This said, the Court should have taken the opportunity presented by *Wall* to clarify how far the remedies directives are to be read as a concretisation of (procedural) general principles of EU law applicable to contracts which, although not covered under the directives, because of their cross-border interest must

⁷⁰ Case C-91/08 *Wall AG v. La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* [2010] ECR I-2815. See *supra* at 1, S. Treumer, 'Enforcement', 47 f.

⁷¹ *Ibid.*, paragraph 43.

⁷² *Ibid.*, paragraph 65.

⁷³ Hansen, *supra* at 59, 309.

⁷⁴ Case C-503/04 *Commission v. Germany* [2007] ECR I-6153.

⁷⁵ A. Brown, 'EU Primary Law Requirements in Practice Advertising, Procedures and Remedies for Public Contracts Outside the Procurement Directives' [2010] *PPLR* 180.

⁷⁶ See also S. Treumer, 'Enforcement', *supra* at 1, 74 f.

be awarded in compliance with the (substantive) general principles of the TFEU. This is very much the case because the approach followed in some of the Member States such as the UK is to avoid providing effective remedies in connection with award procedures concerning contracts not covered by the 2004 directives.⁷⁷ The same happens in Germany concerning contracts below the EU threshold.⁷⁸ In other jurisdictions, even if the attitude is less structured, bidders to contracts falling outside the scope of the substantive directives are afforded a more limited protection. In Denmark, for instance, the application of the new standstill provisions has been excluded for those contracts not covered by the substantive directives.⁷⁹ It is fair to say that other jurisdictions – such as Italy and France – don't suffer from this problem, having extended the remedies to the breaches affecting the procedures leading to the conclusion of all public contracts.⁸⁰ In turn, however, applying heavy and remedial procedural requirements with reference to contracts whose value might be somewhat modest might be criticised as regulatory overkill.⁸¹

2 Persisting Weak Points in the System

2.1 Keeping Member States in Line

The best pointer to the effectiveness of the system is the development of a litigation culture in Member States which were not used to it.⁸² This is the case for the different jurisdictions of the United Kingdom. Instinct

⁷⁷ See for a critical view M. Trybus, 'An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales', in: S. Treumer & F. Lichère (Eds), *Enforcement*, *supra* at 1, 201 f.

⁷⁸ M. Burgi, 'EU Procurement Rules', *supra* at 11, 106 f; see also F. Wollenschläger, 'Deutschland', 447 f.

⁷⁹ See critically Treumer, *supra* at 1, 74 f.

⁸⁰ *Ibid.*, F. Lichère & N. Gabayet, 'Enforcement', 316 f (the latter references on the standstill period, concerning which it was the case law rather than the legislation that decided the spillover of EU remedies to any contract); the same is the case with the Czech Republic: J. Kindl, M. Ráž, P. Hubková & T. Pavelka, 'Czech Republic', in: U. Neergaard, C. Jackson & G.S. Ølykke (Eds), *Public Procurement Law*, *supra* at 11, 275.

⁸¹ D.C. Dragos, B. Neamțu & R. Velișcu, 'Remedies in Public Procurement in Romania', in: S. Treumer & F. Lichère (Eds), *Enforcement of the EU Public Procurement Rules*, *supra* at 1, 159 ff.

⁸² For some data and discussion D. Fairgrieve & F. Lichère, 'Procedures and Access to Justice in Damages Claims for Public Procurement Breaches', in: D. Fairgrieve & F. Lichère (Eds), *Public Procurement Law. Damages as an Effective Remedy*, *supra* at 18, 192 f.

told economic operators not to bite the hand that feeds them but this has been changing as of late.⁸³

Of course the change is not necessarily welcome. The crisis with the ensuing need to speed up the disbursement of public money to kick start recovery has led some Member States to try and streamline review procedures to rapidly dispose of cases,⁸⁴ or at least give priority to public procurement cases.⁸⁵

At times reformers at national level have not contented themselves with making review procedures more efficient – a wholly legitimate endeavour and one fully in line with the requirements laid down in the remedies directives.⁸⁶ In some Member States recent provisions are raising the costs of bringing claims in public procurement award procedures to levels whose consistency with EU law may well be thrown into doubt.⁸⁷ One may also question the consistency with the principle of effective judicial protection of the Slovenian legislation limiting the grounds of review in procurement cases.⁸⁸

2.2 The Issues which were not Tackled in the Reform of the Remedies Directives

Other issues with the EU remedies system in public contract cases are somewhat ingrained in the system and the 2007 reform seems not to have acknowledged let alone addressed them. It is submitted that the remedies spelt out in the first directives were not sufficiently articulated, leaving the Member States and domestic jurisdictions too much leeway in shaping what redress to afford disgruntled economic operators.

Concerning annulment, Article 2(1)(b) simply provides that courts and other review bodies must be given the power to set aside ‘decisions taken unlawfully’. ‘Discriminatory technical, economic or financial specifications’ in the contract documents are mentioned as (obvious) unlawful decisions in the same provision, but there is no definition or any other indication as to what makes a decision

⁸³ Trybus, *supra* at 76, 232; see also C. Donnelly, J. Mellerick, A. Murtagh, J. Finn & B. Gordon, ‘Republic or Ireland’, in: U. Neergaard, C. Jackson & G.S. Ølykke (Eds), *Public Procurement Law*, *supra* at 11, 524.

⁸⁴ Van de Meent, *supra* at 39, 642 f; Sołtyśńska, *supra* at 11, 663 f.

⁸⁵ P. Norman & E-M. Mühlenbock, ‘Sweden’, in: U. Neergaard, C. Jackson & G.S. Ølykke (Eds), *Public Procurement Law*, *supra* at 11, 734 f; the same happens in Slovenia in case of projects co-financed by the EU: P. & B. Ferk ‘Slovenia’, *ivi*, 703 f.

⁸⁶ The recitals in Directive 89/665/EEC indeed require ‘effective and rapid remedies’; as C.H. Bovis, ‘Remedies’, *supra* at 1, 367, remarks, speed is a requirement flowing from the principle of effective judicial protection.

⁸⁷ See for instance A. Németh, ‘Hungary’, in: U. Neergaard, C. Jackson & G.S. Ølykke (Eds), *Public Procurement Law*, *supra* at 11, 501 f; in other costs may be traditionally high: e.g. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn & B. Gordon, ‘Republic of Ireland’, *ivi*, 524. See also the question raised in Case C-495/14 *Tita*, pending.

⁸⁸ *Ibid.*, P. & B. Ferk, ‘Slovenia’, 703 f.

unlawful. The question goes to the core of the judicial review of administrative actions. The problem is that the intensity of judicial review varies a lot in different domestic jurisdictions.⁸⁹ This means that similar public procurement decisions will meet a variable degree of scrutiny or deference in different Member States. Specifically, this will be the case when contracting authorities may be said to enjoy – as is often the case – a degree of discretion or are called on to make complex technical assessments.⁹⁰

For instance, decisions as to the exclusion of candidates or tenderers often imply wide evaluation margins. It is sufficient here to recall that under Article 57(4)(c) of Directive 2014/24/EU the exclusion may be decided ‘where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable’. The burden of proof seems to be on the shoulders of the contracting authority. However in most Member States this will translate into a duty to give reasons. The question is – but the remedies directives are silent and there is no case law – to what length the courts will be ready to go in scrutinising the reasons given and to second guess whether the economic operator’s integrity is or is not questionable. Article 57 is replete of formulas such as ‘sufficiently plausible’, ‘significant or persistent deficiencies’, ‘serious misrepresentations’ which all raise the same question: how far are the national courts going to review decisions taken on these aspects?

The same applies to many other decisions taking place in an award procedure. To provide a few more examples, under Article 67(2) of Directive 2014/724/EU the contracting authority is to select the most economically advantageous tender based inter alia on criteria such as ‘quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions’. All of these involve complex assessments.⁹¹

The problem is that the case law has not yet given much indication as to the standards of review of legality expected from the national courts.

Hospital Ingenieure Krankenhaustechnik Planungs (HI) concerned the question whether national rules limiting the extent of the review of the legality of the withdrawal of an invitation to tender to the mere examination of whether that decision was arbitrary is compatible with what has since become EU law.⁹² The starting point is the consideration that Directive 89/665/EEC ‘does no more

⁸⁹ See the contributions collected by O. Essens, A. Gerbrandy & S. Lavrijssen (Eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Groningen 2009).

⁹⁰ Hansen, *supra* at 59, 288; please also refer to Caranta, *supra* at 61, 67 ff.

⁹¹ P. Bordalo Faustino, ‘Evaluation models in public procurement: A comparative law perspective’, in: M. Comba & S. Treumer (Eds), *Award of Contracts in EU Procurements* (Copenhagen 2013).

⁹² C-92/00 *Hospital Ingenieure Krankenhaustechnik Planungs GmbH (HI)* [2002] ECR I-5553.

than coordinate existing mechanisms in Member States in order to ensure the full and effective application of the directives laying down substantive rules concerning public contracts'.⁹³ Stated in another way, 'it does not expressly define the scope of the remedies which the Member States must establish for that purpose'.⁹⁴

However this does not mean that the Member States are totally free. Quite the contrary – the question of the extent of the judicial review exercised in the context of the review procedures covered by the remedies directives must be examined 'in the light of the purpose of the latter, taking care that its effectiveness is not undermined'.⁹⁵ The Court is referring here to the effectiveness of the directive – *effet utile* – rather than to the effectiveness of judicial review. As the Directive is on remedies, there is hardly a distinction between the two, and anyway Recital 3 to the 1989 Directive refers to the effectiveness of the remedies provided. Keeping in mind the aim of strengthening remedies pursued by the directives, and in the absence of indications to the contrary, the Court concluded that the scope of the 'judicial review to be exercised in the context of the review procedures referred to therein cannot be interpreted restrictively'.⁹⁶ Therefore it is not 'lawful for Member States to limit review of the legality of a decision to withdraw an invitation to tender to mere examination of whether it was arbitrary'.⁹⁷

Basically, very peripheral judicial review is against EU public procurement law, including both the remedies directives and the general principle of effective judicial protection. The required standard remains to be seen.

The answer might have come in the recent *Croce Amica One* case, if only the question had been better drafted.⁹⁸ The referring administrative court asked whether it is

'consistent with Community law for the decisions adopted by a contracting authority in matters of public procurement to be open to unlimited review by a national administrative court, in exercise of the jurisdiction conferred in matters relating to public procurement, covering the reliability and the suitability of the tender, and thus going above and beyond the limited cases of clear absurdity, irrationality, failure to state adequate reasons or error as to the facts?'

⁹³ *Ibid.*, paragraph 58.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, paragraph 59.

⁹⁶ *Ibid.*, paragraph 61.

⁹⁷ *Ibid.*, paragraph 63.

⁹⁸ C-440/13 *Croce Amica One Italia Srl v. Azienda Regionale Emergenza Urgenza (AREU)* ECLI:EU:C:2014:2435.

Given the precedent in *HI* the question obviously turns on whether domestic courts are required under EU law to go beyond those limited grounds of illegality listed in the reference (rather than having the *possibility* to do so)? The Court of Justice decided to rephrase the question and asked whether the national court ‘may’ conduct a review enabling it to take account of the reliability and suitability of the tenderers’ bids and ‘to substitute its own assessment for the contracting authority’s evaluation as to the expediency of withdrawing the invitation to tender’.⁹⁹ The Court then refers to *HI* recalling the discretion left to the Member States and the limits following from the principle of effectiveness to find that a) ‘review of legality cannot be confined to an examination of whether the decisions of contracting authorities are arbitrary’;¹⁰⁰ and b) that EU law entails ‘a review as to whether an act was lawful, not a review of whether the act was expedient’.¹⁰¹

Again, judicial review cannot be limited to the possibility strike down an ‘arbitrary’ decision. It does not, however, necessarily extend to the merits of the decisions. The problem of course is the distinction between legality and merits in cases in which the contracting authority is exercising discretion or at least is called to make complex factual assessments.¹⁰² The Court of Justice did not go into this. Given the question it was content with stating that Member States are (obviously) free to go beyond what is required under EU law and thus ‘grant the competent national courts and tribunals more extensive powers for the purpose of reviewing whether a measure was expedient’.¹⁰³

It is submitted that as a minimum national courts should do more than review whether the contracting authority has disclosed to the aggrieved bidders all the information now listed in Article 55 of Directive 2014/24/EU. In line with the standard of review of EU Courts, national courts should also be given the power to establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation, and further, whether it is capable of substantiating the conclusions drawn from it.¹⁰⁴

The uncertainty as to the scope of judicial review spills over to damages. Unlawfulness is a requirement to a successful damages action. This means that, all other things being equal, damages will have more chance of being

⁹⁹ *Ibid.*, paragraph 38.

¹⁰⁰ *Ibid.*, paragraph 43.

¹⁰¹ *Ibid.*, paragraph 44.

¹⁰² Please also refer to R. Caranta, ‘On Discretion’, in: S. Prechal & B. van Roermund (Eds), *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford 2008), 185.

¹⁰³ C-440/13 *Croce Amica One Italia* ECLI:EU:C:2014:2435, paragraph 45.

¹⁰⁴ Case C-525/04 *P Spain v. Lenzing* [2007] ECR I-9947, paragraph 57.

awarded in those jurisdictions that take a more rigorous look at the lawfulness of public procurement decisions.¹⁰⁵

This is only one of the issues raised by damages in public procurement law. The problem is that if possible the remedies directives are even stricter concerning liability claims than they are about annulment actions. Article 2(1)(c) of Directive 89/665/EEC merely states that Member States must give courts and other review bodies the power to ‘award damages to persons harmed by an infringement’. As the Court of Justice remarked in *Spijker*, Article 2(1)(c) ‘contains no detailed statement either as to the conditions under which an awarding authority may be held liable or as to the determination of the amount of the damages which it may be ordered to pay’.¹⁰⁶ Article 2(6) allows Member States to make annulment actions a condition precedent to liability claims.¹⁰⁷

Liability actions normally raise a whole series of issues which tend to become more complex in public procurement cases.¹⁰⁸ One point is causation. What is the relevant standard? It is quite rare that an economic operator will be in a position to show that the contract should have been awarded and that it would have been if no breach of EU law had been committed. Direct awards are especially hard to deal with under a remedy such as damages. An economic operator can show it would have been interested in taking part in an award procedure if only a contract notice had been published. This is however very different from showing that it should have been awarded the contract.¹⁰⁹ The position is only marginally better with reference to an economic operator who could show that it was wrongly excluded from an award procedure or not invited to submit a tender in a restricted procedure. EU law should say something on the relevant standard to assess causation.¹¹⁰

Another point is heads of damages. We can think of at least three such heads in procurement cases: actual costs, lost profit, and lost opportunities. Punitive damages might also be considered.¹¹¹ Actual costs of participation are normally much lower than profits expected from a contract. Actual costs – different from legal costs – are actually non-existent in direct award situations.¹¹² Directive

¹⁰⁵ Please refer to R. Caranta, ‘The Liability of EU Institutions for Breach of Procurement Rules’ [2013] *EPPPL* 238.

¹⁰⁶ Case C-568/08 *Spijker* [2010] ECR I-12655, paragraph 86.

¹⁰⁷ Whether the (normally) short deadlines for annulment actions may then be applied to damages claims as well will be decided in Case C-166/14 *MedEval – Qualitäts-, Leistungs- und Struktur-Evaluierung im Gesundheitswesen GmbH*, pending.

¹⁰⁸ See the papers collected by D. Fairgrieve & F. Lichère (Eds), *Public Procurement Law*, *supra* at 9.

¹⁰⁹ C. Bovis, ‘Remedies’, *supra* at 1, 389.

¹¹⁰ Please refer to R. Caranta, ‘Damages for Breaches of EU Public Procurement Law: Issues of Causation and Recoverable Losses’, in: D. Fairgrieve & F. Lichère (Eds), *Public Procurement Law*, 167.

¹¹¹ C. Bovis, ‘Remedies’, *supra* at 1, 107.

¹¹² Caranta, *supra* at 108, 178 ff.

89/665/EEC does not give any indication as to which heads of damages should be recoverable in public procurement cases, and under which conditions. In some Member States, such as some Nordic countries, the uncertainty works against the claimants.¹¹³

Ineffectiveness may remedy some of these situations, but stronger rules on damages would certainly enhance the overall effectiveness of the system.

A somewhat more detailed provision is to be found in Article 2(7) of Directive 92/13/EEC remedies in the utilities sector under which, where a claim is made for the costs of participation in an award procedure, the claimant may only be required to prove a) an infringement of Community law; and b) that he would have had a real chance of winning the contract; and that, as a consequence of that infringement, that chance was adversely affected. The provision gives some indications as to the causation standards applicable to damages claims.¹¹⁴

It points to a relatively low standard, but it refers to only one of the potential heads of damages. Somewhat surprisingly, the provision was not extended to the liability for the breach of public contract rules in the classic or ordinary sectors.

The unbearable stringency of the EU provisions on damages has not been complemented much by the case law. In *Spijker* itself the Court of Justice was content to refer to the three conditions for Member State liability as laid down in *Francovich* and fine-tuned through *Brasserie du pêcheur* and *Factortame*,¹¹⁵ and to recall the residual procedural autonomy of the Member States as to the procedural rules applicable (autonomy qualified by the need to comply with the principles of equivalence and effectiveness).¹¹⁶ The Commission seems thus far to have been happy to challenge those Member States which, contrary to the general rule on State liability for breach of EU law, required disaffected economic operators to prove the fault of the contracting authority to get damages.¹¹⁷

In *Strabag* the Court of Justice further elaborated on the case law on the requirement of fault by holding that even national legislation based on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities is not meeting the requirements of EU law

¹¹³ See S. Treumer, 'Basis and Conditions for a Damages Claim for Breach of EU Public Procurement Rules' D. Fairgrieve & F. Lichère (Eds), *Public Procurement Law*, 159 ff; Southern countries seem to be more generous: see N. Gabayet, 'Damages for Breach of Public Procurement rules: A French Law Perspective', *ivi*, 7, and S. Ponzio, 'State Liability in Public Procurement: The Case of Italy', *ivi* 89.

¹¹⁴ C. Bovis, 'Remedies', *supra* at 1, 389.

¹¹⁵ Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

¹¹⁶ Case C-568/08 *Spijker* [2010] ECR I-12655, paragraph 90 ff.

¹¹⁷ Case C-275/03 *Commission v. Portugal*, not published in the ECR, paragraph 31; Case C-70/06 *Commission v. Portugal* [2008] ECR I-1; see also Case T-33/09 *Portugal v. Commission* [2011] ECR II-1429, which was upheld by Case C-292/11 *P Commission v. Portugal* ECLI:EU:C:2014:3.

because the risk is still that a tenderer harmed by an unlawful decision is nevertheless deprived of the right to damages where the contracting authority is able to rebut the presumption of fault.¹¹⁸

In passing it is noted that the public procurement specific case law seems more demanding than the case law on State liability in that the latter allows the defendant to plead an excusable mistake.¹¹⁹

3 Lessons from EU Public Contract Law for EU Law more Generally

The remedies directives had a strong impact on those jurisdictions such as Germany,¹²⁰ which denied competitors standing to challenge procurement decisions, and possibly in the United Kingdom, where those decisions were rarely challenged, if ever.¹²¹ Additionally, Directive 2007/66/EC resolved doubts on the fate awaiting contracts concluded in breach of EU rules. One could also opine that the review system has become *too* effective, making the life of procurement officials overly tough and delaying important projects.¹²²

I happen not to share this vision as I believe that a strong remedy system is possibly the most strategic contributor to the effectiveness of EU law. From this angle, it is submitted that EU law – or EU case law – should address some fundamental issues as to the conditions for remedies such as annulment and damages, arguably strengthening the requirements imposed on the Member States.

This leads to the question of whether, and if so to what extent, the remedies developed with reference to public contracts might also be relevant as a blueprint in other areas of EU law.

One foremost issue seems to be to distinguish between areas regulated under private rather than public law. Of course this distinction must not be

¹¹⁸ Case C-314/09 *Strabag* [2010] ECR I-8769; see also T. Kotsonis, 'The Basis on which the remedy of Damages must be Made Available under the Remedies Directive: *Stadt Graz v. Strabag AG* (C-314/09) [2011] PPLR NA59.

¹¹⁹ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Federal Republic of Germany, The Queen v. Secretary State for Transport ex parte Factortame Ltd and Others* [1996] ECR I-1029, paragraphs 78 ff.

¹²⁰ A similar impact was produced in Switzerland: E. Clerc, 'Suisse', in: U. Neergaard, C. Jackson & G.S. Ølykke (Eds), *Public Procurement Law*, *supra* at 11, 739 f.

¹²¹ See e.g. B. Doherty, 'United Kingdom', in: U. Neergaard, C. Jackson & G.S. Ølykke (Eds), *Public Procurement Law*, *supra* at 11, 761 f and 796; M. Trybus, 'An Overview', *supra* at 11, 232; another downside is conflicting case law: A. Sołtysińska, 'Poland', *supra* at 76, 664.

¹²² B. Doherty, 'United Kingdom', *supra* at 119, 761 f and 796; see also C. Bovis, 'Remedies', *supra* at 1, 391.

taken as an absolute barrier.¹²³ Mixed areas exist and are very relevant, and public contracts may well be one of them.¹²⁴

However the sectors regulated under public law tend to be specific because of the relevant powers of unilateral decision conferred to the public authorities – and this is even more relevant with reference to public contracts – and because disputes tend to be polycentric, in that a multiplicity of economic operators are fighting for one contract. The latter makes ADR hardly relevant in this area because the conflict between competitors cannot normally be mediated (the contract cannot be awarded pro-quota). Moreover disputes for the award of public contracts do not normally involve small claims. This is another reason why mediation techniques are not really relevant in this area. On the other hand, public contract remedies also include damages and affect the contract, thus recalling private law notions.

As they are, the old public procurement remedies may provide a template to outline judicial protection in areas in which the *Marktbürger* is confronted with administrative decisions conditioning his or her freedom. Authorisation or licence schemes such as those provided for many service activities jump to mind. Directive 2006/123/EC on services in the internal market lays down a number of substantive provisions binding the choices of Member States but provides no remedy. Similar considerations apply to a number of more sector specific instruments, such as Directive 2002/20/EC on the authorisation of electronic communications networks and services (the Authorisation Directive). Interim relief, annulment and damages are obviously appropriate in these areas. As already noted, however, the present public procurement remedies directives still present many shortcomings. The imposition of a standstill period between the communication of a draft authorisation or licence and its actual adoption could also be envisaged.

The new 2007 remedies and ineffectiveness among them are however specific to the special case of public contracts where a private law contract is the outcome of an administrative law procedure. On the contrary, there is not much need for ineffectiveness measures in a standard administrative law context since in most jurisdictions decisions based on an illegal procedure are simply annulled. Ineffectiveness is more relevant in private law situations and in the end something similar is provided for under Article 6 of Directive 93/13/EEC on unfair terms in consumer contracts – which deprives unfair terms of any binding character.

¹²³ See the papers collected by M. Ruffert (Ed.), *The Public-Private Law Divide: Potential for Transformation?* (London 2009).

¹²⁴ See R. Noguellou & U. Stelkens, 'Propos introductifs', in : R. Noguellou & U. Stelkens (Dir/Eds), *Droit comparé des Contrats Publics – Comparative Law on Public Contracts* (Bruxelles 2010), 10 ff.