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Judicial Protection and Competitive Award Procedures in Germany

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Abstract

The history of German public procurement law is a history of attempts by the German legislator to implement the EU public procurement directives on judicial protection, namely Directive 89/665/EEC of 21 December 1989, as minimally as possible. Paradoxically, the history of German procurement law is also the history of an increased spreading of the model of judicial review in 'competitive award procedures' underlying Directive 89/665/EEC to other administrative procedures. Here, one can discern mutual fertilization of the discussions on the minimal standards for judicial protection foreseen in Directive 89/665/EEC, as well as a parallel discussion on minimal standards (directly derived from the German constitution) for judicial review in competitive award procedures concerning the recruitment of public officials. On this basis, one may discern trends in German case law, administrative practice, and scholarship towards developing judicial review systems in competitive award procedures for public procurement beyond the thresholds set by the EU directives. This is relevant for privatizations, gambling licences, and procedures to grant the right to use public spaces, to name only a few. However, these trends encounter difficulties because the German General Administrative Court Procedure Act and other relevant legislation are not tailored to competitive award procedures. This article will analyse these different trends and suggest explanations for them.

1. Introduction[1]

That the concepts of French administrative law directly influenced the doctrine of German administrative law in the 19th century (especially

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1 List of German abbreviations: BAG = Bundesarbeitsgericht (Federal Labour Court); BGBl = Bundesgesetzblatt (Federal Gazette); BGH = Bundesgerichtshof (Federal Court of Justice); BGHZ = Entscheidungen des BGH in Zivilsachen (collection of decisions on private law of the BGH); BVerfG = Bundesverfassungsgericht (Federal Constitutional Court); BVerfGE = Entscheidungen des Bundesverfassungsgerichts (collection of decisions of the BVerfG);

through the work of *Otto Mayer*)[2] has become commonplace. In general, all over Europe there have been 'transplants' of administrative law concepts and institutions between 1880s and 1920s which may justify classifying the administrative legal orders of these states into 'legal families'.[3] By contrast, the development of German administrative law after 1945 can clearly be described as an autonomous *national* development, at least until (the end of) the 1980s. Within this time frame the situation is, again, not very different in Germany from other West European States.[4] Comparative reasoning has played only a very small role, if any, in drafting new statutes, legal education, and the day-to-day practice of the administration and the courts. For instance, two of the most important German codifications of general administrative law – namely the Code of Administrative Court Procedure of 1960 (*Verwaltungsgerichtsordnung – VwGO*)[5] and the Federal Administrative Procedure Act of 1976 (*Verwaltungsverfahrensgesetz – VwVfG*)[6] – were drafted without any reference to other admin-

BVerwG = Bundesverwaltungsgericht (Federal Administrative Court); BVerwGE = Entscheidungen des Bundesverwaltungsgerichts (collection of decisions of the BVerwG); DVBl = Deutsches Verwaltungsblatt (law journal); DÖV = Die Öffentliche Verwaltung (law journal); GG = Grundgesetz (Basic Law - Federal Constitution of Germany); GWB = Gesetz gegen Wettbewerbsbeschränkungen (Act Against Restraints of Competition); LKV = Landes- und Kommunalverwaltung (law journal); NJW = Neue Juristische Wochenschrift (law journal); NVwZ = Neue Zeitschrift für Verwaltungsrecht (law journal); NVwZ-RR = Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport (law journal); NZA = Neue Zeitschrift für Arbeitsrecht (law journal); NZBau = Neue Zeitschrift für Baurecht und Vergaberecht (law journal); OLG = Oberlandesgericht (higher ordinary court); VwGO = Verwaltungsgerichtsordnung (Code of Administrative Court Procedure); OVG = Oberverwaltungsgericht (higher administrative court); VGH = Verwaltungsgerichtshof (designation of the higher administrative courts in Baden-Württemberg, Bayern and Hessen, cf. § 184 VwGO); VwVfG = Verwaltungsverfahrensgesetz (Administrative Procedure Act); ZBR = Zeitschrift für Beamtenrecht (law journal); ZIP = Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis (law journal); ZPO = Zivilprozessordnung (Code of Civil Court Procedure).

2 The influence of French administrative law on the work of *Otto Mayer* should not be underestimated: O Jouanjan, 'Die Belle époque des Verwaltungsrechts – Zur Entstehung der modernen Verwaltungsrechtswissenschaft in Europe (1880-1920)' in A von Bogdandy, S Cassese and PM Huber (eds), *Handbuch Ius Publicum Europaeum – Band IV: Verwaltungsrecht in Europa: Wissenschaft* (C. F. Müller 2011) 425-459, § 69 n° 9. See also, for more details on the French influence on German administrative law, U Scheuner, 'Der Einfluß des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung' (1963) 16 DÖV 714, 718f.

3 M Fromont, 'A Typology of Administrative Law in Europe' in A von Bogdandy, PM Huber and S Cassese (eds), *The Max Planck Handbooks in European Public Law – Vol. 1: The Administrative State* (Oxford University Press 2017) 579-600, 580ff.

4 U Stelkens, A Andrijauskaitė and Y Marique, 'Mapping, Explaining, and Constructing the Effectiveness of the Pan-European Principles of Good Administration – Overall Assessment' in U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020) 757-822, para 31.18.

5 For the basic principles of the VwGO see MP Singh, *German Administrative Law in Common Law Perspective* (Springer 2001) 183ff.

6 It directly applies only to federal authorities, but the 16 *Länder* have either passed similar laws or simply declared the federal VwVfG to also govern the activities of their respective authorities. Consequently, it is common to refer *pars pro toto* only to the federal VwVfG when speaking of the German codification of administrative procedure law. For the constitutional reasons for this complex situation, see A Jacquemet-Gauché and U Stelkens, 'Caractères essentiels du droit allemand der la procédure administrative' in J-B Auby and T Perroud (eds), *Droit comparé*

istrative systems in their *travaux préparatoires*.[7] Furthermore, the courts have developed administrative law through general principles of administrative law without reference to 'foreign' sources or concepts, but by reference to national 'meta concepts' (good faith, rule of law, legality, legal security, reasonability, proportionality, equality, etc.). At the time, these 'meta concepts' were by no means considered to be European or even 'global'.[8] Until the 1990s, the *Europeanisation* of *national* administrative law in general and of German administrative law in particular was not discussed – even with regard to the national administrative law of Member States of the (then) European Economic Community (EEC).[9]

This all changed in the 1990s: a turning point in the history of German administrative law, especially with regard to its 'Europeanisation'. In one fell swoop, the extent to which the *acquis* had gradually grown over the years since the founding of the EEC was made clear to German politics and scholarship when the need to implement the whole *acquis communautaire* more or less from day one in the territory of the former German Democratic Republic arose.[10] Furthermore, the entry into force of the Single European Act of 1986 added environmental law as a very 'prominent' field of EEC activity, with implications for all levels of administration. Moreover, the legislation of the EEC and – following the Treaty of Maastricht – of the European Community (EC) was increasingly spreading into areas which had previously been regulated exclusively or

de la procédure administrative (Bruylant 2016) 15-36, 21ff and J-P Schneider, "Germany" in J-B Auby (ed), *Codification of Administrative Procedure* (Bruylant 2014) 203-226, 207ff.

7 To simplify matters, in the following we only refer to the legislation concerning administration in general. This means, above all, that we will *not* refer to the special legislation on administrative procedure and court procedure in social and fiscal law matters (each of them having a special hierarchy of courts). See on this U Stelkens, 'Administrative Appeals in Germany' in D Dragos and B Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014) 3-55, 5ff.

8 See U Stelkens, 'The Impact of the Pan- European General Principles of Good Administration on German Law - Is Yet to Come!' in U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020) 301–329, para 11.47ff.

9 It has to be recalled that the first edition of Jürgen Schwarze's ground-breaking work on European administrative law was first published in its original German version (in two volumes) in 1988 (J Schwarze, *Europäisches Verwaltungsrecht* (1st edn, Nomos 1988)). Its English translation was published in 1992 (J Schwarze, *European Administrative Law* (1st edn Oxford University Press 1992); its objective was ('only') to define – in accordance with the general principles common to the laws of the Member States – general principles of EEC law to be respected by the EEC's institutions. Thus, it followed the model of Article 215(2) of the Treaty establishing the European Economic Community (Article 340(2) Treaty on the Functioning of the European Union [2016] OJ C202/49 (TFEU)) and Joined Cases 7/56, 3/57 to 7/57 *Algera and Others v Common Assembly of the European Coal and Steel Community*, ECLI:EU:C:1957:7, [54]ff. Schwarze's work was (initially) not about detecting general principles of European administrative law which could harmonise the national administrative law of the Member States of the EEC or, later, the EU.

10 AK Mangold, *Gemeinschaftsrecht und deutsches Recht* (Mohr Siebeck 2011) 241.

mostly by the national legislature. Finally, EC secondary law and the case law of the European Court of Justice (ECJ) created more and more obligations for Member States to effectively enforce Community law, above all by creating new (directly applicable) rights for individuals, enterprises, and NGOs, and by giving them access to national courts in order to seek the enforcement of EEC/EC law by national authorities.[11]

This trend in Community legislation was met with a diametrically opposed trend in Germany in the 1990s. The enormous challenges of Reunification, coming on top of problems also triggered in West Germany by the structural change from an industrial to a service society and its economic consequences, questioned the suitability of the basic structures of administration and administrative law developed in the comparatively 'contemplative' 'Bonn Republic'. The new 'Berlin Republic' had to manage the transformation from a planned economy to a market economy in the 'new *Länder*', as well as having to rehabilitate and reconstruct most of the East German infrastructures that had been neglected over decades. Furthermore, the enormous costs of the reunification led to the need for substantial austerity measures in West Germany as well. The 'old *Länder*' were (and still are) challenged by the fact that most of the West German infrastructures built between the 1950s and 1980s needed (and mostly still need) considerable investments. All this led to an 'economy first' approach in German politics in the 1990s to attract investors – a policy to which all other objectives were, seemingly, ultimately subordinated.[12] Lengthy administrative procedures for granting licences, building permits, and the planning of infrastructures – as well as wide access to courts for individuals against such 'investor-friendly decisions' leading to (alleged) lengthy administrative court procedures – were (and still are) the last thing wanted. Thus, in quite comprehensive legislation at both federal and *Land* levels, the procedural standards of the VwVfG and the VwGO for third parties were reduced, and access to court for third parties limited to 'accelerating' procedures to the benefit of investors and to reduce costs.[13]

These diametrically opposed trends in German and EC politics led to increased interest in the concepts underlying the EC's legislation within German politics and legal scholarship. These concepts were often identified as 'foreign'

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11 In Germany, this trend is often called 'functional subjectivisation' ('*funktionale Subjektivierung*') of EU Law: see e.g. J Masing, 'Der Rechtsstatus des Einzelnen im Verwaltungsrecht' in W Hoffmann-Riem, E Schmidt-Aßmann and A Voßkuhle (eds), *Grundlagen des Verwaltungsrechts I* (2nd edn, CH Beck 2012) 437-542, § 7 para 91ff.

12 A Jacquemet-Gauché and U Stelkens, 'La simplification administrative en Allemagne' in J-B Auby and T Perroud (eds), *Droit comparé de la procédure administrative* (Bruylant 2016) 365-377.

13 See, on this development, E Schmidt-Aßmann, 'Der Verfahrensgedanke im deutschen und europäischen Verwaltungsrecht' in W Hoffmann-Riem, E Schmidt-Aßmann and A Voßkuhle (eds), *Grundlagen des Verwaltungsrechts II* (2nd edn, CH Beck 2012) 495-555, § 27 para 86ff.

concepts, mainly following French and British models, which needed to be understood to ensure a minimal implementation entailing as few changes in German law as possible. In general, German administrative law was considered to be a 'victim of Europeanisation', and the transposition of directives an unwanted transplant. This led to – partly excessive – defensive reactions by German politicians and scholarship, illustrated by the famous dictum of J. Salzwedel comparing EC law with 'occupation law' intervening in 'established national legal systems'.[14] This was, of course, particularly exaggerated, but nevertheless characteristic of the perception of Europeanisation in Germany at the time.[15] It expressed the frustration of German politicians and scholars about the loss of authority to interpret administrative law applicable in Germany.

This situation has mainly been documented and analysed with regard to infrastructure planning and environmental law. However, the same type of reaction happened with regard to the transposition of 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 to public works contracts (Directive 89/665/EEC).[16] Its recitals explicitly stated that the then existing directives on public procurement[17] 'do not contain any specific provisions ensuring their effective application' and that 'the existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions'.[18] Thus, it was considered 'necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement'.[19]

The implementation of such procedures for the conclusion of public contracts covered by Directive 89/665/EEC (i.e. 'contracts for pecuniary interest concluded between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of

14 J Salzwedel and M Reinhardt, 'Neue Tendenzen im Wasserrecht' (1991) 10 NVwZ 946-952, 947.

15 R Wahl, 'Die Rechtsbildung in Europa als Entwicklungslabor' (2012) 18 Juristenzeitung 861-870, 862f.

16 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 to public works contracts [1989] OJ L395/33.

17 Namely, Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts and Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts [1971] OJ L209/1.

18 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 to public works contracts [1989] OJ L395/33, Recital 1.

19 ibid, Recital 6.

products or the provision of services')[20] was met with considerable resistance in Germany, and the German legislator sought to minimally implement this directive.[21] Recognizing enforceable individual rights to competitors in procurement procedures leading to public contracts covered by Directive 89/665/EEC was mostly considered superfluous: it would create unnecessary bureaucratic burdens for the administration, thus delaying and even hindering much-needed public investments.[22] This explains why, firstly, in 1993 the German legislator tried, unsuccessfully, to 'circumvent' Directive 89/665/EEC by creating a review system 'equivalent to a judicial procedure' without being one,[23] and tried to do so by changing budgetary law.[24] This also explains, secondly, why, after the foreseeable failure of this attempt[25] and in order to avoid an infringement procedure,[26] in 1998 the German legislator adopted a finally successful but minimalistic transposition of Directive 89/665/EEC. The transposition inserted a new 'Part IV' entitled 'Award of Public Contracts' into the Federal Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*).[27] To be more concrete, since 1998, the §§ 97ff of the GWB establish a special review procedure for unsuccessful competitors. The §§ 97ff. GWB have been modified first in 2009 to transpose Directive 2007/66/EC amending directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts,[28] and then in 2016 to

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20 See the definition of Article 2 (1) No. 5 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

21 PM Huber, 'The Europeanization of Public Procurement in Germany' (2007) 7 European Public Law 33.

22 M Burgi and F Koch, 'Contracts below the Thresholds and List B Services from a German Perspective' in R Caranta and D Dragos (eds), *Outside the EU Procurement Directives - Inside the Treaty?* (Djøf Publishing 2012) 119-161, 120.

23 H-J Priess, 'New infringement proceeding regarding the transposition of the Remedies Directives' (1996) 2 Public Procurement Law Review 51-53.

24 *Zweites Gesetz zur Änderung des Haushaltsgrundsätzegesetzes* of 26 November 1993 (BGBl I 1993 1928). See, in detail on the 1994 legislation, A Niedzela, 'Recent legislation on Public Procurement in Germany: Measures for Implementing the E.C. Procurement Rules' (1994) Public Procurement Law Review 44. See also PM Huber, 'The Europeanization of Public Procurement in Germany' (2007) 7 European Public Law 33, 39ff.

25 M Dreher, 'Der Rechtsschutz bei Vergabeverstößen nach 'Umsetzung' der EG-Vergaberichtlinien' (1995) ZIP 1869-1879.

26 See letter from EC Commissioner Mario Monti to the German Foreign Minister of 31 October 1995 (SG (95) D/13624-95/2044) available in (1995) ZIP 1940-1946. See also, on this proceeding, PM Huber, 'The Europeanization of Public Procurement in Germany' (2007) 7 European Public Law 33, 40.

27 *Gesetz zur Änderung der Rechtsgrundlagen für die Vergabe öffentlicher Aufträge (Vergaberechtsänderungsgesetz – VgRÄG)* of 26 August 1998 (BGBl I 1998 2512).

28 Article 1 of the *Gesetz zur Modernisierung des Vergaberechts* of 20 April 2009 (BGBl. I 2009 790). See also 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 [2007] OJ L335/31.

implement the European legislative package for the modernisation of the public procurement directives of 26 February 2014. On this last occasion, nearly all of these GWB provisions were reformulated and renumbered by the Act to Modernise the Law on Public Procurement of 17 February 2016.[29] However, the specific review mechanisms of §§ 97ff GWB (in their original version of 1998 and their reformed version of 2016) are only available for contract awards exceeding the European threshold values. No specific judicial review procedure exists for contracts 'below the thresholds'. This leads to a complete disjuncture in procurement law according to whether a contract falls under the scope of the EU directives or not, and thus to the famously infamous dichotomy of German public procurement law ('*Zweiteilung des Vergaberechts*').[30]

In fact, the idea of creating enforceable individual rights for competitors in public procurement matters as required in Directive 89/665/EEC was completely 'foreign' to the German administrative law of the 1990s.[31] This is explained in this article's introductory section. However, German administrative law has incrementally domesticated this foreign element in two ways. The third section explains a first 'conceptual spill over effect' of Directive 89/665/EEC. Indeed, recognition of the need for judicial protection developed in competitive award procedures outside the scope of Directive 89/665/EEC and even outside the scope of public procurement, i.e. in other procedures used to allocate scarce goods.[32] The fourth section explains a second form of 'conceptual spill over effect' of the transposition of Directive 89/665/EEC. It became clear that the regular types of action foreseen for judicial review in administrative matters were inadequate for judicial protection in public procurement matters, so that in 1998 a completely new system of judicial protection (which became §§ 97ff GWB) had to be designed more or less 'from scratch'. This nevertheless sheds

29 *Gesetz zur Modernisierung des Vergaberechts (Vergaberechtsmodernisierungsgesetz – VergRModG)* of 17 February 2016 17.02.2016 (BGBl I 2016 203).

30 M Burgi and F Koch, 'Contracts below the Thresholds and List B Services from a German Perspective' in R Caranta and D Dragos (eds), *Outside the EU Procurement Directives - Inside the Treaty?* (Djøf Publishing 2012) 119-161, 119ff; K Summann, 'Winds of Change: European Influences on German Procurement Law' (2006) 35 Public Contract Law Journal 563, 564 and U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 33-66, 36ff.

31 Nevertheless, there has been a quite extensive scholarly discussion on the subject: cf PM Huber, 'The Europeanization of Public Procurement in Germany' (2007) 7 European Public Law 33, 34.

32 The term 'competitive award procedure' is taken from Article IV-9 of the ReNEUAL Model Rules on EU Administrative Procedure (<www.reneual.eu/index.php/projects-and-publications/reneual-1-0>). In our view, it describes the specific character better than the term 'allocation procedures', which is also often used: cf P Adriaanse and others, 'The Allocation of Limited Rights by the Administration: A Quest for a General Legal Theory' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 3-25, 11ff and F Wollenschläger, 'EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure' (2015) 8 Review of European Administrative Law 205.

light on the need to further develop the 'regular' system of administrative justice to cope with the particularities of competitive award procedures.

2. Public procurement, fundamental rights and public authority

The reasons why the creation of enforceable individual rights for competitors in public procurement matters was so completely 'foreign' to German administrative law are twofold. The first reason is that in Germany, after 1945, the protection of individual (fundamental) rights against acts of 'public authority' was considered the most prominent task of administrative law and administrative justice. However, some administrative decisions were not considered to be an expression of 'public authority'. In these cases, they were neither considered as being subjects of administrative justice nor as being applicable to the (directly applicable and enforceable) fundamental rights provided by the Constitution of the Federal Republic of Germany – the 'Basic Law' (*Grundgesetz – GG*) of 23 May 1949. A theory similar to the French theory of '*actes détachables*' did not develop in a general manner.[33] The German approach to administrative justice focused on those relationships between the individual and the administration characterized by 'subordination of the individual to the administration' (subsection 2.1.). In public procurement matters, this has only lately been (mostly) overcome by case law and scholarship, yet it still has considerable repercussions (subsection 2.2).

2.1. Article 19(4) GG and the German public-private law divide

As a reaction to the atrocities of the Nazi regime (and the developments in the Soviet Occupation Zone), the *Grundgesetz* places great emphasis on the binding force of fundamental rights on all powers of the state as directly applicable law (see Article 1(3) GG)[34], as well as on the binding force of the constitutional order, law and justice (Article 20(3) GG)[35]. To guarantee the enforceability of these obligations, Article 19(4) GG stipulates that

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33 H Schröder and U Stelkens, 'Le contentieux des contrats publics en Allemagne' (2011) Revue française de droit administratif 16, 17. The German 'two-step theory' ('*Zweistufentheorie*') – consisting in the construction of an administrative act in the sense of § 35 VwVfG prior to the conclusion of a private law contract – is only applied in matters of subsidy law and access to public facilities but not with regard to public procurement.

34 Article 1 (3) GG reads: 'The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law'. All translations of the articles of the *Grundgesetz* are taken from <www.gesetze-im-internet.de/englisch_gg/englisch_gg.html>.

35 Article 20(3) GG reads: 'The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice'.

Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. (...).[36]

Thus, since 1949 the most prominent task of administrative law and administrative justice has been to protect citizens from arbitrary (ab)use of governmental power. This conception of the role of administrative law and the focus on its limiting function (in contrast to the 'enabling function' of administrative law)[37] characterized the case law of the newly (re-)established administrative courts and the (West) German codifications of general administrative law until the 1980s.[38] However, the challenges of West Germany after the end of the Nazi regime 'only' concerned the robust implementation of human rights, democracy and the rule of law in the existing administrative legal system. It was neither possible nor desired to instead have a parallel total change of the pre-1933 general and sector-specific legislative framework,[39] to be used as the basis of administrative routines in day-to-day practice, which defines administrative missions and enables the different branches of administration to fulfil their tasks.[40] Hence, the 'limiting function' of German administrative law could be strengthened while maintaining its enabling instruments, which were known to be sufficiently effective to deliver public services. For this reason, it can be said that, in West Germany, adding and strengthening democratic, rule of law

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36 See, on the crucial role of Art. 19 (4) GG for the further development of German administrative law: E Riedel, 'Access to Justice as a Fundamental Right in the German Legal Order' in E Riedel (ed), *German Reports on Public Law* (Nomos 1998) 77-102; cf. on Article 19 (4) GG in general: C Bumke and A Voßkuhle, *German Constitutional Law* (Oxford University Press 2019), para. 1270ff.

37 The 'limiting function' of administrative law has to be contrasted with its 'enabling function'. The latter is the function of 'enabling' the administration to fulfil its tasks (as defined by the legislator and the government) by releasing it from the bonds of private law (in the sense of common law or '*droit commun*') and providing it with a legal toolkit more adequate for pursuing public interests than private law can provide. Cf. on the different conceptions of the tasks of administrative law which are, however, not mutually exclusive C Harlow, 'European Administrative Law and the Global Challenge' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 261-85. It seems plausible that this differentiation between the 'enabling function' and 'limiting function' of administrative law reflects the very influential juxtaposition of the 'green light theory' and the 'red light theory' developed by C Harlow and R Rawlings (in *Law and Administration* (3rd edn, Cambridge University Press 2009) 1ff). See also, on these different tasks of administrative law, U Stelkens and A Andrijauskaitė, 'Introduction: Setting the Scene for a True European Administrative Law' in U Stelkens and A Andrijauskaitė (eds), *Good Administration and the Council of Europe – Law, Principles and Effectiveness* (Oxford University Press 2020) 1-16, para 0.25ff.

38 See, on the (re-)establishment of administrative courts in West Germany: M Niedobitek, 'Die Neugründung der Verwaltungsgerichtsbarkeit in Westdeutschland ab 1945' in K-P Sommermann and B Schaffarzik (ed), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa – Vol. 1* (Springer 2019) 915-958.

39 This pre-1933 legal framework continued to be applied or even developed further during the Nazi regime if it pleased or did not disturb the National Socialist leaders.

40 See also Article 123(1) GG: 'Law in force before the Bundestag first convenes shall remain in force insofar as it does not conflict with this *Grundgesetz*'.

and human rights elements to administrative law could be understood as a (far-reaching) process of 're-founding'[41] the pre-1933 German system of public administration and its law. It was not the start of a completely new administrative law.

This meant that the particularities of the German 'public-private law divide' and its functions – dating from the foundation of the German Reich in 1871 (and even earlier) – were transposed into the administrative legal order of the (West) German Federal Republic founded in 1949.[42] From the perspective of legal practice, the German 'public-private law divide' is only of relevance with regard to the scope of application of either public or private law to administrative action.[43] The delimitation of the scope of private law and public law is a problem in practice only because (1) public bodies are allowed to use private law instruments (namely to conclude contracts governed by private law) and because (2) if private law is applicable to administrative action, the administration is 'subjected' to private law and to the jurisdiction of the ordinary courts. This principle was considered to be necessary to guarantee the rule of (private) law and equality before the (private) law: it meant that public authorities had no special rights in the sense of privileges, and their actions could be submitted to the judicial review of the ordinary courts ('*Fiscus iure privato utitur*').[44] It is also the expression of a strict separation between, on the one hand, the scope of private law and the jurisdiction of the ordinary courts (guaranteed by the Reich's legislation on the establishment of ordinary courts and ordinary court procedures of 1877, the so-called '*Reichsjustizgesetze*') and, on the other hand, the scope of public law, where judicial review over administrative decisions did not necessarily exist until the entry into force of Article 19(4) GG. That separation therefore divided administrative activity into (1) an area in which (federal) private law was applicable and administrative action was subject to review by the ordinary courts, and (2) an area open to regulation by a special (public) law (open to regulation

41 The term is used with regard to Germany by J-P Schneider, 'German Traditions in Administrative Law' in M Ruffert (ed), *Administrative Law in Europe: Between Common Principles and National Traditions* (European Law Publishing 2013) 49-65, 54.

42 For this evolution, see U Stelkens, *Verwaltungsprivatrecht* (Duncker & Humblot 2005) 53ff. See also J-P Schneider, 'The Public-Private Law Divide in Germany' in M Ruffert (ed), *The Public-Private Law Divide: Potential for Transformation* (European Law Publishing 2009) 85-98, 85ff.

43 The question of whether a specific legal provision is part of public law or private law is clear in most cases: see M Burgi, 'Rechtsregime' in W Hoffmann-Riem, E Schmidt-Aßmann and A Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Vol I* (2nd edn, CH Beck 2012) 1257-1318, § 18 para 18ff.

44 J Hatschek, 'Die rechtliche Stellung des Fiskus im Bürgerlichen Gesetzbuche' (1899) 7 Verwaltungsarchiv 424 and O Mayer, *Deutsches Verwaltungsrecht – Vol. I* (1st edn, Duncker & Humblot 1895) 53ff and 138. This has been 'labelled' by the author of the present piece as 'principle of the administration being bound by private law' ('*Grundsatz der Privatrechtsbindung der Verwaltung*'): cf U Stelkens, *Verwaltungsprivatrecht* (Duncker & Humblot 2005) 52ff.

also by the *Länder* to a large extent) and (depending on the legislation of the *Länder*) not necessarily subject to judicial review in every case.

This explains why the administrative court system established by West Germany after 1949 pursuant to Article 19(4) GG was mostly meant to establish and guarantee judicial review over administrative action where public law was applicable. The focus was not on bridging the public-private law divide by extending and enforcing judicial review over administrative action governed by private law. Furthermore, when speaking of any person's rights, Article 19(4) GG makes it clear that judicial protection in administrative matters is primarily conceived to enable individuals to enforce their individual rights (namely fundamental rights) against illegal administrative action. The newly established administrative courts were thus mainly conceived to protect the individual against the administration – and not to ensure the legality of the administration as such.[45]

2.2. Public procurement and fundamental rights

Now we come back to public procurement by describing the German situation until the transposition of Directive 89/665/EEC in 1998. There was (and still is) no overarching special regime granting specific powers to contracting public entities, such as those existing in French administrative law.[46] On the contrary, public contracts were (and still are) considered to be private law contracts that do not imply any specific powers for the contracting public entity, unless provided for by contractual clauses.[47] This means, too, that the courts considered the whole procurement process to be subject to private law.[48] Furthermore, public contracts resulting from these procedures were (and are) concluded to be valid or invalid and executed according to private law

45 See BW Wegener, 'Subjective Public Rights – Historical Roots versus European and Democratic Challenges' in H Pünder and C Waldhoff (eds), *Debates in German Public Law* (Hart 2014) 219-237.

46 The German 'public law contract' ('*öffentlich-rechtlicher Vertrag*'), codified in §§ 54ff VwVfG, is not conceived of as being a means for procurement or similar contracts, but as an alternative to administrative single case decisions, especially in cases in which pre-existing public law relationships are to be modified: cf U Stelkens and H Schröder, 'Allemagne/Germany' in R Noguellou and U Stelkens (eds), *Droit comparé des Contrats Publics – Comparative Law on Public Contracts* (Bruylant 2010) 307-338, 315f.

47 See, on this, J Masing, 'Les prérogatives de contrôle exercées par l'administration relativement à l'exécution des marchés publics en Allemagne' in G Marcou and others (eds), *Le contrôle des marchés publics* (IRJS Editions 2009) 311-322 and U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 55ff.

48 See the references at U Stelkens, *Verwaltungsprivatrecht* (Duncker & Humblot 2005) 415ff. Above all, this view on the procurement process as being entirely subjected to private law is still held by Bitterich: see K Bitterich, *Vergabeverfahren und Bürgerliches Recht* (Nomos 2013) 693ff.

rules.[49] That there were specific procedural rules for public entities for awarding public contracts in budgetary law – which still apply for public contracts 'below the thresholds' in addition to some special legislation of the *Länder* (*Landesvergabegesetze*) –[50] does not contradict this statement. Both these budgetary rules and the *Landesvergabegesetze* were (and are) aimed at ensuring the sound management of public funds. They did (and do) not create individual (enforceable) rights for the applicants for the sole reason that they are not meant to protect them. In general, German budgetary rules have no direct effect on the relationship between the individual and the administration and are only binding 'internally', i.e. within the administration.[51] Compliance with these budgetary rules was (and is) therefore not a condition for the validity of a public contract. In sum, this system did not provide for the possibility of any action to prevent or quash a public contract following the discovery of irregularities in the award procedure. Only the possibility of an *a posteriori action* for damages was then recognised for unsuccessful applicants on the basis of the principle of *culpa in contrahendo*, i.e. an action based on violation of the pre-contractual relationship of trust established between the contracting authority and the applicants in the award procedure.[52]

What is more, in 1961 the supreme ordinary court – the Federal Court of Justice (*Bundesgerichtshof – BGH*) – ruled in the famous *Gummistrümpfe* ('elastic stockings') decision that the contracting authority is simply not bound by the fundamental rights guaranteed by the *Grundgesetz* in public procurement matters because it does not act as a public authority. The relationship between the public authorities and applicants for an award is 'from the outset and exclusively' governed by private law.[53] Following a judgment in 1962 of the Federal

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49 This, at any rate, is the largely undisputed starting point. In contrast, it is highly controversial whether, how, and to which extent the disregard of public law requirements in the conclusion and enforcement of public contracts governed by private law can be sanctioned by applying general private law provisions. This is, however, not a specific problem of public procurement contracts, but of all public contracts governed by private law: see U Stelkens, *Verwaltungsprivatrecht* (Duncker & Humblot 2005) 904ff.

50 A collection of the *Landesvergabegesetze* may be found at <www.saarheim.de/Gesetze_Laender/vergabegesetze-laender.htm>. Those *Landesvergabegesetze* mostly deal with issues related to 'green' and 'social' award criteria; special control institutions are sometimes provided for. However, those are considered to be structured procedures dealing with petitions of the unsuccessful bidders, but not as legal remedies: U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 49.

51 For the entrenchment of German public procurement law in budgetary law and its consequences, see K Bitterich, *Vergabeverfahren und Bürgerliches Recht* (Nomos 2013) 212ff.

52 M Burgi, 'EU Procurement Rules - A Report about the German Remedies System' in S Treumer and F Lichére (ed), *Enforcement of the EU Public Procurement Rules* (Djøf Publishing 2011) 105-153, 142 and M Burgi and F Koch, 'Contracts below the Thresholds and List B Services from a German Perspective' in R Caranta and D Dragos (eds), *Outside the EU Procurement Directives - Inside the Treaty?* (Djøf Publishing 2012) 152f.

53 BGH, case KZR 1/61 [1961], BGHZ 36, 91-105, 96.

Administrative Court (*Bundesverwaltungsgericht – BVerwG*), this, among other things, ruled out any possibility of construing a decision on the conclusion of a contract as a decision that could be challenged before the administrative courts in public procurement matters.[54] In the same vein, to date it is not disputed that the VwVfG neither directly nor indirectly covers administrative procedures aimed at the conclusion of private-law contracts.[55]

Nevertheless, the 'constitutional setting' of judicial review in public procurement matters has partly changed since the 1990s. The aforementioned case law of the BGH has been partly overruled. Today, following recently established case law of the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*), any administrative action – even if governed by private law – is bound by fundamental rights.[56] However, in a judgment of 2006 the BVerfG still argued that in public procurement matters the

State acts as a demand party on the market to meet its needs for certain goods or services. In this role, the State is not fundamentally different from other market participants. It does not rely on its superior public legal power when deciding on the award of a contract, so there is no reason to classify its measure as an exercise of public authority within the meaning of Article 19(4) GG.[57]

Based on this decision, the BVerwG concluded that the private law nature of procurement contracts justifies procurement litigation falling under the jurisdiction of the ordinary courts if not stipulated otherwise by statute.[58] Such a statutory basis is missing for most public contracts 'below the thresholds'.

3. The (reluctant) 'spill over effects' of Directive 89/665/EEC

Against this background, it becomes clear that the transposition of Directive 89/665/EEC obliged the German legislator to establish effective judicial protection in a field where it was (1) not necessary from the point of

54 BVerwG, case VIII C 160/60 [1962], BVerwGE 14, 65-72, 66f.

55 M Burgi, 'EU Procurement Rules - A Report about the German Remedies System' in S Treumer and F Lichére (ed), *Enforcement of the EU Public Procurement Rules* (Djøf Publishing 2011) 106f.

56 BVerfG, case 1 BvR 699/06 [2011] ECLI:DE:BVerfG:2011:rs20110222.1bvr069906), BVerfGE 128, 226–278, 244 and BVerfG, Case 2 BvR 470/08 [2016] ECLI:DE:BVerfG:2016:rk20160719.2bvr047008.

57 BVerfG, case 1 BvR 1160/03 [2006] ECLI:DE:BVerfG:2006:rs20060613.1bvr116003, BVerfGE 116, 135–163, 149f. Translated from the original German by the author. F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 93-124, 99.

58 BVerwG, case 6 B 10/07 [2007], BVerwGE 129, 9–20, 13ff.; F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 107f.

view of the German public and constitutional law and (2) not wished for because it was considered to slow down public investments, as described before. This explains why, firstly, in 1993 the German legislator tried (unsuccessfully) to 'outsmart' Directive 89/665/EEC by creating a review system 'equivalent to a judicial procedure' without being one, as already mentioned.[59] It also explains, secondly, why in 1998 the transposition of Directive 89/665/EEC was carried out in a minimalistic fashion: the specific review mechanisms of the GWB were only available for contract awards exceeding the European threshold values, leading to the aforementioned '*Zweiteilung des Vergaberechts*'.[60] For contracts 'below the thresholds', no specific judicial[61] review procedure is foreseen. Nevertheless, Directive 89/665/EC created a certain awareness of the specific challenges of judicial review in competitive award procedures in cases where the enforceable individual rights of applicants were either already or newly recognized in German administrative law or newly derived by the ECJ from the Treaties or secondary law. Thus, Directive 89/665/EC triggered academic reflection and shaped the case law of the ordinary and administrative courts dealing with these procedures. The following paragraphs will outline the most important fields in which this development has been discussed.

In this sense, the most important 'national counterpart' to Directive 89/665/EC is the case law on selection procedures for public officials based on Article 33(2) GG, stipulating that

Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.[62]

This provision is applicable to both public officials with the specific status of '*Beamte*' (those members of the public service who stand in a relationship of service and loyalty defined by public law: cf Article 33(4) GG) and public officials employed on the basis of employment contracts under private law.[63] Furthermore, it is undisputed that Article 33(2) GG creates a directly enforceable right for each applicant to be recruited and promoted on the basis of his/her merits. If there are more applicants than open positions, the competent authority has to choose the 'best' applicant – a choice which can be judicially

59 See *supra* text attached to (n 23).

60 See *supra* text attached to (n 30).

61 See, for administrative review systems established in some *Länder*, U Stelkens, 'Administrative Appeals in Germany' in D Dragos and B Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014) 44f and U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 48f.

62 All translations of the articles of the *Grundgesetz* are taken from <www.gesetze-im-internet.de/englisch_gg/englisch_gg.html>.

63 W Laubinger, 'Die Konkurrentenklage im öffentlichen Dienst – eine unendliche Geschichte' (2010) 10 ZBR 289, 290.

reviewed and which falls under the scope of Article 19(4) GG.[64] Until the 1990s, there were only a few cases where applicants contested general exclusion from access to the civil service. Since the 1990s, however, selection decisions in this matter have increasingly been contested.[65] This leads to an extensive case law from both the administrative courts[66] and the labour courts[67] (the latter being competent for litigation when a private law labour contract is at stake).[68] Quite soon, parallels between judicial review in these recruitment procedures and the system of Directive 89/665/EC were detected.[69]

The same applies to competitive award procedures concerning the classical cases of 'scarce licences' (especially in traffic law and gambling law) and 'concessions' (e.g. stands at a public market) in public economic law. Here it was recognized as far back as the 1950s that applicants could refer to their fundamental right to conduct a business or to freely choose their occupation, deriving from Article 12(1) GG[70] a right to equal treatment and equal opportunities in the respective competitive award procedures.[71] Furthermore, in a famous decision of 1972, the BVerfG deduced from Article 12(1) GG a right to access to higher education, which again leads to the recognition of a right to equal treatment and equal opportunities in competitive award procedures for study places.[72] Directive 89/665/EC has here once again shed light on comparable minimum standards for effective judicial review in these procedures.

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64 See e.g. BVerfG, case 2 BvR 1576/88 [1989] (1990) NJW 501-502; BVerfG, case 2 BvR 311/03 [2003], ECLI:DE:BVerfG:2003:rk20030729.2bvr031103 (2004) NVwZ 95-96 and BVerfG, case 2 BvR 206/07 [2007] ECLI:DE:BVerfG:2007:rk20070709.2bvr020607 (2007) NVwZ 1178-1179.

65 BVerfG, case 2 BvR 1576/88 [1989], (1990) NJW 501-502: this case was of specific importance here.

66 See, for a summay of the current case law regarding '*Beamte*': R Brinktrine, 'Konkurrentenstreitverfahren im Beamtenrecht' (2015) 11 Juristische Ausbildung 1192. See also, in more detail, M Kenntner, 'Rechsstruktur und Gestaltung von Konkurrentenstreitigkeiten für die Vergabe öffentlicher Ämter' (2016) 6 ZBR 181.

67 See e.g. BAG, case 9 AZR 837/13 [2015] ECLI:DE:BAG:2015:190515.U.9AZR83, (2015) NZA 1074-1076.

68 See, for a critique, B Pützner, 'Der Rechtsweg für arbeitsrechtliche Konkurrentenklagen im öffentlichen Dienst' (2016) Recht der Arbeit 287-291. See also OVG Rheinland-Pfalz, case 2 B 10139/19.OVG [2019] ECLI:DE:OVGRLP:2019:0325.2B10139.19.00, (2019) NVwZ-RR 562-566.

69 See e.g. J Gundel, 'Neue Entwicklungen beim Konkurrentenstreit im Öffentlichen Dienst' (2004) 37 Die Verwaltung 401-430, 420ff and A Voßkuhle, 'Strukturen und Bauformen neuer Verwaltungsverfahren' in E Hoffmann-Riem and E Schmidt-Aßmann (eds), *Verwaltungsverfahren und Verwaltungsgesetz* (Nomos 2002) 277-347, 290ff.

70 In a 1972 decision, the BVerfG deduced from Article 12 (1) GG a right to access to higher education: BVerfG, cases 1 BvL 32/70 and 1 BvL 25/71 [1972], BVerfGE 33, 303-358, 329ff.

71 See, for the historical development using the example of gambling licences, M Martini, 'The Allocation of Gambling Licences, Radio Frequencies and CO2 Emission Permits in Germany' in P Adriaanse and others (eds), *Scarcity and the State II* (Intersentia 2016) 42-85, 48ff. See, for traffic law, F Wollenschläger, *Verteilungsverfahren* (Mohr Siebeck 2010) 379ff.

72 See, for a general overview, F Wollenschläger, *Verteilungsverfahren* (Mohr Siebeck 2010) 354ff.

Another 'conceptual spill over effect' of Directive 89/665/EC can be discerned in public procurement outside the scope of Directive 89/665/EC, i.e. contracts 'below the thresholds'. It became clear that limiting judicial protection to an *a posteriori action* for damages on the basis of *culpa in contrahendo* (as described above)[73] is hardly in line with the newer case law of the ECJ, which derives general principles of non-discrimination and transparency in public procurement directly from EU primary law if a certain 'cross-border interest' for the contract in question cannot be excluded.[74] Furthermore, a right to equal treatment and equal opportunities in public procurement for all applicants for public contracts even 'below the thresholds' follows from the aforementioned recent case law of the BVerfG binding all administrative action (including public procurement) to the fundamental rights guaranteed by the *Grundgesetz*.[75] Even though the BVerfG did not expand Article 19(4) GG to this field in 2006,[76] it has become increasingly clear that the non-application of Article 19(4) GG in such cases is incoherent and does not reflect 'the state of the art' in constitutional law. This is why the ordinary courts are developing a more or less effective system of judicial review for public contracts 'below the thresholds'. They 'tweak' the general rules on interim measures of §§ 923ff of the Code of Civil Court Procedure (*Zivilprozessordnung – ZPO*) by drawing from the minimal requirements provided for in Directive 89/665/EC and the case law on selection procedures for public officials without saying so.[77] This does not exclude legal uncertainties, also due to the fact that this case law is developed by the higher civil courts (*Oberlandesgerichte – OLG*) alone as there is no possibility of appeal to the BGH in respect of interim relief orders within the meaning of §§ 935 ff. ZPO. Thus, the BGH has neither the opportunity nor the possibility to create and ensure uniform case law in this area.

Finally, the situation is unclear regarding sales or leases of public assets and public undertakings, i.e. privatization procedures leading to a transfer or lease of assets from the state to a private undertaking or an individual. Here, in

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73 See *supra* text attached to (n 52).

74 For a summary of this case law, see R Caranta, 'The Borders of EU Public Procurement Law' in in R Caranta and D Dragos (eds), *Outside the EU Procurement Directives - Inside the Treaty?* (Djøf Publishing 2012) 25-60 and F Wollenschläger, 'EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure' (2015) 8 Review of European Administrative Law 205, 209ff.

75 See *supra* text attached to (n 56).

76 See *supra* text attached to (n 57).

77 See M Burgi and F Koch, 'Contracts below the Thresholds and List B Services from a German Perspective' in R Caranta and D Dragos (eds), *Outside the EU Procurement Directives - Inside the Treaty?* (Djøf Publishing 2012) 151ff; M Jansen and OM Geitel, 'Rügen und richten außerhalb des Kartellvergaberechts' (2015) 2 Vergaberecht 117; T Siegel 'Das Haushaltsvergaberecht' (2016) 107 Verwaltungsarchiv 1, 26ff and U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 49ff.

practice, the principles of the *Gummistrümpfe* decision of 1961[78] still apply, and individual rights of the bidders are not recognized. For instance, the idea of understanding the privatisation procedures of the *Treuhand* (the agency established to privatize East German enterprises from 1990 to 1994) as administrative procedures and asking for effective judicial review for unsuccessful applicants[79] was quickly rejected by the courts in favour of a purely private law approach.[80] Today, this still corresponds to the current case law of the administrative and ordinary courts concerning the sale and lease of public assets.[81] These procedures are only governed by budgetary law[82] and EU state aid law, with the latter being, however, mostly considered as not really governing the procedure but as rules permitting private enforcement of (material) law.[83] In contrast to the situation in public procurement matters 'below the thresholds', ordinary courts do not systematically develop case law to recognise the effective judicial protection of unsuccessful applicants. This is different in situations where sale and lease contracts are not awarded to the highest bidder, whether this occurs to subsidise investors or in pursuing social policy considerations (e.g. selling building plots to large families at a price below the market price). Since the 1950s, it has been established case law that the administration has to respect the right to equal treatment in state aid matters regardless of the public or private law character of the act allocating the grant and the form of the grant (a financial subsidy or a real subsidy).[84] This situation is quite paradoxical: whereas the EU Commission recommends competitive award procedures for the privatization of public undertakings and the sale of assets to prove the market conformity of the transaction (and thus to eliminate any suspicion of illegal state aid from the outset),[85] the case law of the German courts requires a transparent award procedure only

78 See *supra* text attached to (n 53).

79 See e.g. R-F Fahrenbach, 'Das Privatisierungsverfahren nach dem Treuhandgesetz' [1990] Deutsch-Deutsche Rechts-Zeitschrift 268-270; R-F Fahrenbach, 'Die Treuhandanstalt im Verwaltungsprivatrecht' (1993) ZIP 1-14; W Krebs, 'Rechtsschutzprobleme bei Entscheidungen der Treuhandanstalt' (1990) ZIP 1513-1523, 1522ff and R Weimar, 'Handlungsformen und Handlungsfelder der Treuhandanstalt – öffentlich-rechtlich oder privatrechtlich?' (1991) DÖV 813-823, 818.

80 See e.g. BGH, case III ZR 90/03 [2004], BGHZ 158, 253-263, 259 (with further references).

81 See e.g. BGH, case V ZR 56/07 [2008], (2008) NZBau 407-408; OLG Koblenz, case 1 U 7/17 [2017], (2017) NJW 3310-3311 and VGH Baden-Württemberg, case 1 S 2403/17 [2018] ECLI:DE:VGHBW:2018:0424.1S2403.1, (2018) NJW 2583-2586.

82 F Wollenschläger, *Verteilungsverfahren* (Mohr Siebeck 2010) 466f.

83 See e.g. OVG Bremen, case 2 B 266/18 [2018] ECLI:DE:OVGHB:2018:1120.2B266.18.00 [2018], (2019) DVBl., 584-586; O Philipp, S Vetter, and J Kiesel, 'Veräußerung von Grundstücken durch die öffentliche Hand' (2020) LKV 539-549.

84 See, for the development of this case law, U Stelkens, *Verwaltungsprivatrecht* (Duncker & Humblot 2005) 968ff.

85 F Wollenschläger, 'EU Law Principles for Allocating Scarce Goods and the Emergence of an Allocation Procedure' (2015) 8 Review of European Administrative Law 205, 242ff (with further references).

for awarding a subsidy. In sum, it is hard to understand why – in contrast to the other situations explained above – Directive 89/665/EEC is not used as sort of a 'template' to design effective judicial protection in privatization procedures. In any case, the long term repercussions of the *Gummistrümpfe* decision of 1961 are still particularly noticeable here.

4. Inadequacy of the regular types of action of the VwGO and the ZPO for judicial review of competitive award procedures and the solutions proposed by the GWB

When drafting the new system of judicial review – which finally entered into force in 1998 – it was discussed whether the administrative courts should be declared competent for judicial review in public procurement matters.[86] However, 'administrative court bashing' was quite popular in politics at the time: administrative courts were accused of conducting proceedings far too slowly and sluggishly, and of applying the existing legislation far too strictly to the detriment of economical needs and public welfare. The ordinary courts were considered to have far more economic expertise and understanding of economic issues. Debating the merits of this rhetoric – which we would call 'populist' today for being based more on feelings than verifiable facts – is not intended here.[87] What is currently more interesting is that the 'regular types of action' foreseen in the VwGO have been considered, rightly, as inadequate for litigation, in public procurement matters, in particular, and competitive award procedures, in general. Should the administrative courts become competent for judicial review in competitive award procedures, the rules of the VwGO would have to be tweaked to guarantee effective legal protection to an unsuccessful applicant to the extent that they become barely recognizable. The same applies to the regular types of actions foreseen in the ZPO. For this reason, the legislator instead introduced a completely new review system in public procurement matters 'above the thresholds' (§§ 97ff GWB).

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86 PM Huber, 'The Europeanization of Public Procurement in Germany' (2007) 7 European Public Law 33, 47.

87 Summarizing these discussions from the perspective of an administrative judge: P Stelkens, 'Verwaltungsgerichtsbarkeit in der Krise' (1995) DVBl. 1105-1114; P Stelkens, 'Verwaltungsgerichtsbarkeit im Umbruch - eine Reform ohne Ende?' (1995) NVwZ 325-335 and P Stelkens, 'Aktuelle Probleme und Reformen in der Verwaltungsgerichtsbarkeit' (2000) NVwZ 155-159.

4.1. The object of judicial review

The first issue is to identify which administrative decision can be challenged by an unsuccessful applicant: what is the principal *object* of judicial review? It seems quite obvious that, at the end of the award procedure, two administrative decisions have to be distinguished. The first decision regards who wins the competition and who loses it (award decision). The second decision concerns allocating the scarce good which was the object of the competition to the winner (allocation decision). In the current version of Directive 89/665/EEC (as amended by Directive 2007/66/EC),[88] Article 2a clearly differentiates between the 'contract award decision' and the contract.

Even though this differentiation seems to be logical, no such distinction is made in Germany (in most cases), but it is considered that – in principle – the allocation decision includes or coincides with the award decision. This 'unique' decision has to be challenged by an unsuccessful applicant in court. If it is quashed to the detriment of the successful applicant, the award procedure can be pursued further and lead to a different award decision. This, at least, is the solution in the classical cases of 'scarce licences' (especially in traffic law and gambling law) or allocation of scarce goods (e.g. stands at a public market) by administrative acts (*Verwaltungsakte*) in the sense of § 35 VwVfG,[89] as well as (in principle) for selection procedures for '*Beamte*', who are also appointed by a *Verwaltungsakt*. However, this system is only effective if the procedure is merely concerned with the allocation of one single 'good'. If more than one 'good' – e.g. 100 study places or 10 gambling concessions – is to be awarded in one procedure, one cannot ask an unsuccessful applicant to challenge all these decisions to 'reopen' the procedure for their benefit.[90] Indeed, requiring such a challenge with its corresponding cost risks would not be considered to provide effective judicial protection.[91]

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88 See 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 [2007] OJ L335/31 and 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 to public works contracts [1989] OJ L395/33.

89 § 35 VwVfG defines the *Verwaltungsakt* as a unilateral decision taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect. See, for more details on the concept of '*Verwaltungsakt*' in German administrative law, MP Singh, *German Administrative Law in Common Law Perspective* (Springer 2001) 63ff and U Stelkens, 'Administrative Appeals in Germany' in D Dragos and B Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014) 7ff.

90 F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 113ff.

91 See e.g. VGH Bayern, case 22 B 15.620 [2015] ECLI:DE:BAYVGH:2015:0722.22B15.62, NVwZ-RR 2016, 39-43 and F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 110.

Furthermore, this system simply does not work if the unique awarding and allocation decision cannot be quashed by the court – namely if the stake of the competition is the conclusion of a contract. In German law, the acceptance of an offer to contract can be either valid or invalid *ipso iure,* leading to an invalid contract independently of a judicial decision.[92] Thus, if the contract concluded with the successful applicant is invalid, the award procedure is *de jure* still 'open' independently of a judicial decision, and the applicant has to find a way to prompt the contracting authority to recognize this and to, in fact, reopen the procedure. However, the validity of contract is governed by private law which – except for special provisions – only provides for certain cases of nullity (e.g. breach of a statutory prohibition in § 134 BGB and breach of morality in § 138 BGB). Already in view of the prerequisites of these provisions, it should be clear that these provisions should not be applied light-handedly in case of a breach of public procurement rules. This is all the more true in view of the drastic consequences of nullity under German law. A void contract is void *ex nunc*: services already performed must be returned. Therefore, the assumption of nullity of a public contract according to § 134 or § 138 (1) BGB can only be considered in extreme cases (collusion, bribery, and similar).[93]

This leads to a second issue: there is no coherent case law pertaining to the effects on allocation decisions of deficiencies in the awarding procedure. At least for selection procedures for '*Beamte*', as well as in most cases where the competitive award procedure leads to the conclusion of a contract, the courts have established a principle of the 'stability of the allocation decision'.[94] This means that, once this allocation decision is taken, it cannot be repealed following deficiencies in the award procedure. Thus, the allocation decision becomes 'immune' to judicial review with its adoption, and every action in court has to take place before this decision is taken. Otherwise, an unsuccessful applicant can only claim damages. The reasons behind this principle of the 'stability of the allocation decision' are quite simple: it allows the immediate execution of the allocation decision, therefore speeding up its implementation and creating legal certainty for the successful applicant. In public procurement, this 'stability' principle was more or less logical as long as no individual rights of the applicants were recognized. The non-respecting of simple budgetary law with its merely 'internal effects' could have no effect on the 'external' contractual relationship between the successful applicant and the contracting authority.[95] However,

92 U Stelkens and H Schröder, 'Allemagne/Germany' in R Noguellou and U Stelkens (eds), *Droit comparé des Contrats Publics – Comparative Law on Public Contracts* (Bruylant 2010) 326.

93 U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 41.

94 F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 111ff.

95 See *supra* text attached to (n 52).

even though § 97(6) GWB (formerly § 97(7) GWB) explicitly states, for public contracts 'above the thresholds', that 'Undertakings shall have a right to have the provisions concerning the procurement procedure complied with', § 168(2) GWB (formerly § 114(2) GWB) provides that 'Once an award has been made, it cannot be revoked'.[96] The latter provision was in line with the initial version of Article 2(6) of Directive 89/665/EEC in allowing as phrased in the Directive that 'a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement'.

It is clear that combining the principle of the 'stability of the allocation decision' with the principle of 'coincidence' between the awarding decision and the allocation decision can make effective judicial review for an unsuccessful applicant impossible. Thus, in 1999, the ECJ held in the Austrian *Alcatel Austria* case[97] that such a combination is not in line with Directive 89/665/EEC and that it must be possible to effectively challenge an award decision. The ECJ deduced from this consideration that

Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages.[98]

Interestingly, the BVerfG had already followed the same reasoning in a decision of 1990 concerning the selection procedures for '*Beamte*'.[99] It accepted that the BVerwG could apply the 'stability principle' for the appointment of '*Beamte*' as long as unsuccessful applicants were informed about the award decision and the recruiting authority respected a standstill period of at least two weeks before appointing the successful applicant. This enabled an unsuccessful applicant to apply to the administrative courts for interim relief, namely a court order not to appoint the successful applicant. As a consequence, the BVerwG loosened up the 'stability principle' in the case of '*Beamte*', and it does not apply if: (1) the unsuccessful applicant has not been informed; (2) the standstill period has not been respected; or (3) an interim order of the court has not been respected.[100] The idea of a 'stand still period' in competitive award procedures was

96 All translations of the sections of the GWB are taken from <www.gesetze-im-internet.de/englisch_gwb/index.html>.

97 Case C-81/98 *Alcatel Austria* ECLI:EU:C:1999:534.

98 ibid, para 43.

99 BVerfG, case 2 BvR 1576/88 [1989], (1990) NJW 501-502. See on this case C Bumke and A Voßkuhle, *German Constitutional Law* (Oxford University Press 2019), para. 1793ff.

100 BVerwG, case 2 C 16/09 [2010], BVerwGE 138, 102-122. For a critique, see W Schenke, 'Rechtsschutz bei Auswahlentscheidungen – Konkurrentenklage' (2015) DVBl. 137-143.

therefore well-known in Germany, enabling smooth implementation of the *Alcatel Austria* decision in 2001 by introducing such an obligation in § 13 of the implementing regulation to §§ 97ff GWB (*Vergabeverordnung – VgV*).[101] This solution, for its part, seems to have shaped Articles 2a to 2d of Directive 89/665/EEC as amended by Directive 2007/66/EC. In 2009, to transpose Directive 2007/66/EC into German law, § 13 VgV was repealed and new provisions were introduced into the GWB:[102] § 101a and § 101b, today § 134 and 135 GWB. These provided for ineffectiveness of a contract in cases of violation of the standstill period, provided that unsuccessful candidates claim ineffectiveness within 30 calendar days of the public contracting authority informing them of the conclusion of the contract.[103] By contrast, in its decision of 2006, the BVerfG explicitly stated that there is no constitutional need to guarantee effective judicial protection for unsuccessful applicants in public procurement 'below the thresholds'.[104] However, there is newer case law of the ordinary courts on the issue which does not agree with this view.[105] The development is in flux here: even if changes may be on the horizon, the time lapse before these changes percolate deeper into the judicial mindset demonstrates resistance on these matters.

4.2. The timing of judicial review

The above explanations have shown that there is a discrepancy in those competitive award procedures to which the 'stability principle' applies between what can be claimed in interim procedures – namely an order *not* to issue the allocation decision – and what can be claimed in the main proceedings – namely repealing the award decision to 'reopen' the award procedure. Such

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101 *Vergabeverordnung (VgV)* of 9 January 2001 (BGBl I 2001 110). See, on this solution and its shortcomings, K Hailbronner, 'Rechtsfolgen fehlender Information oder unterlassener Ausschreibung bei Vergabe öffentlicher Aufträge (§ 13 VgV)' [2002] NZBau, 474-481.

102 Art 1 of the *Gesetz zur Modernisierung des Vergaberechts* of 20 April 2009 (BGBl. I 2009 790).

103 For more details, see M Burgi, 'EU Procurement Rules - A Report about the German Remedies System' in S Treumer and F Lichère (ed), *Enforcement of the EU Public Procurement Rules* (Djøf Publishing 2011) 126ff and 136ff; U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 41ff and F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 112f.

104 BVerfG, case 1 BvR 1160/03 [2006] ECLI:DE:BVerfG:2006:rs20060613.1bvr116003, BVerfGE 116, 135–163, 155f.

105 See A Dagenförde, 'Die Vorabinformationspflicht im Vergaberechtsschutz: Eine unendliche Geschichte' [2020] NZBau 72-77; M Jansen and OM Geitel, 'OLG Düsseldorf: Informieren und Warten auch außerhalb des GWB' (2018) 4 Vergaberecht 376-387; M Sitsen, 'Ist die Zweiteilung des Vergaberechts noch verfassungskonform?' (2018) 7 Zeitschrift für deutsches und internationales Bau- und Vergaberecht 654-660; cf however, OLG Celle, case 13 W 56/19 [2020] ECLI:DE:OLGCE:2020:0109.13W56.19.00, (2020) NZBau 679-680 and Kammergericht Berlin, case 9 U 79/19 [2020], (2020) NZBau 680-683.

a discrepancy between the object of the interim procedure, on the one hand, and the object of the main procedure, on the other hand, is extremely unusual and does not fit in the ordinary structure of court proceedings as regulated in the VwGO or the ZPO. In the end, unlike in ordinary interim procedures, the interim procedure replaces the main proceedings and obliges the courts to apply strict scrutiny.[106]

Moreover, the VwGO is mostly conceived of as an *a posteriori* legal protection which can only be sought once a definitive administrative decision has been taken, so that courts may, in general, *not* be competent to preventively forbid the adoption of an administrative decision[107] or to intervene in an ongoing administrative decision-making process. The latter, in general, does not necessarily have to be the object of an interim measure of the court, and is derived quite clearly from § 44a VwGO.[108] The idea behind § 44a VwGO is that a procedural error can only infringe on the rights of an applicant if the final decision infringes their rights. This means that errors in procedure only need to be corrected by courts if the outcome of the procedure may interfere with claimants' rights.[109] This exclusion of appeals against procedural acts is, however, problematic in complex procedures with many parties. Above all it may delay the allocation decision in competitive award procedures. A procedural error at the very beginning of the procurement may easily infect all the following procedural steps and the final decision, meaning that the procedure may have to be re-opened from scratch if a judicial challenge is successfully lodged. The disadvantages are all the more unacceptable, as in these procedures the individual procedural steps can also be distinguished easily (call for application, establishment of selection criteria, exclusion of completely unsuitable applicants, evaluation of individual applications, establishment of a ranking list, etc.). Furthermore, some of these procedural steps may only concern individual applications. It may thus be justifiable to limit judicial review to these procedural defects in review processes only when initiated by applicants affected by these defects.

The review system of §§ 97ff GWB is quite well-adapted to these needs: in fact, the review bodies[110] may not take up the matter *ex officio*, and review is

106 F Wollenschläger, 'The allocation of limited rights by the administration: Challenges of legal protection' in P Adriaanse and others (eds), *Scarcity and the State I* (Intersentia 2016) 113.

107 See F Hufen, *Verwaltungsprozessrecht* (11th edn, CH Beck 2019) s16 paras 9ff.

108 'Appeals against procedural acts by authorities may only be asserted at the same time as appeals which are admissible against the factual decision' (all translations of the sections of the VwGO are taken from <www.gesetze-im-internet.de/englisch_vwgo/index.html>).

109 Hufen, *Verwaltungsprozessrecht* (11th edn, CH Beck 2019) s 23 para 94 ff. See also, in the allocation context, F Wollenschläger, *Verteilungsverfahren* (Mohr Siebeck 2010) 654ff.

110 See, in detail, on the structure of the review process foreseen in §§ 155ff GWB (formerly §§ 102ff GWB): M Burgi, 'EU Procurement Rules - A Report about the German Remedies System' in S Treumer and F Lichère (ed), *Enforcement of the EU Public Procurement Rules* (Djøf Publishing 2011) 111ff; U Stelkens, 'Administrative Appeals in Germany' in D Dragos and B Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014) 40ff and U Stelkens, 'Le contrôle et le contentieux des contrats publics en Allemagne' in L Folliot-Lalliot

opened only on appeal (§ 160(1) GWB). This appeal is only available to applicants, who must claim that their rights under § 97(6) GWB have been infringed by the contracting authority's failure to comply with the procurement rules (cf § 166(2) GWB). The admissibility of this appeal is subject to strict conditions: the applicant must first complain to the contracting authority about the alleged and established irregularities in order to enable immediate regularisation (§ 166(3) GWB). This has implications for the review procedure. Overall, the review system is akin to an emergency procedure designed to ensure compliance with the rules of public procurement by the contracting authority in an ongoing contract award procedure, i.e. one which has not yet resulted in the actual conclusion of the contract in question with the contracting authority. Thus, the review procedure must in principle be conducted *in parallel with* the award procedure and may – or must, if necessary – be introduced even before the decision to award the contract is finally taken. The real object of the review procedure of §§ 97ff GWB is therefore not the review of the award decision, but the respect of all the procedural measures carried out by the contracting authority up to the conclusion of a valid contract.

Creating such a review procedure by 'tweaking' the procedural rules of the VwGO or the ZPO in those competitive award procedures not covered by §§ 97ff GWB seems impossible. Nevertheless, the question arises of whether §§ 160ff GWB could serve as a template for general rules on (administrative) court procedure, creating a new type of court action in the VwGO – namely a court action tailored to the particularities of competitive award procedures. The ZPO could refer to these rules in cases where the ordinary courts have jurisdiction.

5. Conclusion

In the 1980s, German actor Walter Giller regularly ended his comedy TV show with the words 'It [meaning life] remains difficult'. This wisdom applies to German law as a whole, but above all to the way the German legislator implements EU directives in German law when they do not really 'fit' with existing legal concepts.[111] Here, it may take a long time until (if at all) these new rules are really integrated and 'adopted' as making sense by the relevant stakeholders. Today – in contrast to the 1990s – one can say that the regulatory aim of Directive 89/665/EEC is accepted, and its transposition in §§ 97ff GWB

and S Torricelli (eds), *Contrôles et contentieux des contrats publics/Oversight and Challenges of Public Contracts* (Bruylant 2018) 42ff.

111 See M Payrhuber and U Stelkens, '1:1-Umsetzung" von EU-Richtlinien: Rechtspflicht, rationales Politikkonzept oder (wirtschafts)politischer Populismus?' (2019) 2 Europarecht 190, 215ff.

can be considered to be a success.[112] However, the review system introduced by §§ 97ff GWB still forms a sort of 'foreign body' in the system of judicial review in administrative matters in Germany. Its potential to serve as a model for 're-designing' and improving judicial review in all kinds of competitive award procedures is far from exhausted. Improving judicial review in competitive award procedures does not necessarily mean creating/recognizing more rights for unsuccessful applicants. It means, rather, adapting the 'standard procedures' for judicial review to the specific needs of these specific kinds of procedures.

[112] See M Burgi, 'Entwicklungstendenzen und Handlungsnotwendigkeiten im Vergaberecht' [2018] NZBau 579-585.